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International Center for Research and Development
858/6,
Kaduwela Road,
Thalangama North,
Sri Lanka
Tel : +94112744306
Fax: +94112744306

Email : info@theicrd.org
Web: www.theicrd.com

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UNITY IN DIVERSITY
PROTECTION OF LINGUISTIC AND PHILOSOPHICAL
MINORITIES IN THE BELGIAN FEDERAL STATE

Prof. Ludo M. VENY
Head Department Public Law
Ghent University

As one of the few countries in the Council of Europe, Belgium has not ratified the Framework Convention for the Protection of National Minorities neither the Charter for Regional or Minority Languages.

Yet minorities are efficiently protected. *Firstly*, the Constitution guarantees the principle of equal treatment and non-discrimination. *Secondly*, Belgium evolved from a unitary to a federal State. The three (linguistic) Communities are each, on their territory, responsible for cultural affairs (including language protection measures, ...), education (including the choice of the language of instruction) and personal tinted matters (e.g. health care, welfare policy for certain groups, ...). However, mechanisms must be developed within each community for the protection of philosophical and religious minorities or in the area of governance and administration. *Thirdly*, at the federal level linguistic minorities are double protected; the Council of Ministers is linguistically jointly composed and in the Federal Parliament a guaranteed presence of each language group is constitutionally assured. The Legislative can only adopt certain laws on the use of languages as well as laws concerning the State structure with a qualified majority; for approving other laws a parliamentary language group can temporarily suspend the legislative process.

The protection models have always led to consultation and never to a violent conflict.

INTRODUCTION

1. Countries without the existence and presence of minorities on their territory are almost unthinkable. Whether or not under "foreign pressure", in a democratic state under the rule of law the Constitution will protect minorities in one way or another; a general principle of equality, a non-discrimination clause, certain institutional guarantees for minorities, a spacious or more limited autonomy on essential policy areas for minorities, etc.

Recognition and protection of minorities became gradually also the subject of international treaties. Relevant for Europe amongst other can be mentioned: the Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966, the International Covenant on Civil and Political Rights of 16 December 1966 (ICCPR), the Convention on the Rights of the Child of 20 November 1989 (CRC), and – since the last two decades in particular – the European Charter for Regional or Minority Languages of 25 June 1992 and the Framework Convention for the Protection of National Minorities of 1 February 1994.

2. Also in the Kingdom of Belgium the rights of minorities are protected. Although already since the independence article 10 of the Belgian Constitution (BC) enshrines a general principle of equality and stipulates that no privileges can be granted to nobility, the Constituent Assembly considered it useful to complement this principle in 1970 with a non-discrimination clause (article 11 BC).

The French-speaking minority in Belgium also enjoys blocking mechanisms in both the Legislative and the Executive, and is treated equally in the highest courts and at the top of the administration; in almost similar way the Dutch-speaking minority is protected in the Brussels-Capital Institutions. The German-speaking minority, as the Flemish and French Community, enjoys in numerous policy areas a regulatory and executive autonomy.

Equally, the Belgian State, sometimes very late, ratified the above mentioned UN Conventions.

Both CoE-Treaties are creating more difficulties; to date, neither is ratified. Political objections, and in particular a different view about the interpretation of the concept of "national minority" between the two largest linguistic communities, a complex legal situation concerning the agreement of mixed treaties, the extent of any reservations to these treaties,..., are some reasons for the absence of ratification. However, the Belgian Government, looking for a special majority to get a part of the fifth State reform approved, signed the Framework Convention on July 24, 2001.

3. From the non-ratification should not be inferred that linguistic and philosophical minorities in Belgium are badly protected, quite the contrary. This contribution aims to enlighten those typically national protection mechanisms in favor of these minorities.

I. A GENERAL PRINCIPLE OF EQUALITY AND A NON-DISCRIMINATION CLAUSE

4. Legal basis. Since the independence in 1830-31 article 10 BC reads: “*No class distinctions exist in the State. Belgians are equal before the law: [...]. Equality between women and men is guaranteed*”.¹ The initial interpretation of the Court of Cassation of this principle "equal treatment in similar cases, unequal treatment in unequal cases", could not avoid an unjustified differentiated treatment of groups; after all, it was sufficient to consider a (minority)group as a different situation, so distinguished persons of both groups had not to be treated equal.

That case law was followed by lower courts.

The constitutional revision of December 23, 1970 - alongside other protection mechanisms for the largest linguistic minority² - inserted a general principle of non-discrimination. Article 11 BC stipulates that “*enjoyment of the rights and freedoms recognized for the Belgians must be provided without discrimination. To this end, laws and federated laws³ guarantee among others the rights and freedoms of ideological and philosophical minorities*”.⁴

Likewise under the influence of the case-law of the European Court of Human Rights (ECHR) on equal treatment, judges from the eighties of last century leave the for-mentioned classic Cassation case-law; this trend was reinforced by the establishment of the Constitutional Court in 1980 that has the power to review legislative acts to the principle of equality and non-discrimination.

Order to see if a differentiated treatment is discriminatory today, the following review pattern is followed :i) is an objective criterion used, ii) is this relevant and iii) is there a reasonable justification for different treatment. No longer exclusively (un)equality of treatment between persons in the administrative practices is evaluated, but also (un)equal treatment and non-discrimination between groups in the legislation can be reviewed.

5. Anti-discrimination legislation. Finally, early XXI century on both federal and federated level anti-discrimination legislation was adopted. The Law of May 10, 2007 combating certain forms of discrimination applies in Belgium as far as it is related to a federal policy area. The law introduces a prohibition of direct and indirect discrimination based on a legally forbidden ground, such as age, sexual orientation, civil status, birth, wealth, religion or belief, political

¹ The last sentence was inserted by constitutional revision of December 21, 2002.

² About this extensively, *infra* n° 15-23.

³ “Law” refers to the legislative act adopted by the Federal Legislative, while “federated law” refers to the legislative act adopted by the Legislative Assembly of a Community or a Region.

⁴ Exemplification in n° 31-34.

opinion, language⁵, current or future state of health, disability, a physical or genetic characteristic, and social origin.

Although the law intends as a general objective the elimination of all forms of discrimination, the Constitutional Court consent with the closed system, i.e. a restrictive list of grounds of discrimination.

For the Flemish policy areas the Federated Law of July 10, 2008 regulates the equal treatment policy within the Flemish Community and the Flemish Region. To a large extent this federated anti-discrimination legislation, where equal treatment is concerned, accords with the federal law.

This act also contains provisions to elaborate a policy on equal opportunities.

Both regulations apply in the relationship citizen/government, but also horizontally between individuals or a between citizen and a private legal entity.

6. Foreigners. For the sake of completeness article 191 BC is to be mentioned: *“all foreigners on Belgian soil benefit from the protection provided to persons and property, except for those exceptions provided for by the law”*. Legislation may likewise be reviewed to this constitutional provision by the Constitutional Court and especially the exception clause is central. The non-discrimination clause as referred to in that article shall therefore not be interpreted in the sense that all rights for nationals should also be recognized for citizens with foreign nationality.

II. THE PRINCIPLE OF TERRITORIALITY AND LINGUISTIC MINORITIES

§1 The use of languages

7. Constitutional freedom of language. Prior to observe is that under article 30 BC *“the use of languages spoken in Belgium is optional: only the law can rule on this matter, and only for acts of the public authorities and for judicial affairs”*.⁶

⁵ Due to language perils and tensions between the Dutch- and French-speaking communities, "language" was not included in the initial law. After complaint, the Constitutional Court decided that absence of this ground in the law in itself was contrary to the principle of non-discrimination (Constitutional Court 6 October 2004, n° 147/2004).

⁶ This article is implicitly modified and expanded by the constitutional revision of 1970 with the insertion of article 129 BC: *“The parliaments of the Flemish and the French Communities, to the exclusion of the federal legislator, regulate by federated law, each one as far as it is concerned, the use of languages for: 1° administrative matters, 2° education and 3° social relation between employers and their personal, as well as documents required by the law and by regulations”*.

The constitutional right applies only to citizens and therefore refers only to private relations: the family, the worship services, in shops and stores, etc.. This freedom in family life and in private relations comprises moreover *all* languages, not only the three official languages.

On the other hand, there are strict rules on the use of languages for public administration action(s)⁷, the Justice⁸, the military, education⁹ and in the framework of social relations between employee and employer.

§2 Linguistic regions

8. The principle of territoriality. In addition, there is the division of the Belgian territory in “linguistic regions” and is the result of a long process, started in 1932, resulting in two Laws on the use of languages of 1962 and 1963 and finally inserted in article 4 BC in 1970. The current article stipulates that “*Belgium comprises four linguistic regions: the Dutch-speaking, the French-speaking, the German-speaking region and the bilingual region of Brussels-Capital*”.¹⁰

On this constitutional provision rests the territoriality principle and has for certain aspects relating to the protection of linguistic minorities especially important legal effects. The starting point is clear: explicit monolingualism in the Dutch- and French-speaking region¹¹, principled monolingualism in the German-speaking region and mandatory bilingualism in the region of Brussels-Capital. Or to put it another way, “regional language is operational language”.

9. The division of Belgian territory in linguistic regions is more than a mere geographical division and has a direct impact on the use of language in the action and for documents of administrative authorities in those regions. With respect to a minority in a linguistic region this implies:

a) no right to contact authorities in the minority language and a ban on the use of a language other than the regional language by public entities. On this principle exists a legal exception for a number of specific mentioned municipalities along the “language border” where inhabitants, not

⁷ Royal Decree of July 18, 1966.

⁸ With of course the guaranteed right to be assisted by an interpreter, cf. article 6.3.(a) and (e) EChHR.

⁹ Law of July 30, 1963.

¹⁰ The three linguistic communities live very concentrated; the Dutch-speakers in the North, the French-speakers in the South, the German-speakers in the East and both Dutch- and French-speakers (15% respectively 85%) in the Brussels-Capital Region.

¹¹ It should be stressed that these linguistic regions are in fact not language homogeneous and count a, whether or not numeric important, language minority.

government administrators, enjoy certain language facilities¹²; they can apply the administration, depending on, in French (in the Dutch-speaking region) or in the Dutch (in the French-speaking region) and request to be answered or to receive an administrative document in that language;

b) absence of the right to education in the pupils' language in another linguistic region, with the exception - again - of education in a municipality with language facilities;

c) the possibility of a Community to impose to a candidate the obligation to learn the regional language (i.e. language knowledge) to obtain certain facilities (child care, social housing, ...);

d) the express prohibition for a Community to take measures to support or to protect the corresponding minority in another linguistic region (e.g. by subsidizing cultural events), i.e. a territorial jurisdictional limitation.^{13 14}

The concept of the territoriality principle refers to these consequences regarding to linguistic regions.

10. CoE recognition of the territoriality principle and the reasons for the non-ratification. The conformity of this Belgian territoriality principle with international law has been to date the subject of two judgments of the ECHR. In the famous Belgian-Linguistic Case¹⁵ it was considered that the principle of territoriality whereby measures are taken to ensure the language homogeneity of a region, is not arbitrary.¹⁶ Such restrictive language measures are based on an objective factor, namely the region. In addition, the basis of the territoriality principle relates the general interest, in particular to ensure that schools provide education in the regional language. All the more, as in accordance with the legislation and on simple request of the legally fixed number of municipality inhabitants, the Government has to offer education in another official language in municipalities with language facilities.

Yet discriminatory, the ECHR considered that residents of such municipalities with language facilities are allowed to provide for their children education in the minority language,

¹² The so-called municipalities with language facilities.

¹³ The territorial responsible Community can require from a local government that 75% of a municipal library collection corresponds to the language of that linguistic region even though the municipality population in majority is no Dutch (Constitutional Court 24 June 2003, n° 88/2003).

¹⁴ A special arrangement applies to the bilingual Brussels-Capital Region for which both the French and the Flemish Community in the policy areas assigned to them, can regulate for the French- respectively the Dutch-speaking educational, welfare and cultural institutions.

¹⁵ ECHR 23 July 1968, *Serie A*, Vol. 6.

¹⁶ That view was confirmed in the judgment "Mathieu-Mohin and Clerfayt" (ECHR 2 March 1987, *Serie A*, vol. 113) with respect to the lack/non-recognition of representatives of a linguistic minority in a federated Parliament.

while children of parents of this linguistic minority not residing in such municipalities may not attend schools offering education in the minority language.

The fact that the Kingdom of Belgium, to date, did not ratify the Framework Convention for the Protection of National Minorities nor the European Charter for Regional or Minority Languages can be explained on the basis of a number of reasons. *Firstly*, both major linguistic communities don't agree on the notion "national minority". There is no dispute that the German-speaking community is to be recognized as a minority in the federal context; on the other hand, due to numerous other protection mechanisms for the French-speaking minority on the federal level and thereby their co-dominant position, this minority is thus not recognized. The Advisory Committee to the European Treaties, however, judges that minorities equally can occur at the regional level. In that sense, the problem arises that also Dutch-speakers in the French and the German linguistic region and French-speakers in the Dutch and German linguistic region are to be considered as a national minority; and in particular on whether the French-speakers in the Dutch-speaking region should be recognized as a minority language, there is an unbridgeable gap between the two linguistic communities. For the same reasons as the French-speakers at the federal level, the Dutch-speakers in the bilingual Brussels-Capital region - because of the structural protection measures - pertain to a co-dominant position. *Secondly*, both major linguistic communities have a different point of view on minority rights. For the French-speaking politicians, supported by some resolutions of the Parliamentary Assembly of the Council of Europe¹⁷, the protection of a linguistic minority aims the recognition of individual and specific rights for its members and this over the entire territory both for federal and federated matters. The Belgian model however is focused primarily on the institutional protection of the French-speaking minority on federal level, the Dutch-speaking minority in the bilingual region of Brussels-Capital and certain rights for a linguistic minority in the so-called municipalities with language facilities along the language border. The interpretation of minority rights in the French-speaking opinion run against the territoriality principle on which, until today, the Belgian compromise is based. Both previous views make that an agreement in Belgium on the concept of "national minority" is impossible. *Thirdly*, in accordance with article 167, §4, BC mixed treaties, i.e. conventions regarding matters for which also the Communities have jurisdiction, should get ratification not only of the federal Legislature but also of each federated Parliament in so far as their powers are included in the Treaty. Taking into account the division of powers in the Belgian federal context this supposes the agreement of the Flemish Parliament with both treaties before they can be ratified by the Belgian State; this, however, is unthinkable.

¹⁷ Resolution Columberg, n° 1172 of September 25, 1998 and Resolution Nabholz-Haidegger, n° 1301 of September 26, 2002, www.coe.int.

III. THE BELGIAN FEDERALISM

11. *Legal and historical context.* Established as a unitary State in 1830, the Belgian State gradually evolved since 1970 over a regionalized State into a federal State (1993). However, unlike most classic federal states the Belgian federal State is not established as an aggregative or centripetally federalism, i.e. the unionizing of former independent states, but by a centrifugal or segregated federalism, i.e. the transformation - or the break-up - of the unitary state.

Beside to the federal government, the Belgian federal State is composed of three Communities and three Regions with an overlapping territorial scope of application. This process of federalization is based on two important differences. On the one hand, the observation that Belgium comprises three linguistic communities¹⁸, and therefore also three official languages that coincides with different cultures. To ensure that each culture - and the associated language - can retain its identity, three (Cultural) Communities were erected in 1970. It should be repeated that these linguistic communities are living very concentrated. The idea of linguistic community thus answers rather to a personality principle but within the above described principle of territoriality.

On the other hand, between the linguistic regions exist important economic differences; those regional economic differences led to the establishment of three Regions and this on the basis of a mere territoriality principle.

12. This complex structure for a relatively small country doesn't prevent that the Belgian federation is essentially bipolar, in particular Dutch- and French-speakers. This bipolar structure can also be induced from the composition of the federal assemblies, the administration and the highest courts, the dispute resolution in case of conflicts of interest, the elections for the Senate and the European Parliament.¹⁹

13. *The Belgian federal context and the protection of minorities.* A federal State structure by itself protects minorities in some way. For the recognition and protection of linguistic and

¹⁸ Roughly 60% Dutch-, 39% French- and 0.7% German-speakers. Immigration of foreigners makes that in reality these percentages are rather 56%, 38% and 1%, in addition to English, Spanish, Italian, Portuguese, Turkish, Slavic languages, Arabic, ...

¹⁹ And thus concomitant the linguistic splitting of political parties; Belgium has no longer "national parties".

philosophical minorities a sufficient analysis can be limited to the legal concept of the Communities.²⁰

In accordance with the federal logic each Community has its own Parliament and Executive.²¹ The territoriality principle implies that, at least legally, no linguistic minorities are recognized in the federated Parliamentary Assemblies - and consequently the Executives²²; that legal regime is however not reflecting the existing reality. The numerically significant French-speaking minority in the Dutch-speaking region, mainly concentrated in only one of the five Flemish provinces²³, results in one French-speaking member in the Flemish Parliament; however, either in the Parliamentary Assembly nor in the County Council members of the French-speaking minority enjoy any special recognition or protection.

Under article 87 Special Law on the Reform of the Institutions of August 8, 1980 (SLRI) each Community has its own administration, own public institutions and own staff. Once again the territoriality principle implies that the actions of the administration and the institutions befalls exclusively in the language of the linguistic region, while the staff in principle only may be recruited on the basis of a degree corresponding to the language of the linguistic region.²⁴ Taking into account the rights of the linguistic minority in the municipalities with facilities, some civil servants must have knowledge of the second official language.

14. Community powers. There can be repeated that Communities were established in order to protect the singularity of every culture and language. Each Community is therefore responsible for:

- **cultural affairs.**²⁵ By this is understood, among other things, the protection of the language, the cultural heritage, museums and scientific-cultural institutions, libraries, radio- and television-

²⁰ “Regions” have with the Federal Government shared competences in certain economic areas (e.g. economic policy, natural resources, public works, regional public transportation, harbors, regional airports, ...) and “territorial matters” (e.g. spatial/urban planning, environment, nature conservation, housing, agricultural policy and marine fishery, decentralized authorities, ...) where the protection of minorities in principle does not play a part. Every linguistic community - except the German-speaking - can regulate in its discretion in these matters.

²¹ Articles 115 and 121 BC.

²² With the exception of the Brussels Parliament and the Brussels Government, *infra*, n° 28-30.

²³ Where on a County Council of 72 members, five members belong to the French-speaking minority.

²⁴ There is an exception, in particular succeeding in a language exam that proves an advanced knowledge of the regional language.

²⁵ Article 4 SLRI.

broadcasting, aid to the written press, preschool education in kindergartens, permanent education and cultural entertainment, leisure activities and tourism, physical education and sports, ...;

the almost complete educational system, with the exception of the determination of the beginning and the end of compulsory education²⁶, the number of school- or academic years for obtaining a degree and the social security system of the staff;

- **the use of languages in administrative matters**²⁷, **education** and **social relations**, this for the own linguistic region and with the exclusion of the municipalities with language facilities²⁸;

- **health policy**, including care provision in and outside nursing institutions and health education, **assistance to persons** such as family policy, the reception and integration of migrants, the seniors' and the disabled policy, youth protection and juveniles in conflict with the law, social assistance to inmates in view of their social reintegration, ...;

- the **competence to conclude international treaties**²⁹ and the possibility of **international cooperation** in all those matters but under the implicit assumption that foreign States accept this international legal personality

IV. THE SPECIFIC PROTECTION OF LINGUISTIC MINORITIES AT THE FEDERAL LEVEL AND IN THE INSTITUTIONS OF THE REGION OF BRUSSELS-CAPITAL

§1 The federal level

15. *The composition of the federal parliamentary assemblies.* The elections for the House of representatives take place in accordance with the principle of proportional representation, where the Dutch-speaking region and Wallonia (both the German- and the French-speaking regions) are divided in five provincial constituencies each; the bilingual Brussels-Capital region includes one electoral district.

Senators are elected by the population by two electoral colleges; 25 by the Dutch and 15 by the French electoral college. These directly elected senators are supplemented with ten co-opted senators from the Flemish and the French Community Parliament each; the German Community Council may co-opt only one senator. Then the 35 Dutch Senators co-opt another 6 Senators and 25 French Senators another 4 Senators.

²⁶ Each community determines the contents of the compulsory schooling, the monitoring and sanctioning in case of denial of it.

²⁷ This competence is limited to the municipalities; a Community therefore has no power to regulate the use of language in its own institutions.

²⁸ For the German-speaking community limited to only education.

²⁹ The Flemish Community and the Flemish Region have since 1995 and up to date ratified approximately 500 bilateral treaties.

16. After their election and inauguration the members of the House of representatives and the Senate are classified into two parliamentary language groups; other than the recognition of three linguistic communities in Belgium can evoke, the federal MP's are divided only in two language groups, namely the Dutch and the French language group.

For the House of representatives an objective criterion is used, in particular the place of election. Regardless of their language adherence, MP's elected in the Dutch-speaking region belong to the Dutch and the elected Members of Parliament in Wallonia belong to the French language group; elected MP's in the bilingual Brussels-Capital region belong to that language group according to the language in which they have taken oath.

The Dutch language group in the Senate counts 41 members and the French language group 29 Senators. The German-speaking co-opted senator doesn't belong to a language group, any directly elected German senator to the French language group.

The format of language groups in both parliamentary assemblies protects the French-speaking minority in the parliamentary action in general and the adoption of laws in particular.

17. *The adoption of special majority laws.* According to the general rule laws are adopted by a simple majority, i.e. an attendance quorum of half plus one on the total of MP's in the concerned Assembly and an approval quorum of half plus one on the yes- and no-votes; the Belgian Constitution is revised by a double two-thirds majority, i.e. a presence quorum of 2/3 over the entire concerned Assembly and an approval quorum of two-thirds on the yes- and no-votes.³⁰ Both since the initial Constitution existing majorities, do not take into account whether or not there is a majority in a language group; this means that a federal law can, in principle³¹, be adopted against the will of a language group.³²

With the first State reform of 1970 that dual system is broken; some expressly in the Constitution mentioned laws must be adopted with a special majority. A special majority law³³ is passed on the condition that a majority of the members of each language group is present, by a

³⁰ Invalid and blank votes are taken into account for the presence but not for the approval quorum.

³¹ I.e. legally possible but politically unthinkable. Although the current Belgian Government does not have the confidence of the majority of the Dutch language group in the House of representatives.

³² See, however, the protection mechanism of the "linguistic alarm bell", *infra*, n° 20-22.

³³ Article 4, in fine, BC.

majority of votes casts in each language group and provided that the total number of votes in favour that are cast in both language groups is equal to at least two thirds of the votes cast.³⁴ In addition, this special majority laws are expressly mentioned in article 77 BC; consequently, they have to be approved in both the House of representatives and the Senate.

18. The special majority laws referred to in the Constitution are in first instance the “community laws”; this means the acts implementing the successive state reforms whereby the powers and the financing of the Communities and Regions, the election of the federated Parliaments and the election of the federated Executives,... are fixed.

In addition the Law on the Constitutional Court is to be mentioned.

Finally, there is the law on the use of languages in administrative affairs specifically for the municipalities with language facilities and where the inhabitants belonging to the linguistic minority enjoy certain language facilities; so the limitation and certainly the abolition of these facilities become impossible, given the necessary approval of the French language group in both federal Assemblies.

19. When adopting the special majority laws, each language group - but in particular the linguistic minority - disposes in both Parliamentary Assemblies of a double "veto". On the one hand, the adoption of a special law can be stopped because all or the majority of MP's of a language group leave parliamentary hemisphere; with no members or just a minority presence in that language group, the voting cannot be continued. On the other hand, the veto for a language group willing to demonstrate being explicitly against the bill; at that time they will vote by majority “no” so that the law in the absence of the prescribed approval quorum in that language group, is not adopted.

20. *The “linguistic alarm bell”*.³⁵ In principle, an ordinary law can be approved against the will of the minority language group; this is the case, for example, where in a federal Parliamentary

³⁴ The co-opted senator from the German Community Council does not belong to one of the two language groups and should, therefore, be held outside the adoption of the special majority laws; that is why the Senate in its rules of procedure provides that his vote counts for the ordinary approval quorum in both language groups and for the two-third quorum over both language groups. On this topic SIMONART, Henri. Making an end to the discrimination of the German-speaking community in the Senate, in *Which reforms for the Senate*. Brussels: Bruylant. 33-36.

³⁵ See VUYE, Hendrik. 2008. Ringing the alarm bell. Looking for the legal and political scope of article 54 Constitution: reconciliation procedure or bolt. *Public law Chronicles*, no. 1, 69.

Assembly voting is not majority/opposition but Flemish-/French-speaking MP's. Article 54 BC³⁶ has worked out a special protection mechanism for such a situation, particularly the linguistic alarm bell.

Except for budgets and laws requiring a special majority, a reasoned motion signed by at least three-quarters of the members of one of the language groups and tabled following the depositing of the report and prior to the final vote in public sitting, can declare that the provisions that it designates of a government or a private member's bill can gravely damage relations between the Communities.

In that case, the parliamentary procedure is suspended and the motion is referred to the Council of Ministers, which within thirty days thereof gives its reasoned opinion on the motion and invites the House involved to pronounce on this opinion, or on the Government or private member's bill that, if need be, has been amended

This procedure can be applied only once by the members of a language group with regard to the same Government bill or private member's bill.

21. As with other legal concepts, the linguistic alarm bell also aims preserving the often delicate balance between the Dutch-speaking majority and the French-speaking minority. In line with the Belgian democratic parliamentary regime this implies equilibrium whenever a search for a compromise between the two language groups occurs; obviously, this endeavor accords with the thinking of "national-minded" political parties, but encounters the objections of "nationalist" or "separatist" political parties.

Otherwise proposed, the French-speaking MP's see the alarm bell initially as a reconciliation procedure that, in the absence of an agreement, shall have the effect that the legislative initiative is stored in the refrigerator. Members of the Dutch language group consider the alarm bell as a temporary suspension of the legislative process which, in the absence of an agreement, is just continued.

In the eyes of separatist Flemish parliamentarians the alarm bell procedure signifies a right of veto for the language minority.

From the parliamentary activity can be deduced that this "exceptional motion" had to overcome the living fear of "minorization" within the French language group; but that fear is not so real, according to a single finding that cannot be ignored. In forty two years existence of the

³⁶ Article 54 BC.

linguistic alarm bell procedure, it is only used twice.³⁷ Nevertheless, the fact remains that the threat of this procedure by a language group, is often enough to have swallow the questionable bill by the other language group. Thus, the alarm bell procedure has mainly a dissuasive character; after all, a language problem that is driven on the striker, creates difficulties in the Council of Ministers which cannot escape unscathed and often leads to early elections.

22. There is no doubt that the alarm bell procedure is a technique of minority protection. However, in the current state of constitutional legislation the alarm bell in the federal parliament only protects the French-speaking minority; the only real minority in the Belgian federation, the German-speaking Community, is not even represented as such in - at least - the House of representatives and remains out in the cold.

23. *The joint composition of the Council of Ministers.* Beside the protection mechanisms within the Legislature, the Constitution also provides for the protection of the French-speaking minority in the Executive. Under Article 99 BC the Council of Ministers consists of maximum fifteen members, including the prime minister; the latter excepted, the Council of Ministers counts an equal number of Dutch- and French-speaking ministers.

The Council of Ministers is complemented by Secretaries of State and then forms the government council. Here the language parity is broken since the numerical ratio between the two linguistic communities is reflected in the respective number of Secretaries of State.

The constitutional minority protection concerns exclusively the formal composition of the Council of Ministers; the occasional absence of a minister has no repercussions on the operation of the council who also in that case may validly deliberate. Moreover, the decision-making process shall be carried out according to a customary rule by "consensus"; exceptionally at the moment of a real voting, when both language communities are opposite positioned, the resignation of the government and, most probably, also new parliamentary elections will be the result.

³⁷ The first alarm bell covered a rather minor case, in particular the integration of an economic college as a full faculty in a Flemish University; an amended bill was proposed by the Council of Ministers and is as such adopted by the Legislative. The second had a clear political character, in particular the splitting of a bilingual constituency in a monolingual Dutch-speaking and bilingual constituency (bill proposed only by the Flemish language group in the House of representatives). Several conflicts of interest (see *infra*, n° 26-27) were invoked so that the Council of Ministers had not to deal with this problem; a statement on the revision of the Constitution led to new elections after which Belgium's longest government formation ever known arises since the initial problem required a solution first.

24. The Constitution or the law stipulates the circumstances in which the decision-making in Council of Ministers is compelled. Can be mentioned in this regard: intervention at the linguistic alarm bell procedure (article 54 BC), substitution of the deceased or resigned Head of State during the ten days of the interregnum (article 90 BC), determining the inability of the Head of State to govern (article 93 BC), ...

The Legislature may determine that a Royal Decree can only be issued after it has been deliberated within the Council of Ministers.

Furthermore, virtually all files with a particular political importance are decided in the Council of Ministers, for example, the discussion of a draft bill.

25. *Other institutional mechanisms of language minority protection.* Without further elaboration, in the highest courts³⁸ the functions of judge and prosecutor are joint distributed between Dutch- and French-speaking magistrates.

Similarly for the top posts in the Belgian administration applies a linguistic parity; 40% only Dutch-speaking, 40% only French-speaking and 20% bilingual (10% each per language group) staff members. The decisive criterion for determining a government official in a language group, is the language in which the appropriate diploma or certificate was obtained or is succeeding in a language examination.

26. *The Consultative Committee.* In the exercise of their respective responsibilities the federal State, the Communities, the Regions and the Joint Community Commission, act with respect for the federal loyalty, order to prevent conflicts of interest in the exercise of their respective powers.

Nonetheless, conflicts of interest may arise because a bill under discussion in a parliamentary assembly, either is misjudging the rules on the division of competences between the Federal State, the Communities and the Regions, either the exercise of those powers can cause damage to the interests of another entity; a conflict of interest can then be invoked by another assembly than that were the bill is tabled provided that a motion is signed by three-quarters of his members.

Then, the parliamentary discussion of the bill is suspended and the presidents of both parliamentary assemblies involved must hold consultation. If these consultations do not lead to

³⁸ I.e. the Constitutional Court, the Court of Cassation and the Council of State.

any result, the Senate makes decisions, by means of reasoned opinion, on the pending conflict of interest.

Finally, the case ends at the Consultative Committee that has to find a solution. Yet, whatever is the outcome of this procedure, the Parliamentary Assembly will still decide on the consequences which it attaches to the opinion of the Consultative Committee.

This entire procedure can suspend the legislative process for 120 days. In contrast to the linguistic alarm bell procedure³⁹, there are no quantitative restrictions. With respect to the same bill, another assembly can, at any time, again provoke a new conflict of interest; bearing this in mind, should the case arise, the legislative process can be suspended for more than a year.

27. The Consultative Committee is also composed taking into account an equal language representation, especially six Dutch-speaking and six French-speaking ministers.⁴⁰ No language group can impose her opinion - neither the weight of the Flemish majority - to the other but in practice any solution for the arisen problem is rare. It concerns often conflicts where both linguistic communities, at least their parliamentary representatives, oppose one another with drawn knives; exactly the language parity that signifies an obstruction for any negotiated solution whereby the initial problem can assume unreal proportions and can result in new parliamentary elections.⁴¹

§2 The federated level

28. Linguistic minorities protection at the federated state level only plays in the Legislature and the Executive of the Brussels institutions in the bilingual Brussels-Capital region.

The Brussels-Capital Regional Parliament is divided into a Dutch-speaking and French-speaking language group; according to a recent political agreement the Dutch language group counts 17 and the French language group 72 members what should display the linguistic ratio in the bilingual region of Brussels-Capital, quod non.

Normally the federated laws, as in the federal parliamentary assemblies, are adopted with a simple majority; language adherence plays indeed in most matters little to no role, since it

³⁹ See *supra*, n° 20.

⁴⁰ Alongside a second parity, namely six federal ministers and six representatives from the federated Executives.

⁴¹ See the underlying political problem of the split of the bilingual electoral district in 2010, *supra*, footnote n° 37.

concerns the regional competences⁴². However, the Brussels legislator⁴³ enjoys also community tinted powers, in particular the welfare policy and public welfare institutions; for those matters a federated law can only be adopted by a qualified majority; this assumes a simple majority (half plus one) for the presence quorum and a simple majority (half plus one on yes- and no-votes) for the approval quorum, both within every language group. As the French minority in a federal assembly has a veto in the adoption of special majority laws, the Flemish minority has a similar right to veto for the approval of community tinted laws in the Brussels Parliament.

29. A similar institutional protection exists within the Brussels Executive. The Brussels Government, except the Prime Minister, must consist of two French-speaking and two Dutch-speaking ministers; also three regional Secretaries of State are elected, of which at least one must belong to another - i.e. Dutch-speaking - group.

In community tinted matters whereof in the Brussels-Capital Regional Parliament a qualified majority is required, exclusively the two French-speaking and the two Dutch-speaking ministers of the government⁴⁴ can participate in the decision-making process and the voting; the Prime Minister as well as the Brussels minister of the Flemish government and the Brussels ministers of the French Community Government have only an advisory vote. Since the decisions should be adopted by a simple majority (half plus one), every time one minister from a language group has to vote together with both ministers of the other language group to approve a decision; a decision can therefore never be issued against the will of both ministers of the minority language group.

30. The Dutch-speaking minority in both the United Meeting as well as the United College of the Joint Community Commission, such as the French-speaking politicians at the federal level, enjoys a double veto, either by staying absent at the sittings during the vote, either by unanimously reject a draft decision.

V. THE PROTECTION OF IDEOLOGICAL AND PHILOSOPHICAL MINORITIES

§1 The quest for cultural autonomy

⁴² For a non-exhaustive list of these, see *supra*, n° 20.

⁴³ Gathering officially in those competences as the “United Meeting of the Joint Community Commission”.

⁴⁴ Then officially gathering as the “United College of the Joint Community Commission”.

31. A Flemish sigh. The introduction of cultural autonomy in the first state reform forced to a specific protection of philosophical and ideological minorities⁴⁵ and this on all administrative levels. It was feared that the ideological and philosophical balance mainly Catholics and liberals would be broken; in particular, a considerable rationalist and agnostic minority within the Flemish Community and numerically significant Christian minority in the lap of the French Community.

The above-cited article 11 BC contains the obligation to guarantee by law and federated law in particular the rights and freedoms of these minorities against measures of administrative authorities in cultural matters, while article 131 BC instructs the federal legislature to adopt regulations to prevent any discrimination for ideological or philosophical reasons. The first guarantee led to the Culture Pact Act of July 16, 1973, the second to the establishment of an ideological and philosophical alarm bell procedure by the Law of July 3, 1971.⁴⁶

§2 The alarm bell procedure

32. Protection of ideological and philosophical minorities in the community parliaments. In the field of minority protection somewhat similar to the linguistic alarm bell in the federal assemblies, both procedures do differ significantly.

Article 4 of the 1971 Act provides that a reasoned motion, signed by at least one fourth of the members of a Community Parliament and tabled after the submission of the report and before the final vote in the public meeting, may declare that the provisions it designates in a legislative bill, contents a discrimination for ideological or philosophical reasons. Subsequently the Presidents of the federal Legislative Chambers and the Flemish and French Community Parliaments, sitting as a board, decide on the admissibility of the motion, given the provisions of article 4; in case of equality of votes, the motion is admissible.

The decision on the admissibility suspends the examination of the contested provisions. In that case, the legislative bill and the motion are referred to both federal Legislative Chambers, who rule on the merits of the motion.

The parliamentary debate on the designated provisions in the motion can only be resumed in the federated Assembly after each of the Legislative Chambers has declared the motion unfounded.

⁴⁵ To be clear: ideological and philosophical stands for "religious or non-religious philosophy" and not as political conviction.

⁴⁶ On this topic see especially ALEN, André. 1993. *Treatise on Belgian Constitutional Law*. Mechelen: Kluwer, 219-222.

33. Because of the political-philosophical significance and sensitivity of such a conflict, the assessment is not entrusted to a court nor to the Council of Ministers. In a two-step procedure four Assembly-Presidents decide on the admissibility and 150 MPs, respectively 71 senators on the merits of the alarm bell; the intervention and involvement of the federal Legislature must prevent the fear of any potential minorisation of some ideological and philosophical tendencies at the Community level.

As with the linguistic alarm bell at the federal level, the use of the ideological and philosophical alarm bell procedure at Community level remained rather limited; especially in the context of media regulation, it is used a number of times. It cannot be denied that the constitutional granted autonomy to the communities with this alarm bell procedure is somewhat curtailed. This is certainly true when a motion is declared admissible, since in that case the other language group in both federal assemblies is convened to rule on a matter of the other community. And since, as outlined above, the ideological ratios are different in both parts of the country, this could in turn give rise to community difficulties. Consultation between the philosophical convictions is therefore also central here.

§3 The Culture Pact Act

34. The ideological and philosophical alarm bell procedure deals only with legislative initiatives. Regarding the still existing fears of discrimination on the part of administrative authorities, the political parties have concluded a Cultural Pact; this pact subsequently was inserted in the Culture Pact Act of July 16, 1973.

Firstly, the law enshrines and individual right to non-discrimination for ideological and philosophical opinions; everybody has equal access to cultural infrastructure. *Secondly* ideological and philosophical group rights - not only minorities - are guaranteed; for example, the right to participate in the elaboration of cultural policies (media, fine arts, youth policy, ...). In addition, advisory bodies have to be set up in which users and groups are proportionally represented without predominance of one group. All groups have access to public broadcasting and are associated with its administration; objective standards guarantee the granting of subsidies. *Thirdly* initially cultural functions must be spread fairly over all groups ensuring each group an minimum presence and without one group being predominant; in several cases the Constitutional Court⁴⁷ decided the concerned article not valid. *Finally* a Standing National

⁴⁷ E.g. Constitutional Court 15 July 1993, n° 65/93 and 20 April 1994, n° 47/99.

Committee was set up with advisory and conciliatory powers in case of a complaint against an allegedly discriminatory measure of a local authority in cultural matters.

VI. CONCLUSION

35. It cannot be claimed that the rights of minorities are trampled where, once again, the large territorial concentration of the linguistic groups should be highlighted.

Firstly, in the framework of the federal State structure - for national minorities important policy areas - are exclusively transferred to each Community; to be mentioned are education, the use of languages in different policy domains, cultural matters, certain religious matters, media, ... Admittedly, the territoriality principle applies in a way the three Communities have exclusive powers in those matters, but also exclusively for their own linguistic region; support and protection of language enjoyed in another linguistic region is therefore excluded. *Secondly*, the Belgian Constitution guarantees, without any territorial restrictions with respect to every linguistic, religious or philosophical minority, ... the freedom of peaceful gathering, freedom of association, freedom of expression, freedom of worship, the active freedom of education to erect private schools as well as the possibility of cultural associations⁴⁸, the possibility of radio and television broadcasting without disturbance over the borders of a linguistic region, to distribute and to sell in the Flemish region French or German newspapers and magazines, the almost total freedom in private and in public life to use, orally and in writing, the minority language, the free assistance of an interpreter in judicial proceedings in another linguistic region, ... *Thirdly*, the federal and Flemish anti-discrimination legislation protects linguistic, ideological and philosophical minorities in private legal relationships, meaning the labor market, the leasing and renting of estate, the access to all publicly accessible establishments (pubs, hotels, restaurants), ... For cultural matters, several protection measures exist in the framework of the Culture Pact Act. *Fourthly*, as well linguistic as ideological and philosophical minorities enjoy protection

⁴⁸ The freedom of a member or a group of a linguistic minority to erect private educational and cultural institutions in another linguistic region, doesn't contain an obligation for that Community to recognize - e.g. because the language of instruction is not respected - and neither to subsidize those institutions.

mechanisms in the development of legislation, either the requirement of a special majority, either the alarm bell procedure.

Although two fault lines have mastered political history since Belgian independence, the necessary permanent consultation between the opponents at the various levels of government and the constitutional and statutory protection mechanism for minorities have prevented any armed conflict. To date, the political turmoil is only verbally fought.

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Dr Ewelina Cala-Wacinkiewicz
Department of International Law
Faculty of Law and Administration
University of Szczecin Poland

RIGHT TO DEVELOPMENT AS A THIRD-GENERATION HUMAN RIGHT

I. IN PLACE OF INTRODUCTION WITH THE CONSIDERATION OF METHODOLOGICAL ASSUMPTIONS

It could seem that a collective category of 'human rights' being backed by abundant subject literature¹ is being subject to analyses in all of its aspects, from the subjective to the objective perspective², to the individual and collective³ interpretation, and finally, to the horizontal and vertical one⁴. Undoubtedly, if one was to stop at this wording (taking into account the number of papers devoted to it) it would not be necessary to describe human rights once again in any other perspective. However, taking into account the development of said subject matter, along with the accompanying parallel development of various relations, such as social, economic, political, cultural or any other, it is impossible not to follow the changes that occur in the subject matter. Writing on human rights is not a question of fashion or current trends in the discussion on the protection of the individual. It is rather a necessity resulting in the obligation to analyse the state of human rights observance, how countries and other entities of international law implement their duties concerned and also in what scope the international community creates mechanisms which States are able to use in order to secure the standard of subjective protection to their citizens, or persons residing on their territories⁵.

In the above context, human rights protection may be analysed in the individual – individual relation (acknowledging how natural persons oblige the rights ascribed to them, paraphrasing a well-known maxim, that our rights ends where others' begin), in the State – individual relation (on the assumption that it is the States that, for their citizens, create inner mechanisms of human rights protection) and in the international community - States relation (where the main burden and the need to take actions is attributed to international organizations⁶ which, through their legislative actions, determine the said standard giving the States the possibility, even through the ratification of international agreements⁷, of transplanting this standard onto the grounds of national legal regulations). In this respect, one can express a belief that regulating many aspects that make up the human rights protection system is due precisely to international organizations such as the United Nations or the Council of Europe, whose achievements to a large extent changed the face of post-war international relations.

An excellent theoretical justification for the basis of two of the last relations, i.e. the State - the individual and the international community - the States, may be provided by the concept of the so-called structural approach to human rights described by Drzewicki. It emphasizes the need to identify and remove structural obstacles that lie at the root of many injustices, referring to domestic and international obstacles that block the obtaining of the desired standard of human rights enjoyment⁸. Their removal is the main

responsibility of the Member States and the international community as a whole. It needs to be remembered, however, that without mutually complementary actions of internal and external nature it will not be possible to provide a structured approach to the protection of human rights, and without this, the undertaken actions will be illusory and ineffective, if not simply unnecessary.

Therefore, advocating the legitimacy of said approach it may be suggested that it is referred to one of human rights, namely the right to development. It does not enjoy the universality of analyses devoted to it as, for example, the right to life, freedom of thought, conscience and religion, and the right to a fair trial, which makes it all the more an interesting subject for analysis. The more so that, as in a lens, it is focused on the need to combine the efforts of the States and the international community to grant it a normative character, and also - more importantly - to ensure its observance. The appearing necessity, in the context of the right to development, to apply the structural approach can be treated not only as a goal to be achieved, but above all as the only way for this right to be effectively implemented.

This is why the primary research goal of this study is to introduce a dualistic nature of the right to development - on the one hand relating to its individual aspect, which can be implemented in the State – individual relation, and on the other hand the collective one, i.e. coming down to the international community - State relation.

This right will be shown in a broader context against a generation of human rights, and more specifically the third generation, to which it was assigned. In addition, the determined perspective of considerations also implies reference to the normative aspect of the right to development. Because even though the existence of the problem itself does not need to be proven in any special way, it is not, unfortunately, dealt with by the international legislator to the extent that would provide States with a sufficient instrument for its effective protection. And since the development of both individuals and nations, and eventually, of the entire international community guarantees the implementation of human rights protection it is worth dedicating this paper to this particular issue.

II. GENERATIONS OF HUMAN RIGHTS WITH PARTICULAR REGARD TO THE THIRD GENERATION

On the grounds of the international law of human rights protection a classification of human rights offered by Karel Vasak according to their generations is quite commonly rooted⁹. Such "treatment" can be, above all, attributed an ordering nature, facilitating the characterisation of particular rights enshrined in said generations through the creation of a certain "theoretical classification scheme that takes into account the evolution of human rights"¹⁰. With its help, not only is it possible to analyse the content of individual rights that make up generations, but also to play their role and axiological justification behind assigning them to particular generations, which "complement and intersect each other, serving to create a universal and comprehensive concept of human rights"¹¹. That universality is grounded in the practice of the international community, who, through the forming of human rights protection systems (universal – that is of the UN, European, and other non-European), somehow "works" on the same matter of human rights. Of course, regulations on the protection of individual rights adopted by these systems or means to pursue claims arising from their violations differ, but the catalogue of rights to a certain extent remains common, based on everyone's inherent dignity.

Therefore, not advocating uncritical use of those generations¹², their differentiation certainly orders the contemporary discussion in the human rights area. And although judging from today's perspective the differentiation of only three generations adopted by Karel Vasak has lost its up-to-

date status, their dynamic development both in subjective and objective terms, enforces updating rather than depreciating the said concept. It is therefore necessary to expand the original three generations by a fourth one, often treated as still being *in statu nascendii*.

The first of the two mentioned generations have a normative foundation. Rights assigned to them are contained in two major international agreements adopted under the auspices of the UN, such as the Covenant on Civil and Political Rights of 16 December 1966¹³ and the Covenant on Economic, Social and Cultural Rights of 17 December 1966¹⁴.

Therefore, neither does it cause major controversies nor difficulties to assign the first generation of civil and political rights such rights as the right to life, the right to freedom and personal safety, the right to freedom of thought, conscience and religion, the freedom of assembly and of association, and the right to participate in the conduct of public affairs, or the enjoyment of active and passive voting rights.

The second generation of economic, social and cultural rights includes rights such as: the right to employment, and the associated right to just and favourable conditions of work, the right to form and to join trade unions, the right to social security and adequate standard of living and also the right to participate in cultural life and to benefit from technological advances.

Some difficulties are brought about, though, by the third generation for whose real functioning, as stressed in the doctrine, 'the cooperation of all internal social groups as well as the international community'¹⁵ is required. It includes the so called solidarity rights¹⁶, also described as collective rights or rights 'relating to the standard of living'¹⁷. Here - as opposed to political or economic rights - there is no interpretive guidance allowing for the determination of the rights comprised in the category of "solidarity rights". This results in a non-uniform formulation of a catalogue of these rights in the doctrine of human rights, and thus a certain arbitrariness of classification.

According to some, included here is the right of nations to self-determination¹⁸, protection of ethnic, linguistic and religious minorities, as well as the right to peace and development¹⁹. According to others however, the catalogue is made up of the right to development, the right to peace, the right to environment, the right to common heritage of mankind and the right to communicate²⁰. Taking into account, however, the fact that the premise of this article is not to determine the binding catalogue of third-generation rights, one can settle on a finding that the perspective of the right to development as a right of the subject generation is uncontroversial and does not require additional proof. It is certainly a solidarity right, whose implementation requires coherent actions taken by the international community and its main actors, i.e. States. It is a collective right, referring to the international community as a whole (though not only, as will be further discussed). And it is a right relating to the quality of life, which to some extent determines development. As pointed out, moreover, in the doctrine of the subject "the emergence of a third generation of human rights was to be a response to the existence of global issues through the implementation of international solidarity"²¹

The above outlined need to refer to the youngest and not well-established doctrine of the fourth generation of human rights is a complement to Karel Vasak's concept. And even though, using Engle's term, the rights of some are "essentially ignored throughout the world"²², "forcing" them into the catalogue of human rights while classifying them according to the newly created

generation deserves approval. For the fourth generation includes rights of sexual minorities, or the right to adopt (in relation to UN's recognition of infertility as a disease of civilization of the twenty-first century). Admittedly, this generation has yet to be given a formalized dimension and its own complete catalogue of rights. However, this can be justified by a precise, though simple, statement that "one cannot determine once and for all the catalogue of human rights, because they are constantly developing"²³. Therefore, this generation will probably remain "open" at this stage, if only to – in response to challenges of present day - show that the international community is not lagging behind the changing reality.

III. RIGHT TO DEVELOPMENT – GENESIS AND CHARACTER OF THE RIGHT TO DEVELOPMENT

Finding the origins and sources of the right to development on the one hand seems pretty obvious, on the other hand may give rise to some divergent observations, especially if one looks at them through the prism of the character of the right in question.

Subject literature quite commonly points to the process of decolonization²⁴ and the development of newly established countries or other countries less economically developed²⁵, and thus to the principle of self-determination of nations²⁶, as the genesis of the right to development. Pointing to international community's operation stages does not raise doubt. Nations' pursuit of full independence in the international arena can be related to their right to development, as the right to freely determine their political status and freely pursue their economic, social and cultural development is the essence of self-determination²⁷. In one perspective the development is understood as a right of a collective nature, inherited in nations, and in a broader perspective – in States and the whole international community.

Indication of a "turning point" which sparked the discussion on the right to development cannot be, however, fully identified with the rise (existence) of development itself. Rather, this genesis will be a reflection of the right to development penetrating onto the grounds of human and legal discussion, since the development itself seems to be inherently inscribed in the fate of the individual, and consequently of the international community. After all, "to develop - is to achieve a more favourable state than the current one, to reach a higher level in a certain discipline, to gain momentum, to thrive, to become more mature, to enjoy to a greater extent than at the present specific goods and values"²⁸. These assumptions led us (individually and collectively) to the current stage of development, initiating the development long before talks on the need to examine it in terms of the law began.

As for the sources of the right to development we must "seek [them] in the dignity of the human person"²⁹ And thus, for example, according to the Constitution of the Republic of Poland of 2 April 1997³⁰ the inherent and inalienable dignity of the human is the source of rights and freedoms of a human and citizen. The dignity of a human is inviolable, and respect and protection thereof is the duty of public authorities. Dignity in this approach therefore constitutes a foundation of human rights *in genere* and the determinant of duties assigned to public authorities in the scope of its protection, out of which this paper will later deduce State authorities' duty to implement the right to development.

In this sense, dignity is a kind of "link" between the category of "development" and human rights as a normative category, facilitating (though in very simple words) the introduction of the

right to development as a human right in the face of the existence of a common denominator.

Against this background, it is therefore reasonable to say that "the focal point of the approach to the development is a reference to generally accepted standards of full protection and realization of human rights as the ultimate goal of a good development process for all"³¹. This approach shows that the right to development can also be seen as an individual right. And probably this approach seems to be more valid today. Development of an individual will definitely have a bearing on the development of the State, and thus the entire international community, though undoubtedly the development of the latter two will also be connected to the development of the individual.

However, one should realise that the issue of the perception of the right to development and its nature itself is a matter of optics and of the method of reasoning. This resembles the "from smaller to larger" pattern, that is, from the individual to the international community. In the doctrine one encounters the thinking reflecting the opposite pattern, and thus "from larger to smaller," or from the international community to the individual, of which Mazurek writes noting that "the right to development is a right of a collective provided, however, that it always has the rights of a specific person, living in a particular country or nation in mind"³²

The dualistic nature of the right to development outlined above shows that this right, in its construction, defies classical division of human rights into individual and collective rights. This makes it not only an interesting object of analysis, but also gives rise to the discussion on its character. Because if, for example, one attempted to adopt a "collectivist position it would pose a temptation to believe that the development of some (...) individuals is less essential to the development of the group entity they form"³³, and it certainly would strike against the philosophy of individual rights. This supports this paper's assignment of the primacy of the individual concept over the collective one, or at least their equal treatment. Views treating the right to development as the only collective right³⁴ thus seem not to have the modern *ratio*, because it is "the integral self-realization of the individual [that] is the ultimate goal of development"³⁵.

IV. RIGHT TO DEVELOPMENT – ATTEMPT ON A DEFINITION AND NORMATIVE (?) CHARACTER

The idea of the right to development is an attempt to adapt the system of human rights and problems in the development not only in the economic sphere, but also political, social and cultural³⁶. Hence, considered justified are views treating the right to development as "absorbing" or conditioning the implementation of the rights of the first and second generation. Lopatka uses a very accurate term in this context: the right – synthesis, as necessary for its implementation is the enjoyment of all other human rights³⁷. Embracing the right to development, however, does not relieve one of attempts to define it.

The objective treatment of the right to development in its definition is referred to by, *inter alia*, Sengupta who claims that the right to development is the right to the process of development, consisting of a progressive and gradual implementation of all recognized human rights, such as citizen rights and political rights, economic, social and cultural rights (and all other rights recognized by international law), as well as the process of economic growth in accordance with human rights standards³⁸. Another description of the right to development can be found in Szarfenberg, for whom the right to development is the right 'to realise one's potential'³⁹.

Yet another approach, though not doctrinal but normative, can be found in the Declaration on the Right to Development, which is a resolution of the General Assembly of the United Nations adopted on December 4, 1986⁴⁰. In accordance with its Article 1, the right to development is an inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. According to this article the human right to development also implies the full realization of the right of peoples to self-determination, which include (subject to the relevant provisions of both International Covenants on Human Rights), the exercise of their inalienable right to full sovereignty over natural wealth and resources.

Thus, reproducing the definition of the "right to development" of the mentioned above definition one can single out four meanings of this term, which are equated with the right to the process of development, the right to the process of economic growth and the right to the realization of developmental potential, as well as the right to participate in, contribute to and enjoy all forms of development (e.g. economic, social, cultural and political).

In this context it is not surprising that the right to development is considered in a multifaceted and multidimensional way. It is an inalienable human right arising from the dignity inherent in each and the human person is the central subject of development and should be the active participant and beneficiary of this right (Article 2 of the Declaration).

The above provisions of the Declaration also allow to re-refer to the individual and collective character of the rights in question, seeming to be a confirmation of the standing taken above on the primacy of the former. When analysing provisions contained in the Declaration one can say that this primacy results from an implication expressed *expressis verbis* in art. 2 which runs in the direction: from the right of the human person to development - to the realization of the right of peoples to self-determination. Thus, if the secondary nature of the individual whose development was conditioned by the development of a nation was the will of the international legislator, this wording would be reversed (and therefore the right of peoples to self-determination would imply the right of the individual to development). Only on this basis has the position argued above - questioning voices of "collectivists" - gained an additional argument⁴¹.

Moving on to the grounds of the search for the normative dimension of the right to development, at the outset, one should mention two different situations. The first one, when legal acts only refer to the concept of 'development'; and the other one, when they determine it and give it a legal dimension. From the point of view of the analyses conducted, of course, greater significance can be attributed to the latter.

Nonetheless, while subjecting important international-legal acts to analysis, the category of "development" appears in the Universal Declaration of Human Rights of 10 December 1948⁴² threefold (not counting the preamble). Once, in the context of social security, expressed in Art. 22 providing that the enjoyment of economic, social and cultural rights is indispensable for the dignity and the free development of personality of the individual. Then in art. 26, which refers to the right to education (and the goal of education is the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms). And lastly, in the provisions according to which everyone has duties to the community in which alone the free and full development of his personality is possible (Article 29 of the Declaration). It is worth noticing in this context, however, that the references quoted above in their essence refer to the same category, that is, the development of the personality of the individual, and the Declaration itself, although it

was the first document of the post-war world⁴³ dealing directly with human rights, bears only the status of *soft law*.

Regulations for development were also included in a number of international agreements, and therefore acts legally binding the international community as a whole, as well as States that have chosen to adopt them.

And thus, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950⁴⁴, adopted under the auspices of the Council of Europe, only in the preamble refers to the category of development and only in terms of the protection and development of human rights, not the individual.

It looks a little different in the previously referenced Covenants (that is, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights), whose provisions contained in Art. 1 sound identical, providing for the enjoyed by nations right to self-determination, which was already mentioned above. By way of reminder, by virtue of this right peoples determine their political status freely and freely secure their economic, social and cultural development. In the Covenant on Economic, Social Cultural Rights the word "development" occurs additionally in other contexts. It refers, namely, to the development and utilization of natural resources (Article 11), the healthy development of the child (Article 12), the full development of personality (Article 13), the development of a system of schools (Article 13) and science (Article 15).

References to development are also noticeable in the provisions of the Charter of Fundamental Rights of the European Union of 13 December 2007⁴⁵. Its preamble refers to the preservation and development of the common values on which it is based, the development of EU freedoms (that is, the freedom of movement of persons, goods, services and capital and the freedom of establishment) and the development of scientific and technological progress. In the remainder of the Charter of Fundamental Rights the category of development occurs in Art. 32, where, in the context of the employment of young people, an order is established to protect them from work likely to harm their safety, health or physical, mental, moral and social development. Moreover, Art. 37 (which deals with environmental protection) talks about the principle of sustainable development.

Only a relatively cursory analysis of the provisions of international documents, most importantly, of a binding nature, shows that the category of "development" is inscribed in their contents in a fairly wide and diverse context (from the subjective one such as the development of the child, to the objective one, such as the development of the system of schools, etc.). Both nations and natural individuals were associated with the development, which reflects the idea that it is the category of "development" that will facilitate the enjoyment of human rights, through which its original meaning is expressed.

The situation is different in the context of the normative aspect of the right to development. The demonstration of its existence (or lack thereof) bears an important meaning in so much that it will allow to answer the question of whether the international community has provided States with the required mechanisms for the protection of these rights and therefore, how the States perform this protection for the benefit of their citizens.

In legal acts of a binding nature the right to development is contained to the full extent in Art. 22 of the African Charter on Human and Peoples' Rights adopted in Nairobi on 26 April 1981⁴⁶. Under its provisions, all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the

common heritage of mankind. And States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

Also, the statute of another international organization, namely the Organization of American States adopted in Bogota on 30 April 1948⁴⁷ contains *explicite* reference to the right to development. It states in Art. 17 that each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

References to the right to development can also be found in documents of no commonly binding nature, which then greatly reduces its character⁴⁸. However, it must be admitted that, given the relative scarcity of treaty regulations devoted to the right to development, even those of a non-binding nature may constitute a form of "compensation". Interestingly also, the right to development penetrated onto the grounds of the international system of human rights out of a non-binding right. As Drzewicki notices this right has been recognized as a human right in the Resolution of the General Assembly of the United Nations 34/46 of 23 November 1979. And then, resolution 36/133 of 14 December 1981 stated that the right to development is the "inalienable human right"⁴⁹.

In addition, as already mentioned above, the right to development has been expressed and defined in one of the most important documents on the same topic, namely the Declaration on the Right to Development of 1986. It is "an example of the connection of thinking about development and human rights on a very general level with emphasis on values such as justice and subjectivity and emphasizing the role of the State and international cooperation while respecting the principle of sovereignty"⁵⁰ Nevertheless, it is this declaration that we owe the facilitating of the right to development with a normative formula. The declaration in its regulations also refers to the responsibility of States for the creation of national and international conditions favourable to the implementation of the right to development, as well as their responsibilities to formulate international development policies, to remove human rights violations and to take measures for the implementation of the right to development. States should cooperate with each other for this purpose and work towards international peace and security.

Another act having the same legal status as the above cited document, is also worth mentioning, namely the Vienna Declaration and Programme of Action of 12 July 1993 (hereinafter referred to as the Vienna Declaration)⁵¹, a resolution of the General Assembly of the United Nations. It is the result of the summoned World Conference on Human Rights, which reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights (section 10 of the Declaration). In addition, this declaration in point 11 stated that the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.

In this context, it should be noted that the reference to the Declaration on the Right to Development contained in the discussed Declaration shows particular systemic thinking about human rights, against which the right was established. It is a pity, however, that the United Nations has failed to translate this way of thinking into concrete actions towards giving it a treaty basis. The formulation of such an important right only in the form of a resolution of the General Assembly is bound to leave an unsatisfied want.

Summing up the discussion on the normative character of the title right it must be noted that certainly the realization of the right to development is an obligation so much of countries⁵², as of the

entire international community. This obligation, however, must be imposed on them by virtue of provisions of a generally binding status (e.g. in the form of an international agreement⁵³), as currently binding agreements (African and American) only have a regional rather than universal character.

In order to enforce, thus, the implementation of obligations imposed on actors, it is necessary to have a legal base in this scope. For if the right to development is to include a normative load, following this, individuals must earn the right to demand specific actions from the governing bodies and nations, similarly, from the international community.

Evaluating *de lege lata* the nature of the right to development, unfortunately, "it is most appropriate to attribute it the nature of a programme norm, that is a norm that in general terms defines a general direction for the organs of the State"⁵⁴, and this is definitely not sufficient.

SUMMARY

The analysis proposed by the Author of one of human rights, that is the right to development, has been carried out against the background of a broader perspective - the third generation of human rights. This perspective set the character and essence of the title right to development, allowing for it to be shown in the perspective of the individual and collective rights. Moreover, it has shown why the protection of the rights of this generation (as rights relating to the quality of life) to such a large extent depends on the policies of individual States, and in a broader context – on the international community. Because it is them that bear the obligation to implement the right to development, even though – it needs to be stressed with complete determination – it is still not sufficiently regulated by the law.

In assessing the current state of affairs one might formulate a view that, the establishment of third-generation rights was not followed by specific legislative actions for there was not enough political will, leaving the concept of a structural approach to human rights only at the stage of theory.

Therefore, taking as a basis the assumptions guiding the creation of an objective generation, (as the one that forces solidarity actions of international legal entities) States must not feel exempt from the obligation to implement the right to development understood as an individual right. Their citizens, in order to realize the right in question, need legislative actions from States (which is why initial assumptions mentioned the State – individual relation). The international community must not feel exempt from actions taken for the benefit of nations, and more broadly, of the States, and therefore from the obligation to implement the right to development as a collective right (in accordance with a separate international community - State relation). It is its standards that should set for States the manner and direction of proceedings.

And although – what one needs to be aware of – entities of international law need to come a long way to remove obstacles barring the way of the implementation of the right to development (thus harming various, often extreme, interests), it time for definite actions. In order for each person and all nations to be able to fully enjoy rights they are entitled to. Isn't it perhaps that we 'are somehow 'doomed' for development'⁵⁵?

ENDNOTES

1. As an example one might point to: Banaszak, Boguslaw. (ed). 1993. *Prawa człowieka. Geneza, koncepcje, ochrona. [Right of the human person. Genesis, concepts and protection.]*. Wrocław; Gronowska, Bożena., Jasudowicz, Tadeusz., Balcerzak, Michał., Lubiszewski, Maciej., Mizerski, Rafał. 2005. *Prawa człowieka i ich ochrona. [Human rights and their protection]*. Toruń; Florczak, Agnieszka., Bolechow, Bartosz (eds). 2006. *Prawa człowieka a stosunki międzynarodowe [Human rights and international relations]*. Toruń; Sieghart, Paul. 1992. *The International Law of Human Rights*. Oxford; Doebbler, Curtis. 2006. *Introduction to international human rights law*. Cd Publishing; Beitz, Charles. 2009. *The idea of human rights*. Oxford; Freeman, Michael. 2002. *Human rights: an interdisciplinary approach*. Cambridge; Donnelly, Jack. 2003. *Universal human rights in theory and practice (2nd ed.)*. Ithaca.

2. In subjective terms one can speak of the rights of the child (see for example: Jaros, Paweł. 2009. *Prawa dziecka w konfliktach zbrojnych [The rights of the child in armed conflicts]*, [in:] Jasudowicz, Tadeusz., Balcerzak, Michał., Kapelanska-Pregowska, Julia. (eds.) *Współczesne problemy praw człowieka i międzynarodowego prawa humanitarnego [Modern problems of human rights and of international humanitarian law]*. Toruń., pp. 261-294;), of the rights of women (see for example: Grzybek, Agnieszka (ed). 1998. *[Prawa kobiet w dokumentach ONZ [The rights of women in the documents of the UN]*. Warszawa; of the right of minorities (see for example: Jasudowicz, Tadeusz. 1992. *Some Legal Aspects of the Protection of Minority Rights in Europe*. [in:] Bloeda, Arie, de Longe, Wilco. (eds.) *Legal Aspects of a New European Infrastructure*. Utrecht. In objective terms, for example, of the rights to birth, life and death (see for example: Tokarczyk, Roman. 1997. *Prawo narodzin, życia i śmierci. [The right to birth, life and death]*. Zamykacze; the right to a fair trial (see for example: Krzywonos, A., Golaczynski, Jacek. 2002. *Prawo do sadu [The right to access to justice] [in:] Banaszak, Boguslaw., Preisner, Artur (eds.)*. *Prawa i wolności obywatelskie w Konstytucji RP [Civil rights and freedoms in the Constitution of the Republic of Poland]*. Warszawa, or the right to life, survival and development (see for example: Nowak, Manfred. 2005. *Article 6. The Right to Life, Survival and Development*. [in:] Alen, Andre., Vande, Johan., Eugeen, Lanotte., Fiona, Verhellen., Berghmans, Ang Eeva, and Mieke Verheyde. *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden.

3. On the said perspective see: Engle, Eric. 2006. The Third Wave? The Generation Theory of Human Rights, *Vera Lex. New Series*, vol. 7, p. 121.

4. As it is stressed in the doctrine an essential feature of human rights is their vertical character in the relation between private entities on the one hand and entities comprising public authorities on the other. The vertical nature of human rights does not exclude as an exception their horizontal activity, especially when the legal norms shape State's obligations to create conditions fostering human rights or are directed at reducing the cumulated long-term discrimination of particularly injured groups. See: Drzewicki, Krzysztof. 2012. *Prawa człowieka [Human rights] [in:] A. Przyborowska – Klimczak, D. Pyc. (eds.) Leksykon prawa międzynarodowego publicznego [Lexicon of public international law]*. Warszawa. p. 346.

5. The criterion of place of residence was mentioned along the criterion of citizenship on purpose as it seems that it is currently gaining quite significant importance, perhaps even greater than the criterion of citizenship, which is exemplified by the norms of private international law.

6. For international organizations see: Meknes, Jerzy., Wasilkowski, Andrzej. 2010. *Organizacje międzynarodowe. Prawo instytucjonalne. Wyd 2. [International organisations. Institutional law. Second ed.]*. Warszawa.
7. Ratification is understood each time as an international act under which a State implements on the international grounds its consent for being bound by the treaty. See: Vienna Convention on the Laws of Treaties of 23 May 1969, Journal of Laws, No 74, item 439.
8. Drzewicki, Krzysztof. 1998. *Prawa człowieka a prawo do rozwoju [Human rights and the right to development]* [in:] Tomala, Karin. (ed). *Uniwersalizm praw człowieka. Idea a rzeczywistość w krajach kultur pozaeuropejskich [Universalism of human rights. Idea and reality in the countries of non-European cultures]*. Warszawa. p. 104.
9. Vasak, Karel. 1977. Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights. *The UNESCO Courier*. Paris, p. 29.
10. Nowak, Manfred. 1993. *Trzy generacje praw człowieka. Ich znaczenie w swietle przeslanek ideowych i historycznych oraz w swietle ich genezy [Three generations of human rights. Their importance under ideological and historical premises and the light of their genesis]* [in:] Banaszak, Boguslaw. (ed) *Prawa człowieka. Geneza, koncepcje, ochrona [Human rights. Genesis, concepts, protection]*. Wroclaw. p.105.
11. Ibidem, p. 106.
12. The more so that we can see various attempts at their description showing, for example, that the first generation international human rights appear to be a part of *jus cogens*, second generation rights are also customary laws but may be derogated from. Third generation rights are aspirational goals. See: Engle, Eric. op. cit., p. 113. Another approach emphasises the differences of the rights of a different generation, which become prominent especially in reference to mechanisms ensuring the implementation of these rights. First-generation rights may find effective legal protection both, on the grounds of domestic law and international law. Implementation mechanisms of second-generation rights are mostly different and rarely are domestic courts able to control their observance effectively, most often these rights cannot be guaranteed without substantial financial outlays. For the third-generation rights though, neither the domestic law, nor the international law provides any special mechanisms, analogically to the fourth-generation rights. See: Czaplinski, Wladyslaw., Wyrozumska, Anna. 2004. *Prawo międzynarodowe publiczne – zagadnienia systemowe, wyd. 2, [International public law – systemic issues. Second ed.]*, Warszawa. pp. 426-427.
13. Journal of Laws of 1977, No 38, item 167.
14. Journal of Laws of 1977, No 38, item 169.

15. Michalowska, Grazyna. 2007. *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej [Protection of human rights in the Council of Europe and the European Union]*. Warszawa, p. 12.
16. This term is used, for example, by: Alston, Philip. 1988. Making Space for New Human Rights: The Case of the Right to Development. *Harvard Human Rights Yearbook*.1988, No 1, p. 3.
17. Nowak, Manfred, op. cit., p. 106.
18. Robert Andrzejczuk, showing the justification for the outlining of the right of nations to self-determination as a solidarity right, indicates that in this case the generativity of human rights was to be an argument for the expansion of the entitled entity. And solidarity would give the opportunity of introducing the collective in place of the latter. In consequence, the right to self-determination would be a collective human right to which a nation is entitled. It would be also a solidarity right. See: Andrzejczuk, Robert. 2004. *Prawa człowieka podstawa prawa narodow do samostanowienia [The rights of nations to self-determination]*. Lublin, p. 122.
19. See: Nowak, Manfred, op. cit., s. 116.
20. See: Drzewicki, Krzysztof. 1983. Trzecia generacja praw człowieka [Third generation of human rights]. *Sprawy Miedzynarodowe [International Affairs]*, No 10, p. 83.
21. Andrzejczuk, Robert, op. cit., p.122.
22. Engle, Eric, op. cit., p. 123.
23. Mazurek. Franciszek. 1983. Prawo do rozwoju [The right to development], *Roczniki Nauk Spoecznych [Social Sciences Annals]* Vol XI, No 1, p. 231.
24. Similarly: Szarfenberg, Ryszard. 2006. *Prawo do rozwoju [Right to development]* [in:] Florczak, Agnieszka., Bolechow, Bartosz. (eds.). *Prawa i wolnosci I i II generacji... [Rights and freedoms of the II and III generation...]*. Torun, p. 381.
25. Drzewicki, Krzysztof. *Prawa człowieka..., [Human rights...]* p. 97.

26. Nowak, Manfred, op. cit., p. 106.
27. See: At. 1 of the Covenant on Civil and Political Rights.
28. Lopatka, Adam. 1991. *Prawo do rozwoju [Right to development]*, [in:] R. Wieruszewski (ed.). 1991. *Prawa człowieka. Model prawny [Human rights. Legal model]*. Wrocław -Warszawa – Kraków, p. 46.
29. Andrzejczuk, Ryszard, op. cit., p.122.
30. Journal of Laws of 1997, No 78, item 483 as amended.
31. Staszewska, Katarzyna., Marczynski, Marek. 2008. *Polska pomoc rozwojowa a Deklaracja ONZ o Prawie do Rozwoju. Proba oceny [Polish developmental aid and the UN Declaration on the Right to Development. An assessment attempt]*, http://www.socialwatch.org/sites/default/files/pdf/en/polsce14_2008_pol.pdf.
32. See: Mazurek, Franciszek, op. cit., p. 234. The author bases his statement on R.J. Dupuy and G. Abi-Saab's position.
33. Szarfenberg, Ryszard. 2006. *Prawo do rozwoju [The right to development]*, [in:] Florczak, Agnieszka., Bolechow, Bartosz. (eds) *Prawa i wolności I i II generacji..., [Rights and freedoms of the II and III generation...]*. Toruń, p. 380.
34. For example: Abi-Saab, Georges. 1980. *The Legal Formulation of the Right to Development*, [in:] Dupuy, Rene Jean (ed). *The Right to Development at the International Level*. Hague, p. 170. Krzysztof Drzewicki actually believes that majority of experts give primacy to the collective dimension of the right to development, while a minority objects against such stratification. See this Author, *Third...*, pp. 88 – 89.
35. Lopatka, Adam, op. cit., p. 50.
36. Drzewicki, Krzysztof. *Third...*, p. 84.
37. Lopatka, Adam, op. cit., p. 50.
38. Sengupta, Arjun. 2004. The Human Right to Development. *Oxford Development Studies*, vol. 32, p. 182.

39. Szarfenberg, Ryszard, op. cit., p. 381.
40. A/RES/41/128. Declaration text. [in:] Andrzejewski, Robert. op. cit. pp. 291 – 295.
41. Summing up and emphasising that his question is more courageously expressed by Andrzejczuk, one can refer to the statement that rights which a nation is entitled to have a completely different character than the rights of a human person. The right to self-determination and the interconnected right to development are rights of peoples. See: Andrzejczuk, Robert, op. cit., pp. 140 – 141.
42. A/RES/217A(III).
43. Rob Buitenweg in this context says that the Universal Declaration turned out to be the start of a series of declarations and treaties on human rights. See: Buitenweg, Rob. 1997. *The Right to Development as a Human Right?*, *Peace & Change*, Vol. 22, Issue 4, p. 41.
44. Journal of Laws of 1993, No 36, item 175 as amended.
45. OJ (EU) C 326/391 of 26 October 2012. References here were made to the provisions of the Charter introduced by the Treaty of Lisbon of 13 December 2007, No 203, item 1569.
46. Text of the Charter <http://libr.sejm.gov.pl/tek01/txt/inne/1981.html>, and also [in:] Gronowska, Bożena., Jasudowicz, Tadeusz., Mik, Cezary. 1993. *Prawa człowieka. Dokumenty Międzynarodowe [Human Rights. International Documents]*. Torun. On the subject of right to development see further: Chinedu Okafor, Obiora. 2008. „Righting” the Right to Development: A Socio-Legal Analysis of Article 22 of the African Charter on Human and Peoples’ Rights, [in:] Marks, Stephen P. (ed) *Implementing the Right to Development. The Role of International Law*. Geneva, pp. 52 – 63.
47. Charter of the Organization of American States: <http://www.oas.org>.
- On the subject of the right to development expressed in the Charter see further: Negro, Dante M. 2008. Article 17 and Chapter VII of the revised OAS Charter and relevant experience of OAS institutions, [in:] Marks, Stephen P. (ed) *Implementing the Right to Development. The Role of International Law*. Geneva, pp. 64 – 71.
48. Compare: Von Schorlemer, Sabine. 2008. *Normative Content of a Treaty as opposed to the Declaration on the Right to Development: A Commentary*, [in:] Marks, Stephen P. (ed) *Implementing the Right to Development. The Role of International Law*. Geneva, pp. 32 – 38; Baxi, Upendra. 2008. *Normative Content*

of a Treaty as Opposed to the Declaration on the Right to Development: Marginal Observations, [in:] Marks, Stephen P. (ed) *Implementing the Right to Development. The Role of International Law*. Geneva, p. 47 – 51.

49. Drzewicki, Krzysztof, *Third...*, p. 87.

50. Szarfenberg, Ryszard, *op.cit.*, p. 394.

51. A/CONF.157/23, available at: <http://www.unhcr.org/refworld/docid/3ae6b39ec.html>.

52. The internal dimension of the right to development focuses on the duties of each state to ensure domestic policies that seek to contribute to the realization of the fundamental human rights of all its subjects. See: Salomon, Margot. 2008. *Legal Cosmopolitanism and the Normative Contribution of the Right to Development*, [in:] Marks, Stephen P. (ed) *Implementing the Right to Development. The Role of International Law*. Geneva, p.18.

53. Compare: Marks, Stephen P. 2008. *A legal perspective on the evolving criteria of the HLTF on the right to development*, [in:] Marks, Stephen P. (ed) *Implementing the Right to Development. The Role of International Law*. Geneva, pp. 72 – 81.

54. <http://www.prawaczlowieka.edu.pl>

55. Mazurek, Franciszek, *op.cit.*, p. 235.

“Analysis of the Legal Regulations for Manmade Disasters with special Reference on Nuclear Disasters”

Aditya Mahadevia *

Second Year Law student Nirma University, India

Abstract

German disaster sociologist - Rudiger Wolf Dombrowsky insisted that “...*Disasters do not cause effects. The effects are what we call a disaster*”.

Any act natural or man-made to the range which is sufficient warrant resulting in massive destruction, ecological damage, dent into the human life, and deterioration of public health is a disaster. From the flood-ravaged provinces of Pakistan and tsunami battered shorelines of Japan to the storms, floods, landslides and quakes that struck Australia, New Zealand and Spain, disasters have hogged the headlines in the past 18 months. Many believe that catastrophes are the by-product of global climate change.

These days, nuclear technology is used in several applications such as medicinal, power and off-course military, etc. Out of these, nuclear energy based power is getting popular. In any case, because of growth in applications, based on nuclear technology, there are several nuclear installations being found at industrial scale. In spite of all industrial sophistications accidents still occurs. The problem with nuclear accidents is – though, less frequent (due to high degree of sophistication and control measures), but, once an accident occurs, the impact is severe such as the Chernobyl disaster in Ukraine (Russia) 1986, Fukushima meltdown in 2011, etc.

In East Asia and the Pacific where risk is concentrated, the countries there have improved capacity in disaster response, preparedness and early warning systems which is announced by the Global Assessment Report on Disaster Risk Reduction in 2011, produced by the U.N.’s disaster management agency UNISDR. Since then even the Indian National Disaster Management Guidelines and Management of Nuclear and Radiological emergencies have passed out stringent laws for prevention of the disaster.

The aim of the paper is to evaluate how the national and international policies are made for pre and post disasters specially focusing on nuclear disasters. The aim of the author is to analyse how far these legal regulations do and policies for prevention of disaster really helps in the present world.

Keywords: Nuclear Disasters, Manmade Disasters, Legal Regulations

1.0 INTRODUCTION

1.1 The author taking the reference of the Centre for Research on the Epidemiology of Disasters (2006), to describe disaster where CERD generally, defines as disaster as an unforeseen event that causes great damage, destruction and human suffering, which overwhelms local capacity, necessitating a national or international level assistance (CRED, 2010). Augmenting the classification system of CRED (2010), these disasters can be classified into three broad categories: natural disasters, technological disasters, and man-made disasters.

Firstly, natural disasters can be divided into three subgroups:

- 1) Hydro-meteorological disasters including floods, storms, and droughts;
- 2) Geophysical disasters including earthquakes, tsunamis and volcanic eruptions;
- 3) Biological disasters such as epidemics and insect infestations.

Secondly, technological disasters are mainly composed of two subgroups:

- 1) Industrial accidents such as chemical spills, collapses of industrial infrastructures, fires, and radiation;
- 2) Transport accidents by air, rail, road or water.

Finally, man-made disasters are also composed of two subcategories;

- 1) Economic crises including growth collapse, hyperinflation, financial, and currency crises;
- 2) Violence such as terrorism, civil strifes, riots, and wars and Nuclear wars.

The author will focus on the third points, which are the manmade disasters.

Manmade disasters are attributable to conditions resulting from human conduct such as grossly negligent acts, gross inaction or serious errors.

These are broadly:

- (i) Fire outbreaks especially in places to which the public has access including high-rise buildings,
- (ii) Building collapses,
- (iii) Stampedes in public places and
- (iv) Industrial disasters viz., explosions, escape of noxious fumes and gases, mishaps in underground mines, etc.,
- (v) Exposure to radio-active (Nuclear) waste.

What are the main causes of these man-made disasters?

The author here has mentioned causes of various types of man-made disasters such as:

1.2 Building collapses

Building collapses can occur on account of weak foundations unsuited to the conditions of soil and water-table, vulnerability to water-logging, faulty structural designing, weak beams and poor quality of construction. Non-observance of earthquake resistance standards in vulnerable areas is another cause. Sufficient care is not taken while granting permissions or to inspect during the

construction stage. The architect, contractor and engineer engaged by the builder do not insist on observance of specified standards. They are too willing to sign the certificates. Further, the old age buildings with little or no maintenance pose a perennial threat to the safety of inmates. The civic authorities give no forewarning nor do they seldom exercise the power vested in them to demolish such buildings. Some of the residents of old buildings do not bother to spend money for renovation or safety measures.

1.3 Industrial disasters occur by reason of utter indifference on the part of the owner/manager in handling hazardous substances such as toxic gases or other flammable substances enumerated in the Environment Protection Act, 1986 coupled with lack of adequate fire control equipment in the premises and emergency evacuation plans. The storage of combustible material without even enclosing them with fire-proof walls/partition aggravates the problem. The escape of poisonous gases has terrible impact on the safety and health of those living in the vicinity. There is no periodic inspection by the technical personnel of the Government/local bodies at the time of and after issuing/renewing the licenses and certificates.

2.0- THE HORRENDOUS DISASTERS IN WORLD HISTORY

2.1 Bhopal Gas Tragedy, India

Bhopal Gas Tragedy also known as the union carbide gas leak was one of the most deplorable disasters in the history of India.

On the night of December 2, 1984, the Union Carbide pesticide plant in Bhopal, India began to leak methyl isocyanate gas and other poisonous toxins into the atmosphere. Over 500,000 were exposed and there were up to 15,000 deaths at that time. In addition, more than 20,000 people have died since the accident from gas-related diseases. More than 40 tons of methyl isocyanate gas leaked from a pesticide plant in Bhopal, India, immediately killing at least 3,800 people and causing significant morbidity and premature death for many thousands more. The company involved in what became the worst industrial accident in history immediately tried to dissociate itself from legal responsibility. Eventually it reached a settlement with the Indian Government through mediation of that country's Supreme Court and accepted moral responsibility. It paid \$470 million in compensation, a relatively small amount based on significant underestimations of the long-term health consequences of exposure and the number of people exposed. The disaster indicated a need for enforceable international standards for environmental safety, preventative strategies to avoid similar accidents and industrial disaster preparedness. The Supreme Court noted³ that the leak and escape of the poisonous fumes from the tanks in which they were stored occurred late in the night of December 2, 1984 “as a result of what has been stated to be a ‘runaway’ reaction owing to water entering into the storage tanks”. Owing to the then prevailing wind conditions, the fumes blew into the hutments abutting the premises of the plant and the residents of that area had to bear the brunt of the fury of the vitriolic fumes. Besides, large areas of the city were also exposed to the toxic chemical fumes.

2.2 Chernobyl Meltdown, Ukraine:

Chernobyl Meltdown also known as the Nuclear Power Plant Explosion in Chernobyl was one of the world's most deadly disasters of all.

On April 26th 1986, the Chernobyl Plant in the Ukrainian Soviet Socialist Republic had a major meltdown, which resulted in the atmospheric release of radioactive material four hundred times more radioactive than Hiroshima.¹ Since the accident there have been countless children with birth defects, a sickening increase of cancer sufferers and many other health issues as well. It is estimated that the disaster could result in nearly 100,000 fatal cancers, and the area won't be safe for any activity, including farming for up to 200 years

2.3 London's Killer Fog

With the advent of industry, London's population was accustomed to seeing foggy, pollution laden air. In 1952 however, this pollution took a tragic turn. This winter, the weather was cold and residents burned more coal in their fireplaces to alleviate the chill. The smoke laced with sulfur dioxide, nitrogen oxides and soot, and left London encased in a black cloud of near total darkness and killed over 12,000 people

2.4 The Kuwait Oil Fires

The Gulf War oil spill is the largest oil spill in history making it one of the worst man-made disasters of all time. In 1991, following the invasion of Kuwait, Hussein sent men in to blow up the Kuwait oil wells. They managed to set over 600 ablaze and these burned for over seven months. The oil spill that resulted from the fires caused considerable environmental damage.

2.5 The Three Mile Island Nuclear Explosion

In Harrisburg, PA on March 28, 1979, the Three Mile Island nuclear reactor experienced a partial core meltdown. While little radiation was released from the accident thanks to a working containment system, this accident became the rallying call for fears about the nuclear power industry. Livestock deaths, premature deaths and birth defects have been attributed to the nuclear meltdown.

2.6 Fukushima Disaster

A massive 8.9-magnitude quake hit northeast Japan on Friday, causing dozens of deaths, more than 80 fires, and a 10-meter (33-ft) tsunami along parts of the country's coastline. Homes were swept away and damage was extensive. And the disaster didn't end with this. Eleven reactors at four sites near Japan's northeast coast were shut down per seismic emergency procedures. Five reactors at two sites in the Fukushima prefecture declared emergencies due to loss of normal site power and backup emergency power. According to a British nuclear expert the explosion at the Fukushima I nuclear plant looks likely to be a "significant nuclear event" with a bigger impact on public health than the 1979 meltdown at Three Mile Island. As of 15 March, the Finnish nuclear safety authority estimated the accidents at Fukushima to be at Level 6 on the INES. On 24 March, a scientific consultant for Greenpeace, working with data from the Austrian ZAMG and French IRSN, prepared an analysis in which he rated the total Fukushima I accident at INES level 7. The accident caused nuclear contamination in the surrounding environment, water, milk, vegetable and other food items. People living in surroundings were moved to safe shelters and food grown in the area was banned for sale. The Japanese government in handling the situation in the most efficient and

¹ David R. Marples, *The Social Impact of the Chernobyl Disaster* (New York: St. Martin's Press, 1988); Grigori Medvedev, *The Truth about Chernobyl* (New York: BasicBooks, 1991); Medvedev, *Legacy of Chernobyl*; Alla Yaroshinskaya, *Chernobyl: The Forbidden Truth* (Oxford: Jon Carpenter, 1994).

amazing way that anyone can imagine. Screening is being done and people are given proper medical care. Initially 3 workers were affected by the radiation.

2.7 Cambodia Stampede

Cambodia stampede ranks second worst stampede recorded in the last ten years. Cambodia's Water Festival in royal palace in Phnom Penh was attended by an estimated 2 million revelers in which the Cambodia stampede took place on the newly built Rainbow bridge. An initial investigation into a stampede at a festival in the Cambodian capital that killed hundreds of revelers initially concluded it was set off when a crowded bridge started swaying and caused mass panic. Cambodian Information Minister said as of Wednesday the official toll was 351 dead and 395 injured.

2.8 Uphaar Tragedy

A total of 59 people had died in the theatre fire while over 100 other were injured during the maiden show of blockbuster film 'Border' on June 13, 1997.²

Most of the victims, who had been asphyxiated to death due to fumes sucked by air-condition duct from the fire triggered in a Delhi Vidyut Board transformer installed in the basement of the hall and spewed into the theatre, were seated in the upper-floor classes, balcony and DC, of the theatre.³

3.0 - LEGAL ASPECT

3.1 Legislation in India

The legislation, which is of most relevance to the subject in question, is The **Disaster Management Act, 2005**.

The Act is aimed at prevention and mitigation of effects of disasters and for undertaking a holistic, coordinated and prompt response to any disaster situation. It is meant to provide for requisite institutional mechanisms for drawing up and monitoring the implementation of the disaster management plans and ensuring measures by various wings of government (vide Statement of Objects and Reasons). It provides for setting up of a National Disaster Management Authority under the Chairmanship of the Prime Minister, State Disaster Management Authorities headed by the Chief Ministers and District Disaster Management Authorities headed by District Magistrates. It also provides for constitution of a National Disaster Response Force and setting up of National Institute of Disaster Management. The Act also provides for the constitution of Disaster Response Mitigation Funds at the National, State and District levels. The Act also provides for specific role for local bodies in disaster management. The expression 'disaster' and 'disaster management' are defined as follows:

“Disaster” means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or manmade causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area;

² Uphar Tragedy, Available at www.jagran.com-http://post.jagran.com/Uphaar-tragedy-HC-seeks-original-file-for-excop-trial-1327924968#sthash.o9j9sltf.dpuf viewed on- 23/3/2013

³ Check the annexure 1 – which shows the judgment of Municipal Corporation, Delhi v. Association of Victims of Uphaar Tragedy, AIR 2012 SC 100.

“Disaster management” means a continuous and integrated process of planning, organizing, coordinating and implementing measures which are necessary or expedient for –

- i. Prevention of danger or threat of any disaster;*
- ii. Mitigation or reduction of risk of any disaster or its severity or consequences;*
- iii. Capacity-building;*
- iv. Preparedness to deal with any disaster;*
- v. Prompt response to any threatening disaster situation or disaster;*
- vi. Assessing the severity or magnitude of effects of any disaster;*
- vii. Evacuation, rescue and relief;*
- viii. Rehabilitation and reconstruction”*

3.2 The Act contemplates drawing up of a plan for disaster management at National, State and District level. Responsibilities have been cast on the Ministries and Departments of Government of India and the States to take measures necessary for prevention or mitigation of disasters in accordance with the guidelines laid down by the National Authority and the State Authorities as the case may be. Making provision for funds in the annual budget for the purpose of carrying out the activities and programmes set out in disaster management plans is contemplated by the Act.

Section 22.

This section states the functions of the State Executive Committee (SEC) of which the Chief Secretary is the Chairperson, are set out in

Sub-section(1)

The sub section of the above section says that SEC shall have the responsibility for implementing the National Plan and State Plan and act as the coordinating and monitoring body for management of disasters in the State.

Sub-section (2)

The sub section (2) say about the enumerates various specific functions of SEC, without prejudice to the generality of the provision in of Sub- section(1).

Section 64

Section 64 of the D.M. Act confers power on the National and State Executive Committees, State Executive Committee or the District Authority, as the case may be, to initiate action for making or amending the rules, regulations, bye-laws etc., if the same is required forthe purposes of prevention of disasters or the mitigation thereof. The appropriate department or authority is required to take necessary action thereon.

In 1991, the **Public Liability Insurance Act 1991**was enacted which imposed obligation on the owners of industries handling hazardous substances to take mandatory insurance to provide compensation to victims of industrial disasters. Where death or injury to any person (other than a workman) or damage to property results from an ‘accident’ as defined in Section 2(a), the owner

shall be liable to give relief as provided for in the Schedule. The ‘workmen’ as defined in the **Workmen’s Compensation Act 1923** has been excluded from the purview of the Act.

The other relevant Central legislations are:

- **The Cinematograph Act, 1952;**
- **The Factories Act, 1948;**
- **The Electricity Act, 2003**
- **Indian Electricity Rules, 1956;**
- **The Fatal Accidents Act, 1855;**
- **The National Green Tribunal Act, 2010;**
- **The Workmen’s Compensation Act, 1923;**
- **The Explosive Substances Act, 1908,**
- **The Inflammable Substances Act, 1952,**
- **The Indian Boilers Act, 1923,**
- **The Mines Safety Act 1952 and Mines Rules,**
- **The Insecticides Act, 1968, The Civil Liability for Nuclear Damages Act, 2010;**

Provisions of **Indian Penal Code**⁴

Section 304-A (causing death by rash or negligent act),

Section 304 (culpable homicide not amounting to murder),

REFERENCES

Annexure-I

Para 17 of the Judgment of the Supreme Court in Municipal Corporation, Delhi v. Association of Victims of Uphaar Tragedy, AIR 2012 SC 100.

“The High Court approved the recommendations of Naresh Kumar Committee which were extracted in detail in the judgment of the High Court. The High Court also made the following recommendations:-

- i. A) Several requests by the fire authorities for adequate maintenance and timely up gradation of the equipment have floundered in the bureaucratic quagmire. When lives of citizens are involved, the requirement of those dealing in public safety should be urgently processed and no such administration process of clearance in matters of public safety should take more than 90 days. The entertainment tax generates sufficient revenue for the administration to easily meet the financial requirements of bodies, which are required to safeguard public health.

⁴ View the annexure-2

- ii. B) Considering the number of theatres and auditoria functioning in the city, sufficient staff to inspect and enforce statutory norms should be provided by the Delhi Administration.
- iii. C) The Delhi Police should only be concerned with law and order and entrusting of responsibility of licensing of cinema theatres on the police force is an additional burden upon the already over burdened city police force.
- iv. D) The inspection and enforcement of the statutory norms should be in the hands of one specialized multi-disciplinary body which should deal with all aspects of the licensing of public places. It should contain experts in the field of (a) fire prevention (b) electric supply (c) law and order (d) municipal sanctions (e) urban planning (f) public health and (g) licensing. Such a single multidisciplinary body would ensure that the responsibility of public safety is in the hands of a body which could be then held squarely responsible for any lapse and these would lead to a situation which would avoid the passing of the buck. The existing position of different bodies looking after various components of public safety cannot be continued. A single body would also ensure speedier processing of applications for license reducing red tape and avoidable complications and inevitable delay.
- v. E) All necessary equipment should be provided to ambulances and the fire brigade including gas masks, search lights, map of water tanks located in the area including the existence of the location of the underground water tanks. Such water tanks locations should be available to the firemen working in the area. The workshop for the fire tenders service and maintenance should also be fully equipped with all spares and other equipment and requisition made by the fire brigade should receive prompt and immediate attention.

There should also be adequate training imparted to the policemen to control the crowd in the event of a disaster as it is found that onlookers are a hindrance to control the crowd in the event of a disaster as it is found that onlookers area hindrance to rescue operations. Similarly all ambulances dealing with disaster management should be fully equipped.”

Annexure-2

Provisions of the Indian Penal Code

Section 304-A: Causing death by any **rash** or **negligent** act is an offence punishable with imprisonment of two years or with fine or with both.

Section 304:

This section provides for the punishment for culpable homicide not amounting to murder. It is sometimes a moot point whether a rash or negligent act could really and more appropriately fall within the second limb of section 304 which says that if the act is done with the knowledge that it is likely to cause death but without any intention to cause death, the accused person shall be punishable with imprisonment for a term which may extend to ten years or with fine or with both. When mass deaths occur by reason of the acts or omissions of serious magnitude committed by the accused, the prosecution invokes this section at times.

11.5 In the offences under Chapter XIV, i.e., the offences affecting the public health, safety, etc., the provisions relevant to the subject under consideration are the following:

Section 284 – negligent conduct with respect to poisonous substances.

Section 285 – negligent conduct with respect to fire or combustible material

Section 286 – negligent conduct with respect to explosive substance

Section 287 – negligent conduct with respect to machineries

Section 277 makes fouling water of public spring or reservoir a punishable offence. Imprisonment of three months or fine of Rs. 500/- or both is the punishment prescribed.

Section 278 says “making atmosphere noxious to health” for which only a fine of Rs.500/- is the punishment.

Annexure-3

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**ENVIRONMENT TOXICANTS DISTURBING REPRODUCTIVE HEALTH OF
WOMEN**

ADITYA SINGH RAJPUT*****

Reproductive health is a fundamental ingredient of the human right to health and has been acknowledged by the United Nations (UN) Commission on Human Rights. According to the formal explanation by the World Health Organization (WHO), health is more than absence of illness. Reproductive health is a state of complete physical, mental and social well-being and not merely the nonexistence of reproductive disease or ill-health. It is essential to make a note of that female reproductive disorders may also develop during various life stages of the female. In recent years, strong indications prove environmental exposures effect on health such as increased infertility, recurrent miscarriage, early puberty in girls etc. This piece of work will ascertain the basics of female reproductive health disorders and the probable role that the environment may play in the development of these disorders. Environmental toxicants likes Polychlorinated biphenyls, Sulphur dioxide and Arsenic (leads to miscarriage) etc are harmful to reproductive health of women. This paper would be focussing on effect of exposures that occur during critical phases of development and the adverse effect of toxicants on women's reproductive health. Lastly, paper would be recommending propositions to deal with this contemporary problem.

Keywords – Reproductive health, Toxicants, Environment

***** STUDENT OF NATIONAL LAW UNIVERSITY, PURSUING BBA.LL.B.

“Everyone should have the right and be able to live in a healthy environment, with access to enough environmental resources for a healthy life.” ~Anonymous~

REPRODUCTIVE RIGHTS OF WOMEN

The WHO defines reproductive health *as a state of complete physical, mental and social well-being, and not merely the absence of reproductive disease or infirmity*. Reproductive health includes all of the reproductive progression, functions and systems at all phases of human life. This definition means that people are competent to have a satisfying and safe sex life and that they have the ability to reproduce and the liberty to decide if, when and how frequently to do so. Men and women not only have the right to be well-versed and to have access to safe, effectual, reasonable and suitable means of family planning of their choice that are not against the law but to have safe and healthy environment which is getting affected by exposure of chemical owing to the establishment of industries. Furthermore, men and women should have access to appropriate health care services that will enable women to go safely through pregnancy and childbirth, as well as to provide couples with the best chance of having a healthy infant.

Reproductive health is a universal concern, but is of special significance for women particularly during the reproductive years. However, men also demand specific reproductive health needs and have particular tasks in terms of women's reproductive health because of their decision-making powers in some reproductive health matters. Reproductive health is an essential constituent of an individual's overall health prominence and a central determinant of worth of life.

REPRODUCTIVE RIGHTS VIS-À-VIS HUMAN RIGHTS

The human right to health has been acknowledged by the United Nations (UN) Commission on Human Rights, is a clear component of several UN human rights treaties, and is included in agreements from intergovernmental world forum, particularly in the 1994 International Conference on Population and Development (ICPD). The right to health is mode of expression for the human right to the highest sounded standard of health and covers both health care and other determinants on which health depends, such as access to water and food, freedom from violence, and a healthy environment and toxicant free environment. The right of each one to enjoy the highest attainable touchstone of physical and mental health is a natural human right as acknowledged in major human rights apparatus, including the Universal Declaration of Human Rights and the Convention on the Rights of the Child. Reproductive health is a vital building block of the human right to health. Reproductive health is widely acknowledged as an indissoluble part of the human right to health because reproductive health has different repercussions for a woman or a girl than for a man or boy. Moreover, the full esteem of the right to reproductive health depends on the enjoyment of other rights, including the right to have healthy, safe and conducive environment.

Various factors directly affect how well an individual keep up his or her reproductive health status. Despite the other factors, the environment in which an individual lives, both natural and physical, may present significant risk that may directly affect reproductive health. For

instance, some occupational exposures (e.g works with hazardous pesticides) can have adverse effects in reproductive life.

EFFECT OF ENVIRONMENT ON REPRODUCTIVE RIGHTS

Environmental chemicals or toxicants can adversely affect human reproduction and child development in a various ways resulting in impaired fertility, miscarriage or fetal death, altered fetal growth, birth defects, and other developmental disorders. Several chemicals, compounds (both synthetic and organic), metals, and other environmental contaminants have been connected with unfavourable human health effects.

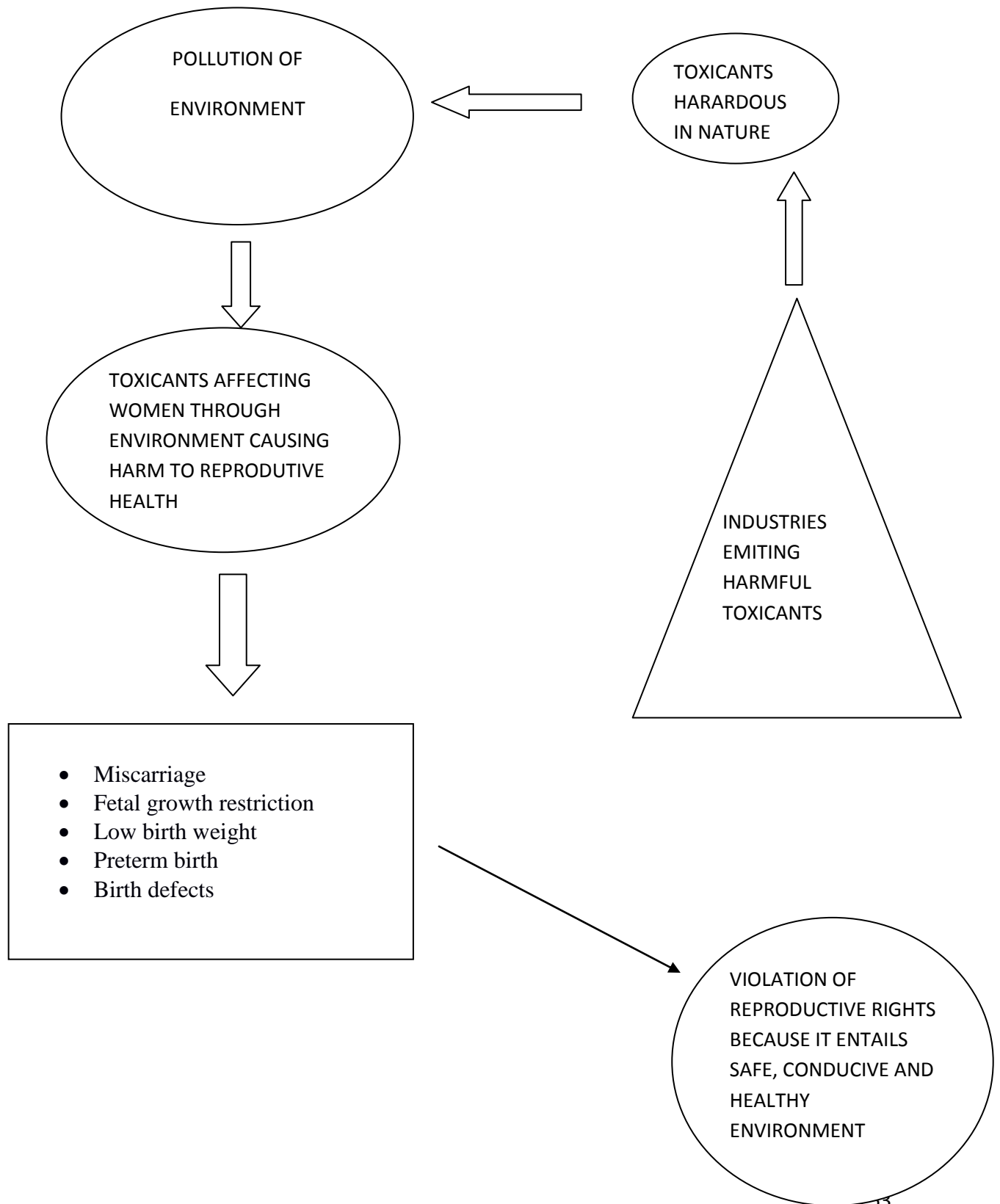
A body of research recommended that maternal exposure to environmental toxicants and unhealthy environment cause a risk to women's health as well as to fetal and child health and development. Toxicity is the ability of a material to cause harmful health effects. These chemicals de-valued a single cell, a group of cells, an organ system, or the entire body in its effectiveness. The toxicity of a substance depends on three factors: its chemical fabric, the degree to which the substance is absorbed by the body and the body's capability to detoxify the substance and also the ability to eliminate it from the body. A toxic effect of the chemicals and its efficacy can be ascertained by the by a test only. Chemical Toxicants which is hazardous in nature and contaminants can pose a risk of:

- Miscarriage
- Fetal growth restriction
- Low birth weight
- Preterm birth
- Birth defects
- Cognitive delays in children

How chemicals affect the body:

Exposure of these hazardous chemicals normally occurs through inhalation, skin or eye contact, and ingestion. These are known as the routes of exposure. When you breathe a substance into the lungs, oxygen is absorbed and other chemicals enter into the bloodstream and damage the body to the fullest. Moreover, the skin is a taken as a protective barrier that aid in maintaining foreign chemicals out of the body. But, some chemicals can easily pass through the skin and enter the bloodstream and damage the internal parts of the body. If the skin is cracked or cut, toxicants and contaminants can penetrate through the skin more easily. Sometimes, chemicals can be ingested if they are on hands, clothing, or beard, or when they accidentally contaminate food, drinks, or cigarettes. Metal dusts, such as lead or cadmium, are often ingested this way.

DIAMATRIC REPRESENTATION OF THE TOPIC: VIOLATION OF REPRODUCTIVE RIGHTS (RIGHT TO HAVE SAFE ENVIRONMENT)



DISASTROUS EFFECT ON THE REPRODUCTIVE PARTS OF WOMEN

Effects of chemicals on reproduction encapsulate a decreased capability to conceive children (infertility, sterility, abnormal sperm, or a longer wait for conception), lowered sex drive, menstrual disturbances, spontaneous abortions (miscarriages), low birth weight, stillbirths, and defects in children that are apparent at birth or later in the child's development. Developmental problems detected after infancy may involve the brain or reproductive system. Like, Teratogens are chemicals which cause malformations or birth defects by altering the development of tissues in the fetus in the mother's womb. Other chemicals that harm the fetus are called fetotoxins. If a chemical causes health problems in the pregnant woman herself, the fetus may also be affected.

EFFECT ON ENDOCRINE SYSTEM:

The endocrine system is a intricate network of hormones that monitors various bodily functions such as growth and development. The endocrine glands encapsulate the pituitary, thyroid, adrenal, thymus, pancreas, ovaries, and testes. These organs and glands release several hormones into the bloodstream and act as natural chemical couriers to regulate the processes of the body. But Specific environmental toxicants directly affect the endocrine system and these Endocrine disruptors can change normal hormone levels, stimulate or stop the production of certain hormones, or change the way hormones move through the body. These chemicals upset the balance of hormones in workers, possibly affecting reproductive function. It is proven that some endocrine disruptors may affect development of the reproductive organs of the fetus. In this way, these kinds of chemicals give birth to the risk which can cause internal imbalance in the life of the women. Environmental agents can interfere with female reproductive function including change in hormonal balance and intervening with fertilization and abnormal reproductive development or function of women.

PEOPLE MOSTLY AFFECTED:

Agricultural families, workers and agricultural communities are mostly affected by certain pesticides than the general population. Farm workers suffer from poor semen quality and infertility due to the exposure to some pesticides. Workers who regularly invite higher occupational exposures to some substances are at particular risk, but exposures in the general population are often sufficient to increase risks as well.

Poor and low income families, who live in filthy and less desirable areas, such as near industrial sites are exposed to harmful chemicals at higher levels, In addition to this, adults in such families are more likely to work in manufacturing, or other commercial sectors, where exposures are more common get affected by these harmful toxicants. Some toxicants are ubiquitous in nature and its exposures are more common among particular populations, and it is too difficult for anyone to avoid these chemicals. For example, people who consume large amounts of sport fish might have higher mercury exposure, while an agricultural community might have increased exposure to pesticides. Some exposures have no benefit and should be avoided by all.

Air pollution is an intricate mixture of gases, aerosols, and particulates. Particulate air pollution can be consists of of products of incomplete combustion of fossil fuels, metals, and various organic and inorganic chemicals. Exposures to heavy metals, solvents, PCBs, and some pesticides increase the risk of infertility.

Despite these, some environmental toxicants, such as pesticides, are intentionally released into the environment. Others, however, are released unintentionally during manufacturing, use, and disposal and few chemicals are created by-products of industrial processes unintentionally. Environmental toxicants and contaminants that may effects adversely on reproductive health of women are present in media such as the water, air, soil, dust, food, and consumer products. Humans are exposed to these contaminants in the home, community, school, or workplace. Toxicants enter into the body in one or more of three ways as discussed above through inhalation, ingestion, or absorption through the skin. Toxicants are then distributed to tissues and organs and cause irrecoverable harm. Moreover, certain toxicants are stored in the body for long periods of time in muscle, bones etc. Exposure to air pollutants such as sulphur-dioxide and particulate matter increases the risk for preterm birth and low birth weight.

The ubiquity and persistence of toxicants, both in the environment and within the body, pose unique challenges in addressing this public health issue pertaining to the reproductive rights of women. Without public awareness efforts or media attention, individuals might not be aware of potential toxicants in their communities. Even though some substances, such as the pesticide DDT grossly affect the reproductive rights of women. Thus, a pregnant woman may be unaware that she is being exposed to a potentially dangerous substance. Even if she tries to limit her exposure during her pregnancy, toxicants affect may passed on to her child during pregnancy and while a woman may limit her exposure to harmful substances once she knows she's pregnant, this may be after the fetus has undergone the most critical period of organ development in the first eight weeks of pregnancy. Many environmental toxicants also are prevalent in occupational settings. For example, despite improvements in protections for workers, there has been increasing concern that workers accumulate agricultural chemicals on their clothing and skin and carry these chemicals home, thereby exposing their families. Women in certain jobs may be at increased risk: examples range from oncology nursing to women in the home/office cleaning business etc.

Exposures that damage organs or systems early on can have life-long implications for the individual, and potentially affect his or her reproductive capacity. While a very large number of environmental toxicants are potentially harmful to health, the most commonly studied ones can be divided into three major categories: heavy metals, air pollutants, and pesticides. Prenatal exposures to heavy metals, including mercury, lead, and arsenic, are associated with increased risk for brain damage, congenital malformations, miscarriage, and low birth weight.

EFFECT OF SOME TOXICANTS

Toxicants	Sources	Impact on fetal
Heavy Metals		
Mercury	Skin contact with mercury in the work place	Brain damage, poor coordination, digestive problems
Lead	Lead paint, contaminated soil, contaminated dust	Increased risk of miscarriage and still birth, low birth weight and preterm birth; neurodevelopmental effects
Arsenic	Contaminated food, water, or air; occupational exposure, inhaling sawdust or smoke from arsenic-treated wood; exposure to high-levels of arsenic in soil.	Increased risk of miscarriage, congenital malformations.
Air pollutants		
Sulphur dioxide	Polluted air	Increased risk of low birth weight and preterm birth
Particulate matter	Polluted air	Increased risk of low birth weight
Pesticides		
Polychlorinated biphenyls (PCBs)	Drinking water, breathing air or eating foods, or exposure to soil that are contaminated; via older electrical equipments or transformers	Lower birth weight; decreased motor skills; depressed immune system
DDT	Exposure via agricultural work	Increased risk of miscarriage, preterm birth, small for gestational age.

REMEDIES

Women are exposed to harmful chemicals at workplace or normal environment which is consisting of toxicants which is harmful for the body. It's a state duty to keep check on these contaminants. People give some powers to the government and it's a duty of the state government to protect the rights of the people, here the right to have healthy and safe environment which is being contaminated by the industries in pursuance of development. So in order to protect the women, State and local public health institution should aware the communities pertaining to the issue of environmental toxicants and reproductive health at the local level. In order to decrease preconception and prenatal exposure, widespread awareness of environmental toxicants and their effects on reproductive and its outcomes is essential. Environment toxicants should be identified and as environmental toxicants are identified, the associated risks of exposure should be communicated to women so they can reduce their exposure or eliminate it completely.

Reproductive health providers play a vital role in communicating environmental health risks, as they are a key, for women during the preconception and prenatal periods. Health care providers and women of child-bearing age need updated information and guidance in order to address and manage environmental exposures effectively. To effectively address maternal and child exposures to environmental toxicants, organisation could benefit from working closely with environmental health professionals. Over the years, some with environmental health have evolved (for example, efforts to address lead poisoning) but these have not necessarily been continuous or vigorous in many areas of the country. At this juncture, increasing knowledge about toxicants may have brought the field to a "tipping point" wherein renewed efforts are indicated. A collaborative effort of reproductive health provider should provide knowledge on environmental toxicants to women so they can take steps to limit exposure before and during pregnancy. Moreover, exposure limits should be established by health and safety authorities to control exposure to hazardous substances.

When two or more chemicals in the workplace have the same health effects, industrial hygienists use a mathematical formula to adjust the exposure limits for those substances in that workplace. Exposure limits are set to protect most workers. However, there may be some workers who will be affected by a chemical at levels below these limits. Environmental monitoring is the most accurate way to determine your exposure to most chemicals. Substitution is using a less hazardous substance. But before choosing a substitute, thoroughly consider its physical and health hazards. For example, mineral spirits (Stoddard solvent) is less of a health hazard than perchloroethylene for dry cleaning, but is more of a fire hazard. Also consider environmental aspects such as air pollution and waste disposal.

CONCLUSION

‘Environmental problems are serious and impact most heavily on the most vulnerable members of society: the old, the very young and the poor.’

~Michael Meacher~

Right to have safe and healthy environment is an inherent right of a person. Environment toxicants affect the women reproductive rights adversely. This is state duty to provide environment justice to its citizen. Government should intervene and should set the limit of environment toxicants and should take the precautionary steps in order to eliminate or reduce exposures to these hazards are often readily available. This should include the introduction of safer chemical alternate or nonchemical advanced technologies, improved workplace practices. Public health agenda should be set by the state to prevent a variety of diseases and disorders with profound personal, family, and community consequences.

However, there much emphasis has been given on the effect of toxic substances on the health of women pre-conceptionally and during pregnancy. As countries are facing the problems of low birth weight and preterm birth, even with advanced technology and enhanced prenatal care, the arena of environmental toxicants is ripe for investigation and action. To ensure population health, state need to expand their policy ambit to include the environmental factors that influence health in the earliest stage of life and the preconception period. Reproductive health questions and concerns cut across many aspects of social and economic life and are beyond the capacity of the health sector alone to resolve. But many problems and their costly consequences could be averted if reproductive health were routinely dealt with within the context of primary health care. This will require strengthening health systems, building trust among the communities they serve and expanding access to reproductive health programmes that respond to social, cultural, economic and gender factors. Reproductive health of women will bring the well-being in the society. Certain chemicals which are hazardous in nature are being consistently used in the industries but development shouldn't be at the cost of the impairing the rights of the women. At the last, every person has the right to live in an environment adequate to his or her health and well-being and a state should strive to preserve these rights of its citizens to the fullest.

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RE-EVALUATING THE INTERPLAY BETWEEN LAW, JUSTICE AND HUMAN GOVERNANCE: A CASE STUDY OF NIGERIAN EXPERIENCE*

* Benjie Ogwo

ABSTRACT

The concepts of law, justice and human governance are devoid of generally acceptable definition in the legal jurisprudence throughout the world. Law and Justice are closely connected that one is indispensable of the other. They constitute veritable tools for human governance. The best of governance is democracy. The Nigerian experience is apposite for consideration in this article to the extent that despite the civil war experience, the ethnic crisis, the religious crisis and hostilities especially in the northern part of the country, the Niger Delta militants episode, the political crisis arising from election malpractices that has plagued the democratic processes in Nigeria, the concepts of law, justice, human governance has thrived in Nigeria body polity. The supreme court of Nigeria has in various cases, for instance, in Governor of Lagos State v Ojukwu, Obeya Memorial Specialist Hospital v AG of the Federation, Abubakar GCON & 2Ors v Musa Yar'adua & 5ors demonstrated the applicability of the concepts of law, justice, democracy and human governance.

KEYWORDS: Law, Justice, and Human Governance.

I. INTRODUCTION

The objective of this article is to examine the concepts of law, justice and human governance and their interplay generally and with particular reference to Nigerian experience as a case study. In doing this we are to critically examine the meaning of the various concepts of law, justice and human governance. We shall also examine the concept of democracy which we have identified in this work as the best form of government that could allow the application of law and justice as the bedrock for human governance. Justice is the end goal of every law; hence, any law that does not produce justice is not law but a perversion of law. Part of the objectives is to demonstrate that true human governance cannot be said to exist in absence of freedom, equality and justice. Law and justice becomes the necessary veritable tools for actualising human governance, however, where there is conflict between law and justice, justice prevails.

II. DEFINITION AND MEANING OF LAW

The concept of law is an ancient phenomenon that has stood the test of time in the history of manⁱ despite its surrounding controversies. It is a truism that the concept of law is devoid of any generally acceptable meaning in the legal jurisprudence throughout the world. Therefore, the jurists, scholars and practitioners, even though have commented on the subject of law have not been *ad idem* on the meaning or the scope of law.ⁱⁱ In the same manner, the term justice even though is as old as man is still one of the most evasive concepts in the history of man. It is evasive to the extent that its administration or dispensation depends upon divergent factors ranging from one epoch to the other.ⁱⁱⁱ In as much as searching for the various meanings or definitions of law and justice may not be the focus of this paper, it seems that an x-ray of the meanings or definition of the concept of law and justice and its role in human governance is indispensable and inevitable.

Law and justice are closely connected; one is indispensable of the other, it is on this note that it has been contended that the association of justice with law is so intimate that it is relevant in the making, application and compliance with almost every aspect of law.^{iv} Therefore, law and justice are considered as an indispensable entity; they cannot be examined in abstract without same being related to the practical realities of issues at stake. Human governance through the

means or instruments of political democracy seems to be one of those issues. For meaningful development in human society and governance to occur, law and justice constitute veritable tools. In discussing development in human society and human governance, the best of governance is democracy. Hence, a brief examination of the concept of democratic ideals in analyzing this topic is also inevitable. It is not in doubt that law and justice have been existing together. The existence of man in a society automatically gave birth to the existence of law. The question calling for the meaning or definition of law definitely cannot receive a satisfactory answer in this article. However, the writer is of the view that proffering some meanings is inevitable in the circumstances.

For the purpose of this article, law is defined as “the regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society...”^v Law could also be defined as “the aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative actions, especially the body of rules, standards, and principle that the courts of a particular jurisdiction apply in deciding controversies brought before them”.^{vi} In a more elaborate and comprehensive definition, Allott^{vii} said:

A law or legal system comprises of norms, institutions and processes. The norms include the rules of law, as well as principle...The rules include both primary rules, which directly prescribe behaviour, and secondary rules, which govern the application of the primary rules and the functioning of the institutions and processes of the system including the processes for adding to or varying rules. The institution of the law comprises both the facilities (e.g. Judges) for the operation of the processes and the application of the norms the statutes and the relationships identified and controlled by the norms, i.e. the relationships on which the norms operate. The process of the law describes the norms and institutions in action. Adjudication is one process of the law; making a contract is another.

The foregoing definition of law is comprehensive to be equated to a legal system in which both the substantive and adjectival (procedural) law are just a part. Justice is also defined as “the fair and proper administration of law”.^{viii} The implication of this definition is that law is not an end in itself. It is only a means to an end.^{ix} The end here is justice. Hence, law and justice are inseparable. In other words, the goal, purpose or the ultimate end of every law is justice. Any law that is not aimed at doing or achieving justice is no law but a perversion of law.^x It, therefore, means that an attempt to discuss law is an irresistible urge to also discuss justice, hence, law and justice. The coverage of law is so wide, so high and so deep to the extent that it could not be packaged in a cage to be limited to a particular field. It means that law and justice constituting the tools for human governance cannot be found and/or relevant in the political sphere *per se* but extends to socio-economic areas, cultural and educational aspect of a particular society. It cuts across every human activity. Thus, it has been said, it is the regime that orders every human activity.

Roscoe Pound^{xi} examined the nature of law and commented on two ideas of law, stating that “some twenty years ago I pointed out two ideas running through definitions of law; one an imperative idea, an idea of a rule laid down by the law making organ of a politically organized society deriving its force from the authority of the sovereign, and the other, a rational or ethical idea, an idea of a rule of right and justice deriving its authority from its intrinsic reasonableness or conformity to ideals of right and merely recognized, not made by the sovereign”. It is interesting to note that the two ideas of law propounded by Roscoe Pound^{xii} incidentally belonged to the two broad realms of law. The first idea of law in the modern development of law is classified or referred to as the positive law or man-made law; while the second idea of

law falls squarely within the realm of natural law. In the modern understanding of the concept of natural law, it is worthy of note that natural law has been identified in two perspectives, namely, the traditional or ancient theory of natural law and the modern theory of natural law.^{xiii}

Interestingly, it seems that these two ideas of law, conceived and popularized by Roscoe Pound, which eventually found themselves in two different realms, originally found it difficult to agree with each other. For instance, while the positivist maintains that law must be examined or treated as it “is”^{xiv} and no more, the natural law school of thought is of the view that law can be understood from the “ought”^{xv} propositions. The positivist examines law as it is posited and this is done with reference to *inter alia*, the state or sovereign, the natural law adherents contended that (it natural law) features in the legal system, politics, ethics, social relation, international affairs, economic matters and relations. It deals with the concept of rule of right and justice. To the natural law theory, the potency or efficacy of any law is determined by the justness and rightness of the law. On the other hand, the positive law is concerned with whether the law is made by the sovereign and that the metaphysical elements of justness or rightness which are not verifiable have no place in determining the validity of a particular law.^{xvi}

Some positivists, like Bentham^{xvii} and Austin, were of the view that law is law and it has nothing to do with extraneous matters of right or wrong. In the words of Bentham:

A law may be defined as assemblage of signs declarative of a violation conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power such violation trusting for its accomplishment to the expectation of certain events which it is intended. Such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.^{xviii}

Bentham, was not alone in the attack against the idea of treating law with extraneous matters of justness or rightness, one of such antagonists is John Austin who^{xix} defined law within the confines of sovereign, command and subject, when he asserts: “A law, in the most general and comprehensive acceptance in which the term in its literal meaning is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him”.^{xx} It seems that these two ideas of law, originally at parallel have gradually started coming to have common end. This has been identified as the feature of our legal system in the 21st century when the principles of natural law have been identified as a source of credibility to any positive law. Scholars have also identified the fusion between the principles of natural law and positive law.^{xxi}

The interplay between the natural law and positivism has been equally examined by Uchegbu^{xxii} when he asserted that the two concepts (natural law and positivism) are fundamental to jurisprudence and that the two make up what is today styled jurisprudence. Therefore, in some instances, each compliments the other, and at other times, each is opposed to the other. As a matter of fact every positive law that does not promote or foster natural justice or substantial justice may lack the necessary support or coercion that could enable such positive law to command the obedience of the subjects. It is an incontestable fact that natural justice or substantial justice is the spring-boards of natural law. The concern of this article is to examine law and justice and in what way they constitute the tools for human governance which directly or indirectly aids development of societal values and considerations. In this wise, law is being examined herein as a legal system. Once the legal system is faulty, all other systems, namely, educational system, political system, cultural system, social system would be seriously affected. In other words, the success or otherwise of the fundamental objectives and directive principles of any state or country are highly depended on the legal system of that state or country.^{xxiii} To this end, law, no doubt is an instrument of social control or social engineering.^{xxiv} It is the wheel

on which the pivot of the society rotates or moves. The word society here connotes a community of people as of a state, nation, or locality, with common cultures, traditions and interests.^{xxv} It could be an association or company of persons united by mutual consent to deliberate, determine and act jointly for a common purpose.^{xxvi} Within the society law is not examined from one angle of that society but must be addressed from various available perspectives depending on the issues or facts to be dealt with or handled, hence, it constitutes the entire legal system.^{xxvii}

III. LAW AS A DISTINCTIVE SOCIAL INSTITUTION

One of the criticisms against the traditional positive theory of law is the non recognition of the functions of law in the matter of dispensing social justice.^{xxviii} To the critics, social justice should be the concern of the law, where law should be used to satisfy the needs of human society and not necessary a mere command of the sovereign. According to Rudoff Von Thering law would have failed if it (law) cannot be used to resolve the various conflicting interests of the society thereby satisfying the need of the individuals that comprise of the society Thus, he says:

Want is the band with which nature draws man into society, the means by which she realize the two principles of all morality and culture. Every body exists for the world and the world exists for every body. Dependents as he is upon his fellow men through his need and the more so as his need grows man would be the most unhappy being in the world if the satisfaction of his need depend upon accident, and he could not count with all security upon the co-operation and assistance of his fellow man.^{xxix}

The contention of Rudoff Von Thering in the foregoing statement that “every body exists for the world and the world exists for everybody” with due respect should be extended to mean that law should not be limited to being the command of the sovereign that the subjects must obey per se, as contended by Austin^{xxx} but it (law) should be examined in a wider context as a distinctive social institution through which the government of the day should be bound to satisfy and/or ensure the satisfaction of the need of the people within the society. In other words, law must be given a more dynamic role of being an instrument to direct the state to provide and/or ensure the provision of basic facilities for the minimum standards of living for the people in the society through social justice. It should be noted and emphasized that Rudoff Von Thering^{xxxi} was not a lone voice to be reckoned with in the fight for social justice employing the instrument of law. Rawls^{xxxii} in his own contribution to the theory of justice set down two principles of justice in the following words:

First, each person is to have an equal right to extensive basic liberty for others. Second, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.

Rawls in his theory admonished the rulers or the power holders that law should be used to ensure equality of rights to basic liberty and facilities that all social values, liberty and opportunity, income and wealth, and the bases of self-respect are to be distributed equally unless an unequally distribution of any, on all, of these values is to everyone’s advantage.^{xxxiii} It seems that this expected purpose of law came to realization in the era of positive law governance. For instance, in Nigeria, pursuance of the social objectives, the Constitution^{xxxiv} provides:

The state social order is founded on ideals of Freedom, Equality and Justice... Exploitation of human or natural resource in any form whatsoever for reasons, other than the good of the community, shall be prevented. The state shall direct its policy towards ensuring that all citizens without discrimination on any

group whatsoever, have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life; the health, safety and welfare of all persons in employment are safeguarded and not endangered or abused; there are adequate medical and health facilities for all persons; there is equal pay for equal work without discrimination on account of sex, or any other ground whatsoever, children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect; provision is made for public assistance in deserving cases or other conditions of need; and the evolution and promotion of family life is encouraged.

As it will be pointed out, true human governance cannot exist in absence of freedom, equality and justice. The intertwine nature of law and justice has been examined in terms of the ideals of a society which is not only established by law but can only be sustained by law and justice. In other words, law would have failed woefully to sustain society where it is not understood and operated, in terms of justice.

IV. JUSTICE

It has been contended that from time immemorial the idea of justice has been elusive, slippery and metaphysical.^{xxxv} That is to say, even though the term justice is not new and as a matter of fact universal, but it varies in content from person to person, community to community and place to place. Understanding the idea or concept of justice is a sine qua non for appreciating every law since justice is the end of the law. Law is only a means to this end. Jurisprudentially, we may therefore have different kinds of justice depending on the nature of the facts and the circumstances culminating in the issue begging for justice. In the political realm, we may have political justice, in the economic realm, we have economic justice; in the realm of social ideals, there is social justice and in the realm of inherent culture, there may be inherent cultural justice. For instance, political debates, issues and controversies call for political resolution with an aim of scoring political justice. It is on this note it becomes imperative to briefly consider different kinds of justice in order to better appreciate the matter at stake.

Types of Justice

First, we have cumulative justice which is justice that is concerned with the relations between persons and especially with fairness in the exchange of goods and the fulfilment of contractual obligations.^{xxxvi} The word 'persons' here is wide enough in content to cover both the natural and artificial persons which is legally described as juristic persons.

Secondly, distributive justice which is justice owed by a community to its members, including the fair allocation of common advantages and sharing of common burdens.^{xxxvii} Aristotle^{xxxviii} in his discourse on justice contends that the essence of justice is constituted not so much in the individual ethics but in the community. To him (Aristotle)^{xxxix} distributive justice is nothing but the proper distribution of rewards in accordance with contributions following the criteria of equality. As a matter of fact, Aristotle's proposition of distributive justice is premised on the assumption of equality in the society. The distributable rewards includes honour, wealth, virtue, freedom of birth and such other goods as may be shared by members of the community, it has been further contended by Aristotle^{xl} that where there is failure on the part of distributive justice, then it becomes imperative to correct it by corrective justice in order to avoid injustice being perpetuated in the community.

The question is who is in charge of distributive justice and corrective justice? It seems that from the scholarly contributions, while the legislature is in charge of the distributive justice, the judiciary administers corrective justice. The implication is that distributive justice is the ideal,

the goal and the expectation and where it cannot be achieved or attained owing to some faults or defects, then the judiciary would intervene to dispense corrective justice. It is therefore contended that corrective justice is an aberration and/or exception, it is of interest to note that by the theory of distributive justice, it is not only the benefits, rewards or advantages that are shared or distributed but that burdens, disadvantages or other evil things such as duties, liabilities, disabilities and similar negative tendencies are also distributable.

Separation of Power and Justice

A close examination of the concepts of distributive and corrective justice tends to portray the role that is expected of the legislature, the executive and the judiciary in the modern system of governance. This is to the effect that in as much as the legislature, the executive and the judiciary are expected to be independent and separate in order to avoid an abuse of liberty and freedom of individuals, the ultimate concern of law which is justice demands that there cannot be water-tight separation of powers.^{xlii} It was Montesquieu who in his discourse properly examined the concept of separation of powers and its limits. In his words:

Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it, and to carry his authority as far it will go...to prevent this abuse, it is necessary from the nature of things that one power should be a check on another...when the legislative and executive powers are united there can be no liberty...Again, there is no liberty if the judicial power is not separated from the legislature and executive.

In other words, where either or both the legislature and executive had failed to dispense distributive justice in the traditional performance of their duties, the judiciary should and would not be incapacitated in any manner but must take the bull by the horns and intervene through the instrumentality of corrective justice.

Natural Justice

Natural justice is defined in a moral sense as opposed to, a legal understanding of justice. It is not in dispute that like other kinds of justice, natural justice lacks definite and generally acceptable yardstick in its determination. Hence, in the English case of *Price v. Dewhurst*,^{xliii} it was held amongst others that, although the judges have frequently asserted that a foreign judgment which contravenes the principle of natural justice cannot be enforced in England, it is extremely difficult to fix with precision the exact cases in which the contravention is sufficiently serious to justify a refusal of enforcement. It is on this note that Shadwell V.C, once said that whenever it is manifest that justice has been disregarded; the court is bound to treat the decision as a matter of no value and no substance.^{xliii}

It is true that the concept of natural justice features so prominently in judicial statements or pronouncements to the extent that if it were possible, it is essential or crucial to fix its exact meaning or scope. It is in the midst of this controversy and search for guiding criteria in determining the scope other expression 'contrary to natural justice' that it was contended by Chesires^{xliiv} that the only statement that can be made with any approach to accuracy is that in the present context the expression (contrary to natural justice) is confined to something glaringly defective in the procedural rules of the foreign law. In other words, what the courts are vigilant to watch is that, the defendant has not been deprived of an opportunity to present his side of the case. This by extension simply means no lack of fair hearing. Put in other way round where the expression is used, it means that there is a violation of fair hearing.

Considering the pivotal nature of natural justice in the administration of justice generally, it is worthwhile to briefly comment on the principles of natural justice. Hence, Oluyede states "in the realm of administrative law, natural justice are fundamental rules which are so necessary to the proper exercise of power that they are projected from the judicial to the administrative

sphere”.^{xlv} Also, Wade et al, maintained that “in its broad sense, natural justice may mean simply the natural sense of what is right and wrong and even in its technical sense it is not often equated with fairness”.^{xlvi} There is no doubt that the idea or notion of natural justice is not a myth but a reality that permeates every sphere of human endeavours generally and in the administration of law and justice in particular. Every aspects of law tends to ensure that the rules or principles of natural justice are adequately complied with. This has been confirmed by the Courts in a number of cases.^{xlvii}

There are other forms of justice which tends to show that the concept of justice cannot be pinned to a particular beginning and so the end seems to be unpredictable. For instance, personal justice is justice between parties to a dispute, regardless of any larger principles that might be involved. The implication is that while distributive justice tends to dwell more in the realm of the community, personal justice only concerns those that are affected by the dispute. Popular justice is usually considered less than full fair and proper even though it satisfies prevailing public opinion in a particular case. The question is to what extent is popular justice justifiable when it is less than fully fair and proper?

There is no doubt that the idea of popular justice left much to be desired. It is on this note that Allen^{xlviii} contended that “Nothing is more treacherous than popular justice in many of its manifestations, subject as it is to passion, to fallacy and to the inability to grasp general notions or to distinguish the essential from the inessential”.

In the past years, many political decisions have raised mixed feelings as to whether such justice dispensed can be categorized as popular justice or social justice which is that justice that conforms to a moral principle, such as that all people are equal. May be one may conclude that all political decisions arising from the conduct of all manner of elections in this nation (Nigeria) are political justice at work, meaning that they are neither popular justice nor social justice. Or could they be classified as positive justice that is justice as it is conceived, recognized, and completely expressed by the civil law or some other form of human law. There is no doubt that all political decisions arising from the conduct of elections which are based on the Electoral Laws and the Constitutions are human laws.

Substantive Justice

Substantial justice is justice fairly administered according to rules of substantive law, regardless of any procedural errors not affected by the litigant’s substantive rights.^{xlix} In other words, it is a fair trial on the merits. Of late, substantial justice has been popularized and understood in contrast to technical justice. It is a situation where the substantive law as it affects the rights and the obligations of the parties to the dispute are being examined on the merit and not to shut out the parties on ground of procedural errors or irregularities. It seems that most Rules of Court nowadays are also conscious of this development and have proceeded to codify the concept of substantial justice. For instance, section 60 of the Kogi State Area court¹ Law provides:

No proceedings in an Area Court and no summons, warrant, process, order or decrees issued or made thereby shall be varied or declared void upon appeal or revision solely by reason of any defect in procedure or want of form but every court or authority established in and for the state and exercising powers of appeal or revision under this law shall decide all matters according to substantial justice without undue regard to technicalities.

The concept of substantial justice is both substantive and procedural and it should be emphasized that it is not only limited to Area Courts. Even the Superior Courts are enjoined to apply substantial justice in the performance of adjudicatory functions. It should be pointed out that even though rules of court are meant to be obeyed to the extent that failure to comply with its requirement shall nullify the proceedings^{li} it is noteworthy that in the spirit of substantial justice, it has been declared:

Where at any stage in the course of or in connection with any proceedings, there has by reason of anything done or left undone been a failure to comply with the requirements as to time, place, manner or form, the failure shall be treated as an irregularity and may not nullify such step taken in the proceedings. The judge may give any direction as he thinks fit to regularize such steps.^{lii}

In the same manner, it is provided that the Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these Rules to be begun by an originating process other than the one employed.^{liii} Consequently, it is the rule that in the course of determining disputes brought before the Court, matters must be resolved in accordance with substantial justice. The concept of substantial justice is therefore a reality rather than being a myth. And in fact, the subject justice exists as a fact; it is real and not mere illusion or a myth conjecture.

V. HUMAN GOVERNANCE

It seems that the concepts of law and justice remain abstract unless and until it is expressed in relation to human governance. There is no doubt that there are diverse forms or ways of governance. However, for the purpose of this paper, democracy has been identified as the best means of human governance. Then what is democracy?

The word democracy is more or less a household name having been experienced in different forms and at different levels over the years within and outside Nigeria. In Nigeria, the word democracy becomes popular as it has been equated with politics especially in the era of the use of thugs to entrench democracy. There is no doubt that in the light of the practical realities of human governance, different understandings must have been attached to the concept of democracy.

It is not in dispute that many people have written on the subject of democracy and one may be tempted to say that there is nothing new about democracy. Meanwhile, the fact that many people have commented on the subject “democracy” and many are still writing epitomizes the indispensability of the concept in the modern human governance throughout the world.

It is interesting to note that in spite of the physical and human development experienced in the apartheid policy of governance of South Africa, as long as that Government did not imbibe democratic principles and ideals, it was condemned continually both locally and internationally until democracy was entrenched. Democracy has been defined as the government by the people, either directly or through representatives.^{liv} However, over the years the definition proffered by Abraham Lincoln in the Gettysburg Speech has stood the test of time to wit, “Government of the people by the people and for the people”.^{lv} This presupposes that for a government to qualify as a democratic government, people in governance must have been elected by the majority votes lawfully casts by the people in atmosphere of free and fair election.^{lvi}

Hence, while Roskin^{lvii} described democracy as a system of government in which all qualified adults shared the supreme power either directly or through representatives by them; the Encyclopedia Americana^{lviii} maintained that democracy is a form of government in which major decisions of government or the direction of policy behind these decisions rest directly or indirectly on the freely given consent of the majority of the adults governed. The implication therefore is that democracy presupposes that people must have been given an opportunity to exercise their rights to vote and be voted for and everyone must have been given an equal rights or equal opportunity to exercise their rights. It is on this note that Olawepo^{lix} asserts that democracy is characterized by very laudable attributes which has earned it the attribute of being the best system of government in the entire world. This opportunity to exercise one’s rights should be given by law. It is on this note that the former Chief Justice of Nigeria^{lx} is reported to

have submitted that “democracy presupposes rule of law”^{lxix} which has to be the rule by the court for which a rule by cutlass has never in history, been, nor will ever be a substitute. In the era of thuggery in this country, one wonders whether there has been true democracy in our human governance.

VI. LAW AND HUMAN GOVERNANCE

It has been observed hitherto that fishing for a generally acceptable definition of law is an unending academic adventure. All the same, for the purpose of this discourse with respect to law and human governance, the concept of law is conceived as ‘doing things with rules’.^{lxxii} To Oyebode,^{lxxiii} law is a technique of social ordering.

In this context, law should be understood in both substantive and adjectival (procedural) parlance. In short, law should be the bedrock upon which true governance should not only be established and determined but the yardstick in assessing its validity and efficacy. For instance, it should not be enough to say that the people in governance are elected by the majority votes casts in an election, but we should proceed to clearly say and answer in the positive whether such elections was freely and fairly conducted in accordance with the law guiding the conduct of that election. In this sense, law should be examined as a system of rules that ensures that the human conduct and activity are administered in accordance with the law in relation to the election. It is more apposite to say that, there cannot be a true governance in absence of law. Oyebode,^{lxxiv} further lending his weight of opinion to the rule of law and the democratic tradition which is akin to true governance asserted that whenever the rule of law is in place, the viability of any democratic project is so much enhanced. Any purported governance that is not established on the rule of law would lead to anarchy and end in chaos. This would lead to lawlessness and unruly behaviour in the society and the end result would be an abuse and/or ultra violation of human rights. There can never be true governance where human rights are not respected and valued. There cannot be respect for human rights where the law does not acknowledge human rights as its own source. In other words, it should be born in mind that human rights being inalienable ought and should determine the law and not the other way round. It is on this note, the Constitution of the Federal Republic of Nigeria^{lxxv} provides with respect to its Fundamental Objectives and Directive Principles of State Policy that “the Federal Republic of Nigeria shall be a state based on the Principles of Democracy and Social Justice”.

The Nigerian Constitution^{lxxvi} acknowledging the fact that for there to be any true governance, such governance must be established on and in pursuance of the fundamental law of the land. The implication is that it would be absolutely difficult if not impossible for any fair group of individuals to rise or wake up and tried to alter or destroy the governance ideals and principles for selfish interests. Hence, the nature of the governing principles to be practiced and/or observed has been clearly stated or provided for in our Constitution^{lxxvii} as follows:

It is hereby, accordingly, declared that:

- (a) Sovereignty belongs to the people of Nigeria from whom government through this constitution derives all its powers and authority;
- (b) The security and welfare of the people shall be the primary purpose of government; and
- (c) The participation by the people in their government shall be ensured in accordance with the provisions of this Constitution.

It is beyond contest that both scholars and practitioners are *ad idem* to the effect that where the governing ideals and principles entrenched in the above stated provisions of Nigerian Constitution are strictly adhered to and practiced, the right of the people is ensured and guaranteed. In other words, where through the instrumentality of the law, the rights of the people to participate in the affairs of the government of the day are ensured, preserved and protected; there are bounds to be true governance. The rule of law includes ensuring that through the functionality of the law, the rights of the people are not violated with impunity and

where such rights are to be violated, it must be in accordance with the law itself and not in accordance with the caprices of men that are in power. In short, the rule of law is antithesis of the rule of men and the rule of force, where force is applied, then it must be force in accordance with the force of law and not force of men.

It is on this note that Oyeboode^{lxviii} in quoting a leading American scholar declared that the rule of law essentially means that, “The power of rulers is limited and the limits can be enforced through established procedures. It means government that is, at once devoted both to the public good of the entire community and to the preservation of the liberties of individual persons as far as that is consistent with public good”^{lxix}.

The essence of the rule of law is to ensure that the rulers do not exercise their power which encompasses the political, economic, social or otherwise powers according to the individualistic tendencies but that the exercise of such powers are rightly regulated or directed by the rule of law. It is interesting to note that the custodian of the constitutional political powers are resident in either the legislature, the executive or the judiciary and each of these arms must ensure that the exercise of the powers vested in them is in accordance with the provisions of the fundamental laws of the land – the rule of law. To a large extent, the judiciary in the performance of its duty of adjudication using the instrumentality of the rule of law over the years ensured the sustenance of true governance. The rights of individuals as against the exercise of arbitrary powers of those in government had been proffered, protected and/or guaranteed as well as ensuring that the duties imposed upon the holders of the governmental powers have been performed. In other words, the judiciary has used and/or applied through the instrumentality of the rule of law to determine what came to be popularly known as executive lawlessness and also has declared unconstitutional, null and void where the legislature in making laws had exceeded their powers to the detriments of the rights of the individual or groups of individuals or violating the constitutionally entrenched doctrines of the separation of powers.^{lxx} The judiciary has also through the instrumentality of the law ensured that the corporate principles of federalism^{lxxi} entrenched in the fundamental law of the land are not violated.

VII. NIGERIAN EXPERIENCE

In considering the Nigerian experience on the interplay between law, justice and human governance, it becomes imperative to explore the feature of the Nigerian legal system. At the outset, it must be born in mind that the Nigerian legal system is not limited to the positive laws enacted by the legislative body in Nigeria under the Nigerian Constitution.^{lxxii} The Nigerian legal system is not restricted to the received English law which includes common law, the doctrines of equity and the statutes of general application in force on the 1st January, 1900^{lxxiii} but it incorporates the native law and custom (customary law).

VIII. NATIVE LAW AND CUSTOM (CUSTOMARY LAW)

Customary law can be regarded as the original law of the land. It seems that the originality of the customary law of the people is not only acknowledged but well recognized to the extent that even the application of the received English law is made enforceable subject to the limits of the local jurisdiction and local circumstances.

With due respect the phrase “local jurisdiction and local circumstances” in determining originality of the customary law has also received the blessing of the Supreme Court of Nigeria when in a number of cases the Court maintained that native law and custom is organic. For instance, in the case of *Oyewunmi Ajagunbade III v. Ogunesan*,^{lxxiv} Honourable Justice Obaseki, JSC described customary law to wit:

The organic or living law of an indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static. It is regulatory in that it controls the lives and transactions of the community subject to it. It is said that

custom is a mirror of the culture of the people. I would say that customary law goes further and imports justice to the lives of all those subject to it.

The Supreme Court of Nigeria has over the years consistently maintained the fact that customary law is a feature of the Nigerian legal system and consequently enforceable. In the case of *Zaiden v. Mobosen*,^{lxxv} the Supreme Court maintained that customary law is not a law enacted by any competent legislature in Nigeria; yet it is one that is enforceable and binding within Nigeria between the parties subject to its sway.

Originally, the scope of customary law in Nigeria was so wide to have accommodated Islamic law.^{lxxvi} Hence, it was referred to “as a blanket description covering very many different systems”.^{lxxvii} However, it has been strongly contended that Islamic law cannot and does not form part of the customary law in that Islamic law is universal while customary law is not. While Islamic law is written on a general note, customary law is not. The Supreme Court in the case of *Aikamana v. Bello*,^{lxxviii} took a different position on the status of Islamic law which is diametrically opposed to the statutory provision.^{lxxix} Customary law consists of customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that are treated as if they were laws.^{lxxx}

The matter of customary law as a special feature of Nigerian legal system deserves some unusual attention in that it is not an enacted law by the legislative body, it is not like the common law of England which is a product of the decision of the common law courts and not the doctrines of equity which flows from the decisions of Chancery Courts. Customary law is inherent and indigenous to the people. It is regarded as the oldest form of law known to the people, yet it is active, living and dynamic adapting to the changes in the ever growing changing community.

How do we identify a customary law? In other words, how do we establish or prove its existence and its relevance for the purpose of its applicability to day to day transactions in the society? Incidentally, both statutes and case law have in no doubt acknowledged and recognized the existence and the relevancy of customary law provided the condition precedent by way of the validity test is being fulfilled. Customary law is a question of fact which must be proved to exist before it can be applied and/or enforced.

The Evidence Law acknowledging the existence of customary law in the Nigerian legal system provides:

A custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence.^{lxxxii}

In the case of *Osadebe v. Osadebe*,^{lxxxii} the Court of Appeal, Enugu Division, commenting on the provision of the old Evidence Act state “where such a custom has not been subjected to previous use and pronouncement by the courts then it cannot qualify for judicial notice in which case it will fall under the requirement of proof by evidence, being a question of fact”.

In the same vein, in the case of *Nteogwuike v. Otuo*,^{lxxxiii} the Supreme Court of Nigeria held that:

Native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such a notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof”.

Once a particular custom is established to exist either by being judicially noticed or by proof of evidence, it qualifies as law that can be administered between the parties concerned with respect to the subject matter.

The Nigerian experience of the interplay between law, justice and human governance would not only be examined in the context of customary law bearing in mind the fact that apart from the received English law, legislation has been one of the major features of the Nigerian legal system. As we could infer from the realist view of school of thought, law is not limited to the enactments of the law maker. In other words, it is the judgment of the courts of law based on the interpretation of the Constitution and statutes that is considered to be the true or real law. On this note, the role played by the Nigerian judiciary equally greatly determine the extent to which law and justice have influenced or affected human governance. For instance, Haruhiko Kuroda^{lxxxiv} maintained that:

We all realise that before investors enter the market, they want to know what the rules are. After they enter the market, they want reasonable assurances the rules will either stay the same or will be changed. Only in a transparent and participatory manner with due regards to vested rights. It is clear in our minds that an important consideration for investors in the legality and reliability of executive are regulative decisions, the soundness of laws, and the legal interpretation and enforcement of contractual and statutory obligations. Investors have, and will continue to leave markets that are badly governed and that fail to provide a strong sense of predictability, reliability, transparency, and accountability. They would go to better governed economies where costs and risks can be better managed. They are also likely to share their bad experiences with other investors.

The establishment of or proof of customary law by judicial notice is a special feature of human governance in the Nigerian legal system. The fact of judicial notice of such a custom absolves the parties alleging the existence of the custom from calling evidence to prove its existence.

It is doubtful whether the court on its own accord can raise and rely upon a particular custom simply because such a court takes judicial notice of such a custom. The existence of such a custom might have been raised by the party themselves and the court would then confirm if judicial notice is taken of such a custom. It is interesting to note that human governance based upon the customary law is as recognized as that based upon the statutory laws too.

It is not every custom practiced by the people that are accepted as having the force of law capable of enforcement. There are tests that every custom is subjected to when such a custom passes the test then such custom is therefore accepted as law and enforceable. Incidentally, the said various tests are also products of statutory provision which are not inherent in the people. These tests are legally referred to as validity tests. One validity test becomes a legal requirement that such a custom must satisfy. It must not be repugnant to natural justice, equity, good conscience, public policy, nor incompatible with any law for the time being in force.^{lxxxv}

There are divergent social issues that have hitherto plagued the security, the integrity and the stability of Nigeria as a country yet through the instrument of law, justice and human governance Nigeria has remained one as a political entity. Those social maladies ranges from civil war, ethnic crisis, religious crisis and hostilities especially in the Northern part of Nigeria, the Niger Delta Militancy episode, corruption, the political crises arising from election malpractices that had plagued the democratic process in Nigeria, yet, the concepts of law, justice and human governance has thrived in Nigerian body polity.

IX. POSITIVE LAW IN NIGERIA

It is a known fact throughout the whole world that between 1967 and 1970, Nigeria fought civil war and at the end of the civil war through the instrument of positive law, Nigeria established the National Youth Service Corps^{lxxxvi} (NYSC) Scheme. Through this scheme Nigeria became

more integrated and inter-tribal marriage was encouraged and till date the scheme has greatly assisted in fostering the unity and inter-tribal and communal harmony.

Nigeria has witnessed serious religious and ethnic crises especially in the Northern part of the country. As a result of this ethnic and religious crisis culminating in the Boko Haram insurgency, the Nigerian Government has applied positive law in enacting Terrorism Act.^{lxxxvii} The Act^{lxxxviii} was meant to use law as an instrument of justice and human governance.

In an attempt to fight corruption especially that of the political office holders and senior civil servants, the government of the Federal Republic of Nigeria positively enacted Corrupt Practices and Other Related Act (ICPC),^{lxxxix} the Economic and Financial Crimes Commission (Establishment) Act (EFCC),^{xc} and even Money Laundering Act.^{xcii} The government of the Federal Republic of Nigeria has rolled out enough positive laws which were intended to ensure dispensation of justice and enhance good human governance.

At this juncture, it is incumbent to cite some decisions of the Nigerian courts where the judiciary has lived up to expectation in ensuring the protection and the preservation of human rights thereby maintaining true governance. In the case of *Governor of Lagos State v. Ojukwu*,^{xcii} Honourable Justice Eso, JSC delivering the lead judgment had this to say:

It is a very serious matter for anyone to flout a positive order of a court and proceed to taunt the court further by seeking a remedy in higher court while still in contempt of the lower court. It is more serious when the act of flouting the order of the court...is by the Executive...for one organ and, more especially the Executive, which holds all the physical powers, to put itself in sabotage or deliberate contempt of the order. Executive lawlessness is tantamount to a deliberate violation of the constitution...The essence of the rule of law is that it should never operate under the rule of force or fear. To use force to effect an act and while under the marshal of that force, seek the court's equity is an attempt to infuse timidity into court and operate a sabotage of the cherished rule of law. It must never be.^{xciii}

Where there is goodbye to the rule of law, the consequential output is goodbye to good or true governance and certainly anarchy and rule of force will be the order of the day. Similarly, in the case of *Obeya Memorial Specialist Hospital v. A.G. of the Federation*,^{xciv} the Supreme Court of Nigeria per Honourable Justice Obaseki in upholding the rule of law as against the rule of force vehemently condemned an exhibition of executive lawlessness on the part of the Benue State.^{xcv}

The constitution being the fundamental law of the land constitutes the bed rock of every legal system and therefore compliance with the constitution is a threshold of the rule of law. Consequently, judges in order to ensure the maintenance of true governance must desist from playing politics but must be determined to adjudicate on matters of conflicting interest based on the ideals or principles of the rule of law. Without equality of access to the courts for the ventilation of grievances, real or imaginary before the courts, the so called equality before the law is nothing but a myth.^{xcvi} The relationship between justice and human governance should border us for the simple reason that there cannot be true governance in the absence of dispensing justice. Are there practical steps being taken to ensure the realization of these noble objectives? In the summit on the Administration of Justice in the 21st Century, Honourable Justice Uwais^{xcvii} CON, asserted:

There can be no doubt that the administration of justice is the cornerstone of the Rule of Law, without which democracy cannot thrive. The courts are the leading agents of government, charged with the responsibility of administering

justice. The efficient administration of justice in economic development of a nation is a catalyst to success.^{xcviii}

On this note, it can be said that the summit on the administration of justice is one of the practical steps in this direction.

All we are trying to establish and/or justify in this paper is that the bedrock of the workings of human governance must be the rule of law.^{xcix} The end of every rule of law is justice and consequently, law and justice becomes the twin pillars or tools upon which human governance can be established and built.

X. CONCLUSION & RECOMMENDATION

In concluding our discourse, we have seen that law and justice even though seems to be intertwined, they each maintain their independent special identity in the administration of justice. And where law and justice seems to conflict, justice supercedes. Hence, it is submitted that justice is more important than law.

Meanwhile, human governance needs both the law and justice to thrive in the political, economic, social, educational and cultural dispensation, and in the centre of law and justice is human right. Therefore, one may be tempted to ask considering the prevailing religious, cultural, political and socio-economic crises, whether there is hope for Nigeria? The author, answering the question in the positive place reliance on the decision of the Supreme Court of Nigeria in the case of *Abubakar GCON & 2 Ors v. Musa Yar'Adua & 5 Ors*^c wherein Honourable Justice Niki Tobi, JSC stated:

Despite all the insults, this court will continue to administer justice, in the interest of our cherished democracy. This court has consistently promoted democracy in its judgments and will continue to do so in appropriate cases. This court will not shy from its responsibilities as a final court in deserving cases to promote democracy in the performance of its judicial duties in accordance with section 6 of the Constitution.

This court has no jurisdiction to interpret or construe clear provisions of the Constitution or a statute in the guise of promoting democracy when the enabling law does not allow it. As that would be a trespass on the constitutional role of the National Assembly. It will not do such a thing. Not at all, this is because the court has a constitutional responsibility to respect and adhere strictly to the separation of powers in the Constitution.

It is therefore recommended that first, those saddled with the responsibility of human governance should be conscious of the tenets, principles and/or rule of law and justice.

Secondly, the operators of human governance must possess indepth knowledge of the legal system.

Thirdly, the operators of the system must realise that human governance cuts across every department of human endeavours.

Fourthly, everyone involved in human governance must realise that justice is and should be the end of every law.

* Benjie Ogwo, Esq., LL.B (Hons) (ABU), LL.M, Ph.D. (Makurdi), B.L. (Lagos), H.O.D, Department of Public Law, Faculty of Law, and Dean, Student Affairs, Kogi State University, Anyigba and a former Chairman, Nigerian Bar Association, Idah Branch, (2004-2006), benogwo@yahoo.com.

ⁱ This is supported by the maxim *ibi societatis ibi jus* which means “that wherever there is society there is law”. See Ucheghu, A., *The Jurisprudence of the Nigerian Legal Order*, (Lagos: Ecowatch Publications Ltd., 2004) p. 7.

ⁱⁱ This is to buttress the contention that “much juristic thought has through the ages been devoted to finding an acceptable definition of law, with varying degree of success”. See Honourable Justice T.A. Aguda *Poverty, Law and Justice in Nigerian Essays on Jurisprudence*, Elias, T.O., and Jegede M.I., (eds.), (Lagos: M.J. Professional Publishers Ltd., 1993) p. 432; Hackner, P.M.S., “Hackner in Law, Morality and Society (ed. Hackner and Rez, 1977), p. 5; and Thomas Arnold, *The Symbols of Government* (1935), pp. 36-37.

ⁱⁱⁱ Ladan, M.T., *Introduction to Jurisprudence, Classical and Islamic* (Lagos: Malthouse Press Ltd., 2006), p. 10, where it is slated “the idea of justice has been understood differently at different time” see also, Honourable Justice T. Akimola Aguda, *Poverty, Law and Justice in Nigeria Essays in Jurisprudence*, Elias, T.O., and Jegede, M.I. (eds.), Lagos: M.J. Professional Publishers Ltd., 1933), p. 432 where it is stated “Justice is a term which is difficult of definition in the abstract”.

^{iv} *Ibid.*, see also, Yemi Akinseye, G. (ed.) *Law, Justice and Stability in Nigeria* in Ibadan (1993), pp. 1-48; Eze, O., *Justice for Sale in Southern Nigeria* (10, Lagos, 1996), pp. 120-140; Otteh J., *Fading Lights of Justice*, CLO, Lagos (1993), pp. 1-100.

^v Bryan, A. Garner, *Black’s Law Dictionary* 9th edn. (U.S.A: West Group, St. Paul Minn, 2004), p. 962.

^{vi} *Ibid.*

^{vii} Allott, A., *The Limits of Law*, (London: Butterworths, 1980), p. 7.

^{viii} Bryan, A. Garner, *op. cit.* p. 942.

^{ix} T.A. Aguda, *op. cit.* p. 432.

^x Adaramola, F., *Basic Jurisprudence* 3rd edn., (Lagos: Raymond Kunz Communication, 2004), p. 21.

^{xi} *More about the Nature of Law in Legal Essays* Tribute to Drinkip Mcmrray, (1935), p. 513 at 515.

^{xii} *Ibid.*

^{xiii} Ogwo, B., “The Concept of Natural Law: A Reality or Myth in Corpus of Topical Legal Issues”, *Essays in Honour of Honourable Justice S.U. Onu, JSC, CON*, in Abdullahi (ed.) (Kaduna the Regent Printing & Publishing Ltd., 2008), pp. 260-262.

^{xiv} Freeman, M.D.A., *Llyod’s Introduction to Jurisprudence* (London: Sweet & Maxwell Ltd. 7th edn., 2001), pp. 11-12. Adaramola, F.A., *Basic Jurisprudence* (Lagos: Raymond Kunz Communication, 2004), p. 12, where it is stated that “the issue of legal positivism and idealism involves the seemingly interminable controversy between the ‘IS’ and the ‘OUGHT’ credos among jurists, and as to whether either of these approaches to law is adequate for society. See also, Ndubusi, F.N., and Nathaniel, O.C., *Issues in Jurisprudence and Principles of Human Rights* (Lagos: Amodus Publisher, 2002), p. 114 wherein distinguishing between the Positive Law and the Natural Law it is said “...there exist no closeness or affinity between law and extraneous moral ideals”. That law as posited by authority as autonomous, and should not be compared with any metaphysical ought, standard”.

^{xv} *Ibid.*

^{xvi} *Ibid.*

^{xvii} (1748 – 1832).

^{xviii} Bentham J., *Of Laws in General*, (London: Anthlone University Press, 1979).

^{xix} (170-1859).

^{xx} Austin, J., *The Province of Jurisprudence Determined* (Hart George Weidenfeld & Nicolson Ltd., 1954), p. 1.

^{xxi} See Ndubusi, F.N. & Nathaniel, O.C. *op. cit.*, p. 33, where the writers stated extensively: “Natural Law has continued to be a recurring theme in all areas of human endeavour. It features in the legal system, politics, ethics, social relation, international affairs, economic matters and religion. It is a central issue of discourse in almost all matters of state affairs. In the modern world, it has continued to predominate in state matters and policies...This trend has changed, as natural law has in the modern world become a plank in evaluating legal system, political ideology and economic policies. It has been used as a platform for moral justification, actions and inactions of political and economic institutions. The controversy of ‘Is’ ‘Ought’ theory, the justification, rationale and the moral basis of positive law centres on its derivation from natural law”.

^{xxii} Uchegbu, A., *The Jurisprudence of the Nigerian Legal Order* (Lagos: Ecowatch Publications Nig. Ltd., 2004), p. 106.

^{xxiii} Chapter II of the constitution of the Federal Republic of Nigeria, 1999 as amended deals with Fundamental Objectives and Directive Principles of State Policy.

^{xxiv} Ogwo, B., *op. cit.*, p. 249.

^{xxv} Bryan, A. Garner, *op. cit.*, p. 518.

^{xxvi} *Ibid.*

^{xxvii} Richard, A. Posner, *The Problems of Jurisprudence* (1990) pp. 220-221.

^{xxviii} Rudolf Von Thering (1818-1892) the German Jurists of the 18th Century whose contribution to the study of law is how to apply the law for the resolution of the inevitable conflict between the social interests of the society and the individual selfish social interest.

^{xxix} Rudolf Von Thering, *Law as Means to the End* (Trans by I. Husik, 1924) quoted by Honourable T. Akinola Aguda, *op. cit.*, p. 434.

^{xxx} Austin, J., *op. cit.*

^{xxxi} Rudolf Von Thering, *op. cit.*

^{xxxii} Rawls, J.A., *Theory of Justice*, (The Belknap Press of Harvard U.P. 1971), pp. 60-61.

^{xxxiii} *Ibid.*, See also, Uchegbu, A., *The Jurisprudence of the Nigerian Legal Order* (Lagos: Ecowatch Publications Nig. Ltd., 2004), pp. 149-150.

^{xxxiv} Section 17(1)(2)(a)(b)(c)(d)(e)(1)(g)(h) of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

^{xxxv} Uchegbu, A., *op. cit.*, pp. 145-146.

^{xxxvi} Bryan, A. Garner, *op. cit.*, p. 942.

^{xxxvii} It should be pointed out that many jurists such as Plato, Aristotle, Roscoe-Pound, Rawls, Hobbes, etc. have contributed in various ways to the concept of justice generally in particular to distributive justice.

^{xxxviii} Uchegbu, A., *op. cit.*, pp. 147-148 where the views of Aristotle on Justice was examined; also Dias R.W.M., *Jurisprudence*, (London: Butterworths, 5th edn., 1985), pp. 65-69.

^{xxxix} *Ibid.*, See also, *The Nicomachean Ethics of Aristotle*, Ross Trans (Oxford: 1962 BKV), pp. 106-136.

^{xi} *Ibid.*

^{xii} Yakubu, J.A., *Constitutional Law in Nigeria*, (Ibadan: Demyaxs Law Books, 2003), p. 92. See also, and generally Nwabueze, B.O. & Philips, O.H., *Constitutional Law of Great Britain & the Common Wealth*, pp. 14-16; Wheare, K.C., *Modern Constitution* (2nd edn.) pp. 24-29, 112-116; Swartz, B., *American Constitutional Law*, Dicey, A.V., *The Law and the Constitution* (1961).

^{xliii} (1837) 88 IM 229 at 302.

^{xliiii} *Ibid.*

^{xliiv} Chesire, G.C., *Private International Law*, 6th edn.; 1961, p. 675. See also, Bryan A. Garner, *op. cit.*, p. 881. Oluyede, P.A., *Nigerian Administrative Law* (Ibadan: University Press Pld, Re-Printed, 2002), p. 381.

^{xliv} Oluyede, P.A., *Nigerian Administrative Law*, (Ibadan: University Press Plc, Re-Printed, 2002), p. 381.

^{xlvi} Wade, et al; *Administrative Law* (New York: Oxford University Press, 8th edn., 2000), p. 436.

^{xlvii} See *Ekiti State v. Osayomi* (2005) 2 NWLR (Pt. 909) 67 at 90.

^{xlviii} Allen, C.K., *Law in the Making* (1964) 7th edn., p. 387.

^{xlix} Bryan, A. Garner, *op. cit.*, p. 942.

¹ Which became effective from 28th October, 1991.

^{li} Order 4 Rule 1(1) of the Kogi State High Court (Civil Procedure) Rules, 2006.

^{lii} *Ibid.*, Order 4 Rule 1(2).

^{liii} *Ibid.*, Order 4 Rule 1(3).

^{liv} Bryan, A. Garner, *op. cit.*, p. 479.

^{lv} Kayoed, Eso, *Further Thoughts on Law and Jurisprudence*, (Ibadan: Spectrum Law Publishing, 2003), pp. 44-105.

^{lvi} Abah, I.G., "Strike and the Law under a Democratic Dispensation: Nigerian Perspectives", *Benue State University Law Journal*, Vol. 1, No. 1, 2002, p. 221 at 229.

^{lvii} Roskin, M. et al, *Political Science: An Introduction* (6th edn.) pp. 62-69.

^{lviii} *The Encyclopedia Americana* (Dandury, Americana Corporations International Headquarters, 1978).

^{lix} Olawepo, G.M., *Democracy and Globalization: Panacea for Good Governance in Journal of Private & Commercial Law* being a publication of the Department, Faculty of Law, University of Ado, Ekiti State (2008) 1 UNAD J.P.C.L. p. 329.

^{lx} Honourable Justice Mohammed Bello.

^{lxi} Kayoed, Eso, *op. cit.*, p. 23.

^{lxii} Oyeboode, A., *Law and Nation-Building in Nigeria Selected Essays* (Lagos: CEPAR, 2005), p. 2.

^{lxiii} *Ibid.*

^{lxiv} *Ibid.* p. 86.

^{lxv} Chapter II Section 14 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

^{lxvi} *Ibid.*

^{lxvii} Section 14(2) of the Constitution of the Federal Republic of Nigeria, 1999.

^{lxviii} Oyeboode, A., *op. cit.*, p. 89.

^{lix} Sandoz, E., *Foundations of American Liberty and the Rule of Law*, Crossroads, Vol. 1, No. 9 at p. 5 (August 1995).

^{lxx} Sections 4, 5 and 6 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

- ^{lxxi} Sections 2(2), 4(3)(4) of the Constitution of the Federal Republic of Nigeria, 1999, 78 (1986) 1 NWLR 621.
- ^{lxxii} Section 4(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended.
- ^{lxxiii} The various State High Court Law made provision for the reception of the English law. However, section 33 of the Interpretation Act provides; “subject to the provisions of this section and except in so far as others provision is made by any Federal Law the Common Law together with the Statutes of general application that were in force in England on the 1st day of January, 1900 shall, in so far competence of the Federal Legislature be in force in Nigeria (2) Such imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit and subject to any Federal Law (3) for the purpose of facilitating the application of the said imperial laws they shall be read with such format verbal alterations not affecting the substance as to names, locality, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances”.
- ^{lxxiv} (1990) 3 NWLR 182 at 207.
- ^{lxxv} (1973) 11 FSCI, Also see Asien, J.O. “Introduction to Nigerian Legal System” 2nd edn., (Lagos: Ababa Press Ltd., 2005) p. 114.
- ^{lxxvi} Section 2 of the Native Courts Law of the Northern Nigeria Law No. 6 of 1956 provides that Customary Law includes the Islamic Law.
- ^{lxxvii} Park, A.E.W., “The Sources of Nigerian Law”, 1st edn. (London: Sweet & Maxwell, 1965) p. 65.
- ^{lxxviii} (1998) 6 SCNJ 127 at 136 where Hon. Justice Bashir Wali delivering the lead judgment said “Islamic Law is not the same as Customary Law it does not belong to any particular tribe. It is a complete system of universal law more certain and permanent and more universal than English Common Law”.
- ^{lxxix} Section 2 of the Native Courts Law, *op. cit.*
- ^{lxxx} Bryan, A. Garner, *op. cit.*, p. 443.
- ^{lxxxii} Section 16(1) of the Evidence Act, 2011.
- ^{lxxxiii} (2012) 42 WRN 158 at 176.
- ^{lxxxiiii} (2001) FWLR (Pt. 68) 1076 at 1096.
- ^{lxxxv} Haruhuko Kuroda, President Asian Development Bank on “Good Governance and the Judiciary” being remarks at the International Conference and Showcase on Judicial Reforms: Strengthening the Judiciaries of the 21st Century on 29th November, 2005 at the Makati Shangri-la Hotel, Manila, Philippines.
- ^{lxxxvi} Ese Malemi, “The Nigerian Legal Method”, 1st edn. (Lagos: Princeton Publishing C., 2010) p. 165.
- ^{lxxxvii} Decree No. 24 of 22nd May, 1973 established “with a view to the proper encouragement and development of communities among the youth of Nigeria and the promotion of national unity”.
- ^{lxxxviii} Terrorism (Prevention) Act, 2011.
- ^{lxxxix} *Ibid.*
- ^{xc} ICPC Act, 2000 which came into effect on the 13th day of June, 2000.
- ^{xc} EFCC Act, 2004 which came into force on 4th June, 2004.
- ^{xc} Money Laundering Act, 1995 which commenced since 28th February, 1995.
- ^{xcii} *Ibid.* at pp. 633-634.
- ^{xciii} *Ibid.*, p. 633, 634.
- ^{xciv} (1987) 7 SC 152 or (1987) 3 NWLR (Pt. 60).

^{xcv} Since the government has taken the civilized stand of observing the human rights provisions of the 1979 Constitution (now 1999 Constitution) and the Rule of Law, it cannot allow its image to be tarnished, stained and mutilated by abandoning the rule of law and restoring the rule of force which, in the peculiar circumstances is very barren. The rule of force wearing the kid glove of an Edict can never usher in social let the Benue State Government return to the Law, *ibid.*, p. 187.

^{xcvi} Akintola Aguda, *The Jurisprudence of Unequal Justice* (LASU, 1978) pp. 5-6.

^{xcvii} At p. 14.

^{xcviii} *Ibid.*

^{xcix} Kayoed Eso, *op. cit.* p. 53.

^c (2008) 36 NSCQR (Pt. 1) 231.

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Reflections on the Turkish Immovable Property Tax

Dilek ÖZKÖK-ÇUBUKÇU*¹

Abstract

This paper brings to discuss Turkish immovable property tax one of the emblematic taxes of Turkish tax system. It's the only significant tax resources of the municipalities; the tax is also traditional and oldest one of the three wealth taxes of Turkish tax system. It's also one of the rare taxes assessed *sua sponte* by the "local authorities", obligation of a declaration by the taxpayers and self-assessment is no longer existent since 2002. The paper deals first the Turkish property tax experience. Property tax issues and discussions are resuscitated in the country with a current and much anticipated constitutional reform project questioning the local authorities' taxing powers. Local authorities are responsible for the property taxes' assessment, collection, administration, and utilization of the receipt as a budgetary source. In the case of local authorities' taxation a very powerful legality of the taxes principle is restraining and sometimes seen as a main cause of the precarious budgetary situation of the small municipalities. The paper will finally discuss a recent Constitutional Court's jurisprudence emphasizing the weakness of the immovable property tax system concerning the infringement of the taxpayers' right to legal remedies against the assessment of the tax.

Keywords – immovable property taxation, local authorities' competence of taxation, taxpayers' right

Introduction

Property Tax Law (PTL) as a local tax is a part of wealth taxes' system with the inheritance and gift tax and motor vehicle tax in Turkey. Assessed *sua sponte* administratively based on immovable property the tax is paid on annual basis. Immovable property tax having its source from Property Tax Law² should, as any other taxes, be in conformity of the *Article 73* of the Turkish Constitution stipulating the Constitutional principles of taxation. As it is called "obligation to pay taxes" by the Constitution itself, these principles are primarily encountered the Turkish fiscal environment as follows:

"(1) Everyone is under obligation to pay taxes according to his financial resources, in order to meet public expenditure. (2) An equitable and balanced distribution of the tax burden is the social objective of fiscal policy.(3) Taxes, fees, duties, and other such fiscal impositions shall be imposed, amended, or revoked by law. (4) The Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law."

Generality and ability to pay taxes in paragraph 1, are destined as taxation the principles, to the taxpayers to pay taxes as a general contribution in order to the public expenditures, contributions of the each of the taxpayers according to their ability to pay taxes. Paragraph 2 sets the rules for the State the use of the taxes as a fiscal policy tools, and emphasizes the equity principle for the national tax burden and for the uses of the taxation policy in income redistribution. Paragraph 3 is the legality of the taxes principles, and covers not only taxes but any other fiscal contributions such as fees, duties and *parafiscal* levies (quasi-taxes). Paragraph 4 is the limited taxation power delegation of the legislature to the executives.

In this study, general legal framework of the Turkish immovable property taxation is analyzed first with an overview of the subject and the object of the tax and the beneficiary of its collection including questions about the collection, rates and payments . the second part of this study aims to analyze constitutional and legal issues related to this tax, with references to the Turkish Constitutional Court, Highest Court exercising *a posteriori* control of the consistency of the laws with the Constitution. In this context, property tax will be questioned and examined with the basic above-mentioned Constitutional tax principals.

I. General and Legal Framework of the Turkish Immovable Property Tax

1. General overview of the tax

Turkish immovable property tax is an annual local tax on real property. One of most ancient taxes³ in Turkish tax system the property tax has been came into the modern republican tax system from the Ottoman Empire without significant modification. The historical characteristic is sometimes criticized by the “archaism” of the property taxation⁴.

SLACK (2011) precise that the literature talks about “the” property tax as if it were one tax, it is really two different taxes: a tax on residential property and a tax on non-residential property or land tax. Turkish Property Tax has this two-components taxation with higher tax rates on land tax.

The immovable property tax is as seen usually a local tax, however with lower degrees of the taxation power is given to the local authorities.

2. Legal Framework

a. Object of the tax

Immovable property is the object of the property taxation in Turkey. The definition of immovable property covering by the PTL differs from the definition of the real estate of the civil law which proclaims that land pieces, independent and permanent real rights in land registry and mines are considered as real estate. The “immovable property” term covers -in the term of the PTL- all buildings (*article 1*), lands and building lots (*article 12*) in Turkish borderline, although this definition is not embracing the definition of the “real property” of the Turkish Civil Code⁵. The subject of immovable property can be enumerated as land, independent and permanent additional rights in property registry and in condominium registry in the Civil Code. Article 704 is about real property rights, and article 998 stipulates property rights that should be registered to the land registry (ÖZKÖK-ÇUBUKÇU et al.(2009):19). Considering the independent and additional rights in condominium registry, it should be noted that act on condominium provides for each independent portion of a structure to be registered to condominium registry and is subject to immovable property right.

On the other hand, the taxation purposes differing from those of the civil law stipulates, as it is mentioned above, its own definition of “immovable property” for the property taxation and buildings are defined for that as any ashore or afloat constructions without consideration of the construction materials (article 1). For the matter of the property taxation houses, factories, shops, hangars, and warehouses located within the local government authorities - specifically municipalities as long as they constitute of a “fixed on earth”. This later term that is not statutory is developed by the jurisprudence⁶ to define the constructed buildings.

b. Subject of the tax

The payer of the property tax shall be any legal entity or individual holding the title to real estate existing in the territory of the Turkish Republic. Real estate taxation is thus the territoriality principle. But the right of occupancy, if exists simultaneously with the property rights, precedes over the later. The beneficial owner is legally in charge of the payment of the tax (*art.3 for the building tax and art. 13 for the land tax of the PTL*). This rule is in concordance of the civil code disposition⁷ stipulating that beneficial ownership rights include not only all the rights relevant to ownership yet does not nominally own the legal property, but also all the obligations such as the obligations to repair, to pay taxes and fees. In any case, the tax is due by the occupant in the absence of any legal owner or beneficial owner. The occupant statute has a double function in the PLT’s hierarchical lineage of taxpayers: First of all it is a safety measure for the lawmaker who is looking for a subject to property tax in any case it is not susceptible to detect one. Secondly, the occupancy statute ensures to tax also the slum houses (*gecekondu*⁸ in Turkish), which are considered “constructed and fixed on earth” in terms of the PTL’s *article 1*, but having neither legal owner nor beneficial owner; in both case of the ownership statute requisite legally to be registered to the land register (ÖZKÖK-ÇUBUKÇU et al., 2009). Illegally established and roughly constructed slum housing (GEDİK, 1993) is one of the main urban problems in after-the-2nd world war period. Like most of the developing countries, demographics, urbanization, inward migration, renewals etc. are accepted as the leading factors of the growing housing demand in the country and rapid urbanization and urban population growth is seen (COŞKUN, 2011) which also cause a slum housing problem. KELEŞ (2006) indicates that nearly 12,5 million or

25,5 % of the urban population live in slum houses, while the rate is 5 % in the 50s. Some big cities including Ankara-the capital of Turkey- is recorded the highest rate of slum housing among the Turkish cities suffering from the phenomena⁹.

The PTL prefixes a large number of exemptions- temporary and permanent-from the tax. Central and governments land and buildings, public utility buildings, public properties, buildings and lands owned by non-profit associations and charitable foundations, diplomatic buildings and lands in accordance with the reciprocity principle are permanently exempt from the property taxation. Temporary exemptions are applied within time limits. Newly constructed building exclusively affected to the housing, has the benefice of 5 years of exemption following the year of the completion of the construction. This temporary exemption is on the other hand partial; only the $\frac{1}{4}$ of the tax base is eligible to be exempted. Nevertheless, the onerous or gratuitous acquisition of housing is also enjoying this same fiscal advantage. Some sector-specific temporary exemptions such as tourism facilities, exposition centers, industrial parks, industrial plants in underdeveloped areas are also potential beneficiaries of the 5 years of exemptions. Exemption time limits are larger for the land taxation: 50 years for afforested lands, 10 years for land reclamations, 2 to 15 years for reforested, arboricultured, re-cultivated lands (*article 15 of the PTL*).

c. Beneficiary of the tax

In literature, property taxes are considered to be appropriate as a source of revenue for local governments largely because of the association between the local public services (such as road and transit accessions, school services) rendered and the local taxes, taxation is executed within the scope of the benefit principal (SLACK, 2009). Property localizing in one local authority district is a potential user of the local services provided by this authority and thus taxable by that same local authority. In this rationale the association between the local services and property is more important when the costs and the benefits of the local services.

Local governments in Turkey are entitled to levy property taxes and other direct or indirect local taxes as part of their own revenue sources. Nonetheless, due to the “legality of the tax” principle local authorities power to tax is strictly delimited to the collection for most of the local taxes.

The share of local taxes, those collected within the municipalities' own resources, remains rather small reaching only 12.4 % in total according to the World Bank (2008). Legal sources of those taxes are Municipalities Revenues' Law no. 2464 dated 26.5.1981¹⁰ and the Property Tax Law.

The beneficiaries of the property tax are 3500 existing municipalities. Besides these ordinary municipalities, the 16 metropolitan municipalities provide urban services at the metropolitan level to ensure greater efficiency and coordination between municipalities. The local level is completed by 35 000 villages, the smallest of the local authorities without any distinctive fiscal and financial power. Turkey is governed by pluralist secular democracy, and has always attached great importance to developing its relations with European countries. After the First World War and the proclamation of the Turkish Republic in 1923, deliberately converges its political and social system to modern democracies'. Turkey, which has had a modern municipal system since 1930 and with the European membership foresight, has adopted three new laws favorable to decentralization since 2004 (UCLG, 2008). As it is seen in the table 1, considering the share of the local taxes in the totality of the local governments revenues, local taxation rate within the municipalities' own financial resource base is relatively weak, reaching only 10.7 % in 2006 and 11 % in 2009. To that are added various taxes paid directly by the municipalities, including taxes on property ownership, gambling, public shows and activities, as well as on electricity and gas consumption. Although small, this local share of tax revenue collected locally has been increasing since 1988 (UCLG, 2008). The central government transfers from the general budget tax revenues provide major part of the local revenues. Central government transfers, with recently re-written tax allocation and fiscal equalization law¹¹ are provided as follows:

- 2.85 % of the central government tax revenues are allocated to the ordinary municipalities;
- 2.50 % of the central government tax revenues are allocated to the municipalities within metropolitan municipalities;
- 1.50 % of the central government tax revenues are allocated to the special provincial administrations;

- Metropolitan municipalities receive a share of 5 % of the central taxes collected in the metropolitan area and an additional 30 % of the revenues allocated to the municipalities within the metropolitan municipalities.

Table 1: Local Governments Revenues (2006-2010) (1000TL)

REVENUE by SOURCES	2006	2007	2008	2009	2009
Tax revenues	3.377.516	3.690.832	4.190.482	3.776.080	5.904.388
Revenues from enterprises and properties	8.060.244	8.992.899	9.187.821	10.558.298	11.922.406
Subsidies, aids and special revenues	4.304.960	4.589.299	5.208.655	6.150.040	8.876.235
Interests, contributions and penalties	13.621.545	16.012.989	18.404.010	19.885.113	24.172.266
Capital gains	2.002.846	1.948.766	1.731.648	1.333.119	2.690.268
Receivables	357.794	239.447	119.235	1.067.293	16.555
TOTAL	31.724.905	35.474.232	38.841.851	42.477.177	53.582.118

Source: Directorate General of Local Authorities,

<http://www.migm.gov.tr/Istatistik/Gelirler Kalemlerine Gore Mahalli Idarelerin Gelirleri.pdf> (2.3.2013)

14 % of the municipal budget is paid as subsidies from the various ministries. But central government subsidies and transfers assure a more balanced distribution of financial resources among local governments throughout the country (UCLG, 2008).

Table 2: Revenues by Local Authorities (1000TL)

Local Authorities	2006	2007	2008	2009	2010
Municipalities	20.374.864	23.648.122	25.736.012	26.844.961	34.233.863
Municipal organizations	5.716.057	5.726.524	5.983.883	7.333.985	7.459.228
Special departmental administrations	5.635.984	6.099.586	7.121.956	7.299.672	9.752.093
Local administrations associations*	-	-	-	1.291.325	2.317.412
TOTAL	31.724.905	35.474.232	38.841.851	42.477.177	53.582.118

Source: Directorate General of Local Authorities.

*Revenues statistics of local administrations associations are published since 2009 by the Directorate General of Public Accounts, thus are not available before.

All public authorities- central and local- should share public resources in order to provide the necessary sources for each of them to secure a fair level of public services. The efficient and sufficient drawn of the fiscal decentralization framework is also important for providing local governments to strengthen own finances by giving sources of revenues, protecting taxpayers from heavy tax burden and from over-taxation or double taxation, harmonizing the central government and local authorities the tax systems, taking the measures to eliminate inequalities. As seen on table 2, municipalities are the main beneficiaries, especially the first tier of the

However, the major weakness of the local finance is that local authorities have no considerable taxing rights, with the exception of the tax on property, because they are members of the commission that fixes the tax base those municipalities have a partial taxation power. The central government, in accordance with *article 73, paragraph 3* of the Constitution, fixes all the rates, including those for the property tax.

d. Assessment, Rates and Payment of the Tax

The assessment of any tax is the core issue of taxation. In the case of the Turkish property taxation, the evaluation and assessment methods had important modifications in 2002. Before 2002, the base calculated on fair market value of buildings and lands, and assessed with declarative method. Taxpayers had to filled their property tax records every four years. However, declarative system based on fair market value had some important problems. First of all, taxpayers unrealistically undervalued tax base' declarations made to lawmaker to reconsider the method of valuation of property tax. Tax evasions rates were important before 2002. As property tax structure in Turkey strictly linked to the valuation process and considering that the problems connected immovable property valuation, declared values difference from the fair market value of the real estate was one of the most important cause of the drastic change of the system modification of 2002. In 2002 with the amendment of modification law no. 4751 dated 9.4.2002 declarative system is abolished in order to ensure tax fairness and more convenience in tax payments. According to the new system, the obligation for taxpayers to fill of every four years' the tax return-except in certain situations- has been abolished. Main characteristics restructured with the 2002- modifications are as follows:

1. Declarative system is replaced by a system which can be called "informative". In declarative system obligation of return declaration by taxpayer covers the fact that calculation of the tax base and application of the rate is realized by taxpayer by his/her own. But in new system although the declaration is not existent, taxpayer's only obligation is to provide the necessary information to the administration (to be understood as municipal authorities) who is in charge of the calculation of the base and rate. The informative system obligates taxpayers to inform all new constructions, additions to existing buildings, adds

or removes of elevators or heating facilities; dilapidations as whole or in parts of the buildings for any reason- such as combustion, demolition, etc., changes in usage of buildings from housing to business or vice versa; changes of the lands conditions (for example land consolidations and land fragmentations, any permanent increases or decreases of 25% of the land or buildings fiscal values in all over a city, town or village.

2. Valuation process' shifts also to the valuation *sua sponte* of the base. The role of the taxpayer is diminished in the process giving place to the administrative valuation. The assessment *sua sponte* is defined as administrative assessment of non-declarative taxes depending on the procedures by law. In case of property taxation that is since 2002 non-declarative, thus object to be assessed administratively considering the valuation procedures mentioned in PTL. This process is currently valid with a small group of taxes in Turkish tax system. The rare non-declarative taxes being property tax, motor vehicle tax and local entrainment tax, they only can be assessed *sua sponte*.

3. Valuation criteria is also shifted from fair market value to a formulary approach. The base of the tax is so-called "tax value" is calculated differently for buildings and lands. Tax value of the land is based on administrative discretion method. The tax values of urban lands are determined as minimum unit value by local valuation commission considering different roads, streets or areas in terms of value. In rural lands the tax values are assessed also by local valuation commissions for each type of land (such as barren, base, wetland) in provincial or district lands (*PTL article 29*). A Council of Minister Regulation no. 7/3995 dated 29.2.1972 (therefore Regulation of 1972) concerning the valuation of property tax base still into force is used for the valuation's procedural principals with the *article 29* of the PTL and *articles 49 bis* both defining the tax value and *articles 72 to 76* of the Tax Procedures Code (TPC) stipulating the constitution and functioning of the local valuation commissions. The Regulation of 1972 stipulates that in tax value determination of the rural lands type, class and status of the land are taken into account (*article 33*). For urban lands several criteria is

taken into account, such as distance and proximity to residential or businesses areas and transportation conditions, land position to avenues, streets, circles, beaches, etc., whether or not lands have municipal services such as Water, electricity, gas supply; lands are available which type of constructions, their zoning status, the size of the building and construction site, and their topographic status (article 26). As seen tax value of lands are not value-based but are area-based. Valuation of the buildings is calculated by formulary method according to which tax value of the buildings is “ordinary construction costs per square meters” of the building added to the tax value assessed of their lands (*article 29 of the PTL*). The ordinary construction costs per square meters are jointly regulated and published every year by the Ministry of Finance and the Ministry of Environment and Urban Planning. Cost of construction of the building is calculated by multiplying the square meters of the building outsides with the ordinary construction cost (*article 20 of the Regulation of 1972*). The building tax value consists of a combination of area-based value and construction cost-value. Nevertheless both part of the tax base is administratively determined and thus far beyond the real values of the properties. There is any element in the “tax value” to ensure the determination of the market value of the property. The cadastre-existent in the country- but is not created to provide information for tax purpose.

4. Another problem considering the valuation of the tax base is that capital gains are not monitored and tax due to the lack of the determination of the fair value of the property. The taxed value is a theoretical value.
5. The valuation takes place every 4 years for an annual tax. Between two valuations the base is corrected by the half of the tax correction coefficient determined by the Ministry of Finance according to inflation rate. The correction by half of the inflation rate could erode tax base and limit the revenue accession of the local authorities.
6. Considering *articles 72 to 76* of the TPC stipulating the constitution and functioning of the local valuation commissions are constituted by two members

representing local authorities', two members representing the tax administration and a member representing chamber of commerce in urban lands valuation. For rural lands the composition of the commission is slightly different: with the presidency of the governor of the province, treasurer general of finance of the province, provincial director of the Ministry of Agriculture, a representative of the chamber of commerce and another one of chamber of agriculture the local rural lands valuation commission estimates the land value. Commissioners have certainly local representation capability but in any case it is possible to say that they are experts and professionals on valuation and even less on immovable property valuation that needs a special education, expertise and experience.

Tax rates, as seen in table 3 below, are differentiated according to properties and to their location. Article 8 of the PTL, modified in 2005 in order to compensate the greater need of revenues in big cities, stipulates that rates are increased by 100% in metropolitan municipalities. Regarding the minimum taxation provision of the article 8, the tax of the newly constructed building can be, in any case, less than its calculated land tax. The provision is applied during four years following the year of the completion of construction.

Table 3: Property Tax Rates in Turkey (‰)

	Rates in Ordinary Municipalities	Rates in Metropolitan Municipalities
Buildings:		
Housings	1	2
Business	2	4
Urban Land	3	6
Rural Land	1	2

Council of Ministers has competence to reduce rates to null (PTL art. 8 and art.18). The competence is exercised in 2006 (*Council of Ministers Decision no. 2006/11450, Official Journal no. 26391 of the 29.12.2006*) for a group of taxpayers who possessed a building or apartment as a single dwelling unit that do not exceed 200 square meters. In order to be eligible for the zero rate taxpayers should document that they do not have any income. Disabled, military veterans and widows and

orphans of soldiers and other that the only income is have pensions from social security institutions established by law, are also eligible for the zero rate, if the above determined conditions of size and sole dwelling are ensured. Taking into account all the eligibility conditions, it is seen that the "zero-rate" is a tax benefit for social purpose and the lawmaker with the Council of Ministers have an identification of those who need more social protection for tax purposes. this can be seen as an addition to the series of social protection measures in Turkish tax system.

Tax as mentioned above is a annual tax, payments are made in two installments: March-April-May-first period's and November 2nd period's installments. With the payment of the tax an additional contribution is levied simultaneously. The Contribution to the Protection of Immovable Cultural Heritage is levied as 10 % of the calculated and paid property tax. Based on the Cultural and Natural Heritage Act number 2863 modified with the law no. 5226 in 2005¹², this additional contribution's revenues are used as a source of funding available for the protection of the cultural heritage projects and distributed by governors to the municipalities within the jurisdiction according fairness principal.

Another specific payment rule is applied again as a tax benefit and is destined for restricted buildings and land uses. After restricted by law and by judicial or administrative decisions¹³, buildings and lands are still taxable but during the restriction order the one-tenth of the tax is paid, remaining nine-tenths are suspended. In case of the disposal of the real estate by sale, expropriation or grant, tax becomes due and payable if statute of limitations is not expired for the part of the tax. After the removal of restrictions on the decision of the estate tax will be paid out in full (*PTL article 30*).

II. Some Constitutional-Legal Issues of the Turkish Immovable Property Tax

1. Constitutionality of the Local Revenues

As a country where decentralizing reforms are increasing in scale, Turkey has been motivated by its desire to gain membership of the European Union, whose criteria for membership include respect for human rights. It is therefore within the framework of the European Charter of Local Self-Government, signed in 1988 and ratified in 1992, that this wide-ranging renovation of state structures – including new local

government laws and constitutional changes – is taking place (UCLG, 2008). The most important question arising from the property taxation is about the right of the municipalities to tax. That local authorities have no taxing rights. The sole exception of the rule is the property tax; because they are members of the local valuation commissions that fix the tax base the municipalities have in fact a partial power of taxation.

All the rates, including those for the property ownership tax, are fixed by the central government, in accordance with *article 73 paragraph 3* of the Constitution, which states that “*Taxes, fees, duties, and other such financial impositions shall be imposed, amended, or revoked by law*” and with the *article 73 paragraph 4* of the constitution which states that “*Council of Ministers may be empowered to amend the percentages of exemption, exceptions and reductions in taxes, fees, duties and other such financial impositions, within the minimum and maximum limits prescribed by law*”. Council of Ministers can be empowered by law, and within the limits laid down by law, to fix the exemptions, reductions and rates. Between 1980 and 1990, the Constitutional Court delivered several rulings which interpreted these constitutional provisions as meaning the termination of any local authority taxing right (UCLG, 2008). In addition, *article 127¹⁴* of the Constitution concerning local authorities stipulates, “*These administrative bodies shall be allocated financial resources in proportion to their functions*”. This latter disposition should be reconsidered with the fact that Turkey is one of the first countries¹⁵ that are signatories to the European Charter of Local Self Government adopted under the auspices of Council of Europe, drawing the principles of local governments that shall be recognized in national legislations and especially in the constitutions. *Article 9* of the Charter is about financial resources of the local authorities and stipulates some important financial dispositions:

1. “*Local authorities shall be entitled, within national economic policy, to adequate financial resources of their own, of which they may dispose freely within the framework of their powers.*”
2. *Local authorities' financial resources shall be commensurate with the responsibilities provided for by the constitution and the law.*
3. *Part at least of the financial resources of local authorities shall derive from local taxes and charges of which, within the limits of statute, they have the power to determine the rate.*
4. *The financial systems on which resources available to local authorities are based shall be of a sufficiently diversified and buoyant nature to enable them to keep pace*

as far as practically possible with the real evolution of the cost of carrying out their tasks.

5. *The protection of financially weaker local authorities calls for the institution of financial equalization procedures or equivalent measures which are designed to correct the effects of the unequal distribution of potential sources of finance and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility.*
6. *Local authorities shall be consulted, in an appropriate manner, on the way in which redistributed resources are to be allocated to them.*
7. *As far as possible, grants to local authorities shall not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of local authorities to exercise policy discretion within their own jurisdiction.*
8. *For the purpose of borrowing for capital investment, local authorities shall have access to the national capital market within the limits of the law."*

Even though Turkey, put reservation clauses to *paragraph 4, 6 and 7* of the Charter, the recent reforms are entitled to grant greater financial power to local municipalities, but more efforts are still needed about the taxing power.

On the other hand, a recent Constitutional Court's jurisprudence concerning the Municipal Revenues Law no. 2464 on 26.5.1981 highlights the question about the use of the power to tax. Constitutional Court's decision (*Constitutional Court, E: 2010/62 ve K:2011/175 of 29.12.2011, Official Journal no.28297 on 19.5.2012*) is about the advertising and commercials tax of the Municipal Revenues Law. Court's decided to the annulment of the article 96B of the Municipal Revenues Law, stipulating that local *"taxes and duties tariffs, other than those listed above, shall be determined, within the lower and higher limits specified in this Act, by municipal councils regarding the social and economic differences between the various districts"*. It is obvious that *article 96 B* of the Municipal Revenues Law is given to the municipal councils a taxation power that is not given by the *article 73* of the Constitution. Constitution reviews that the legality principal of the taxes main concern is to avoid any arbitrary use of the taxation power. Within the legality framework, explanatory and complementary regulative and administrative powers could be given to the execution, Council of Ministers. This delegation of taxation power is exclusive and exceptional. However, the power delegated to the municipal councils by article 96B is not explanatory and complementary nor regulative and administrative, but instead it is directly related to the determination of the amount of the tax contrary to the *article 73* of the Constitution and therefore Court decide to the annulment . The

Court deeming it necessary, decided to postpone the date of the entry into force of its decision. This date cannot be more than one year from the date of publication of the decision in the Official Journal, the decision about the *article 96B* of the Municipal Revenues Law enters into force on 19th May 2013.

2. Constitutionality and Legality of the Taxpayers Rights

Another constitutionality problem is linked to the taxpayers' rights. According to the above-mentioned methods of valuation of the property tax, municipalities are combining the tax value of land with the ordinary construction cost. The definite land tax values are handed on and publicly announced by the respective municipalities and communes who have any obligation of individual notification to taxpayers. Taxpayers need to obtain tax base information by themselves from the municipalities. In the administrative assessment procedure it is expected to sue against the assessed value. Nevertheless in *article 49 bis* of the TPC, the right to access to legal remedies by taking an action against administrative proceedings is drawn as a very limited action. Against the tax base valued by local commissions, only institutions, entities and the relevant district and village reeves may sue in the relevant tax court within 15 days. The value decision is not notified to the taxpayers-rural and urban land owners- does not have rights to seek a judicial review on the subject. Then one can ask that would it not be contrary to the Constitution that stipulates on *article 125* that "*Recourse to judicial review shall be available against all actions and acts of administration*"? Many lawyers brought up this topic already but so far, the claim of unconstitutionality of *article 49bis* had not found, until a recent Constitutional Court jurisprudence. A case was filed for the annulment and the stay of execution against the Commission's decision that was the basis of property tax. Constitutional Court decided on the meaning of the *article 49bis* was a "disallowance", for the persons or institutions, of any judicial review, thus unconstitutional (*Constitutional Court Decision, E.2011/38, K.2012/89 of 31.5.2012 published in Official Journal no. 28440 of 13.10.2012*). the Court underlined that the most effective and secure way of pursuing the ability of a person or institution to defend itself against to an injustice or to a damage, the legitimacy of taking action against to an unfair practice or the correction of the damages is to use its right to sue before the courts and stated that

is most notable requirement of the freedom to seek remedy. According to the Highest Court, this right is defined, in the disposition, partially and to the persons and institutions who were not taxpayers themselves. Local valuation commission decisions are administrative actions against which it should be taken in action in order to ensure the rights to seek legal remedy and to be in compliance with the rule of law- major constitutional principal.

Another legally problematic area concerning property tax is the assessment time limit (prescription period) regulation in PTL. The statute of limitations means being unable to sue because of failing to use the right to tax in a timely manner. Time limits eliminate the tax debt and therefore must be considered *sua sponte* (NAS, 2011). Assessment time limit of general tax law is 5 year following the next year of generation of the tax and is stipulated in the article 112 of PTC. Nevertheless PTL has an exception to the rule in the article 40 that for building and land taxes and their penalties if exist, the statute of time limitation begins he beginning of the year following the learning of the situation by the administration and not the following the year of the generation of the tax (which in that case the date of land or building acquisition). This exceptional disposition is in application convert to a non-application of the assessment time limits to the non-assessed and non-paid taxes, and therefore the property tax as a tax debt is never terminated. However, the general acceptance is that one of the reasons for the termination of a tax debt is the statute of limitations and the special property tax disposition is inconsistent with the purpose of the assessment time limits and legally damages property taxpayers to whom tax liability remains perpetual because of the non- application of the general statute of limitation.

Conclusion

Existence of property taxation is in every tax system including Turkish system important for several raisons. The tax as a major part of the local taxation is relatively easy to track down by land and building records by local authorities' and thus this immobility of the base secure a relative own source to them. However, the question is whether is the local authorities are constitutionally able to have their own taxing power. In Turkish case, it is difficult to have an affirmative answer to the question;

because constitutionally the power to tax is an exclusive legislative power drawn by *article 73 paragraph 3* of the Constitution of the Turkish Republic¹⁶. The legislature could delegate the power only to the executive i.e. Council of Ministers and if the delegation is authorize by the disposition of the law. So the delegation itself needs an legislative act *a priori*. On the other hand, the delegation of power is not a full delegation of the legislative powers. It is limited to certain subjects, such as exemptions, allowances, abatements and rates within the lower and topper limits determined by the dispositions of the delegation defined in a legislative act (*Constitution article 73 par. 4*). The partial delegation of the taxation power is relatively recent coming into force first in 1971 with a constitutional amendment to the prior Constitution of 1961¹⁷, and re-enter to the legislative system with the Constitution of 1982. In these constitutional framework it needs an Constitution dispose any delegation of taxation power to the local authorities i.e. to the municipalities, raison why it is needed to revisit the question. Two options seemed to be applicable: if the municipalities are and will be designed as a local authorities with relevant taxation powers the constitutional gap needed to be fill with an extension to municipal assemblies; if the legislation is willing to keep going with status quo in that case it is necessary to revisit all the existent dispositions inconsistent with the *article 73* of the Constitution.

*¹ Public Finance Department, Ankara University, Faculty of Political Sciences, Turkey

² Law no. 1319 on 29.7.1970 published in Official Journal no.13576, 11.8.1970.

³ FAO (2002) indicates that property tax has been known for at least three millennia.

⁴ In fact this criticism is not Turkish phenomena. In France the property taxation which held its own roots from the Ancient Régime at first and French Revolution later, the discussions about the archaism is very common. See for example BOUVIER (1993).

⁵ Turkish Civil Code (Law n.4721 accepted in 22.11.2001) is largely influenced by the Swiss Civil Code.. For more detailed information on Turkish property rights in general see ÖZTAN (2001).

⁶ The Council of State, as the highest administrative court in Turkey, is entitled to review the appeals brought against the judgments given *a priori* by administrative or tax courts. The administrative judicial system mostly inspired by the continental -French administrative courts is based on two levels: courts of first instance are administrative (in the number of 44

on Turkish soil) and tax courts (in the number of 33); second level jurisdictions are regional administrative courts (in the number of 28) or The Council of State functioning as appeal courts. Tax courts judgments are appealed in the Council of State considering the disputed tax base is over certain amount of money (26 950 TL or 15 000 \$ at 2.3.2013). In that case the first level tax courts sentence on plenary session. Tax actions whose subject is less than the limit, are resolved in single judge tax court and than can be taken to the regional administrative court for reviewing.

⁷ The Civil Code disposition in article 813 stipulates the operational and maintenance cost covered by the beneficial owner during the period of the enjoyment of the right.

⁸ Literally translated “*landed on one night*” the term “*gecekodu*” actually underlines and insinuates the precarity of the standards of living in the slum areas.

⁹ In a media analysis, 70% of the population in Ankara, 60 to 65 % in İstanbul, %50 in İzmir and in Adana, 40 % in Samsun and Erzurum and 30 % in Bursa and Diyarbakır are estimated living in slum areas. *Sabah*, 7.11.2011.

¹⁰ Official Journal no. 17354 of 29.5.1981.

¹¹ Law no. 5779 amended on 2.7.2008 concerning the general budget tax contribution to special provincial administrations and to municipalities, replacing the Law no. 2380 amended on 2.2.1981.

¹² Ministry of Tourism and Culture issued a Regulation for the implementation and application of the Contribution in 2005. See Official Journal no. 25875 of 13.4.2005.

¹³ Ministry of Tourism and Culture issued another regulation on restricted building, housing and land (official Journal no.19284 of 17.11.1986). Article 2 of the regulation have a definition of restricted building and land: “*In development plans, public buildings, facilities and schools, mosques, roads, squares, parking, green areas, children's playground, market place, lands since it is separated from the slaughterhouse and other public services are not allowed to work on the land-based and building that are not allowed to be changed and improved and also not allowed to have additions are considered restricted*”. In article 3 the restriction definition continues as follows: “*Urban lands in development plans, but not included in the development program, and therefore permitted to work on and recorded to the land registry such as temporary construction is considered restricted with no effect of temporary construction*”.

Registered as part of the natural and the cultural, archaeological sites, protected areas, sites and places included in the development plan for the purpose of protection of the area and therefore banned of the construction, are also considered restricted.

¹⁴ The article 127 of the Constitution concerning the local authorities is as follows as amended on July 23, 1995: “*Local administrative bodies are public corporate entities established to meet the common local needs of the inhabitants of provinces, municipal districts and villages, whose decision-making organs are elected by the electorate as described in law, and whose principles of structure are also determined by law.*

The formation, duties and powers of the local administration shall be regulated by law in accordance with the principle of local administration.

The elections for local administrations shall be held every five years in accordance with the principles set forth in Article 67. However, general or by-elections for local administrative bodies or for members thereof, which are to be held within a year before or after the general or by-elections for deputies, shall be held simultaneously with the general or by-elections for deputies. Special administrative arrangements may be introduced by law for larger urban centers.

The procedures dealing with objections to the acquisition by elected organs of local government or their status as an organ, and their loss of such status, shall be resolved by the judiciary. However, as a provisional measure, the Minister of Internal Affairs may remove from office those organs of local administration or their members against whom investigation or prosecution has been initiated on grounds of offences related to their duties, pending judgment.

The central administration has the power of administrative trusteeship over the local governments in the framework of principles and procedures set forth by law with the objective of ensuring the functioning of local services in conformity with the principle of the integral unity of the administration, securing uniform public service, safeguarding the public interest and meeting local needs, in an appropriate manner.

The formation of local administrative bodies into a union with the permission of the Council of Ministers for the purpose of performing specific public services; and the functions, powers, financial and security arrangements of these unions, and their reciprocal ties and relations with the central administration, shall be regulated by law. These administrative bodies shall be allocated financial resources in proportion to their functions”.

¹⁵ Charter is sometimes judged to be interfering with the national sovereignties and thus difficult to be apply fully. For example France as a signatory country, ratifies the Charter with many preservation clauses only on January 17th of 2007. See http://www.abgs.gov.tr/files/haberler/2011/yerel_yonetimler_ozerklik_sarti.pdf (12.3.2013)

¹⁶ Also the legislative power itself is define by article 7 of the Constitution as “*Legislative power is vested in the Grand National Assembly of Turkey on behalf of Turkish Nation. This power shall not be delegated.*” Turkey is govern by parliamentary democratic principles, the National Assembly is the sole legislative power.

¹⁷ Constitutional amendment with the Act no. 1488 on 22 july 1971.

PRISONER DISENFRANCHISEMENT: AN ARGUMENT FOR VOTING BY PRISONERS

Naman Mohnot

2nd year student

National Law University, Delhi, India

ABSTRACT

The right to vote and the right to public participation are affirmed in international law under both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). But many countries do not give this right to their prisoners, which is nothing but violation of their fundamental rights. In this paper, Researcher explore the different positions on the right to vote for prisoners and demonstrate that the legal position of world. The debate in much of the world has been around whether individuals who have been tried and convicted of a crime can be deprived of the right to vote. The UK is one of several European countries, including Armenia, Bulgaria, Estonia, Hungary and Romania, which automatically remove voting rights from sentenced prisoners, although remand prisoners still have the vote. Researcher has discussed international law with some relevant case laws. Researcher has also included current position of this issue. Researcher is not insisting that all prisoners have the right to vote, declaring only that it is a blanket ban on such a right that breaches the human rights code.

Three to four keywords - Human rights, Prisoners, Voting rights.

PRISONER DISENFRANCHISEMENT: AN ARGUMENT FOR VOTING BY PRISONERS

Naman Mohnot*

The author by way of this paper has attempted to argue that disenfranchisement of prisoners often tantamounts to their civil death. In pursuance of the same, the author has attempted to correlate diverse strands of thought such as the principle of universal suffrage, qualifications for voting as well as the comparative positions in other countries. The author has then attempted to correlate the aforementioned strands of thought to the Indian position and the effect of international instruments on the same in an effort to answer the basic question as to whether prisoner disenfranchisement qualifies as a reasonable restriction to universal suffrage

I. INTRODUCTION

Suffrage is a civil right to either vote or exercise that right. From time immemorial, the Franks of ancient France have used the word suffrage to indicate political franchise.¹ The legitimacy of democratic government is usually considered to be derived primarily from suffrage. One of the types of suffrage is 'Universal Suffrage.' It is described as a situation where the right to vote is not restricted on the basis of race, sex, belief or status.²

In the ancient period prisoners who were convicted were denied civil rights. The basis of justification was that a person who has committed an offence divests himself of property and legal rights.³ The prisoner who was not awarded death penalty but nevertheless he would suffer 'civil death' The main idea behind this was to:

*2nd year student of National Law University, Delhi.

¹ *Political History of France*, available at [www.britanica.com/political history of France](http://www.britanica.com/political-history-of-france) (Last visited on November 26, 2006)

² *Prisoners / Suffrage*, available at <http://en.wikipedia.org/wiki/Suffrage> (Last visited on November 9, 2006)

³ See E. COKE, 1 INSTITUTE OF LAWS OF ENGLAND, n. 41a.

*Emulate the result that natural death would produce, e.g. Succession would be opened. The civil death would not transmit upon intestacy or by will or receive gifts. All family and political rights were forfeited.*⁴

Removal of prisoner's right to vote is a very controversial issue both internationally and nationally. This paper traces the history of the Indian provisions and examines their effects. Arguments offered on both sides of the debate in India will be considered, before looking at similar debates, and their resolutions as per the constitutional provisions and by way of decisions in other countries such as Australia, Canada, United States and U.K. Subsequently, the Constitution of India shall be examined to find whether it affords protection to the right to vote and whether such protection extends to prisoner's right to vote.

II. PRISONERS DISENFRANCHISEMENT IN INDIA

Unlike many countries, India has disenfranchised sentenced prisoners. India being a common law country, the Commonwealth Franchise Act, 1902 was applied disqualifying the convicted persons who were undergoing sentence from voting. The provisions remained substantially the same when the Commonwealth Electoral Act, 1918 was enacted. The position remained unaltered until the Representation of People Act, 1950 and the Representation of Peoples Act, 1951 were enacted.

II. THE PRINCIPLE OF UNIVERSAL SUFFRAGE

One of the requirements for a free and fair election is universal suffrage – that is, the rule that all adults have an equal opportunity to vote. However, this principle has never been interpreted to mean that everyone in the community must have the right to vote. No democratic nation has ever permitted minor children to vote, and no democratic theorist has ever called their exclusion undemocratic. Most democratic nations also exclude aliens,⁵ people confined to mental institutions, and criminals in prison; and few people consider this to violate the principles of universal suffrage⁶. To further elaborate on the same, the eligibility requirements for voting under contemporary laws have been discussed in the following sections.

⁴ M.R. Damaska, *Adverse Legal Consequence of Commutation and Their Removal- A Comparative Study*, 59 J. CRIM. L. 351 (1968).

⁵ David. C. Earnest, *Neither Citizen nor Stranger: Why States Enfranchise Resident Aliens*

World Politics –MUSE, Volume 58, Number 2, January 2006, pp. 242-275at 243.

⁶ *Id*

III. QUALIFICATION FOR VOTING

A. CITIZENSHIP

Most democratic nations permit only citizens to vote but do not make any further distinction between native-born and naturalized citizens⁷. India follows single citizenship⁸. Articles 5 to 11 of the Constitution of India lay down provisions as to who are the citizens of India at the commencement of the Constitution, as also various classifications such as ‘by domicile’, ‘by migration’ and ‘by registration’.

B AGE

According to Article 326 of the Constitution of India the right to vote is a constitutional right. A person who has reached the age of eighteen years is entitled to vote. A person may however be disqualified to vote by a statute. In *P. Nalla Thampy v B.L.Shankar*⁹, the Supreme Court observed:

Outside of statute, there is no right to elect, no right to be elected. Statutory creations they are, and, therefore, subject to statutory limitations.

C. RESIDENCE

Most democratic systems also require voters to live in the country and in their particular voting districts for certain periods of time before they can vote.

D. REGISTRATION

Only a citizen of India can be enrolled as a voter. When the name of a person is to be entered into the electoral roll, he may be required to satisfy the Electoral Registration authority that he is a citizen of India. But if the name of the person has already been entered in the electoral roll, his name cannot be removed from the roll on the ground that he is not a citizen of India unless the concerned officer has given him a reasonable opportunity of being heard according to the principles of the natural justice.¹⁰

No person is entitled to be registered in the electoral roll for more than once. Further, any person convicted of any specified offences punishable with imprisonment, or who, upon the trial of an election petition, is found guilty of any

⁷ *Id*

⁸ M. P. JAIN, INDIAN CONSTITUTIONAL LAW 927 (2003).

⁹ P. Nalla Thampy vs. B.L. Shankar, AIR 1984 SC 135

¹⁰ Lal Babu Hussain vs. Electoral Registration Officer, AIR 1995 SC 1189; (1995) 3 SCC 100.

corrupt practice, shall be disqualified for voting at any election for 6 years. This disqualification can be removed by the election commissioner for reasons to be recorded by in writing. Subject to these conditions every one who is above the age of 18 years is eligible to be registered on the electoral roll for any constituency¹¹.

IV.COMPARATIVE PROVISIONS IN OTHER COUNTRIES

A. UNITED KINGDOM

The European Court of Human Rights in *Hirst vs. United Kingdom* (No. 2)¹² pronounced in March, 2004, has radically altered the position in the United Kingdom. That case concerned the interpretation of Article 3 of the First Protocol to the European Convention on Human Rights.¹³ As per U.K. law, a prisoner undergoing sentence is legally incapable of voting at any parliamentary or local government elections¹⁴. The validity of that provision was challenged in *Hirst vs. Attorney General*¹⁵. The matter was first heard by the domestic English Court; Lord Justice Kennedy observed that the effect of Article 3 of the Convention was that, if a prisoner was to be disenfranchised, it must be, “*in the pursuit of a legitimate aim*”¹⁶. His Lordship found that the question of the legitimacy of the aims in the case was best left to the legislature. When the matter went before the European Court of Human Right, the court, comprising of seven judges, agreed that the right to vote was subject to exceptions that were imposed in pursuit of a legitimate aim, but held that the English disenfranchisement provision violated Article 3 of the European Convention.

The Lord Chancellor had said: *The ruling of the human rights court against U.K. laws banning prisoners from elections does not mean that all inmates will get the right to vote, The European Court of Human Rights in Strasbourg that banning ex-inmate John Hirst from the polls had breached his rights to free elections.*

The basic human right to vote should not be denied to any prisoner no mater how heinous a crime he has committed. Mr. Hirst had first challenged the vote ban in the High Court, which rejected his plea on the ground that the Representation of Peoples Act, 1983 was incompatible with the Human Rights

¹¹ The Representation of Peoples Act, 1951.

¹² 74025/01 ECHR 2004

¹³ Article 3 of the First Protocol to the ECHR: ‘*The high contracting parties to hold free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature*’

¹⁴ Sec. 3 (1) of Representations of Peoples Act, 1983 (UK): ‘*A convicted person during the time that he is detained in a penal institution in pursuance of his sentence is legally incapable of voting at any Parliamentary or local government*’

¹⁵ *Hirst vs. Attorney General*, (2001) EWHC Admin 239, para 40

¹⁶ *Id.*

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Convention. However, the Strasbourg court, by a majority vote of 12 to 5, ruled in his favour. The Court stated that that his right had been violated under the Convention on Human Rights, to which Britain is a signatory, and which guarantees the “right to free elections”.

According to the judges of U.K., this applies equally to prisoners, describing the voting ban as a “*blunt instrument*” which affected a significant category of people in a discriminatory way¹⁷.

According to the Director Juliet Lyon of Prison Reform Trust (PRT)

*Prisoner should be given every opportunity to pay back for what they have done, take responsibility for their lives and make plans for effective resettlement and this should include maintaining their rights to vote.*¹⁸

With regard to the second object the Human Rights Court followed the reasoning of the Canadian Supreme Court in *Sauve vs. Canada* (Chief Electoral Officer)¹⁹

With respect to the first objective of promoting civil responsibility and respect for the law, denying penitentiary inmates the right to vote is more likely to send messages that undermines respect for the law and democracy than enhance those values. The legitimacy of the law and the obligation to obey the law flows directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

B. UNITED STATES

In the United States the prisoners do not have the right to vote. The leading case, *Richardson vs. Ramirez*²⁰ was decided in 1974. The Supreme Court’s decision upheld a provision under the laws of California which disenfranchised ‘persons convicted of an “infamous crime”’. It is worth noting that this provision not only applies to the prisoners undergoing sentence but also those who have already completed their sentence and have been released. The majority decision was based on the Fourteenth Amendment to the United States Constitution Article

¹⁷ Hirst vs. Attorney General, (2001) EWHC Admin 239, para 42

¹⁸ *Id.*

¹⁹ *Sauve vs. Canada* (Chief Electoral Officer) [2002] 3 SCR 519

²⁰ *Richardson vs. Ramirez*, 418 US 24 (1974)

2²¹, which contemplated those prisoners who committed an offence of ‘*rebellion or other crimes*’ might be disqualified from voting. The majority regarded the question as one for the legislature, and observed:

*Pressed upon us by the respondents, and by amicus curiae, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he is returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum, which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view, which they advocate, is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view. And if they do not do so, their failure is some evidence, at least, of the fact that there are two sides to the argument*²²

A reasonable limit is justified in a free and democratic society. The question before the court was to decide was whether disenfranchisement of prisoners could be considered a reasonable restriction. The argument put by the state was that the legislature was obliged, “to keep balance with the competing claims of inmates to vote with the claims of the society at large to preserve the sanctity of the franchise and to sanction offenders for violating the social contract.”²³ The next point argued by the state was the need to preserve the sanctity of the franchise based on “the requirement for a liberal democracy to have a ‘*decent and responsible citizenry*’, which will voluntarily abide by the laws or at any rate most of them.” The Courts of Appeal rejected all of the Crown’s stated objectives, stating:

If the purpose is to ensure a decent and responsible citizenry, the legislation is both too broad and too narrow. It is too broad in that the legislation catches not only the crapulous murderer but also the fine defaulter who is in prison for no better reason than his inability to pay..... With regard to the alleged objective of punishment, the legislation bears no discernable relationship to the quality

²¹ U.S. CONST., available at <http://docs.law.gwu.edu/facweb/jsiegel/home/constitution.htm> (last visited Jan. 4, 2007).

²² *Richardson*, supra note 20 at 55

²³ *Richardson vs. Ramirez* 336 (1992) 90 DLB (4th) 330

*or nature of the conduct being punished. Indeed, on a reading of the text of s. 51 (e) it is difficult not to conclude that, if it is imposing punishment, such punishment is for imprisonment rather than for the commission of an offence.*²⁴

C. CANADA

Since 1982, the Canadian Charter of Rights and Freedoms contain an express right to vote. A citizen of Canada has the right to vote in an election and to be qualified for membership in their legislative houses,²⁵ subject to reasonable limits prescribed by the law. In *Belczowski vs. The Queen*²⁶, this right to vote and the reasonable limits to which it is subject was in question. Section 51 (e) of the Canada Elections Act which did not allow the right to vote was challenged, *Every person undergoing punishment as an inmate in any penal institution for the commission of any offence* was held invalid under Section 3 of the Charter. The relief sought was granted at the first instance.

A new disqualification was introduced by the legislature of Canada in response to the *Belozowski* position by setting up criteria, which disqualifies a person who is imprisoned for a period of two or more years²⁷. This provision was tested in the 1995 case. The fate of the case was same as its predecessor, and in the first instance it was struck down as being in breach of Section 3 of the Canadian Charter of Rights and Freedom. The Crown was successful in appeal to the Federal Court of Appeals, but eventually the provision was held invalid by a ratio of five to four in the Supreme Court of Canada. The minority view was that the case rested upon, “*philosophical, political and social considerations which are not capable of scientific proof*”. The minority thus concluded that the court should uphold the provision as constitutional because the social and political philosophy advanced by Parliament reasonably justified a limitation of the right to vote. The majority view given by Chief Justice was thus:

In 2002 the Supreme Court of Canada ruled out that the section of the Canada Election Act that prevented inmates serving sentence of more than two years from voting in federal elections was against the Canadian Charter of Rights and Freedoms. All incarcerated electors may now

²⁴ *Id.* at 341 – 342

²⁵ Canadian Charter, section 3: ‘*Every citizen of Canada have the right to vote in an election of the House of Commons or of Legislative Assembly and to be qualified for membership therein.*’

²⁶ *Belczowski vs. The Queen* 330 (1992) 90 DLR (4th)

²⁷ Canada Election Act, 2000, sec. 4C: ‘*Every person who is imprisoned in a correctional institution serving a sentence of two years or more*’

*vote in Federal elections and referendums*²⁸ Presently, all prisoners in Canada are entitled to vote, and the Canada Elections Act contains various provisions to facilitate the prisoners' franchise. Near about 35,000 inmates in Canada became eligible to vote in 2006.

D. AUSTRALIA

The Australian Constitution does not guarantee universal suffrage. Australia has no restriction on prisoners' voting. The Constitution does expressly provide guarantee to the extent that those persons who have or have acquired a right to vote in state elections, shall not be prevented from voting in federal elections.²⁹ This provision could have had the effect of forcing the Commonwealth Parliament to prescribe qualifications for electors that were consistent with most liberal of the equivalent state provisions. On one interpretation of S. 41 of the Constitution, the federal disenfranchisement provision, because it purports to prevent South Australian prisoners from voting at federal elections, would be invalid. This is not; however, the effect of the section as it has been interpreted by the High Court. Rather, the provision has been rendered obsolete by a High Court decision to the effect that it applies only to those who had a right to vote in state elections at the time of federation³⁰. Because the decision has since been reaffirmed,³¹ it seems unlikely that the High Court would revise its view. If the Constitution is to have a bearing on prisoner disenfranchisement, it will be because it contains some relevant implied right or implied restriction on the legislative power of the Commonwealth.

The text and structure of the Australian Constitution include provisions for a system of representative government. Indeed, according to Justice Isaacs: *the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution*³². This requirement for representative government is brought about, in no small part, by

²⁸ Canada Online, *About Canadian Government*, <http://canadaonline.about.com/cs/election/a/electionfirsts.htm> (last visited Dec. 31, 2006).

²⁹ CONSTITUTION OF AUSTRALIA, Section 41

³⁰ In *R. vs. Pearson*; *Ex-parate Sipka* (1983) 152 CLR 254.

³¹ *Id.*

³² *Federal Commissioner of Taxation v. Munro*, 178 (1926) 38 CLR 153.

the fact that Section 7 of the Australian Constitution³³, dealing with the composition of the Senate, and section 24 of the Australian Constitution,³⁴ providing for the composition of the House of Representatives, both require that the members of those houses are to be *'directly chosen by the people'*. It is established that those provisions entrench in the Constitution a system of representative government³⁵. In *Australian Capital Television Pvt. Ltd v. The Commonwealth*,³⁶ it was accepted by the High Court that representative government requires freedom of communication on matters relevant to public affairs and political discussion, and hence that such freedom was implied in the Constitution. From one angle, the act of voting might be seen as the ultimate mode of political communication, and hence it is arguable that a right to vote falls within the Constitutional implication discussed in *ACT v. The Commonwealth*.³⁷ It seems likely, however, that, given the phrase *'chosen by the people'*, the right to vote can itself be directly implied from the constitutional requirement for representative government. Consistent with the implication of a right to vote are the comments of Chief Justice Mason: *'The very concept of representative government and representative democracy signifies government by the people through their representatives'*. According to Justices Deane and Toohey, *'the powers of government belong to, and are derived from,*

³³ See M. V. PYLEE, CONSTITUTIONS OF THE WORLD 46 (2000).

Section 7 – The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. But until the Parliament of the Commonwealth otherwise provides, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provisions the State shall be one electorate.

Until the parliament otherwise provides there will be six senators for each original State. The Parliament may make laws increasing or diminishing the number for senators for each State, but so that equal representation of several original States shall be maintained and that no Original State shall have less than six senators. The senators shall be chosen for a term of six years, and the names of senators chosen for each State shall be certified by the government to the Governor-General.

³⁴ See M. V. PYLEE, CONSTITUTIONS OF THE WORLD 46 (2000).

“Section 24 – The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. The number of members chosen in several States shall be in proportion to the respective members of their people, and shall, until the Parliament otherwise provide, be determined, whenever necessary in the following manner:

A quota shall be ascertained by dividing the number of people of the Commonwealth, as shown by the latest statistics by the Commonwealth, by twice the number of the Senators;

The number of members to be chosen by each State shall be determined by dividing the number of people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State. But notwithstanding anything in this section, five members at least shall be chosen in each Original State.”

³⁵ *Lange v. Australian Broadcasting Corporation*, 104 (1997) 145 ALR 96 .

³⁶ *Australian Capital Television Pvt. Ltd v. The Commonwealth*, (1992) 117 CLR

106.

³⁷ ACT v. The Commonwealth, 65 CLR 373 (1942).

the governed, that is to say, the people of the Commonwealth'. A Judge of the High Court, Justice Kirby, writes: 'it seems to me distinctly arguable that, in Australia, there may be a basic right to vote implied in the text of the Constitution itself'³⁸.

Any right to vote implied in the Constitution would not, however, be unqualified. The Constitution quite clearly provides for the Commonwealth Parliament to legislate with respect to the qualification of electors.³⁹ In addition the term 'chosen by the people' implies two qualifications: that electors would possess, firstly, the ability to make a meaningful choice, and secondly, that they qualify as 'people' of the Commonwealth or, in the case of the Senate, of the relevant State. It might also be argued that the term 'chosen by the people' must be satisfied by less than universal suffrage because many people were excluded from the franchise, including, in many states, women, and aborigines when the federation came into being. If that argument were to be accepted, then the Parliament's power to exclude voters would be very wide indeed. There are grounds, however, to suppose that the High Court might, in interpreting the phrase 'chosen by the people' accord it a more contemporary contextual setting:

The words 'chosen by the people of the Commonwealth' fail to be applied to different circumstances at different times and at any particular time the facts and circumstances may show that some or all members are not, or would not in the event of an election, be chosen by the people within the meaning of these words in s. 24. At some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree. It cannot be determined in the abstract. It depends in part upon the common understanding of the time on those who must be eligible to vote before a member can be described as chosen by the people of the Commonwealth. For instance, the long established universal adult suffrage may now be recognised as a fact and as a result it is doubtful whether, subject to the particular provision in s. 30, anything less than this could now be described as a choice by the people.⁴⁰

³⁸ See J.M. Kerby, *Upholding the franchise - Contrasting Decision in Philippines, U.S and Australia*, 21 AUSTRALIAN BAR REV. (2001).

³⁹ Section 30 & 51 (xxxvi).

⁴⁰ Attorney General (Ch) (Ex. Rer. Mekenlay) vs. The Common Wealth, (1996) 135 CLR 1, 35 & 36

Similar sentiments were expressed by a majority in *McGinty*⁴¹ by Justice McHugh. In *Langer v. The Commonwealth*,⁴² Justice Gaudron expressed the view that:

Notwithstanding the limited nature of the franchise in 1901, present circumstances would not, in my view, permit senators and members of the House of Representatives to be described as 'chosen by the people' within the meaning of those words in Sec. 7 and 24 of the Constitution if the franchise were to be denied to women or to members of a racial minority or to be made subject to a property or educational qualification.

If the Court adopted this approach, in determining what constituted a choice by the people in contemporary terms, it might have regard to overseas domestic provisions, as discussed above, and also to relevant international laws and principles.

V. INDIAN POSITION

The Preamble of the Constitution declares India to be a Democratic Republic. Democracy is the basic feature of the Constitution and it can be sustained only through free and fair elections. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity. It is the cherished privilege of the citizen to participate in the election process, which makes a person feel in a seat of power⁴³. India has adopted adult suffrage as basis of election to the Lok Sabha and the state Legislative Assemblies. Every citizen who has reached the age of 18 years has a right to vote without any discrimination.

The Indian courts often refer to international instruments on human rights while interpreting the meaning and scope of statutory provisions. The modern effort towards what Winston Churchill called “enthronement” of rights of men began with the founding of the United Nations.⁴⁴ Indian courts have acceded to the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights⁴⁵ (but not the optional protocol) on 27th March 1979, subject to certain declaration that set out as to how it would apply certain provisions of the Covenants.

Debarring persons in judicial custody is not unconstitutional. A person who is in prison for his own conduct and is, therefore, deprived of his liberty

⁴¹ *Id.*

⁴² *Langer vs. Commonwealth*, 424 (1996) 134 ALR 400

⁴³ M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 941 (2006)

⁴⁴ P. CHANDRASEKHAR RAO, *THE INDIAN CONSTITUTION AND INTERNATIONAL LAW* 139 (1993).

⁴⁵ U.N.Doc.ST/LEG/SER.E/10, 124-125

during the period of his imprisonment cannot claim equal freedom of movement, speech and expression⁴⁶. Restrictions on voting of persons in prison result automatically from his confinement as a logical consequence of imprisonment. The object is to keep the person with criminal background away from the election scene and therefore, a provision imposing restriction on a prisoner to vote cannot be called unreasonable⁴⁷.

Preventive detention differs from imprisonment on conviction, or during the investigation of the crime, and the same permits for the separate classification of the detainee under preventive detention.⁴⁸ In *Anukul Chandra Pradhan vs Union of India*,⁴⁹ the Supreme Court upheld the validity of the provisions of section 62(5) of the Representation of Peoples Act, 1951⁵⁰ on two grounds; firstly that Article 14 does not affect it, and secondly the Court observed:

*The right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute prescribing the nature of the rights to elect cannot be made with reference to fundamental rights in the Constitution. The very basis of challenge to the validity of sub sec (5) of sec 65 of the Act is therefore, not available and this petition must fail.*⁵¹

Section 62 (5) of The Representation of Peoples Act, 1957, debar a person to vote in an election if he is imprisoned. Proviso to Sub-section (5) carves out an exception for a person subject to preventive detention under the law for the time being in force. The Court in this case held that the classification made is not violative of Article 14. It also does not violate Article 21 on the alleged ground that the restriction on prisoner's right to vote denies dignity of life. Therefore, classification made for persons in preventive detention is reasonable.

⁴⁶ *A. K. Gopalan vs State of Madras*, AIR 1950 SC 88.

⁴⁷ See D. J. DE, INTERPRETATION AND ENFORCEMENT OF FUNDAMENTAL RIGHTS, 629 (2000)

⁴⁸ *Id.*

⁴⁹ AIR 1997 SC 2841; (1997) 6 SCC

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⁵⁰ Section 62 (5) of the Representation of Peoples Act, 1951: 'No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police. Provided that nothing in the sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.'

⁵¹ *Id.*

Article 19 (1) (d) of the Constitution of India⁵² guarantees to every citizen of India the right to move freely throughout the territory of India and Article 19 (1) (e)⁵³ guarantees to the citizen of India the right to reside and settle in any part of India. These rights are interrelated. These rights are, however, not absolute and they are subject to Article 19 (5)⁵⁴ of the Constitution which provides that the state may impose reasonable restrictions on these rights by law in the interest of the general public or for the protection of the interest of any scheduled tribe. A citizen has the right to move from one State to another. He also has the freedom to move from one part of the State to another.

When an offender is sentenced to imprisonment he loses his right to movement and residence as a result of such confinement in prison.. In *Sunil Batra vs. Delhi Administration*,⁵⁵ it was held that the restriction imposed on a prisoner under Sec. 30 (2) of the Prisons Act, 1894⁵⁶ was not unreasonable as the restriction is imposed keeping in view the safety and security of the prisoners and the prison, and the same could not be treated as being violative of Article 19 (1) (d) of the Constitution.

It appears from the discussion, that Supreme Court has omitted to give due regard to the provisions of Articles 325 and 326. Article 325, does not exclude membership on the ground of religion, race, caste or sex. Article 326 is related to elections to the House of the people and State legislative assemblies to be on the adult suffrage. The right to vote is neither a common law right nor a fundamental right, and it is also not purely a statutory right either. It is more substantive as the Right to vote is not a gift of the legislature but flows from the Constitution. Free and fair election has been declared basic feature of the Constitution.⁵⁷

VI. IMPACT OF INTERNATIONAL INSTRUMENTS/ LAW

The Indian courts often refer to international instruments on human rights while interpreting the meaning and scope of statutory provisions. The modern efforts towards Winston Churchill called “enthronement” of rights of men

⁵² CONSTITUTION OF INDIA art 19 (1) (d)

⁵³ *Id.*.

⁵⁴ *Id.*.

⁵⁵ *Sunil Batra vs. Delhi Administration* AIR 1980 SC 1597.

⁵⁶ Section 30. Prisoners under sentence of death.— (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailer and all articles shall be taken from him which the Jailer deems it dangerous or inexpedient to leave in his possession.(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed, by day and by night, under the charge of a guard.

⁵⁷ M.P. JAIN, INDIAN CONSTITUTIONAL LAW 943 (4th ed. 2003)

with the founding of United Nations.⁵⁸ In *New Crest Mining vs. Commonwealth*⁵⁹ Justice Kirby observed, that the principle applies equally to the interpretation of constitutional law, as to common law⁶⁰. Article 25 of the ICCPR states:

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*⁶¹

The distinctions mentioned in Article 2 are distinctions ‘of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The term ‘other status’ could arguably include persons serving sentences of imprisonment. The United Nations Human Rights Committee had previously expressed a contrary view that Article 25 does not prevent states from having a non-discriminatory disenfranchisement provision.

More recently, however, the UNHRC has commented, in relation to the UK provision concerning an old law that convicted prisoners may not exercise their right to vote. The Committee has stated that it fails to discern the justification for such a practice in modern times considering that it amounts to an additional punishment and that it does not contribute towards the prisoner’s reformation and social rehabilitation which is contrary to Article 10, paragraph 3, read in conjunction with article 25 of the Covenant. State parties should therefore reconsider laws depriving convicted prisoners of right to vote.⁶² Article 10(3) of the ICCPR provides: ‘*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*’ This is relevant in the present context because it affords primacy to the aim of rehabilitation, whereas those opposed to voting rights for prisoners often assign punishment and deterrence as objects of equal importance.

The International Convention on the Elimination of All Forms of Racial Discrimination, to which India is a party, is also relevant in this context. The Convention requires states to guarantee to everyone, without distinction as to race, political rights, the right to vote and to stand for election, on the basis of

⁵⁸ P. CHANDRASEKHAR RAO, THE INDIAN CONSTITUTION AND INTERNATIONAL LAW 139 (1993)

⁵⁹ 657-8 (1997) 190 CLR 513.

⁶⁰ *Id.*

⁶¹ Article 25 ICCPR: ‘*Every citizen shall have the right and the opportunity, without unreasonable restriction: (a) To take part in the conduct of the public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the by the electors; (c) To have access, on general terms of equality, to public services in the country.*’

⁶² CCPR/CO/73/UK

universal and equal suffrage.⁶³ The Convention also obliges states to amend, rescind or nullify any law that has the effect of creating or perpetuating racial discrimination, or of strengthening racial division.⁶⁴ Because of the disproportionate effect that prisoner disenfranchisement has on indigenous Indians: it is arguable that such disenfranchisement conflicts with India's obligations under the Convention.

The principles recognised in the international instruments mentioned here are consistent with the approaches taken in Canada and the United Kingdom (in light of the *Hirst* judgment), and that collective approach may lead the Courts of different countries towards a conclusion that the constitutional requirement for choice by the people is akin to a requirement for universal suffrage, subject to the exceptions mentioned above, and discussed below.

VII. IS PRISONER DISENFRANCHISEMENT A 'REASONABLE RESTRICTION' TO UNIVERSAL SUFFRAGE?

Indian laws that are inconsistent with rights implied by the text of the Constitution can be valid if they satisfy two conditions. First, that the object of the law is compatible with the maintenance of the constitutionally prescribed system of representative government. Secondly, that the law is reasonably appropriate and adapted to achieving that legitimate object.⁶⁵ This requirement is, in effect, similar to the test for reasonable exceptions to the Canadian right to vote, and to the 'legitimate aims' exception to the right in the United Kingdom and Europe. Hence in testing any Australian disenfranchisement provision, one can begin with an assessment of its object.

It is no easy task to establish the purpose or object of laws for the disenfranchisement of prisoners. As was discussed in relation to other domestic provisions above, some of the oft invoked reasons are firstly, promoting civic responsibility and respect for the law, secondly, punishment, and thirdly, deterrence. In the Canadian case of *Sauve v. Canada*⁶⁶, the majority held that disenfranchisement attaching to prisoners serving two years or more was not rationally connected to the object of punishment. That finding certainly seems true of the proposed Indian provision: to remove the right to vote from all those serving a sentence. When considering punishment as an object, recall also the requirement in Article 10(3) of The ICCPR: '*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*' This is more consistent with placing rehabilitation above deterrence, and accordingly with an inclusive approach to prisoners in the context of political participation.

⁶³ Article 5 of ICERD,

⁶⁴ Article 2 of ICERD

⁶⁵ 108 (1997) 145 ALR 96

⁶⁶ *Sauve v. Canada*, [2002] 3 SCR 519

As for the assertion that prisoner disenfranchisement can ‘enhance civil responsibility and respect for the rule of law’,⁶⁷ the argument was rejected in Canada and Europe in *Sauve* and in *Hirst* respectively, the respective Courts noting that the provisions undermine respect for the rule of law by detracting from the legitimacy of the legislature from which they emanate. At least it can be said, where prisoners have the franchise, that their fate is sanctioned by a political process in which they continue to play a part. That is a situation more likely to inspire respect than one that separates the prisoner from political society. Again the provision fails to demonstrate a sufficient connection to the object.

VII. CONCLUSION AND SUGGESTIONS

The requirements of the Indian Constitution for representative government are open to be interpreted so as to protect the right of Indians to vote in elections. The proposed provision to remove the right to vote from all prisoners serving a full-time sentence of imprisonment arguably conflicts with the Constitutional requirement, and would accordingly, be liable to be held invalid if challenged in the Court.

There are a variety of ways in which enfranchisement of prisoners could be achieved in practice. Polling stations could be set up in the prisons or special votes could be provided to prisoners. Prisoners are literally a captive population, living in a disciplined and closely monitored environment, regularly being counted and recounted. The Election Commission should have little difficulty in ensuring that those who are eligible to vote are registered and given the opportunity to vote, and achieving the objective of an easily managed poll on the respective Election Day.

⁶⁷ *Hirst vs. United Kingdom*, 2000 EWHC Admin 239.

OFFENCES RELATING TO DECENCY UNDER ISLAMIC LAW AND ITS PRACTICE IN MALAYSIA^{*}

Farheen Baig Sardar Baig

Ahmad Ibrahim Kulliyah of Laws

International Islamic University Malaysia

Abstract: *Islam highly emphasises on marriage as it is an effective means whereby one can lead to a virtuous life free from immorality and emotional inhibition. It is a tazir offence for a man to be alone with a woman who is neither married to him nor is related to him at the degree of mahram, in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in an immoral act. Likewise, zina or illicit sexual intercourse between a man and a woman who are not married to each other, is regarded as a sinful act and hence, forbidden in Islam. Severe punishment is prescribed for performing such an act. In the same vein, exposing the attractive parts of the body, walking or talking in a seductive manner, a woman displaying her ornaments, wearing revealing clothes, among other is prohibited in Islam. It may be added that a male person who wears a woman's attire and poses as a woman for immoral purposes in any public place would be deemed to have committed an offence under the Syariah criminal offences enforced in Malaysia. Again, any person who acts or behaves in an indecent manner in any public place shall be guilty of an offence. As from the above, Islam places high importance to decency and the upholding of moral values because it aims at maintaining the integrity of the society as a safe place to raise children and maintain lineage. Hence, this paper examines the offences relating to decency under Islamic law and with reference to its application in Malaysia.*

Keywords: Offences relating to Decency, Syariah Criminal Offences, Prohibition of Immoral Acts

Marriage lead a virtuous life free from immorality and emotional inhibition

The Quran stresses upon the believer to marry as it is the most effective means whereby one can lead a virtuous life free from immorality and emotional inhibition. In the Quran, chapter 2 verse 187, Allah (s.w.t) says, which may be translated as: "They (your wives) are as a garment to you, and you as a garment to them." The husband and the wife are for mutual support, comfort and protection, complementing each other as garments fit into each other. According to the Shafii school, there are five requirements which are fundamental or essential for a valid Muslim marriage, namely: (a) the offer or the *ijab* of one contracting party; (b) the acceptance or *qabul* of the other party; (c) the offer and acceptance occurs at the same meeting before two witnesses, who have to be male, sane, adult and Muslims; (d) the acceptance must be declared in a clear and unequivocal manner and both witnesses must be satisfied before the acceptance is declared valid; and (e) there must be a *wali* or a

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guardian for marriage. The *wali* is usually the father of the girl. He may also be the paternal grandfather, the brother or uncle. In the absence of these persons, the *Kadi* may step in on behalf of the Ruler of the State as the *wali raja*.¹

Apart from the above, Allah (SWT) commanded the believing men and women alike to lower their gaze together with His command to guard their sexual parts: "Tell the believing men that they should lower their gaze and guard their sexual organs; that is purer for them. Indeed, Allah is well acquainted with what they do. And tell the believing women that they should lower their gaze and guard their sexual organs, and not display their adornment, except that which is apparent of it; and that they should draw their head-coverings over their bosoms, and not display their adornment except to their husbands or their fathers or their husbands fathers, or their sons or their husbands sons, or their bothers or their brothers sons or their sisters sons, or their women, or those whom their right hands posses, or make servants who lack sexual desire, or children who are not aware of womens nakedness; and that they should not strike their feet in order to make known what they hide of their adornment" (chapter 24 verses 30-31).

Guarding of sexual organs must be preserved without any leeway. The Prophet (SAW) said; "The eyes also commit *zina*, and their *zina* is the lustful look" (Bukhari). It is also forbidden that any person should look at the *awrah* of another, whether of the same or the opposite sex, and whether with or without desire. Again, the Prophet (SAW) said; "A man should not look at the *awrah* of another man, nor a woman of a woman, nor should a man go under one cloth with another man, not a woman with another woman" (Muslim). For a man, the *awrah* is from his navel to his knee, while a woman's *awrah* is her entire body except only her face and hands. Exposing the attractive parts of the body, walking or talking in a seductive manner, displaying her ornaments, wearing revealing clothes, among others are prohibited in Islam as these tend to excite a man and to entice him to look with desires. Therefore, a women should be moderate in her dressing that should not invite the opposite sex to have evil intent towards her but on the other hand her dreasing should create respect in the minds of the others around her.

Having said the above, this paper analyses the offences of indecency under Islamic law and with reference to its practice in Malaysian Syariah enactments. At this juncture, it is noteworthy that the word 'law' in article 160 of the Malaysian Federal constitution means written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof. *Syariah* has been excluded from the above said definition. Nevertheless, Islamic law is implemented to some extent in Malaysia particularly in the area of Muslim personal law and minor offences against the percepts of the religion of Islam. Article 74(2) of the Federal Constitution provides as follows: 'Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List'. This includes, *inter alia*, the Islamic law relating to betrothal, marriage, divorce, dowry and maintenance, the constitution, organization and

¹ See Islamic Family Law (Federal Territories) Act 1984 (Act 303) and *Azura bte Adna v Mohd Zulkefli bin Salleh* (2001) 14 JH 179.

procedure of Syariah Courts which shall have jurisdiction only over persons professing the religion of Islam, among others. The States in Malaysia have enacted numerous statutes on the above subject matters.² The following are examples of the *Syariah* statutes implemented in the Federal Territories of Kuala Lumpur, Putrajaya and Labuan: (i) Administration of Islamic law (Federal Territories) Act 1993 (Act 505); (ii) Islamic Family Law (Federal Territories) Act 1984 (Act 303); (iii) *Syariah* Criminal Offences (Federal Territories) Act 1997 (Act 559); (iv) *Syariah* Criminal Procedure (Federal Territories) Act 1997 (Act 560); (v) *Syariah* Court Evidence (Federal Territories) Act 1997 (Act 561); and (vi) *Syariah* Court Civil Procedure (Federal Territories) Act 1998 (Act 585). Muslims in Malaysia are subject to the above special laws to the exclusion of other communities.³

***Khalwat* (proximity)**

Islam prohibits *khalwat* (proximity) between a man and a woman who are not related to one another to the degree of *mahram* relationship. The Prophet (SAW) said; "Whoever believes in Allah and the last day must never be in proximity with a woman without there being a *mahram* with her, for otherwise *satan* will be the third person (with them) (Ibn Hanbal, Ahmad *Al-Musnad*, p. 286). *Mahram* refers to either her husband or any male relative with whom her marriage is permanently prohibited. The prohibited degrees of marriage are laid down by the Quran, chapter 4 verses 22-24. "Prohibited to you (for marriage) are—your mothers, daughters, sisters, fathers sisters, mothers sisters; brothers daughters, sisters daughters; foster-mothers (who gave you suck), foster-sisters; you wives mothers; your step-daughters under your guardianship, born of your wives to whom you have gone in. No prohibition if you have not gone in those who have been wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past. For God is oft-Forgiving, Most Merciful. Also prohibited are women already married except those whom your right hands possess. Thus has God ordained against you. Except for those all others are lawful, provided you seek them in marriage with gifts from your property, desiring chastity not lust. Seeing that you derive benefit from them give them their dowers as prescribed; but if after a dower is prescribed, you agree mutually to vary it there is no blame on you. And God is All-Knowing, All-Wise".⁴

If a man is found being alone together with a woman who is neither married to him nor is related to him at the degree of *mahram*, in any secluded place or in a house or room under

² Malaysia is a federation and is divided into thirteen states—Perlis, Kedah, Penang, Kelantan, Terengganu, Perak, Selangor, Negeri Sembilan, Malacca, Johor, Pahang, Sarawak and Sabah — and three Federal Territories — Kuala Lumpur, Labuan and Putrajaya: see s 3 of the Interpretation Acts 1948 and 1967 (Act 388) (Consolidated and Revised 1989). The Federal Territory of Kuala Lumpur was excluded from the boundaries of the State of Selangor *vide* the Constitution (Amendment) (No 2) Act 1973 (Act A206); the Federal Territory of Labuan was excluded from the boundaries of the State of Sabah *vide* the Constitution (Amendment) (No 2) Act 1984 (Act A585) and the Federal Territory of Putrajaya was excluded from the boundaries of the State of Selangor *vide* the Constitution (Amendment) Act 2001 (Act A1095). Each of these states has their own Syariah courts for the administration of Islamic law.

³ See *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors* [2005] 4 CLJ 666, FC.

⁴ See s. 9 of the Islamic Family Law (Federal Territories) Act 1984 which sets out the relationships prohibiting marriage.

circumstances which may give rise to suspicion that they were engaged in immoral acts, both the man and woman shall be liable for *tazir* punishment, namely a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both. Section 27 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides:

Any— (a) man who is found together with one or more women, not being his wife or *mahram*; or (b) woman who is found together with one or more men, not being her husband or *mahram*, in any secluded place or in a house or room under circumstances which may give rise to suspicion that they were engaged in immoral acts shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

The application of the above provision may be illustrated with reference to the following cases: in *Pendakwa v Zahid Nasir and Juniadah* ((1989) 8 JH 85), the Court of the Chief Kadi found the accused persons guilty of committing the offence of *Khalwat*. They were each sentenced to a fine of RM3,000 or 3 months imprisonment. In *Pendakwa Syarie, Kelantan v Mat Rahim & Anor* ((1992) 9 JH 195), the two accused person were charged with *khalwat*. In their defence the accuseds alledged that they had been married according to the *Hukum Syarak* in Thailand. They produced two witnesses and also the documents showing their marriage performed in Thailand. Thei marriage was also affirmed by the Council of Islamic Religion, Narathiwat, Thailand. An opportunity was given to the prosecution to investigate further into the matter but the prosecution argued that the burden was on the accused to prove that the marriage in Thailand was valid. The Court of the Chief Qadhi held that the evidence produced by the accused could not be set aside unless it could be shown that there was forgery or a breach of the *Hukum Syarak* and the law. The accused were therefore acquitted.

Again, in *Syarie Prosecutor v Sukree bin Masuyu*,⁵ the accused was charged and convicted for committing *khalwat* with two women who were neither his wives nor his *mahram*, in which the act of the accused had raised a reasonable suspicion that he was involved in the commission of an immoral act. In the said case, the accused was convicted based on his confession which was made voluntarily, without any inducement, threat or coercion. The court stated that the act of the accused with the two females who were not his *mahram* being present at the rented house, had raised a reasonable suspicion that he had committed an immoral act with them.

In *Syarie Prosecutor v Mohd Zulkifli Bin Adam & Anor*⁶ the accused persons was charged for committing *khalwat* and they pleaded guilty. Prior to this offence, they were previously convicted for the same offence and a fine of RM500 and RM800 were imposed upon them, respectively. It was stated that the accused persons have no remorse but have challenged the institution of the court. The earlier fine imposed on them by the Syariah court hardly had any effect on them as they considered the punishment a meager sum and viewed that each time they committed the offence they could get away with a mere fine. The court was of the

⁵ (2008) 3 ShLR 172.

⁶ Criminal Suits Nos. 11006-143-0024-2011 AND 11006-143-0025-2011.

view that the imposition of fine has failed to deter persons who had been previously convicted from repeating the crime. As money is not a problem to many, they do not take the sentence of the court seriously and this has resulted in the increase of such offences with scant regard to the laws. This was evident from the acts of the two accused persons herein. Hence, a severe sentence coupled with imprisonment is deemed appropriate to the current circumstances as this would serve a lesson to the offenders from repeating the offence and to the public from committing similar crimes. In the above case, the court convicted both the accused persons; each of them were fined RM2500 and imprisoned for a week.

In *Pendakwa Syarie v Muhaizad Bin Ahmad Mustapha (Ako Mustapha)*,⁷ the accused was convicted and sentenced to RM3000 fine and three months imprisonment. In the above case, the accused was found alone with a non-Muslim woman who was neither his wife nor his *mahram*. The accused voluntarily pleaded guilty to the charge. It was stated that an act of *khalwat* with a *non-mahram*, even if it is with a non-Muslim, is prohibited by *hukum syarak*. It must be added that the above provision is only applicable to a Muslim⁸ and thus, does not apply to a non-Muslim. Further, the Syariah courts are invested with jurisdiction only over persons professing the religion of Islam and thus, does not extend over non-Muslims. It may be possible to charge a non-Muslim party who committed *khalwat* in the civil courts provided that the offence must have been committed in the public place.⁹ For example, in *Ooi Kean Thong & Anor v Public Prosecutor*,¹⁰ the Federal Court, through the judgment delivered by Richard Malanjum FCJ, stated *inter alia*;

⁷ Criminal Case No. 10007-143-29-2008.

⁸ The Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) section 2 defined a 'Muslim' as: (i) a person who professes the religion of Islam; (ii) a person either or both of whose parents were, at the time of the person's birth, Muslims; (iii) a person whose upbringing was conducted on the basis that he was a Muslim; (iv) a person who has converted to Islam in accordance with the requirements of s 85 of Act 505; (v) a person who is commonly reputed to be a Muslim; or (vi) a person who is shown to have stated, in circumstances in which he was bound by law to state the truth, that he was a Muslim, whether the statement be verbal or written. Meanwhile, the Federal Constitution, article 160, defined the word 'Malay' as a person who professes the religion of Islam. In *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119, the 'persons professing the religion of Islam' was defined as a the person who is brought up as a Muslim or his/her upbringing was conducted on the basis that he/she was a Muslim, he/she lived as a Muslim with his/her family and is commonly reputed to be a Muslim. All this is strong evidence of his/her being a person who professes the religion of Islam. See also *Wan Khairani Wan Mahmood v Ismail Mohamad & Anor* [2007] 6 CLJ 582; *Kaliammal A/P Sinnasamy v Majlis Agama Islam Wilayah Persekutuan (Jawi) & Ors* [2012] 3 MLJ 694; Dato' Faiza Tamby Chik, "Malay and Islam in the Malaysian Constitution" (2009) 1 MLJ cxxix.

⁹ The term 'public place' is discussed below.

¹⁰ [2006] 3 MLJ 389.

Reverting to cl. 5(1) we say that even accepting the broad interpretation of the word 'life' in cl. (1) of the said article to mean 'right to livelihood' which includes deprivation of one's reputation,...we cannot by any stretch of imagination conclude that by disallowing any person from behaving in disorderly manner as the impugned by-law stipulates, is a deprivation of one's life or livelihood or reputation. To do so would result in chaos to our society which is anathema to the concept of a civilized community.

In *Ooi Kean Thong's* case, the accused persons were found behaving in a disorderly manner under the trees at Kuala Lumpur City Centre Park, to wit, hugging and kissing, an offence under section 8(1) of the Parks (Federal Territory) By-Laws 1981 and punishable under section 10 of the above statute namely, a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both and in the case of a continuing offence to a fine not exceeding two hundred ringgit for every day during which the offence is continued after conviction. The said By-laws were enacted pursuant to section 102 of the Local Government Act 1976. Initially, the matter was compounded by DBKL and the applicants were supposed to pay the fines imposed. Subsequently, they had a change of mind and decided not to pay the fines as they were strongly of the view that they had committed no wrong in law. The question of law raised before the Federal Court were as follows: (i) whether s 8(1) of Park (Federal Territory) 1981 was ultra vires s 102 of the Local Government Act 1976 and the effect being that the applicants were deprived of their constitutional right of freedom; and (ii) whether the charge against them was contrary to art 5(1) of the Federal Constitution. The Federal Court in their unanimous decision affirmed that the impugned by-law was *intra vires* section 102 of the Local Government Act 1976 and the Federal Constitution.

Zina or illicit sexual intercourse

Zina or illicit sexual intercourse between a man and a woman who are not validly married to each other, is a sinful act and hence forbidden in Islam. As noted earlier, Islam regulates the institution of marriage, disciplined sexual behaviour, condemns adultery and prescribes severe punishment for the offence of *zina*. "And come not near to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)" (chapter 17 verse 32). Again, "Those who invoke not with God any other god, nor slay such life as God has made sacred, except for just cause, nor commit fornication, and any that does this meets punishments" (chapter 25 verse 68). "O Prophet! When believing women come to you to take the oath of fealty to you, that they will not associate in worship any other thing whatever with God, that they will not steal, that they will not commit adultery (or fornication) that they will not kill their children, that they will not utter slander, intentionally forging falsehood and that they will not disobey you in any just matter then do you receive their fealty" (chapter 60 verse 12).

The involvement of an unmarried male or female in a sexual relationship is called fornication. Where both or either of them is/was married to some other male or female, then the sexual

relationship is called adultery. The punishment for fornication is one hundred lashes. "The woman and the man guilty of fornication flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the last day: And let a party of the believers witness their punishment" (chapter 24 verse 2). While the punishment for adultery is stoning to death. It has been related on the authority of Sulaiman who relates from his father Buraidah that a woman belonging to Ghamid came to the Prophet (SAW) and said "Oh Prophet! Clean me". The Prophet (SAW) told her to go back and repent. She said, "I think you get me returned as you had done in case of Maiz Ibn Malik". The Prophet (SAW) then asked her as to what happened to her. She said that she was pregnant as a result of adultery. The Prophet (SAW) said, "I will decide your case when you give birth to the child." The Prophet (SAW) then gave her in the custody of an Ansari man. When she gave birth to the child, she came to the Prophet. The Prophet (SAW) said, "I shall not punish you until someone takes the responsibility of the maintenance and nourishment of the child". A man from Ansar stood and offered to take the responsibility of the maintenance of the child. Thus, the Prophet (SAW) ordered to stone her to death and she was stoned to death" (Muslim). Again, in another *hadith*, the Prophet (SAW) said, "The killing of a Muslim is not permissible except in three cases: (i) when he kills another person; (ii) when he commits zina after being married; and (iii) when he apostates. (Abu Daud).

Sayyid Sabiq in his *Fiqh-us-Sunnah* stated to the effect that *Zina* is a wrongdoing which is exceedingly despicable and also against the manners and honour of mankind. *Zina* also harms the security of the family and household and gives rise to various wrongdoings and harms the life of the individual and the society. *Zina* also harms and causes the loss of the good name and existence of an *ummah* (society). Although this is so, yet Islam is still very careful in imposing the punishment of *zina*, by laying down stringent requirements for proving *zina* which are almost impossible to fulfil. The whole purpose of the punishment for *zina* is towards prevention and causing fear of the punishment rather than the carrying out of the punishment itself. The charge of *zina* usually breaks the harmony of the family, and the home is the principal component of society. If the family is good and happy, this makes society also good and happy, but if it is bad and miserable, this also makes society bad and miserable.

Section 23 of the Syariah Criminal Offences (Federal Territories) Act 1997 prescribes the punishment for sexual intercourse out of wedlock. The above section provides:

(1) Any man who performs sexual intercourse with a woman who is not his lawful wife shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

(2) Any woman who performs sexual intercourse with a man who is not her lawful husband shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

(3) The fact that a woman is pregnant out of wedlock as a result of sexual intercourse performed with her consent shall be *prima facie* evidence of the commission of an offence under subsection (2) by that woman.

(4) For the purpose of subsection (3), any woman who gives birth to a fully developed child within a period of six *qamariah* months from the date of her marriage shall be deemed to

have been pregnant out of wedlock.

The application of section 23 of the above Act may be illustrated with reference to the following cases. In *Pegawai Pendakwa Muis v Haji Adib* ((1988) 6 JH 306), the accused was charged with the offence of illegal sexual intercourse with a woman. The woman had been separately charged and had pleaded guilty. At the trial, the prosecution called two witnesses, the woman concerned and the investigating officer, but the learned Syariah Judge held that this was insufficient to prove the offence of *Zina* as what was required was the evidence (*shahadah*) of four male witnesses. The confession of the woman, the second accused, was only binding on herself. The case therefore was held to depend on the alleged confession of the first accused himself. The alleged confession was given in writing by the first accused to the investigating officer. He denied that he had made the confession and the learned trial judge held that in effect, he had withdrawn the confession. The trial Judge therefore found that no case of *Zina* had been proven against the first accused and accordingly, acquitted and discharged the accused.

Again, in *Pendakwa v Amran & Rosnah*,¹¹ the Court of Chief Qadhi convicted the accused of *Zina*. The first accused was sentenced to one years imprisonment and the second accused to a fine of RM400 or six months imprisonment. In *Pendakwa v Ajmee Hamid & Siti Fariha*,¹² the Court of Chief Qadhi convicted the accused of *Zina*. The first accused was sentenced to a fine of RM800 or ten months imprisonment and the second accused to a fine of RM400 or five months imprisonment. Similarly, in *Pendakwa v Jaffary & Hasliza*,¹³ the accused persons were charged with *Zina*. The first accused claimed trial and after hearing the case the Chief Qadhi found him guilty and sentenced him to a fine of RM1,000 or one years imprisonment. In *Pendakwa Syarie v Muhammad Fauzullah bin Ahmad Basheer*,¹⁴ the accused was charged for committing illicit sexual intercourse out of wedlock and he pleaded guilty as per the said charge by the Syarie prosecutor. The Court sentenced the accused to four month's imprisonment, four strokes of rattan and a fine of RM3,000.

A person who does an act preparatory to sexual intercourse out of wedlock shall also be guilty of an offence. It must be noted that the material element of crime comes into being when the prohibited act has been completed whether the act is positive or negative. If the offender, while committing a crime, completes the prohibited act, he is guilty of the crime in full. A prohibited act is said to be attempted when the offender is not able to complete it. If an adulterer enters the house of a woman with the intention of committing adultery and sits with her in private, he will be guilty of an offence. He will also be guilty if he kisses and embraces the woman.

Section 24 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides that an act

¹¹ (1990) 8 JH 3.

¹² (1990) 8 JH 49.

¹³ (1990) 8 JH 105.

¹⁴ Criminal Case No. 14700-142-0061-2010.

preparatory to sexual intercourse out of wedlock is a crime. The above section provides: "Any person who does an act preparatory to sexual intercourse out of wedlock shall be guilty of an offence and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both." For example, in *Pendakwa Syari'e v Wan Mohd Faizdehar Bin Wan Abdullah*,¹⁵ the accused and his partner were charged of doing an act preparatory to sexual intercourse out of wedlock in a car registration in Shahbandar Square, Kuala Terengganu. Both the accused persons had pleaded guilty of the act as per the charge. A fine of RM2,800 and three weeks imprisonment or imprisonment for five months for failure to pay the fine, was imposed on the accused.

It may be added that marital rape or also known as spousal rape has been criminalised in more than 104 countries in the world.¹⁶ A husband may now be guilty of rape where he forces intercourse on his wife although no formal steps have been taken to end the marriage. In Malaysia, the Penal Code (Act 574), s. 375A provides 'Any man who during the subsistence of a valid marriage causes hurt or fear of death or hurt to his wife or any other person in order to have sexual intercourse with his wife shall be punished with imprisonment for a term which may extend to five years'.¹⁷ In Islam, in the case of forcing one's wife to have sexual intercourse, the husband is not considered to have committed rape. In fact, Islam makes it obligatory on the wife to submit to her husband's request for sexual intercourse except in three situations: menstruation, parturition (*nifas*) and obligatory fasting. The Prophet (SAW) said: "When a man invites his wife to his bed and she does not come, and he (the husband) spends the night being angry with her, the angels curse her until morning" (Muslim). It will only constitute rape if a man forces himself on his former wife whom he had divorced irrevocably (*talaq baiyyin*). Be that as it may, as Allah (SWT) has commanded men to deal with their wives in an honorable way,¹⁸ therefore, abusing, ill treating, and inflicting harm – be it physical, verbal or psychological – among others, are completely unacceptable in such a relationship. Hence, it is not permissible for a husband to force his wife to do more than she is able to bear of intercourse. If she has an excuse such as being sick or unable to bear it, then she is not sinning if she refuses to have intercourse.¹⁹

Reverting back to section 23 of the Syariah Criminal Offences (Federal Territories) Act 1997, and in particular subsection 4, which states that any woman who gives birth to a fully developed child within a period of six *qamariah* months from the date of her marriage shall be deemed to have been pregnant out of wedlock. It is worth noting that the total period of gestation and nursing in Islam is 30 months. In chapter 46 verse 15 it is stated: "And We have commended unto man kindness toward parents. His mother carried him in pain and gave

¹⁵ Criminal Case No. 11005-114-0156-2011.

¹⁶ See 'Marital Rape' at http://en.wikipedia.org/wiki/Marital_rape

¹⁷ Section 375A of the Penal Code introduced pursuant to the Penal Code (Amendment) Bill 2004 (Act A1273) which came into force on 1 January 2007.

¹⁸ In the Qur'an, Chapter 4 verse 19 Allah (SWT) says which may be translated as follows: "O ye who believe! ye are forbidden to inherit women against their will. Nor should ye treat them with harshness, that ye may take away part of the dower ye have given them,— except where they have been guilty of open lewdness; on the contrary live with them on a footing of kindness and equity. If ye take a dislike to them, it may be that ye dislike a thing and Allah brings about through it a great deal of good".

¹⁹ See "There is no Marital Rape in Islam" at <http://muslimahdirections.wordpress.com/2012/11/05/there-is-no-marital-rape-in-islam/>

him birth in pain, and the carrying of him and the weaning of him is thirty months". Meanwhile, in chapter 2 verse 233 and chapter 31 verse 14, the Quran gives the period of nursing as 24 months. For example, chapter 2 verse 233 states: "Mothers shall suckle their children for two whole years; for those who wish to complete the suckling". Again, in chapter 31 verse 14 provides: "And We have enjoined upon man concerning his parents— his mother bearing him in weakness upon weakness, and his weaning in two years—Give thanks to Me and to your parents". As from the above verses of the Quran, 30 months is given as the total for gestation and nursing. The 30 months minus 24 months, leaves only 6 months for the period of gestation, but normal gestation lasts 9 months.

Further to the above, in relation to establish *Zina*, apart from the direct evidence of the eye witnesses, it is also possible to rely on the opinion of experts or (*al-Khibrah*). It is admissible as *qarinah* because, such opinion is so relevant as to form a basis of any decision; it is closely connected with the fact in issue. The opinion of expert has been given great importance in Islamic law; "And We sent not before you (O Muhammad (saw) but men to whom We inspired, so ask the people of the Reminder [Scriptures - the Taurat (Torah), the Injeel (Gospel)] if you do not know (chapter 21 verse 7); "And We sent not (as Our Messengers) before you (O Muhammad (saw)) any but men, whom We inspired, (to preach and invite mankind to believe in the Oneness of Allah). So ask of those who know the Scripture [learned men of the Taurat (Torah) and the Injeel (Gospel)], if you know not (chapter 16 verse 43).

For example, in *Muhammad Azhar v The State*,²⁰ a Pakistani case, the Lahore High Court referred to the DNA report for determining the biological father of the child. In particular, the Court noted: "The DNA test may be an important piece of evidence for a husband to establish an allegation of *Zina* against his wife and use this as a support justifying the taking of the oath as ordained by *Surah Al-Nur* [24: 4] which leads to the consequences of breaking the marriage, the DNA test may further help in establishing the legitimacy of a child for several other purposes. Therefore, its utility and evidential value is acceptable but not in a case falling under the penal provisions of *Zina* punishable under *Hudud* laws having its own standard of proof". Again, in *Pendakwa Syarie Negeri Sabah v Rosli bin Abdul Japar*,²¹ the Court convicted the accused person for *Zina* based on the DNA report and accordingly sentence him to a fine of RM3,000 or in default to 6 months imprisonment.

Incest

Incest refers to sexual relationship between a man and woman who are closely related to each other, or *mahram* (who belong to the prohibited degrees) to each other and marriage between them is forbidden. As noted earlier, the Quran in chapter 4 verses 22-24, clearly outlines those with whom marriage is not permitted. Further, section 9 of the Islamic Family Law (Federal Territories) Act 1984 (Act 303) deals with relationships prohibiting marriage. This section states:

- (1) No man or woman, as the case may be, shall, on the ground of consanguinity, marry—

²⁰ (2005) 3 Sh LR 134.

²¹ (2007) XXIII/II JH 237.

- (a) his mother or father;
 - (b) his grandmother or upwards, whether on the side of his father or his mother, and his or her ascendants, how-high-soever;
 - (c) his daughter or her son and his granddaughter or her grandson and his or her descendants, how-low-soever;
 - (d) his sister or her brother of the same parents, his sister or her brother of the same father, and his sister or her brother of the same mother;
 - (e) the daughter of his brother or sister, or the son of her brother or sister and the descendants, how-low-soever, of the brother or sister;
 - (f) his aunt or her uncle on his father's side and her or his ascendants;
 - (g) his aunt or her uncle on his mother's side and her or his ascendants.
- (2) No man or woman, as the case may be, shall, on the ground of affinity, marry—
- (a) his mother-in-law or father-in-law and the ascendants of his wife, how-high-soever;
 - (b) his stepmother or her stepfather, being his father's wife or her mother's husband;
 - (c) his step grandmother, being the wife of his grandfather or the husband of her grandmother, whether on the side of the father or the mother;
 - (d) his daughter-in-law or her son-in-law;
 - (e) his stepdaughter or her stepson and her or his descendants, how-low-soever [from a wife or a husband with whom the marriage has been consummated].
- (3) No man or woman, as the case may be, shall, on the ground of fosterage, marry any woman or any man connected with him or her through some act of suckling where, if it had been instead an act of procreation, the woman or man would have been within the prohibited degrees of consanguinity or affinity.
- (4) No man shall have two wives at any one time who are so related to each other by consanguinity, affinity, or fosterage that if either of them had been a male a marriage between them would have been illegal in Hukum Syara'.

It can be deduced from the above that any sexual relationship between the above categories would be deemed unacceptable. It may be added that the Penal Code, s 376A provides that a person is said to commit incest if he or she has sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person. The punishment for incest under the Penal Code is provided in s 376B(1) namely, imprisonment for a term of not less than six years and not more than twenty years, and shall also be liable to whipping. In *Ismail Rasid v PP*,²² KN Segara J stated:

Incest is a sin that can hardly be forgiven. Therefore, when a father rapes his daughter and is convicted in court, any sentence passed must reflect the abhorrence of society to such a heinous and despicable act. A sufficiently strong and effective signal must also be sent out to would-be rapists of this species that the court would not hesitate to come down hard on them, in order to protect those naive, helpless and innocent children who had placed unquestioning trust, faith, loyalty and confidence in their fathers to be role models as well as pillars of strength and protection at all times, only to see their lives shattered, humiliated and traumatized by an act of lust that could have easily been curbed and controlled by any self-respecting human being.

²² [1999] 4 CLJ 402.

Again, in *Mohd Zandere Arifin v PP*,²³ Ahmad Maarop J stated:

In my view the offences committed by the appellant had outraged the feeling of the community, warranting even the maximum sentences to be imposed on him. Furthermore the prevalence of this type of offence must also be taken into consideration by the court in assessing sentence. In this case public interest demands that sentences which shows the society's utter abhorrence for this type of offence be passed. The sentences passed must serve as a plain warning that in this country the severest possible penalty awaits any person who commits incest. I am satisfied that the element of public interest and the consideration that the offences committed by the appellant were very grave must prevail, and override the crushing effect which the sentences will have on the appellant.

As noted earlier, as *zina* is a major sin committing *zina* with the *Maharim* (incest) is much greater and obnoxious. In Islam, the punishment for incest is death penalty. The Prophet (SAW) said: Whoever has sex with one of his *Maharim* (non-marriageable woman), kill him.²⁴ The Muslims jurists are agreeable that the one who commits *zina* with a mahram deserves the *hadd* punishment i.e., by execution in all cases. In other words, if a man committed *zina* with his sister or his paternal aunt or his maternal aunt or his wife's mother or the daughter of a wife with whom he had consummated the marriage and so on, then he is to be executed whatever the case, because this intimacy is prohibited in Islam.²⁵ Having said the above, the punishment for incest under the Syariah Criminal Offences (Federal Territories) Act 1992, is stated section 20. The above section provides: "Any person who commits incest shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof."

Sodomy

Sodomy is anal intercourse between two males. It is an obscene, disgusting and detested crime. It is an unnatural sexual act to satisfy ones sexual passion. It is destructive to both morality and manhood. It corrupts society and kills its morale. Islam considers it a detestable act. The Quran mentions the destruction of the people of Prophet Lut (a.s.) who were indulged in such activities. "We also (sent) Lut: He said to His people: Do ye commit lewdness such as no people in creation (ever) committed before you? Because you practice your (sexual) desires on men in preference to women: you are truly a people going beyond bounds" (Chapter 7 verses 80-81). Again, in chapter 26 verses 165-166, Allah (SWT) proclaimed: "Of all creatures (made) in the world, will you run after males, and leave those (the females) whom Allah has made for you to be your mates? No! you are a people exceeding (all moral limits)".

²³ [2006] 5 CLJ 663.

²⁴ Ahmad, Al-Tirmizi and Ibn Majah.

²⁵ See "Question and Answer on Islam" by Shaykh Muhammad S Al-Munajjid at <http://islamqa.info/en/ref/84982>

The Prophet (SAW) is reported to have said; "If a man commits an act of sex with a man, both are adulterous and if a woman commits such an act with a woman, then both of them are adulteresses". Again, "One who touched a boy with passion, he will be cursed by Allah (SWT), the angels and all the people". Similarly, "verily the most fearful of what I fear over my people is the action of the people of Lut". "Four types of people get up in the morning while they are under the wrath of Allah and they sleep in the night while they are under the displeasure of Allah. He was asked: "who are they, O Messenger of Allah? The Prophet (SAW) replied: "Those men who try to resemble women and those women who try to resemble men (through dress and behaviour) and those who commit sex with animals and those men who commit sex with men".²⁶ From the above Quranic provisions and *hadiths*, it is clear that sodomy or homosexuality is a heinous crime and this unnatural sexual offence invites Allah's curse in its worst form.

Islam looks at homosexuality as something contradictory to the very nature according to which God created man. God's creation is generally in pairs. A complete phenomenon is generally divided into two complementary parts. Human being, as a complete entity is divided into males and females. The mental, emotional and physical completion of humans is generally achieved through the combination of a male and a female. Homosexuality is based on a refutation of this obvious fact, and is therefore in contradiction with the very nature on which man has been created.

According to Imam Malik, Imam Shafii, Imam Ahmad and Zaidis, sodomy is an offence liable for *hadd* of *zina* because it is a prohibited sexual intercourse like *zina*. They relied on the *hadith* where the Prophet (SAW) was reported to have said: "Whomsoever you find doing the deed of the people of Lut, kill the doer and one on whom it is done". However, according to Imam Abu Hanifa, sodomy is not an offence liable for *hadd* of *zina* but it is an offence liable for *tazir*. In Malaysia, section 25 of the Syariah Criminal Offences (Federal Territories) Act 1997 uses the term *liwat* which appears to overlap with 'sexual intercourse against the order of nature' and 'outrages on decency' in sections 377A and 377D of the Penal Code, respectively. Section 25 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides: "Any male person who commits *liwat* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof."

Lesbian

Generally, lesbian sexual behaviour is referred to as *sihaq*, "rubbing" or "pounding". The term is also sometimes used for female masturbation. *Sihaq*, or *musahaqa*, translates approximately as "tribadism." While the Quran explicitly addresses male-male sexual activity, there is no consensus as to whether the Quran even mentions female same-sex activity. In the Quran, chapter 4 verses 15-16, Allah (SWT) says; "If any of your women are guilty of lewdness, take the evidence of four (Reliable) witnesses from amongst you against them; and

²⁶ See Abdul Rahman I. Doy, *Shariah The Islamic Law* (1st Edn, London, 1984) p 241.

if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way. If two men among you are guilty of lewdness, punish them both. If they repent and amend, leave them alone; for Allah is Oft-returning, Most Merciful". The above verses of the Quran uses the feminine plural, not the dual: it does not specify "two women" but "your women". The text presumably intends women of the community. Again, while there are *hadith* which addresses mens sexual behaviour with other men, little did it mentioned on lesbian behaviour.

Having said the above, section 26 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides "Any female person who commits *musahaqah* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof." Section 2 of the same Act defined "*musahaqah*" means sexual relations between female persons;

Prostitution

The word 'prostitution' comes from the word prostitute, which means any person who offers his or her body for sexual gratification for hire whether in money or in kind. The Penal Code does not provide for the definition of prostitution. Prostitution as defined in the the Oxford Concise Dictionary (8th edn) as 'a woman who engages in sexual activity for payment; a man or boy who engages in sexual activity especially with homosexual men for payment; a person who debases himself or herself for personal gain'. A person exploiting another person for purposes of prostitution, persons living on or trading in prostitution and soliciting for purpose of prostitution, is prohibited in the Penal Code, sections 372, 372A and 372B. The suppression of brothels is governed by section 373 of the same Act.

On the other hand, in Islam, the Qur'an, in chapter 6 verse 151, Allah (SWT) proclaimed: "Do not take any human being's life, (the life) which God has declared to be sacred – otherwise than in (the pursuit of) justice: this has He enjoined upon you so that you might use your reason"²⁷. In the last address to his community, the Prophet (SAW) said: "Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection ... Regard the life and property of every Muslim as a sacred trust ... Hurt no one so that no one may hurt you... You will neither inflict nor suffer any inequity." The Prophet (SAW) did not prohibit only the unlawful encroachment of one another's life and property, but also honour and respect. Since the violation of chastity of a woman is forbidden in Islam, a Muslim who perpetrates this crime cannot escape punishment.

The Syariah Criminal Offences (Federal Territories) Act 1997, section 21 provides:

- (1) Any woman who prostitutes herself shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.
- (2) Any person who—

²⁷ See also Qur'an, chapter 17 verse 33 and chapter 5 verse 32.

- (a) prostitutes his wife or a female child under his care; or
 - (b) causes or allows his wife or a female child under his care to prostitute herself,
- shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

It may be added that section 22 of the same Act provides that: "Any person who acts as a *muncikari* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof" The term "*muncikari*" is defined in section 2 of the above Act as a person who acts as a procurer between a female and male person for any purpose which is contrary to Islamic Law.

Male person posing as woman

Men and women have their own distinctive characteristics. The Prophet (SAW) declared that a man should not wear a woman's clothing and vice versa. Aspects of such imitation includes, the manner of speaking, walking, dressing, moving, among others. Allah and His angels curse, both in this world and in the Hereafter, a male who imitate a woman and a woman whom Allah has made a female but who becomes masculinized by imitating men. On the authority of Ali, Prophet (SAW) was reported to have said: "The Messenger of Allah forbade me the wearing of a gold ring, a silken garment, and clothing with bold designs" (Muslim). In another *hadith* on the authority of Ibn Umar, "The Messenger of Allah (SAW) saw me wearing two garments having bold designs, and he said, "this is what unbelievers wear. Do not wear such things" (Muslim). Having said the above, section 28 of the Syariah Criminal Offences (Federal Territories) Act 1997 provides that "any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both."

Acts or behaves in an indecent manner in any public place

The Penal Code (Act 574), section 294 provides that whoever, to the annoyance of others- (a) does any obscene act in any public place, or (b) sings, recites, or utters any obscene song, ballad or words in or near any public place, shall be punished with imprisonment for a term which may extend to three months, or with fine, or with both'. Selling, distributing, publicly exhibiting or in any manner putting into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation makes, produces or has in possession any obscene book, pamphlet, paper, drawing, painting representation or figure or any other obscene object whatsoever is also prohibited in the Penal Code section 292. Meanwhile, the Syariah Criminal Offences (Federal Territories) Act 1997, section 29 provides that any person who, contrary to Islamic Law, acts or behaves in an indecent manner in any public place shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

The word 'public place' was explained by Lee Hun Hoe J (as he then was) in *Public Prosecutor v Chen Geok Len & Anor*,²⁸ in the following words:

'The meaning of public place, I think, depends to a great extent upon the context and upon the object of a particular Ordinance. A place may be a public place at one time and not at other times. Thus a railway carriage is a public place while being used for the reception and conveyance of passengers, but not while it lies empty in a siding: see *Langrish v Archer* (1882) 10 QBD 44. *Wellard's case* (1884) 14 QBD 63, appears to be the authority for saying that a public place would seem to include a place to which the public are accustomed to resort without being interfered with though there is no legal right to do so. *Button's case* [1965] 3 WLR 1131 would seem to suggest that a place could be a public place if at the time a substantial part of the public had access to it'.

The Interpretation Acts 1948 and 1967 (Consolidated And Revised 1989) (Act 388), section 3 defined 'public place' to include every public highway, street, road, bridge, square, court, alley, lane, bridle way, footway, parade, wharf, jetty, quay, public garden or open space, and every theatre, place of public entertainment of any kind or other place of general resort to which admission is obtained by payment or to which the public have access.

Conclusion

Islam has made illegal all avenues to committing sexual acts. In fact, the religion commands that marriage is the most effective means in which one can lead a virtuous life free from immorality and emotional inhibition. It is a means of safeguarding one from committing sinful act due to lust and desires (*nafs*) (chapter 24 verse 32). The Prophet (saw) said, "O ye young people, whoever can afford marriage should marry, for that will help him lower his gaze and guard his modesty. Whoever is not able to marry is recommended to fast, as fasting diminishes (his) sexual power"(Bukhari & Muslim). Islam also forbids that any person should look at the *awrah* of another, whether of the same or the opposite sex, and whether with or without desire.

Apart from the above, man should not wear a woman's clothing and vice versa. Again, Muslim men are not allowed to force their girls into prostitution. Allah (s.w.t) says in the Quran, in chapter 24 verse 33: "But force not your maids to prostitution when they desire chastity, in order that ye may make a gain in the goods of this life. But if anyone compels them, yet after such compulsion, is Allah Oft-Forgiving, Most Merciful (to them)." Abu Huraira narrated that the Prophet (SAW) said, "Allah says, I will be against three persons on the Day of Resurrection: (i) One who makes a covenant in My Name, but proves treacherous; (ii) One who sells a free person and eats his price; and (iii) One who employs a labourer and takes full work from him but does not pay him for his labour" (Bukhari). In short, Islam

²⁸ [1967] 1 MLJ 59.

emphasises on the guarding of ones chastity from immorality. Sexual organs must be guarded without any leeway. Exposing the attractive parts of the body, walking or talking in a seductive manner, displaying of a ladies ornaments, wearing revealing and sexy clothes in public places is prohibited.

ABUSE AGAINST CHILDREN AND VULNERABLE ADULTS: MAKING THOSE WHO KNOW AND FAIL TO PROTECT, CRIMINALLY LIABLE

By Hiranthi Abeygoonsekera

Barrister and Solicitor, New Zealand

In March 2012 New Zealand introduced amendments to the Crimes Act 1961 to make those who know about child abuse and elder abuse liable if they fail to protect them.

The changes are intended to protect children and vulnerable adults from assault, neglect and ill-treatment by creating liability for not only those people who are actively involved in the mistreatment, but also those who have frequent contact with the child or vulnerable adult and fail to take reasonable steps to protect them from mistreatment by others in certain circumstances. This includes members of the same household, those who have frequent contact with the abused person and staff in hospitals and institutions where these children or vulnerable adults would reside. The changes are a reminder that health professionals have a broad responsibility in the face of known risk to children or vulnerable adults.

A vulnerable adult is a person who is unable, by reason of detention, age, sickness, mental impairment or any other cause to withdraw himself or herself from the care or charge of another person. The new law clearly recognizes that vulnerable adults are entitled to the same protection that children have.

It brings forth a whole new regime of criminal liability for persons caring for and working with vulnerable adults and children.

The new law recognises the need for greater protection for children and the need to extend this protection to vulnerable adults.

Essentially the new law will extend the duty and liability of those who care for or are in charge of vulnerable adults; extends the offence of ill treatment of a child to that of a vulnerable adult; and makes it an offence to fail to protect a child or vulnerable adult.

Section 151

Section 151 under the old law states:

151 *Duty to provide the necessaries of life*

- (1) *Every one who has charge of any other person unable, by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is (whether such charge is undertaken by him under any contract or is imposed upon him by law or by reason of his unlawful act or otherwise howsoever) under a legal duty to supply that person with the necessaries of life, and is [criminally responsible](#) for omitting without lawful excuse to perform such duty if the death of that person is caused, or if his life is endangered or his health permanently injured, by such omission.*

The new section 151 states:

151 “Duty to provide necessaries and protect from injury

Every one who has actual care or charge of a person who is a vulnerable adult and who is unable to provide himself or herself with necessaries is under a legal duty -

- (a) to provide that person with necessaries; and*
- (b) to take reasonable steps to protect that person from injury.*

A vulnerable adult is defined in the new law as “a person unable, by reason of detention, age, sickness, mental impairment or any other cause to withdraw himself or herself from the care or charge of another person”.

The new law uses the term “mental impairment” rather than “insanity” as used in the old section 151. This reflects changes in mental health services and broadens the scope of persons who would fall within the term “vulnerable adult”.

When one compares that to the old section 151, the following points are of note. First, the change from the wording “necessaries of life” to “necessaries” broadens the scope of the obligation. The expression necessaries of life has always encompassed commodities and services such as food, clothing, housing and medical care which are considered necessary to sustain life. In *R v Lunt [2004]1 NZLR 498* it was held that while the expression is flexible and capable of adjusting to changing times and circumstances, it would be unjustifiable distortion of the plain words to describe the parental function of protecting a child from violence as a “necessary of life”.

Secondly, the new section 151 not only broadens the scope of that duty but creates a new legal duty. It places an obligation on people who have care of vulnerable adults to provide the “necessaries” and to take reasonable steps to protect the person from injury. Previously it was only those who had “charge’ of a person.

While “actual care or charge” is not defined it is likely to include family members, hospital staff, community nursing staff, rest homes and mental health providers, who have actual care or charge of a vulnerable adult.

The term “to protect from injury” could extend to injury arising from an omission. This means there could now be criminal liability if one fails to provide proper discharge planning and a vulnerable adult is injured as a result of it.

Section 151 read in conjunction with 150A means that criminal responsibility only arises if the omission or neglect is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances.

Section 152

The old section 152 imposed an obligation on a parent or person in place of a parent to provide the necessaries of life to a child less than 16 years. The new section 152 places a duty on parents or person in place of a parent “who has actual **care** or charge of a child” under the age of 18 years to provide necessaries and to take reasonable steps to protect the

child from injury. The significant changes are the introduction of a duty to take reasonable steps to protect from injury, the extension to children under 18 years and the addition of the words “who has actual **care** or charge of a child” (which could arguably extend the group of people who could be liable for failing to protect children).

Section 195

The old section 195 reads:

195 Cruelty to a child

Every one [is liable](#) to imprisonment for a term not exceeding 5 years who, having the custody, control, or charge of any child under the age of 16 years, wilfully ill-treats or neglects the child, or wilfully causes or permits the child to be ill-treated, in a manner likely to cause him unnecessary suffering, actual bodily harm, injury to health, or any mental disorder or disability.

New section 195 reads:

195 “Ill-treatment or neglect of child or vulnerable adult

- (1)** *Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), intentionally engages in conduct that, or omits to discharge or perform any legal duty the omission of which, is likely to cause suffering, injury, adverse effects to health, or any mental disorder or disability to a child or vulnerable adult (the **victim**) if the conduct engaged in, or the omission to perform the legal duty, is a major departure from the standard of care to be expected of a reasonable person.*
- (2)** *The persons are—*

 - (a) a person who has actual care or charge of the victim; or*
 - (b) a person who is a staff member of any hospital, institution, or residence where the victim resides.*

- (3) *For the purposes of this section and section 195A, a **child** is a person under the age of 18 years.*

This new section 195 is much broader. It extends the offence of cruelty to a child to that of a vulnerable adult. To be liable under this section the person should be a person who has actual care or charge of a victim or a person who is a staff member of any hospital, institution, or residence where the victim resides. If such a person intentionally engages in conduct or omits to discharge or perform any legal duty that then causes suffering, injury or adverse effects to health or mental disorder, and which is a major departure from expected standards, it will be a criminal offence.

Section 195 A

Most importantly the new law introduces a new provision, section 195A, which creates a new obligation of failing to protect a child or vulnerable adult from risk of death or grievous bodily harm or sexual assault.

New section 195 A reads:

195A "Failure to protect child or vulnerable adult"

- (1) *Every one is liable to imprisonment for a term not exceeding 10 years who, being a person described in subsection (2), has frequent contact with a child or vulnerable adult (the **victim**) and*
- (a) *knows that the victim is at risk of death, grievous bodily harm, or sexual assault as the result of -*
 - (i) *an unlawful act by another person; or*
 - (ii) *an omission by another person to discharge or perform a legal duty if, in the circumstances, that omission is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies; and*
 - (b) *fails to take reasonable steps to protect the victim from that risk.*
- (2) *The persons are:*

- (a) *a member of the same household as the victim; or*
- (b) *a person who is a staff member of any hospital, institution, or residence where the victim resides.*
- (3) *A person may not be charged with an offence under this section if he or she was under the age of 18 at the time of the act or omission.*
- (4) *For the purposes of this section:*
- (a) *a person is to be regarded as a member of a particular household, even if he or she does not live in that household, if that person is so closely connected with the household that it is reasonable, in the circumstances, to regard him or her as a member of the household;*
- (b) *where the victim lives in different households at different times, **the same household** refers to the household in which the victim was living at the time of the act or omission giving rise to the risk of death, grievous bodily harm, or sexual assault.*
- (5) *In determining whether a person is so closely connected with a particular household as to be regarded as a member of that household, regard must be had to the frequency and duration of visits to the household and whether the person has a familial relationship with the victim and any other matters that may be relevant in the circumstances.*

This section is essentially designed to force people who know about violent or sexual offending to bring the offenders to the attention of the police or person of authority.

A person is liable under this section if the person is:

- A member of the same household or a staff member of a hospital, institution or residence where the child or vulnerable adult resides; and
- Has frequent contact with the child or vulnerable adult; and
- Has knowledge of the risks; and
- Fails to take reasonable steps to protect the child or vulnerable adult from the actions or omissions of a third part.

This offence is closely modelled on section 5 of the Domestic Violence, Crime and Victims Act 2004 in the United Kingdom. However the New Zealand provision is broader than the English offence in at least one respect as the UK offence only applies when a child in question has died.

Whilst it is unclear how broadly or restrictively this section will be interpreted it could have an impact on health practitioners who have frequent contact with children or vulnerable adults. They can now be held criminally responsible if they have frequent contact with a child or vulnerable adult and they fail to take reasonable steps to protect a victim when they know there is risk to death, grievous bodily harm or sexual assault. Such a failure would need to be a major departure from the standard of care expected of such a person.

What does this all mean in a practical sense?

Take for example, a 75 year old dementia patient who is brought into hospital with breathing difficulty and it is noted that he has bruising on his chest. The social worker is informed that he attends day care at a rest home and staff have expressed concerns about his injuries to the hospital social worker. He is partially competent and is known to have expressed fear of his son. Hospital staff notices that he gets into foetal position when his son is around. He states he does not wish to go back to his home where he lives with his son.

In these circumstances hospital staff could apply to the Family Court for a section 10 personal order under the Protection of Personal and Property Rights Act 1988 to place the person in a rest home. Counsel for the subject person would then be appointed and the patient's best interests considered. The Court and Counsel for the Subject Person (who have more rights to investigate matters than would hospital staff) could then investigate the matter.

Contacting the police is also an option, but it may mean that the patient has to stay in the hospital until the police investigation is complete.

The Family Court will usually give an urgent interim order, which will enable the Hospital to transfer the patient to a rest home.

In the absence of such an application to the Family Court or the Police could the hospital be liable under section 151 or 195, if they discharge this patient back home and he subsequently dies and an autopsy report indicates he died from injuries he sustained?

In the case of a child in similar circumstances, the appropriate course of action would be to contact Child Youth and Family, a department in New Zealand that has a statutory obligation to prevent children from suffering harm, ill-treatment, abuse, neglect, and deprivation. However, with a vulnerable adult it places a significant onus on the person who is caring for the vulnerable person, such as health professionals and social workers to take action. There is no such equivalent department to take the responsibility for vulnerable adults.

Criminal liability could arise in the case of discharge planning of a vulnerable adult or child, where there is information that the patient is being discharged into a violent or unsafe environment.

The new law makes people who know about offending against children and vulnerable adults stand up and do something about it.

A health practitioner who often take steps to protect their patients by informing relevant authorities, do so because they believe they have an ethical obligation to do so not because they fear criminal liability.

The new legislation will however create a new justification and a new driver to take the necessary steps to protect the vulnerable.

Tax as a public obligation

Stanislav Kouba

1. Abstract

The contribution deals with the term tax, which is very theoretical question. This term was tried to define by many of tax theorists. The right definition is the basic elements of the definition of tax law as a whole and it also first step for tax principles creation. The view of the contribution on the term tax goes through the concept of public obligation. The public obligation is the obligation which arises through the public power, not important who is the creditor of it. The common concept of tax knows the taxes as a kind of public obligations, but important is, whether there are some differences which are essential for formulation of the tax principles. This problem should be main problem of the contribution.

2. Introduction

The term “tax” is used very often for different meanings which are close but different. This problem is not only theoretical, but also in the practical use such as tax legislation or tax law interpretation. In the theoretical point of view the definitions of the tax could lead to the different results of researches in the area of tax theory. This is basic reason for necessity of clarification– to speak about same things when the same terms are used.

The first goal of this contribution is to find the basic meaning of the term “tax” and declare some terminology for this work which can avoid the bad interpretations. This basic meaning could be than starting point of further researches. From the point of view of author it is such case, because his long-time project is research targeting on tax principles. Logical step before the identification and finding tax principles is therefore the specification of the tax term.

For such general topic and for timeless existence of the tax terms definitions it is very necessary to have as a leading factor the material point of view. Thus the investigation of the basic meanings of the tax terms couldn't be influent by formal sides of some institutes. It seems very easy but it is hard to determine the formal and material sides in some cases. Therefore it is very suitable to use some of the methods which are described further and which are oriented on the reaching the material sides of problems.

3. Materials and methods

3.1. Generally

The contribution deals mostly with theoretical issues. For these purposes the main materials will be the theoretical publications from the area of tax law. Also opinions of tax experts and discussions are very suitable and contribution. The sources of the materials are mostly Czech origin (important mention is that the Czech, Polish and Slovak financial law theorists are very collaborative; thus many opinions are very similar in these countries).

In the area of choice of suitable methods the very strong influence has the leading principle of the contribution – the following the material side of the problem. According this principle there are opened the doors for methods which have very close to the economy. Nevertheless this contribution is not economic contribution it could still remain the law contribution. In

this context the economy should be understood as a science which describes the (economic) reality, recommends regulation and analyzes impacts of this regulation. Law on the other side is the science of this regulation (its formulation). Therefore these disciplines could be in collaboration in this contribution not in rivalry.

Concretely the main used methods are the analysis, the synthesis, the comparison and the mind experiment. It is necessary briefly mentioned the method of “mind experiment” which is not so typical. This method allows to construct the specific situation (example) on which could be tested some conclusions and subconclusions.

Except the law publications will be used also the economic publications, because the economy is science which describes the (economic) reality (on the other side the law is something what regulate relations and create new reality). In the area of economy the main issues are set in the microeconomics, because of the researching of individual attitudes to the taxation and the taxpayers view.

The use of the economy opinions also brings another method into use. It is multidisciplinary analysis which uses the law and economic background for argumentation.

3.2. Research progress

The method which is usually used for finding definition for group of institutes is to identify this group as a first step (for tax purposes this group could contain income tax, value added tax, gift tax ...) and then to find features which are common for them (respectively finding of positive correlation of the features). This method is problematic in its first step because it inclines to the choosing of taxes in formal sense (this means the law institutes which are called “taxes” by the law). The group of taxes is than identified as very narrow. For example as taxes are not usually identified historical “natural taxes” (further to the natural taxes in chapter 4.2.5.) or any law institute which is not explicitly called tax (levies, contributions and so on). So the most problematic point for the finding of the definition of the tax is to choose the “group of taxes”. How to identify this group without tax definition? It is cyclic error and therefore this method should be refused.

The method which can avoid above mentioned cyclic error deals with basic concept of tax. The basic concept determines the type of the general law institute which is essential for the complex material (not formal) view on the tax law. This institute (obligation, subobligation, fulfillment, payment, duty, right – see chapter 4.1.) will be than narrowed down by specific features which determine the tax from the other law constructions. The result of such progress will be identification of the concept of tax and its features – these two factors create the material tax definition which could be used for further material research of tax law.

The first step – identification of the basic concept is content of chapter 4.1. The potential concepts are identified through the literature or theoretical evaluation. Then are these concepts evaluated according to usefulness for material researches in the area of tax law.

The second step is identification the relevant features of the taxes. The potential features (criteria) will be then tested separately on the background of this concept. When this feature is relevant and determine the basic tax concept from the other law institutes, it will be considered as a relevant feature (criterion) for the material definition of the tax.

The sources of potential criteria are the definitions of tax which are mentioned in the chapter 4.1. These potential criteria will be tested by above mentioned method. The conclusion will be than statement about relevance of this criterion.

4. Discussion and Results

4.1. Basic concept of tax

4.1.1. Generally

The many theorists and also practitioners were and are searching the definition of the tax. They did it for different purposes (maybe it could be reason for which these definition are different). After comparison these definitions and possible theoretical concepts these definitions and concepts could be split into several groups:

i. Tax as a fulfillment:

Taxes are moneyfulfillments which don't represent against-fulfillment for some special fulfillment and they are set by public authority in the form of law and they are collected to cover the public needs (Tipke, 2010).

Taxes are obligatory, in advance set by the rate, which mostly on the regularly base drain on non-irrecoverable principle part of nominal income of economic subject in favour of public financial fund without any equivalent against-fulfillment (Radvan, 2010, p. 23).

(Boháč, 2011): Taxes are money fulfillments

- *set by the law,*
- *non-optional,*
- *irrecoverable,*
- *non-purposefulness,*
- *set by state or another public corporation,*
- *income of public budgets.*

Tax is financial sum, which government imposes on natural persons, legal persons, property and transactions to ensure the public (government) incomes (Gardner, 2004)

In above mentioned definitions are taxes in concept of fulfillment. It is the most frequently published concept of tax. The essence is that the tax is object of duty, right, obligation or its part (of some obligation).

ii) Tax as a duty:

Concept tax as a duty brings is expression of the taxpayer position in the tax obligation. It is view on the tax from the position of taxpayer. This concept is also often used in usual situation such as statements: "My tax is 100 €.". This statement means that the duty of taxpayer is 100 € not fulfillment.

iii) Tax as a right:

§ 6 paragraph 1 Czech budgetary rule Act: “(1) Incomes of the government budget are

- a) revenue of taxes including accessories,
- b)”.

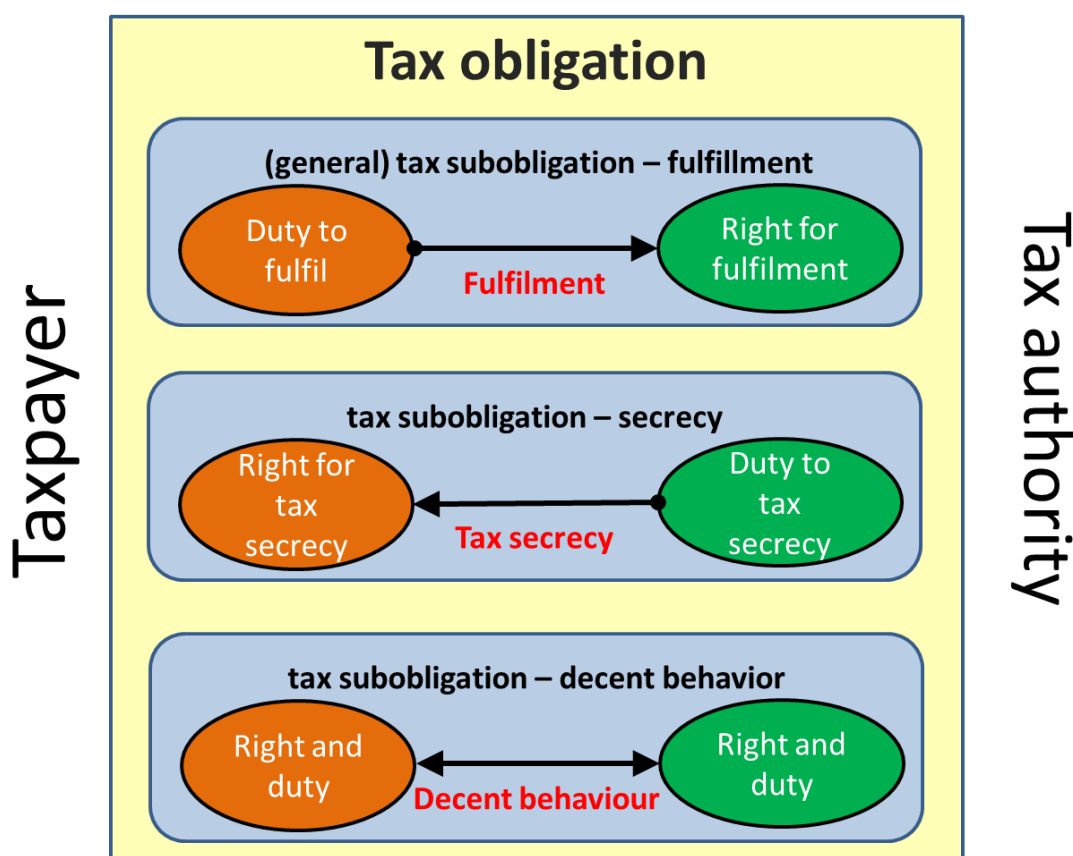
The concept of the tax as a right is expression of the tax from the position of tax beneficiary. His point of view is that the tax is his right. It is typical point of view budgetary law. It is demonstrated in the citation above from the Czech budget rules.

iv) Tax as an obligation

Tax could be considered as a certain kind of legal relation – the tax relation (Radvan, 2008, p. 30)

Advantage of the concept of tax as an obligation is that it aggregates all above mentioned concepts because elements of the tax obligation are besides other the tax rights, tax duties and tax fulfillments. The construction of tax obligation is illustrated in the Figure 1.

Figure 1- Elements of tax obligation



As could be seen in Figure 1 the concept of obligation could be understood in two meanings. Firstly in the narrower meaning by which are covered the main relations between taxpayer and tax authority on the example of income tax it is – the duty to fulfillment, right for fulfillment and fulfillment. This kind of obligation will be further called general tax subobligation. Term subobligation is used because it is part of the tax obligation in the wider

sense (for the tax obligation in wider sense will be further used the term tax obligation). The tax obligation in the wider sense (tax obligation) is aggregation of all tax subobligations.

The tax subobligations could be theoretically split into groups according the rights and duties of taxpayer and tax authority. The first group are the subobligations according which the tax subject has only duties and tax authority only rights (it could be duty to pay lump of sum, or duty to file tax statement). Second group is group of subobligations according which the tax subject has only rights and tax authority has only duties (for example tax secrecy) and the third group of subobligations are subobligations according which the tax subject and tax authorities has bilateral rights and duties (decent behavior).

It could be resumed that there are 5 basic concepts of the tax:

- tax as a tax fulfillment,
- tax as a tax duty,
- tax as a tax right,
- tax as a general tax subobligation,
- tax as a tax obligation.

The determination of concept is not just terminological question (purely formal thing). As was mentioned above the formal side is less important than the material side. The sense of the material side grounds in meaning tax as a starting point for understanding tax law as a whole. The critical point is then to choose the right concept which is the most suitable for this purpose.

For example for the purpose of finding the tax principles is absolutely not relevant formal view. The suitable for this is the material view. The material side of tax law problems and the material concept of law are starting point for further researches.

4.1.2. Concept of fulfillment

The narrowest concept of the tax in the Figure 1 is in the meaning of tax as a fulfillment. Theorists usually consider that fulfillment is a content of duty, right or obligation. According it the concept of tax as a duty, right or obligation is very close to this view. The concept of fulfillment is concentrated only on the fulfillment irrespective to the rights and duties of the parties of the tax obligation. So in the case of no fulfillment there is in fact no tax.

The concept of fulfillment also ignores fact, that there are the other fulfillments except the fulfillment in the general tax obligation (see the other subobligations then general subobligation in the Figure 1). So this concept is very narrow and it is very often narrowed down the tax law as a branch of law by the opinion that tax could be only money fulfillment (payment). Further is this problem described in special chapter (chapter 4.2.5.).

It could be resumed that disadvantage of concept of tax as a fulfillment is its orientation on the transfer not on the relation between the parties of tax obligation. Second disadvantage no reflection on the fulfillments in the other tax subobligations.

4.1.3. Concept of duty

The concept of duty investigates the tax from the position of taxpayer. The tax means especially the intervention into freedoms of the taxpayer. The public power takes a part of taxpayer's freedom to incorporate it into itself. Most often has this part of freedom character of lump of sum so it is intervention into property rights of taxpayers.

Concept of duty is the opposite of concept of tax as a right (this is view of public authority – public budget). This concept could be also supported by the semantic interpretation because of very common phrase “My tax is...” what means “my duty is”. For these purposes is this better concept than concept of filling because when there is nothing fulfilled the duty still pending. On the other hand there is not introduced the side of tax authority which technically represents the beneficiary from the tax.

It could be resumed that disadvantage of this concept is orientation on the position of taxpayer. It not absolutely reflects the other side of tax obligation. Advantage is that it is more flexible than the concept of fulfillment and also it is sometimes understood as all duties (so not only duties in the general tax subobligation).

4.1.4. Concept of right

The side of beneficiary is primary introduced in the concept of tax as a right. This attitude is typical for the public budgetary law where the taxes are one of the most significant incomes of government budget. In spite of this there is similar problem as in the concept of duty because the tax is evaluated only from one side of the tax obligation (from the position of tax authority/beneficiary). Therefore this attitude is not complex too.

Moreover for the budgetary law (and the concept of right) are not important the other rights in the other tax subobligations. This means that the view of budgetary law is also very narrow.

4.1.5. Concept of general subobligation

These above mentioned problem in the concepts of duty and right are solved in the concepts which deal with obligation. These concepts bring inside the rights and duties and therefore tax could be evaluated from the both sides – taxpayer (as a duty) and tax authority (as a right). In fact there could be two obligation concepts on evaluation – the concept of general tax subobligation and the concept of (complex) tax obligation.

The concept of tax subobligation is concentrated on the part of relationship between taxpayer and tax authority. So it ignores the other subobligations (the other rights and duties). This concept brings inside only something what could be called “pure tax obligation”. The tax subobligation is one-side obligation, that means that on the one side is right of public authority and the on the other there is opposite duty. No other rights and duties are covered by this concept.

This concept reflects both sides – taxpayer and tax authority. It could be useful in the case of simplifications because it is the main and major part of tax obligation. In some cases is this majority very high so this simplification do not brings the high deviation.

4.1.5. Concept of obligation

The last and most general concept is concept the tax as an obligation which consents all rights and duties of the parties of this obligation. There are many subobligations in tax obligation – see the Figure 1 which some of them consent for the taxpayer only duties and for tax authorities only rights, some of them consent for the taxpayer only rights and for the tax authority only duties and there are also subobligations in which each party has rights and duties.

The concept of tax obligation brings the complex view on the all parts of taxation (it consents and reflects the other concepts).

This concept is also the most appropriate for further investigation of the material sides of tax law, because of its complexity. Very big advantage is also that a lot of conclusions further are applicable for the other concepts (because of the fact that the concept of tax obligation is the most general).

As could be seen from above mentioned text the term tax is very variable used. Therefore it could be very hard to switch the using the term “tax” to the concept of tax obligation. Therefore it is recommended to use the terms which marks the concrete institute not the term tax which could be understood in several meanings.

The concept of tax obligation was considered the most suitable for the purpose of investigation the material side of tax law. Therefore it will be used for the further investigation within this contribution. As was mentioned above it doesn't eliminate the investigation of the tax fulfillment, tax duties and tax rights. On the contrary these elements constitute the tax obligation and their investigation is part of investigation of tax obligation.

4.2. Tax obligation features

4.2.1. Generally

The dealing with the basic concept of the tax is finding the answer on question what the tax generally is, what could be the main point of the investigation of the tax law. The conclusion reached above is that the tax law should be investigated from the position of tax obligation, because the tax obligation brings inside the needed complexity.

According the methodology will be in this chapter investigated the features of the tax obligation. This attitude could bring more complex view on the term tax. The potential features of the tax obligation were identified from the definitions of the tax above. According it the tax obligation has potentially these features:

- public obligation
- non-optional obligation,
- obligation with general subobligation consisted of payment,
- obligation with general subobligation consisted of nonpurposefull fulfillment,
- obligation with general subobligation consisted of fulfillment with no against-fulfillment,
- right from the general tax obligation means profit of public budgets,

- obligation set by the law,
- obligation set by public corporation.

4.2.2. Relativity

It is very important to consider about absoluteness of the features which will be described. Some of the features are typically absolute (for example the feature of publicity of the obligation) and any of them not. Typical relative criterion is criterion of equivalence described more in detail in chapter 4.2.8. Basic conclusion of this chapter is: “no equivalence is typical for taxes and equivalence is typical for the fees”. But very often there are institutes which are typical by partial equivalence. The rate of equivalence could be measured. Using of net present value is good choice for this type measurement:

$$E_r = NPV_a / NPV_f$$

E_r ... equivalent rate (%)

NPV_a ... summa of net present value of all againfulfillments

NPV_f ... summa of net present value of all fulfillments

Demonstrative example could be example of social security contribution:

Person A pays from age 25 yearly 5 000 € as a social security contribution (only fulfillment). The retirement age is 65 and projected pension is 7 000 € a year. The median age of death is 75. For simplification no discount rates and risks are calculated. The equivalent rate will be 0,35 (35 %) ¹. In this case the social security contribution has more tax character (65 %).

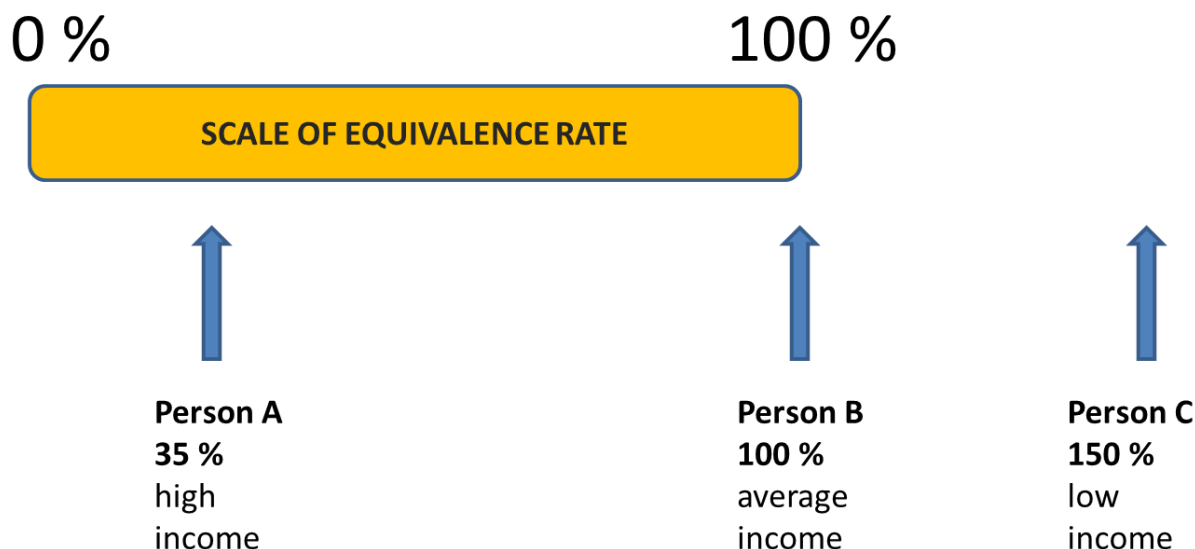
For the social security system is typical solidarity. The person with lower income pays less but their pension don't lower same portion. For example person B could have yearly social security contribution 1 000 € and pension 4000 €. In this case the equivalent rate is 100 % ².

Person C has the lowest income and pay yearly contribution 500 € and will have pension 3750 €. In this case is equivalent rate 150 %. In this case is equivalent rate even more than 100 %. It is mean that person C more receive from the social security system than give on the contributions.

It could be illustrated by Figure 2.

¹ $(10 * 7\ 000) / (40 * 5\ 000)$

² $(10 * 4\ 000) / (40 * 1\ 000)$

Figure 2- scale of equivalence rate

The social security system has usually strong redistribution character. Therefore social security contributions behave different in different levels of income of liable persons. In the cases of small and average income it has no tax character because of high level of against-fulfillments and on the other side in the case of high income it has character of tax because of low level of against-fulfillment.

According above mentioned is proved that some of criterions are relative. In this relative criterion there could be investigated the rate of this relativity and according it should be decided about the character of such obligation.

4.2.3. Criterion of public obligation

Obligation could be divided on private and public. There are many researches in law theory which deals with what is public and what is private (it is up this contribution to solve this problem). They usually deal with the public authority and its empowerment. There is important that the public authority is not in a role of private subject (for example as a side of contract in a contract of sale).

The private obligation deals according different principles. The most important of them is the principle of equality (in rights and also in the position) which is not typical for the tax law and tax obligation. Therefore the statement that the tax obligation is public obligation is relevant feature for definition of tax obligation.

4.2.4. Criterion of non-optionality

Vary of tax definitions contains the non-optionality of the tax obligation. This feature could be also tested and probably used for definition of tax obligation. The non-optionality could be described as something, which not depends on will of taxpayer. On the other hand the optionality could be described as something which depends on will of taxpayer.

This feature of tax obligation seems clear, but some kind of doubts can arise from practical use of these rules. For example: Income tax is imposed on income. This relation is not voluntary – it is given through public law, but on the other hand the existence of this income is usually voluntary. So in the global point of view the income tax is voluntary because everybody could decide about his incomes and so about his tax obligation. Moreover it is reality that this kind of optionality moderates human activity (macroeconomically the tax restrains economic activity). Analogous relation could be seen almost for every kind of tax obligation (not only income tax obligation).

So some kind of optionality could be found in the tax obligation. This kind of optionality could be called as an indirect optionality. The indirect optionality means that the taxpayer could avoid object of taxation (income, property ownership and so on) and by this way he can avoid taxation. On the other hand the taxpayer is not able to influence the relation between object of taxation and tax obligation. In context of fact that almost every tax is imposed on the very common things so the avoiding taxation by the indirect optionality in these cases would lead to very limited life of the taxpayer and therefore this indirect optionality has very close to the non-optionality itself. Respectively the non-optionality should be investigated in the influence of will of taxpayer on the relation between tax object and tax obligation.

According to above mentioned arguments the non-optionality is relevant feature of tax obligation.

As a first remark to non-optionality could be mentioned the optionality investigates tax obligation from the subjective view of taxpayer. Nevertheless from the position of tax authority it is not different. The tax authority has also its non-optional duties incorporated in the tax obligation. Nevertheless in some rights and duties there are signs of optionality. The classic institutes which declare some kind of optionality are tax pardon or tax amnesty (according to these institutes could tax authority give up some tax rights and therefore some tax duties of taxpayer also expire).

As a second remark could be mentioned that non-optionality is connected very strongly with potential criterion “the setting by public authority”. Because this kind of obligation is obligatory and according to the very often principle that the duties could be set only by the public authority the non-voluntary obligation could be only set by this authority in the principle.

4.2.5. Object of fulfillment in the tax obligation (general tax obligation)

According to some of the definitions there is essential feature of the tax obligation the type of the fulfillment. According to some authors only payment (money fulfillment) is acceptable.

This opinion is not generally useful. In the present taxes are oriented on the money, but in the past, there were also taxes oriented on the other things. Firstly the money was not only currency. As well as money it was used for example the metal tools, stripes of linen, axes, furs, salt. These things suits also for satisfying of human needs. Secondly the “payments” with goods – barter - are not anything special. Barter was product of small amount of currency in the past and also by lower trust in it. These types of “payments” were then commonly used also in taxes which were collected in natural forms (grain, cattle, metal tools, ...) very often.

Next argument against the thesis that money fulfillment is feature of the tax obligation deals with factual unimportance of the type of fulfillment (respectively its only formal importance). By the thesis of importance such feature there is given factitious difference when somebody is obliged to give 5 coins and somebody is obliged to give something in the prize of 5. In reality – it is the similar. On the side of taxpayer it brings same sacrifice and on the side of tax authority there is same benefit. The similarity could be more noticeable in the case of good which was used as a payment instrument, such as gold, silver, notes, bonds and the other.

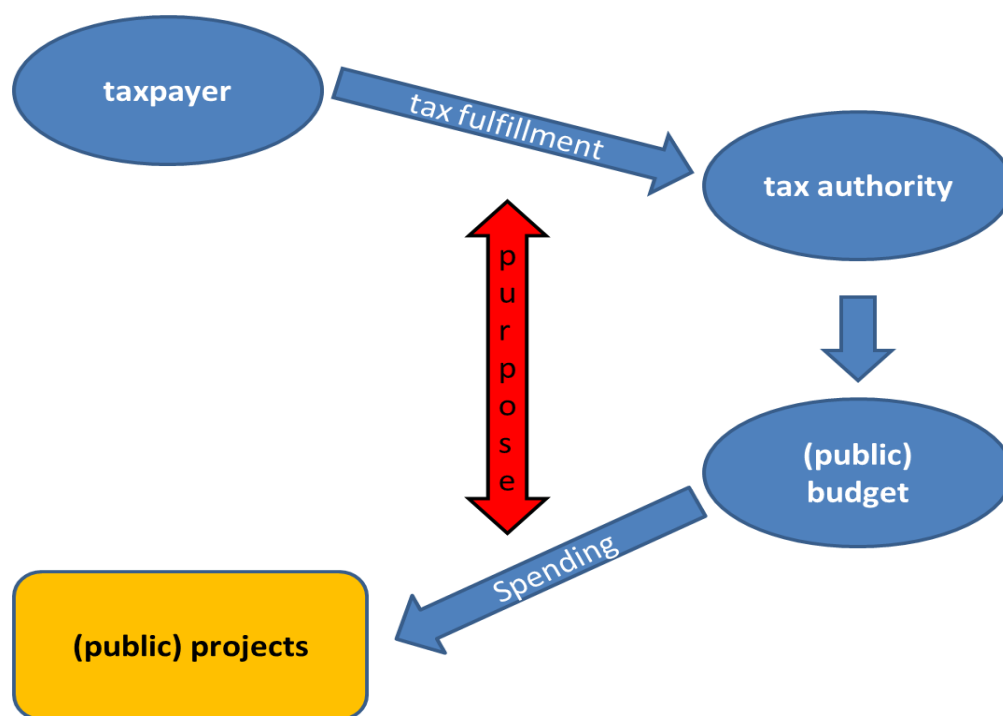
There is no argument for this division and no argument why the group of non-money fulfillment should have special regime or principles. This approach could be also applied wider for example on services. There is no difference when somebody spends a 1 hour in public services for free and the situation when he pays his one hour salary. It is also same on the side of public authority for which is no difference between 1 hour free work and payment in high which is needed to employ somebody for the same work for 1 hour. This means that medieval corvée could have character of tax obligation.

There are also opinions that non-cash income of public budget is heavily evaluated than the cash income and therefore they have different regime. But the factor of evaluation is not real problem it could be considered only as an accounting problem which has no impact on material side of the tax obligation.

As a resume of this chapter it could be said that the type of the filling (in the general tax subobligation) is irrelevant feature of tax obligation.

4.2.6. Non-purposefulness

The purposefulness is a kind of relation between the tax fulfillment and the spending of public budgets on public projects. The relation is illustrated in Figure 3.

Figure 3 – Non-purposefulness

This relation exists in every tax obligation because of budget destination (state budget, environmental budget, fund of public infrastructure). The purposefulness through the public destination is very common. It doesn't mention the certain project (therefore purposefulness should be considered as a relative feature). For purpose of the tax obligation is up to investigate the relevance of this feature for constitution of the tax obligation.

First of all it could be investigated the sense of the purposefulness for all of the parties of investigated obligation. In the standard tax situation there are only two parties – the tax payer and the tax authority (represents in fact public budget). The sense for what is tax fulfillment collected is not important sign of this relation. It is not need to change the borders between these subjects because of it.

In some cases the will of fulfill could be influent by the general purpose. For example: If taxpayer has limited resources he fulfill rather that what will be used for the building of infrastructure than what will be used for the better conditions in prisons. This general purposefulness has no influence on consideration whether it is tax obligation or not. There are no specific rights which arise from tax fullfilment.

On the other hand there could be more specific purpose of the fulfillment which directly creates the rights of somebody who is not public authority. This direct creation incorporates in the investigated obligation new subject – the beneficiary (who is not public authority). So it is created tree-subjects obligation. This three-subject relation is little bit complicated. Especially there will be different view on relation between tax authority and taxpayer. In standard tax obligation the tax duty means the impact into the taxpayer's property rights. On the other side stay the public authority which formulate this impact as a sovereign. Therefore in interpretation of tax law there is principle "*in dubio pro libertate*" which means "in doubts of tax law in favor of taxpayer". When the beneficiary is incorporated in the relation the relation is complete changed. The relation are in fact not between public authority and

(tax)payer and public authority and beneficiary, but the essence is between (tax)payer and beneficiary. The public authority has in the relation only role of agent.

For example: In state A is special “solidary” duty to pay which is income of state budget. In the time of the legislative implementation of the special solidary duty was also introduced the system of redistribution. The solidary duty is in fact the instrument for financing of this special system.

In state B there was introduced the special redistributing system for financing reception centers. The special duty to pay was given on all owners of big residences. The payments are collected by public authority. The sum of these payments is then divided among all reception centers according the number of homeless persons which use the services of these centers and number of nights which they spent there.

In the point of view of taxpayer are above relations very close. Duty in the state A and in the state B has the same content. Also fulfillment is same.

The differences are on the other hand in the complex view on the relation. In the state A there are 2 systems (2 obligations) – the system of collection of money and the system of redistribution. These systems are independent. When is low income in the collection system it does not directly influence the system of redistribution. In the state B there is only one system (1 obligation) – with 3 participants (payer, public authority and beneficiary). The lower income in collection has direct impact on the rights of beneficiaries. Therefore on the duties of taxpayer depends rights of the other subjects.

The duty of payer in the state A should be then considered as a non-purposefulness and the duty of payer in the state B should be considered as a purposefulness. The public authority influences the relation in state B only as an agent for collection of fulfillments. In the state A it is beneficiary in the first relation and the payer of benefits in the second relation.

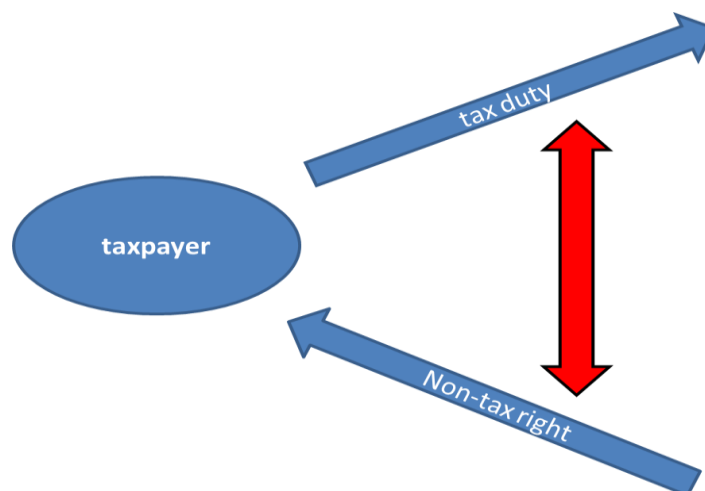
The agent role of the public authority should also influence application of principle “*in dubio pro libertate*” because the merit is not between the taxpayer and tax authority but between the tax payer and beneficiary. Therefore the obligations in the state B couldn’t be considered as a tax obligations (except the other reasons).

According the above the non-purposefulness is relevant feature of public obligation.

As a remark could be mentioned the purposefulness is very close to non-against-fulfillment. It could be its special case in which is the taxpayer also in the role of beneficiary.

4.2.8. No against-fulfillment

The non-against-fulfillment feature is no existence of relation between the tax duty of taxpayer and his rights. The classic example is the social security system in which are duties or fulfillments (mostly in the form of duty to pay) connected with rights which offer social security system. This relation is demonstrated on the Figure 4.

Figure 4 - Non against-fulfillment

For the tax obligation is characteristic that no such relation. This statement is not absolute. It is not rare that some kinds of against-fulfillment or rights arise. For example tax authority in the Czech republic publishes top 20 of taxpayers in the area of income tax as subjects who contribute most into the public budget. It could be viewed as some kind of advertisement which improves PR of the taxpayers. Nevertheless this kind of against-fulfillment is very small on the contrary with the high of the tax duty. Therefore the non-tax character of the income tax is not concluded. More in the Chapter 4.2.2.

In the classic theories there are two groups of similar institute – taxes and fees. The main and maybe only difference between them is existence the against-fulfillments or against-rights. The existence is typical for the fees and non-existence for the taxes.

As was mentioned above this feature is in some cases special situation of non-purposefulness. But it is not need to be in every case.

4.2.9. Right from the general tax obligation means profit of public budgets

According above mentioned the real beneficiary of the tax fulfillment should be investigated. If the real beneficiary is not public authority, but private entity, the investigated institute is in fact regulation the relation between two independent parties, not tax.

The system and attitude is very similar as is in the described conception of non-purposefulness. In this light there is again the accent of the rights of another private entity which are directly bound with the duties of this party.

4.2.10. Obligation set by the law

With the criterion of public obligation is related criterion which states that tax obligation is set by law. In fact the setting by law or any act of public power is the sign of its publicity. Therefore the criterion of stating by law is one of the components of public publicity. Therefore it is not need its explicit mention in the tax obligation definition.

Besides, the setting duties by law is part of modern constitutionality. In the past the roles of government (monarch) in some states was stronger. Therefore the setting by law is mostly the

formal condition of constitutional law not the sign of tax obligation. For example the tax obligation set by not legislation act of the president will be unconstitutional but it will be still tax obligation.

Therefore the setting by law is irrelevant feature for the definition of tax obligation (it should be mostly considered as formal side of present tax obligations)

4.2.11. Obligation set by public corporation

From the view criterion that tax obligation is public obligation and the public obligation could be set only by some kind of public authority it is not need to explicitly mention the setting by public corporation as a feature of public obligation. The feature of setting by public obligation is therefore only a consequence of the publicity of the tax obligation.

Therefore the feature “setting by public corporation” is not relevant feature of tax obligation.

5. Conclusions

For the purpose of investigation of material sides of tax law is necessary to define tax from the material point of view. Mentioning the material sides of taxes, there are several concepts of tax (tax fulfillment, tax duty, tax right, general tax subobligation and tax obligation). The best is to investigate the tax law by the view of tax obligation, because only this concept brings the relevant complexity. The using of term tax for the tax obligation is problematic thanks to rooted use of this term for tax fulfillment. Therefore the term “tax obligation” will be apposite.

The concept of tax is only the ground of the tax obligation definition. For distinguishing the tax obligation from the other obligations the relevant features had to be found. The tax obligation could be than defined as obligation which is:

- public,
- non-optional,
- non-purposeful,
- with no against-rights for taxpayer.

The named feature could be evaluated relatively. The definition is wider than definitions which are usually used. The method used in this article used only features which were found in the found definitions. Then other features could arise when the different methods will be used (for example the question whether the tax obligation has non-penalty character).

6. Acknowledgments

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SEXUAL HARASSMENT IN WORKPLACE IN INDIA

Arundhati Bhattacharyya

Assistant Professor

Dept. of Political Science

B G College

Kolkata

West Bengal

India

Indian women are moving ahead and are slowly gearing up to take up a strengthened position in the working place. They are slowly becoming aware that the obstacles in their path of success should be handled deliberately and not pushed aside thinking that the problem will be solved with time. Working women in India and the world face several problems. Sexual Harassment at the workplace is one of them. Sexual Harassment at the workplace is a form of structured violence against women. The concept of “sexual harassment” assumed a worldview proportions in which women were not flattered by sexual attention, but were extremely tortured by it. In a survey by the joint Reuters/Ipsos global poll, it held that sexual harassment is at dangerous levels in the workplace. According to this finding 1 in 10 workers have been pestered for sex by a senior employer. The surveys of about 12,000 people in 24 countries found workers in India were the most likely to report sexual harassment with a report rate of 26 per cent. They were followed by workers in China with 18 per cent,

Mexico 13 per cent, and South Africa 10 per cent. In Italy, 9 per cent of workers reported being sexually harassed at work, while in Brazil, Russia, South Korea and the United States a total of 8 per cent of workers reported being pushed for sex by a senior.

CRIMES AGAINST WOMEN

A recent study states that India is the worst country for women among the G20 nations. The report suggests that Indian women are not free from violence. The National Crime Reports Bureau 2011 shows that Bangalore comes second in the country for crimes committed against women. According to the report, Bangalore has 1,890 cases, which accounts for 5.6%, after New Delhi (13.3%). A very well-thought explanation has been provided by Arundhati Ghosh. The real problem lies in the presence of many Indias at present. It's difficult for a socio-economically and sexually repressed India to live with the modern, independent India. Backward ideas about gender and sexuality overpower the India in which women want to live on their own. The continuous conflict between tradition and modernity at different levels are creating a complex scenario. Institutions in India do not offer enough support for women who want to report on crimes. Weak laws and the weak implementation machineries make the matter worse. The families also, are, mostly responsible in preventing women from reporting crimes.

Vishakha Guidelines in 1997 was a revolutionary step taken by the Supreme Court of India to tide over the sexual harassment of women in the workplace. In India, the Supreme Court and the High Courts soon took a very progressive approach towards solving the problem of sexual harassment as a violation of human right. The Supreme Court of India has recognized, acknowledged and defined sexual harassment of women at workplace as systemic discrimination against women and as violation of human rights. The Supreme Court clearly states that in the absence of enacted law to provide recourse against sexual harassment at workplaces, the Vishaka Guidelines ‘would be treated as law’ under Article 141 of the Indian Constitution.

The apex Court had put the onus on the employers to provide harassment-free work environment by taking preventive measures and providing complaint resolution mechanisms for redressal of complaints. In India, several organizations have carried out research on sexual harassment of women at the workplace. A survey conducted by Sakshi reveals that 80 per cent of the women respondents stated that sexual harassment exists, 49 per cent had encountered sexual harassment, 41 per cent had experienced it, 53 per cent did not have equal opportunities, 53 per cent were treated unfairly by supervisors, employers and co-workers, 58 per cent had not heard of the Supreme Court’s directives regarding Vishakha guidelines and 20 per cent of the organizations had implemented the Guidelines.

SOME CASES OF SEXUAL HARASSMENT

RUPAN DEOL BAJAJ CASE

Rupan Deol Bajaj, an IAS officer had charged KPS Gill, the IPS officer of sexual harassment. The sexual harassment case happened in 1988 at a Chandigarh dinner when Gill was the chief of the Punjab Police. It took 18 long years, but the decision finally came out in favor of Rupan Deol Bajaj. The case had received excessive media coverage, since it involved two senior officers. But for Bajaj, the decision to file an FIR against Gill was the most difficult question of her life. She was pitted against a senior officer who was the toast of the town for his anti-terrorist operations. On the other hand, Gill did not stand to lose much. Despite the allegations, he was entrusted with crucial assignments and was even invited to preside over important functions. The verdict of the Supreme Court came as a breather not just for Bajaj, but also for the women in India, who now have the support of a successful precedence. But it was disappointing that the Apex Court rejected Bajaj's plea for handling Gill a prison sentence. Bajaj stated, "I had a tough life for 18 years in the world of men with snide remarks. No working women will have to suffer this. This judgment will benefit them". Indira Jaisingh who pleaded Bajaj's case said that for most Indians, Bajaj's honor was less important than the services of Gill, who was described as the "distinguished son of India".

NALINI NETTO CASE

The Kerala High Court admitted a writ petition challenging the Government Order winding up the Justice G. Sasidharan Commission inquiring into the allegation of sexual harassment leveled by Nalini Netto, senior IAS officer, against a former Minister, Neelalohithadasan Nadar. In her complaint to the former Chief Minister, Mr. E. K. Nayanar , in February 2000, Ms Netto had alleged that she was sexually harassed by Dr. Nadar in his office room in the Legislative Assembly Complex on December 21, 1999. Mr. Nadar has strongly denied the allegations, but he was forced to resign following a political fur ore and protests from various quarters, including women's groups.

PRAKRITI SRIVASTAVA CASE

The same minister is also accused of harassing a woman IFS officer, Prakriti Srivastava. This was prior to the assault on Nalini. Prakriti has now lodged a complaint with the police about the harassment perpetrated by the minister. She was summoned by the Crime Branch in the enquiry relating to Nalini Netto and she has given evidence. Her case has also been taken by the Human Rights Commission.

P. E. USHA CASE

The case of P. E. Usha is again that of Sexual Harassment at the workplace. She is a woman activist working at Calicut University and she was being relentlessly harassed by her colleagues at the University. Her context is slightly different. Usha was the victim of sexual assault in a bus by a passenger. Though Usha succeeded in taking the bus to a police station and having the criminal arrested, police action was tardy. Its fallout was unbelievable. Her colleagues in the University began to harass and ostracize her, with one of them even alleging that the incident had taken place with her consent. Usha was menaced by threats that her daughter would also be attacked which forced her to flee the place. She held”.....though I wrote in the Malayala Manorama about my trauma I was not attempting to sensationalize it. Though I am the victim, I am being victimized now. I am out of the University while the man who is harassing me has been given a promotion.”¹⁵

APPAREL EXPORT PROMOTION COUNCIL CASE

Enlarging on the definition of sexual harassment in the workplace, the Supreme Court has ruled that physical contact is not an essential factor, for a female worker, to charge a male colleague with molestation. Each incident of the sexual harassment in the workplace is a violation of the lofty ideals of the Constitution, enshrined in the Fundamental Rights. The Court upheld the dismissal of the Apparel Export Promotion Council Chairman’s private secretary A. K. Chopra on the ground of committing sexual harassment, on a female typist. On 12 August,

1998, accused A. K. Chopra tried to outrage the modesty of the junior employee, at the Taj Palace hotel. There she had been deputed on official work for the Chairman of the Council.

INDIAN CONSTITUTION

Part III and Part IV of Constitution of India guarantee certain rights and provides directives to the State for the protection of rights of women. Fundamental Rights and Directive Principles of State Policy of the Indian Constitution protect women against sexual harassment at the workplace. Article 14 of the Constitution provides that the State will not deny any person equality before law and equal protection before law. Article 15(1) of the Constitution provides that the State shall not discriminate against any citizen on grounds of religion, caste, sex or place of birth. Article 15(3) of the Constitution specially provides that the State is permitted to make special provisions for the benefit of women. Article 16 (1) and (2) prohibit discrimination in general, and also discrimination on the basis of sex, in the offices and those employed under the State. Article 19 (1) (g) of the Constitution provides space ‘to practice any profession or to carry out any occupation, trade or business’. Article 21 of the Indian Constitution reads as:“No one shall be deprived of his life or personal liberty except according to the procedure established by law.” Right to life and liberty includes right to live with dignity and in a profession of one’s choice.

Sexual Harassment at workplace means being deprived of one's precious right to life and liberty. Article 25 supports freedom of conscience & free profession.

1. Duty of the Employer or other responsible persons in work places and other institutions: It shall be the duty of the employer or other responsible persons in work places or other institutions to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts, of sexual harassment by taking all steps required.

2. Definition: For this purpose, sexual harassment includes such unwelcome sexually determined behaviour (whether directly or by implication) as:

- a) Physical contact and advances;
- b) A demand or request for sexual favours;
- c) Sexually coloured remarks;
- d) Showing pornography;
- e) Any other unwelcome physical, verbal or non-verbal conduct of sexual nature

Where any of these acts is committed in circumstances where-under the victim of such conduct has a reasonable apprehension that in relation to the victim's employment or work whether she is drawing salary, or honorarium or voluntary,

whether in government, public or private enterprise such conduct can be humiliating and may constitute a health and safety problem. It is discriminatory for instance when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment or work including recruiting or promotion or when it creates a hostile work environment. Adverse consequences might be visited if the victim does not consent to the conduct in question or raises any objection thereto.

3. Preventive Steps: All employers or persons in charge of work place whether in public or private sector should take appropriate steps to prevent sexual harassment. Without prejudice to the generality of this obligation they should take the following steps:

(a) Express prohibition of sexual harassment as defined above at the work place should be notified, published and circulated in appropriate ways.

(b) The Rules/Regulations of Government and Public Sector bodies relating to conduct and discipline should include rules/regulations prohibiting sexual harassment and provide for appropriate penalties in such rules against the offender

(c) As regards private employers, steps should be taken to include the aforesaid prohibitions in the standing orders under the Industrial Employment (Standing Orders) Act, 1946.

(d) Appropriate work conditions should be provided in respect of work, leisure, health and hygiene to further ensure that there is no hostile environment towards women at work places and no employee woman should have reasonable grounds to believe that she is disadvantaged in connection with her employment.

4. Criminal Proceedings: Where such conduct amounts to a specific offence under the Indian Penal Code or under any other law, the employer shall initiate appropriate action in accordance with law by making a complaint with the appropriate authority. It should ensure that victims, or witnesses are not victimized or discriminated against while dealing with complaints of sexual harassment. The victims of sexual harassment should have the option to seek transfer of the perpetrator or their own transfer.

5. Disciplinary Action: Where such conduct amounts to misconduct in employment as defined by the relevant service rules, appropriate disciplinary action should be initiated by the employer in accordance with those rules.

6. Complaint Mechanism: Whether or not such conduct constitutes an offence under law or a breach of the service rules, an appropriate complaint mechanism should be created in the employer's organisation for redress of the complaint made by the victim. Such complaint mechanism should ensure time bound treatment of complaints.

7. Complaints Committee: The complaint mechanism, referred to in (6) above, should be adequate to provide, where necessary, a Complaints Committee, a special counsellor or other support service, including the maintenance of confidentiality. The Complaints Committee should be headed by a woman and not less than half of its member should be women. Further, to prevent the possibility of any undue pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment. The Complaints Committee must make an annual report to the Government department concerned of the complaints and action taken by them. The employers and person in charge will also report on the compliance with the aforesaid guidelines including on the reports of the Complaints Committee to the Government department.

8. Worker's Initiative: Employees should be allowed to raise issues of sexual harassment at a workers' meeting and in other appropriate forum and it should be affirmatively discussed in Employer-Employee Meetings.

9. Awareness: Awareness of the rights of female employees in this regard should be created in particular by prominently notifying the guidelines (and appropriate legislation when enacted on the subject) in a suitable manner.

10. Third Party Harassment: Where sexual harassment occurs as a result of an act or omission by any third party or outsider, the employer and person in

charge will take all steps necessary and reasonable to assist the affected person in terms of support and preventive action.

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in Private Sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

INDIAN PENAL CODE

The sections of the **Indian Penal Code** that can be applicable to sexual harassment (which makes it a criminal case) are:

Section 294

‘Whoever, to the annoyance of others, (a) does any obscene act in any public place, or (b) sings, recites and utters any obscene songs, ballads or words, in or near any public space, shall be punished with imprisonment of either description for a term that may extend to three months, or with fine, or with both.’ This provision is included in Chapter XVI entitled ‘Of Offences Affecting Public Health, Safety, Convenience and Morals’ and is cognisable, bailable and triable by any magistrate.

Section 354

Whoever assaults or uses criminal force on any woman, intending to outrage her modesty or knowing it likely that he will thereby outrage her modesty, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

Section 509

(Word, gesture or act intended to insult the modesty of a woman) This is included in Chapter 22 entitled 'Of Criminal Intimidation, Insult and Annoyance', and is cognisable, bailable and triable by any magistrate. It holds: 'Whoever, intending to insult the modesty of a woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture is seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.'

Under the Indecent Representation of Women (Prohibition) Act (1987) if an individual harasses another with books, photographs, paintings, films, pamphlets, packages, etc. containing the “indecent representation of women”, they are liable for a minimum sentence of 2 years. Section 7 (Offences by Companies) further holds companies where there has been “indecent representation of women” (such as the display of pornography) on the premises, guilty of offenses under this act, with a minimum sentence of 2 years. The provisions of this act have the potential to be used in two ways:

- If an individual harasses another with books, photographs, paintings, films, pamphlets, packages, etc. containing ‘indecent representation of women’; they are liable for a minimum sentence of two years
- A ‘hostile working environment’ type of argument can be made under this act. Section 7 (Offences by Companies) – holds companies where there has been ‘indecent representation of women’ (such as the display of pornography) on the premises guilty of offenses under this act.

Civil case: A civil suit can be filed for damages under tort laws. That is, the basis for filing the case would be mental anguish, physical harassment, loss of income and employment caused by the sexual harassment.

Several other provisions of the new Sexual Harassment Law passed by the Indian Parliament will be discussed in detail in the final paper.

**THE CORROBORATION CONTROVERSY CREATED
BY SECTION 157 OF THE EVIDENCE ACT 1950**

*Prof. Dr. Mohd. Akram b. Shair Mohamed**

ABSTRACT

Generally by virtue of section 134 of the Evidence Act 1950, the evidence of one witness will be enough to secure a verdict in a criminal cases or judgment in a civil case. This reflects the maxim that witnesses are weighed, not counted. However few exceptions to this general rule have developed. These exceptions have taken two forms: one, where corroboration is required as a matter of law as under section 133A – of the Evidence Act 1950, where a child’s unsworn evidence is admissible against an accused person. He the accused person cannot be convicted without corroboration. Again on a charge of sedition under the Sedition Act 1948, there can be no conviction without corroborative evidence.

Furthermore in cases where the prosecution’s case is based wholly or substantially on or more identification by a witness of the accused the judge must caution himself before convicting the accused according to the Turnbull guidelines.

Then in three circumstances the judge must caution him, in his notes of evidence of the danger of convicting on the uncorroborated evidence of (a) an accomplice under section 133 and 114(b), (b) sworn evidence of children, and victims of sexual offences both male and female.

A special situation has answer under section 157 of the Evidence Act 1950, which allows a witness’s previous statement to corroborate his evidence in court. Two contrary view have surfaced. One view is that a previous statement constitutes true corroboration – this view has now been reestablished by the Federal Court last year, as in India and Brunei. The contrary view is that a previous statement is not true corroboration as being not external to the witness as established by the common law in *R v. Whitehead*, and *R v. Baskerville* is value is only to show consistency. This view now not recognized in Malaysia but prevails in Singapore and England. Obviously Parliament must intervene to clarify the law.

One of the essential safeguards on the quality of evidence has been the common law rules on the corroboration of certain types of evidence. Any decision grounded on information from a single source is often suspect or at least open to question, particularly in criminal proceedings where any verdict of guilty must be “beyond reasonable doubt”. Logically, it is difficult to exclude doubt by relying on a sole witness and procedurally, fairness to a suspect demands more than accusation from one person.

This may be because the circumstances may be such that there is no check on the witness and no power to obtain any further evidence on the subject. Under these circumstances juries may, and often do, acquit. They may very reasonably say we do not attach such credit to the oath of a

* LL.B, Ph.D, Barrister, Advocate & Solicitor; Professor of Law, Ahmad Ibrahim Kulliyah of Law, International Islamic University Malaysia. *This paper is prepared for the oral presentation at the International Conference on Law and Justice 2013 (ICLJ2013) to be held in Colombo, Sri Lanka on 24-25 June 2013.*

single person of whom we know nothing, as to be willing to destroy another person on the strength of it.¹

Notwithstanding this, the rules requiring corroborative evidence under the Evidence Act are now few in number and the testimony of one witness is sufficient to found a conviction or acquittal in criminal cases or a finding in a civil matter. There is no general rule that requires corroborative evidence. As Abdoolcader F.J. vividly said in *Dato Mokhtar Hashim v. PP*.²

“On the number of witnesses called to support a defence of alibi, we pause to observe *testes ponderantur, non numerantur* (witnesses are weighed not numbered or counted), that is in a case of conflict of evidence, the truth is, to be sought by weighing the credibility of the respective witnesses, not by the mere numerical preponderance on one side or the other, a principle ossified and reflected in the provisions of section 134 of the Evidence Act [1950].”

Section 134 states: no particular number of witnesses shall in any case be required for the proof of any fact.

In another recent leading case *MGG Pillay v. Tan Sri Dato Vincent Tan Chee Yioun*,³ the Court of Appeal through Gopal Sri Ram JCA, lucidly remarked at pp. 519-520.

“As I earlier said, the respondent was the only witness called to prove his case. The learned judge appears to have accepted that evidence. In any judgment, based on the authorities referred to, there was no necessity for the respondent to call other witnesses to prove his general damages. He may have reinforced his case by calling other persons. He took the risk of not doing that. As it happened, he was proved right”.

In addition to the decisions cited by counsel, I would also refer to s.134 of the Evidence Act 1950 which is, in my opinion, relevant to the point under consideration. That section is in the following terms:

No particular number of witnesses shall in any case be required for the proof of any fact.

¹ General view of the Criminal Law (1st ed.) 249.

² [1983] 2 MLJ 232 at p. 280. See also *Gurbachan Singh v. PP* [1966] 2 MLJ 125, 132; *Kesavan Senderan v. PP* [1999] 1 CLJ 343, 369.

³ [1995] 2 MLJ 493.

In *Vadivelu Thevar v. State of Madras*,⁴ Sinha J, when delivering the unanimous decision of the Indian Supreme Court, drew attention to the material differences between English law on the subject and the law as enacted in section 134 of the Indian Evidence Act 1872 (which is identical to our section 134), and said at page 619:

“The Indian Legislature [and I might add the Malaysian Parliament] has not insisted on laying down any such exceptions to the general rule recognized in section 134 quoted above. The section enshrines the well-recognized maxim that “evidence has to be weighed and not counted”. Our legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon”.

Again in *Ram August Tewari & Ors. v. Bindeshwari Tewari & Ors.*,⁵ the court made this important observation:

“The evidence of every witness is to be judged on its own merits and if there is nothing in his evidence or in the evidence of other witnesses examined in the case to discredit him, it cannot be disbelieved on the ground that there is only one witness on the point and no other witness has been examined to support him”.

In *Aziz bin Muhamad Din v. Public Prosecutor*,⁶ Augustine Paul (JC as he then was) said at p. 484:

“Section 134 of the Evidence Act 1950 (‘the Act’) states that ‘no particular number of witnesses shall in any case be required for the proof of any fact’. The section enshrines the well-recognized maxim that ‘evidence has to be weighed and not counted’. On the need for corroborative evidence for the proof of any fact, Sinha J said in *Vadivelu Thevar v. State of Madras*⁷ in the following terse terms at pages 618-619:

“On a consideration of the relevant authorities and the provisions of the Act, the following propositions may be safely stated as firmly established:

⁴ AIR 1957 SC 614; but there is insistence by the Malaysian legislature the unsworn evidence of a child must be corroborated for conviction of the accused – Section 133A of the Evidence Act 1950; and under section 6(1) Seditious Act 1948, conviction cannot be had without corroboration.

⁵ AIR 1972 Pat 142, at page 144.

⁶ [1996] 5 MLJ 473.

⁷ Supra footnote 4.

- (1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character.
- (2) Unless corroboration is insisted upon by statute, courts should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires as a rule of prudence, that corroboration should be insisted upon, for example in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.
- (3) Whether corroboration of the testimony of a single witness is or is not necessary must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much depends upon the judicial discretion of the judge before whom the case comes”.

The law as encapsulated in section 134 of the Evidence Act 1950, may be contrasted to civil systems of law (as opposed to the common law system – of which section 134 of the Evidence Act is an example) based on Roman Law where there is a general requirement of corroboration, although perhaps in practice, there is less difference.⁸ The civil law system in fact applies the maxim “*testis unus testis nullus*” one witness is no witness.⁹ Islamic law too appears to subscribe to the plurality witness rule.¹⁰

However the common law, while not developing a general rule requiring corroborative evidence, did recognize that there were cases where the evidence of one witness was not sufficient. This may be because of the situation of the witness, for example, where there is a motive for lying, or the court distrusts the intellectual faculties, the nature of evidence, e.g. identification evidence; or the gravity of the complaint. Accordingly the courts and the legislature have evolved an ad hoc series of common law and statutory rules that require the judge, to consider whether there was corroborative evidence.

⁸ In Scotland, there is a general requirement of corroboration in criminal cases, but not in civil cases, now. But there are also exceptions to this. See MacPhail; “Safeguards in the Scottish Criminal Justice System” [1992] Crim. L.R. 144.

⁹ See *Cressy v. Siward*, 132 YB 5 Edw 11. Seldon Society, Vol. 33 p. 121 at 123, and see also Wigmore (Treatise on the law of evidence – para 2032).

¹⁰ The Syariah Court Evidence (F.T) Act 1977 (Art. 561) section 86, the Syariah Evidence Enactment 1993 (Johore), 1993 (SEE), section 86, Evidence Enactment of the Syariah Court 1989 (Kedah) s. 86, EESC 1991, (Kelantan) s. 86, SCEE 1994 (Malacca) s. 86, SEE, Negeri Sembilan 1991, s. 86, SCEE 1990 Pahang, s. 86, Syariah Court (State of Penang) Enactment 1996, s. 86; Evidence (Syariah Court) Enactment 1994 Perak s. 86; SCEE 1992, Sabah s.86; Syariah Court Ordinance 2001, (Sarawak) s. 86; SEE 1996 (Selangor) s. 86 SCE (Terengganu) E 2001, s. 86, all prescribe in s. 86 of the respective evidence legislations the plurality witness requirements in various types of offences. After stating the requirement of more than one witness, the exceptions to this are also stated. For a more comprehensive treatment of the subject an excellent source where the Quranic, Hadith, and the opinion of the jurists are discussed, see Halsbury’s Law of Malaysia, vol. 14 Syariah Law Islamic Law of evidence paras 250-578.

MEANING AND FUNCTION OF CORROBORATION

The word corroboration simply means support or confirmation. In the law of evidence it refers to a rule of law or practice which requires that certain kinds of evidence be confirmed or supported by other, independent evidence, in order to be sufficient to sustain a given result such as conviction of a criminal offence

“There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement, one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it”.¹¹

In a recent local case *Aziz bin Muhamad Din v. PP*,¹² expressing similar sentiments observed that:

“Corroboration is not a technical term. It simply means ‘confirmation’ (see *DPP v. Hester*¹³). The *locus classicus* on what amounts to corroborative is the celebrated case of *R v. Baskerville*¹⁴ where Lord Reading CJ said at p. 667 “We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect the accused with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it”.

Augustine Paul JC, in the case explained that the word ‘implicate’ does not necessarily mean ‘incriminate’ or inculcate; it may mean only involve (see *R v. Kerim*¹⁵). The learned judge also rehearsed the dicta of Ong CJ (Malaya) in *Brabakaran v. PP*¹⁶ that corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. It may be circumstantial as

¹¹ *DPP v. Kilbourne* [1973] AC 729, 750.

¹² [1996] 5 MLJ 473 at 485.

¹³ [1973] AC 296.

¹⁴ [1916] 2 KB 658.

¹⁵ [1998] 2 Qd R 426.

¹⁶ [1996] 1 MLJ 64.

well as direct. The learned judge followed the Australian case of *Doney v. R*¹⁷ where it was held that consistent with its role of confirming other evidence rather than amounting itself to evidence which necessarily leads to conviction, the corroborative evidence does not need to be proved beyond reasonable doubt.

He also highlighted the law that “the question of corroboration does not arise unless the evidence of the witness requiring corroboration **is itself credible**. In this regard Gunn Chit Tuan J (as he then was) said in *TN Nathan v. PP*:¹⁸

“Lord Hailsham has expressed a similar opinion in the English House of Lords case of *DPP v. Kibourne*¹⁹ when he said at p. 452:

“Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. If his evidence is not credible, a witness’s testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to or by a witness who is otherwise to be believed. If the witness’s testimony falls of its own inanity the question of his needing, or being capable of giving corroboration does not arise”.

Thus the essence of corroborative evidence is where one credit-worthy witness has said (see *Yap Ee Kong & Anor v. PP*²⁰).

Gopal Sri Ram JCA in *Lim Eng Eng v. Pendakwa Raya*;²¹ neatly encapsulated the nature of corroboration thus:

- “3. Evidence that requires corroboration whether as a matter of practice having the force of law or by direction of statute:-
 - (a) must be first capable of belief before any question of corroboration may arise, for evidence that falls of its own inanity cannot be saved by the presence of abundant corroboration;

¹⁷ (1990) 171 CLR 207.

¹⁸ [1978] 1 MLJ 134 at p. 137.

¹⁹ [1973] 1 All ER 440.

²⁰ [1981] 1 MLJ 144.

²¹ [1998] 3 AMR 2079; at p. 2108-9.

- (b) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding s. 157 of the Evidence Act 1950;
 - (c) cannot be corroborated by evidence that itself requires corroboration.
4. To constitute true corroboration in the eyes of the law, the corroborative evidence must:
- (a) be capable of belief;
 - (b) be independent in the sense mentioned in proposition 3(c) above;
 - (c) it must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.
5. At common law, a trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip-service. Good reasons must be furnished for departing from the accepted rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma.

In *Shanmugam Munusamy v. PP*,²² the Court of Appeal at p. 793 observed:

“What is meant by “corroboration”? Sharma J in the case of *Attan bin Abdul Gani v. PP*²³ laid out the law on corroboration clearly. At p. 146 Sharma J said:

The law as to corroboration as enunciated by the various authorities may be summarized thus:

It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according

²² [1991] 1 CLJ 790.

²³ [1970] 2 MLJ 143.

to the particular circumstances of the offence charged. But to this extent the rules are clear:

- (1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.
- (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.
- (3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.
- (4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.
- (5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.
- (6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.
- (7) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it

would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

- (8) Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstance must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.
- (9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word itself implies, means only support, or in other words, an assurance of truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).
- (10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.

In the case of *Yap Ee Kong & Anor v. PP*,²⁴ Raja Azlan Shah CJ (Malaya) as he was then, delivering the judgment of the Federal Court at p. 146 said:

“... Therefore the nature and extent of corroboration is relevant. The rules are lucidly expounded by Lord Reading in *Baskerville’s* case, *supra*. The rules may be formulated as follows:

- (1) There should be some independent confirmation tending to connect the accused with the offence although it is not necessary that there should be independent confirmation of every material circumstance;

²⁴ [1981] 1 MLJ 144.

- (2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice; and

- (3) The corroboration must come from independent sources, thus bringing out the rule that ordinarily the testimony of an accomplice would not be sufficient to corroborate that of another.”

From the weight viewpoint evidence is likely to appear more persuasive to the tribunal of fact when it is corroborated than when it is not. There has long been a question whether certain kinds of evidence, for example, the evidence of young children or accomplices, or victims of sexual offences, should be sufficient for a conviction in the absence of corroboration, or the judge should warn himself of the danger of convicting on the basis of such evidence, if uncorroborated. The desirability of corroboration in these cases arises from the perception that certain types of evidence are inherently suspect, either because of the nature of the witness himself, e.g. a young person, or a person under mental disability, or because of the likelihood that the witness may have some purpose of his own to serve in giving evidence against the accused, as with for example an accomplice or alleged victim of a sexual attack-where allegations are easy to make and difficult to rebut. So if the evidence of such a witness is corroborated by other evidence which comes from a source independent of the witness, a fingerprint, or medical evidence, for example its reliability is clearly enhanced.

In Malaysia, as an exception to the general rule as nut-shelled in section 134 of the Evidence Act 1950, there are cases where either at common law as a matter of practice, which has through passage of time, ripened into a rule of law, or statutes have created exceptions in respect of certain categories of witnesses by calling for, or indeed demanding, that their evidence may not be acted upon in the absence of independent corroboration.

Evidence of a child of tender years under section 133A, and evidence relevant and admissible under section 34 of the Evidence Act 1950, and under section 6(1) of the Sedition Act 1948, illustrate the statutory exceptions, while cases where corroboration caution is required as a matter of practice include evidence of accomplices (sections 114(b) read with section 133), sworn evidence of children and victims of sexual offences, i.e. complainants in cases involving sexual offences. In the latter types of cases a conviction based on uncorroborated evidence is not illegal. The rule of practice (in the trial judge’s direction to himself that he has cautioned himself as to the danger of convicting the accused on uncorroborated testimony of the witness by scrutinizing his evidence with care) regulates the manner in which uncorroborated evidence is to be treated, i.e. the

judge must warn himself of the dangers of convicting on such evidence. In saying that the warning must appear in the judgment or grounds of his decision of the trial court, no particular forms of words need be used.

In *Chiu Nan Hong v. PP*,²⁵ Lord Donovan (for the Privy Council) succinctly said that ...“No particular form of words is necessary for this purpose: what is necessary is that the judge’s mind upon the matter should be clearly revealed”. In *Ng Yau Thai v. PP*,²⁶ Seah SCJ at p. 216 for the Supreme Court said graphically that:

“The warning as to the convicting on uncorroborated evidence if the prosecution evidence is relying on the testimony of an accomplice does not involve some legalistic ritual to be automatically recited by the trial magistrate, or that some particular form of words or incantation be used and if not and if not used, the judgment is deemed to be faulty and the conviction set aside. There is no magic formula and no set words which must be adopted to express the warning.”

This sentiment was again succinctly restated by Gopal Sri Ram JCA in *Lim Guan Eng v. PP*²⁷ that:

“At common law, the trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip service. Good reasons must be furnished for departing from the general rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma”.

Further corroboration is also required where the identification evidence is of poor quality as laid down in *R v. Turnbull*.²⁸

CORROBORATION REQUIRED BY STATUTE

²⁵ [1965] 1 MLJ 40.

²⁶ [1987] 2 MLJ 214.

²⁷ [1998] 3 AMR, 2106, at p. 2109.

²⁸ [1977] QB 244, [1976] 3 All ER 549 CA.

1. Unsworn evidence of children.

Section 133A of the Evidence Act 1950 reads:

“Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth; and his evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code of the Federated Malay States shall be deemed to be a deposition within the meaning of that section:

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material in evidence in support thereof implicating him.”

This section was introduced in the Evidence Act 1950 in 1971 (vide PU(A) 261/71), which is the equivalent of English section 38 of the Children and Young Persons Act 1933.²⁹

In a leading House of Lords case of *DPP v. Hester*,³⁰ Lord Pearson after having recited the relevant part of section 38 of the English Children and Young Persons Act 1933 observed at p. 1069 that:

“The proviso contains the only statutory disqualification of unsworn evidence differentiating its effect from that of other evidence. An accused person is not to be convicted on unsworn evidence unless it is corroborated by some other material evidence in support thereof implicating the accused. The disqualification applies to all unsworn evidence given in a particular case if there are two or more children given unsworn evidence to the same effect, still there can be no conviction unless there is some other evidence corroboration their evidence”.

²⁹ It is important to note that this English section 38 of the Children and young Persons Act 1933 has been removed by section 34(2) of the (English) Criminal Justice Act 1988; which states (2) Any requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a child is abrogated”.

³⁰ [1972] 3 All ER 1056.

Section 133A of the Evidence Act 1950 deals with the giving of evidence by a child of tender years. Recently, in *Yusaini bin Mat Adam v. PP*,³¹ Justice KC Vohrah rightly gave a timely reminder that when a child of tender years is to be called as a witness the court should hold an inquiry to form an opinion as to whether the child can be sworn. The learned judge referred to the Federal Court case of *Muharam b. Anson v. PP*,³² where the witness was ten years old at the time of the trial, but 7 years old at the time of the incident. The trial judge after holding an enquiry and having formed the opinion that though the child did not understand the nature of an oath, nevertheless he thought that she possessed sufficient intelligence to understand the duty of speaking the truth, allowed her to give evidence although unsworn.

In *Yusaini*, the Sessions Court had convicted the appellant for raping his stepdaughter, who was then aged 10 years 8 months. When she gave evidence she was 11 years old. Despite being a child of tender years, yet the court did not hold an inquiry to form an opinion whether the child was in a position to be sworn according to section 133A of the Evidence Act 1933. The girl gave contradictory evidence and the observations noted by the judge showed that she behaved strangely at the trial.

The appellant appealed against his conviction. Justice K.C Vohrah at p. 584, opined that, “when a child of tender years is called to be a witness, the procedure is for the court to hold an inquiry to form an opinion if the child is in the position to be sworn ... the session court did not hold such an inquiry before she allowed the child to give her evidence”. The learned judge pointed out that, “unfortunately ... neither the learned judge of the sessions court nor the deputy public prosecutor nor the counsel who acted for the appellant in the court below appeared to have been aware of section 133A of the Evidence Act 1950” He said that the 11 years old girl “was certainly of ‘tender years’, and ought to have been examined as to whether she had sufficient appreciation of the solemnity of the occasion and the added responsibility of telling the truth over the ordinary duty to tell the truth upon pain of punishment for perjury under s. 14 of the Oaths and Affirmations Act 1949. Only after ... the judge had satisfied herself on the above should the child then have proceeded to take an oath or make an affirmation to tell the truth under the Oaths and Affirmation Act 1949. **Otherwise the child’s evidence should have been taken and reduced in writing following the procedure under section 133A of the Evidence Act 1950. Even then under s. 8 of the Oaths and Affirmation Act any person ‘who by reason of immature age ought not in the opinion of the court to be admitted to give evidence an oath or affirmation shall be admitted to give evidence after being cautioned by the court to speak the truth, the whole truth and nothing but the truth’ (emphasis added) p. 586.**

The failure of the session court judge to follow the procedure in s. 133A of the Evidence Act 1950, was fatal and conviction was accordingly set aside. In *Sidek bin Ludan v. PP*,³³ Abdul Malik

³¹ [1999] 3 MLJ 582.

³² [1981] 1 MLJ 222 at 223.

³³ [1995] 3 MLJ 178.

Ishak J had clearly highlighted the effect of section 133A of the Evidence Act 1950, when he observed that “the effect of this amendment is far-reaching. The proviso to s. 133A of the Act in simple terms means this: A conviction cannot stand on the uncorroborated evidence of an unsworn child witness. It is **insufficient** for the trial court to merely administer a warning on the dangers of so convicting, as the amendment now makes it a rule of law, more explicitly, that the evidence of an unsworn child witness shall be corroborated *PP v. Mohd. Noor b. Abdullah*.³⁴ This amendment distinguishes between testimony of a sworn and an unsworn child witness. In the case of a sworn child witness, the old rule of prudence applies, viz, the need to give and exhaustive warning on the dangers of convicting on such uncorroborated evidence, whereas in the case of an unsworn child witness, s. 133A applies.”

The learned judge wisely noted that “From the wording of s. 133A of the [Evidence] Act, the trial court is obligated by way of a preliminary examination to ascertain the child’s capacity to understand and give rational answers. In the instant case the learned judge concluded, that the trial court had conducted a comprehensive preliminary examination of the three child witness concerned to determine their competence to given sworn or unsworn evidence. They in fact were found to be competent under section 118 of the Evidence Act 1950 to given sworn evidence under the Oaths and Affirmation Act 1950.

In *Shanmugan Munusamy v. PP*.³⁵ The appellant was convicted of murder of his wife in the High Court and sentenced to death. The prosecution’s case was based on the unsworn testimony of the appellants daughter who was nine years old at the time of the incident and twelve during the trial. His trial was by a panel of jurors, who unanimously found him guilty of the charge.

The appeal to the Court of Appeal was *inter-alia* on the following issues:

1. Whether there was a misdirection by the trial judge in respect of the unsworn child’s evidence because there was no warning administered by the trial judge to the jury of the risk of conviction based on a child’s evidence;
2. Whether the cumulative effect of the evidence of other witness were sufficient to corroborate the evidence of the child witness, as the appellant had contended that it was not, whether the trial judge had given another warning to the jury of the risk of accepting the child’s evidence.

The Court of Appeal through Mokhtar Sidin JCA said that the trial judge had made it clear to the jury that an accused person cannot be convicted on the uncorroborated evidence of a child who gives who unsworn evidence. Further there was sufficient corroboration of the child’s unsworn evidence. According the appeal was dismissed.

³⁴ [1992] 1 CLJ 702

³⁵ [1999] 1 CLJ 783.

The recent case of *PP v. Mohammad Terang bin Amit*,³⁶ is instructive. The respondent was a charged with three counts of using criminal force to outrage the modesty PW7, PW8 and PW9. At the time of the alleged commission of the offence, PW9 was 10 years old, whilst PW8 and PW7 were both twelve years old. All the three child witness gave unsworn evidence against the accused. The trial magistrate decided that the unsworn evidence of the three child witnesses could not corroborate each other. Further unsworn evidence given by two other witnesses could not be go used to corroborate the evidence of the three witnesses.

Justice Muhammad Kamil J. supporting the magistrate decision said at pp. 158, 159 that “It is not only a prudent practice but also a statutory requirement in the form of s. 133A of the Evidence Act 1950, that in order to support the case for the prosecution against the accused person, the unsworn evidence of a child must be corroborated by some other material evidence ... It is pertinent to note that the provisions of s. 133A of the Act are in fact derived from s. 38 of the children and Young Person’s Act 1933 of England”. He said that the law was correctly stated by in *DPP v. Hester*,³⁷ where Lord Pearson after having reciting the relevant part of s. 38 of the children and Young Person’s Act 1933 stated that (at p. 1069):

“The proviso contains the only statutory disqualification of unsworn evidence differentiating its effect from that of the other evidence. An accused person is not to be convicted on unsworn evidence unless it is corroborated by some other material evidence in support thereof implicating the accused. The disqualification applies to all unsworn evidence given in a particular case; if there are two or more children giving unsworn evidence to the same effect, still there can be no conviction unless there is some other evidence corroborating their evidence”.

The learned judge agreed with the trial magistrate’s findings that the unsworn evidence of PW7, PW8 and PW9 taken individually, could not be used to corroborate the unsworn evidence of the other two witnesses. The unswron evidence of another two female students, could not be relied upon as well to corroborate the evidence of either PW 7, PW8 and PW9.

It may not be out of place look at some earlier English cases dealing with unsworn evidence of a child from the corroboration standpoint. Lord Hewart C.J.’s judgment in *R v. Manser*,³⁸ suggested that the unsworn evidence of one child will not operate as corroboration of the unsworn evidence of another. In *Manser*, the accused had been charged with indecent assault on two small girls who had given evidence, apparently unsworn, corroborating each other. Lord Hewart CJ opined that each girls evidence cancelled out the other and the conviction was accordingly quashed. However in *R v. Campbell*,³⁹ Lord Goddard commented that, “evidence of an unsworn child can amount to corroboration though particularly a careful warning should be given.”⁴⁰ In *Campbell*, the accused had been charged on seven counts of indecent assaults on small boys. The sworn evidence of each boy was corroborated by evidence given by other boys, some of whom had been the victims of other assaults. The Court of Criminal Appeal held that the accused had been properly convicted.

³⁶ [1999] 1 MLJ 159.

³⁷ [1972] 3 All ER 1056.

³⁸ (1934) 25 Cr. App R. 18, 19.

³⁹ [1956] 2 QB 432, at 438.

⁴⁰ Emphasis added.

Finally in *DPP v. Hester*,⁴¹ the House of Lords held in another case of indecent assault, that a twelve years old complainants' sworn evidence could be corroborated by unsworn evidence given by her nine year old sister. Hester seems to dispose of the matter. It would be clearly otiose if unsworn evidence could be corroborated by sworn evidence but not vice versa.

CORROBORATION UNDER THE SEDITION ACT 1948

Section 6(1) of the Sedition Act 1948 provides that no person shall be convicted of an offence of sedition under section 4 of the Act on the uncorroborated testimony of one witness. *PP v. Mark Koding*,⁴² Mohamed Azmi J. clearly agreed with the law. In the recent case *Lim Guan Eng v. PP*⁴³ where the appellant was *inter-alia* charged with sedition under section 4 of the Sedition Act 1948, the court of Appeal found that there was ample corroborative evidence of the prosecution witness by other evidence to convict the appellant of the charge. This decision was also approved by the Federal Court in *Lim Guan Eng v. PP*.⁴⁴

CORROBORATION REQUIRED UNDER SECTION 34 OF THE EVIDENCE ACT 1950

Section 34 of the Act reads:

Entries in books of accounts regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to inquire, but the entries shall not alone be sufficient evidence to charge any person with liability.

ILLUSTRATION

A sues B for RM1,000 and shows entries in his account-books showing B to be indebted to him to this account. The entries are relevant, but are not sufficient without other evidence to prove the debt.

⁴¹ [1973] AC 296.

⁴² [1983] 1 MLJ 111.

⁴³ [1998] 3 CLJ 769.

⁴⁴ [2000] 2 CLJ 54.

This section, read with the illustration, it is submitted, is another example where statute states the liability (which may in a civil as well a criminal case) cannot be fixed on the parties without corroboration.

As was stated clearly in *Sim Siok Eng & Anor v. Poh Hua Transport & Contractor Sdn. Bhd.*,⁴⁵ by Salleh Abas F.J. at p. 72, 73, 74:

“The fundamental principle underlining this section is a compromise between total rejection and partial acceptance of a doctrine that ‘a man cannot make evidence for himself’. This maxim springs from the desire to safeguard the law against false evidence being used, but the safeguard may be too extreme because unless modified it prevents a party from using entries recorded by itself in a subsequent trial. Thus a compromise is reached between the necessity of evidence and circumstantial guarantee of its truthfulness. Such guarantees are reflected in the following two conditions of admissibility enacted in section 34, i.e,

- (1) the entries are in a book of account regularly kept in the course of business, and

- (2) the entries therein refer to a matter into which the court has to inquire.

Failure to prove the conditions of admissibility would render the book of accounts inadmissible.

Under section 34 of the Evidence Act these entries alone shall not be sufficient to charge the appellant with liability for the sum sued. There must be other evidence to corroborate the truthfulness of these entries. Corroboration however may not necessarily always come from extrinsic evidence, as it may intrinsically be proved by the book of account itself, as for example where the books are in correspondence with themselves and entries therein tally with some other external evidence.” (*Jaswant Singh v. Lala Sheo Narain Lal* [1893-94] 21 IA 6).⁴⁶

⁴⁵ [1980] 2 MLJ 72, at 72-74.

⁴⁶ *Jaswant Singh v. Lala Sheo Narain Lal* [1893-94] 21 IA 6. Emphasis added.

IDENTIFICATION: THE TURNBULL GUIDELINES⁴⁷

Whatever the defence and howsoever the case is conducted, where the evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn himself as to the dangers of convicting on such evidence where its reliability is disputed. In a most recent case respecting the rationale and position of the reception of the Turnbull guidelines – *Jaafar b. Ali v. PP*,⁴⁸ Augustine Paul J. lucidly laid down the law as follows:

“Pre-trial identification of suspected offenders are supplemented by judicial guidelines concerning the appraisal of identification evidence at the trial itself. These guidelines were enunciated by the (English) Court of Appeal in *Turnbull* as a result of criticism of the existing law under which no specific duty was imposed on judges to warn juries against the proven dangers of mistaken identification evidence.”

The impact of *Turnbull* has been strong. Where the warning is not given the conviction will normally be quashed. Even where there is considerable other evidence, the English Court of Appeal had considered it prudent to issue a *Turnbull* direction.

The guidelines have been judicially received in Malaysia, in *Rangapula v. PP*;⁴⁹ *Dato Mokhtar Hashim v. PP*;⁵⁰ *Yau Heng Fang v. PP*;⁵¹ *Arumugam s/o Muthusamy*;⁵² *Jaafar b. Ali v. PP*⁵³ are among the cases where the guidelines was adverted to. In Singapore too has received the guidelines. In fact in the useful Singapore case of *Heng Aik Ren Thomas v. PP*⁵⁴ the Singapore Court of Appeal has reformulated the *Turnbull* guidelines into a three-stage test.

It is useful to appreciate that the guidelines must be applied flexibly.⁵⁵ They cannot be elevated to the status of a statutory rule. In *Nembhard v. The Queen*,⁵⁶ the Privy Council emphasized that the *Turnbull* guidelines did not purport to change the law. The case sets out

⁴⁷ The subsequent, owes its origin to the guidelines enunciated by the English Court of Appeal in *R v. Turnbull* [1976] 3 All ER 549 at 551j – 552e, by Lord Widgery C.J. They are guidelines for the judge should not be elevated to a statutory rule of law.

⁴⁸ [1998] 4 MLJ 406, 414 – 418.

⁴⁹ [1982] 1 MLJ 91.

⁵⁰ [1983] 2 MLJ 232.

⁵¹ [1985] 2 MLJ 335.

⁵² [1998] 3 MLJ 73.

⁵³ *Supra* footnote 47.

⁵⁴ [1998] 3 SLR 465, 475-476.

⁵⁵ *R v. Keane* (1977) 65 Cr. App. R 247.

⁵⁶ [1981] 74 Cr. App. R 144.

“guidelines for trial judges” who are obliged to direct juries in such cases. They were not intended as an elaborate specification to be adopted religiously on every occasion. A summing up if it is to be helpful to the jury should be tailored to fit the facts of the particular case and not merely taken ready-made “off the peg”. In *R v. Mills*⁵⁷ the Privy Council rejected any suggestions that judges should treat the guidelines as a statute to be recited word for word to the jury. All that is required of the judge is that he should comply with the sense and spirit of the Turnbull guidelines. These cases show that the appellate courts have tended to steer away from requiring judges to embark on ritualist incantations.

If the identification is of poor quality the need for supportive evidence arises. The type of corroborative evidence then needed need not be the Baskerville type. All that was required was evidence that would make the judge sure that there was no mistake in the identification. Odd coincidences, could, if unexplained, be supporting evidence.⁵⁸

SWORN EVIDENCE OF CHILDREN

The rule of prudence and practice requires that the judge too in the case of sworn evidence of a child must caution or warn himself of the danger of convicting an accused person on the uncorroborated sworn testimony of a child.

The reasons commonly ascribed to this rule rest on the assumptions that a child's powers of observations and memory is less reliable than an adult's, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely,⁵⁹ their predilections towards fantasy, egocentricity, a child's suggestibility and the children's supposed evil nature. These justifications for the need for a corroboration caution has been criticized, and calls for reforms has become more intense as studies have shown that sexual abuse of children was far more widespread than previously believed, and children's unreliability as witnesses was much less than previously accepted.⁶⁰

⁵⁷ [1995] 3 All ER 865.

⁵⁸ *Heng Aik Ren Thomas v. PP*, supra footnote 53.

⁵⁹ *R v. Dossi* [1918] 87 LJ KB 1024 at 1026, CCA per Atkin J.

⁶⁰ Some of the sources worth perusing are Dennis; corroboration requirement reconsidered [1984] Crim. L.R. 316 at 329. Gertner, “The Unsworn Evidence of Children and Mutual Corroboration” (1978) 16 Osgoode Hall L.J. 495 and Spencer J. and Flin J; *The Evidence of Children – The Law and the Psychology* (2nd ed., 1993) Chap. 1.

In Malaysia the rationale for the requirement of corroboration or caution was spelled out by Thomson CJ in *Chao Chong v. PP*,⁶¹ when he said:

“One reason why children’s evidence is regarded with suspicion is that there is always the danger that a child may not fully understand the effect of taking an oath. Another reason, however, which in this country possesses undiminished force is that it is a matter of common knowledge that children at times find it difficult to distinguish between reality and fantasy. They find it difficult after a lapse of time to distinguish between the results of observation and the results of imagination”.

In the recent well reasoned judgment of Justice Abdul Wahab Patail, in *Kesavan Sendavan*,⁶² where the appellant was convicted of an offence under s. 377A Penal Code, and where the appellant’s conviction was based *inter-alia* on the sworn testimony of the complainant, who was 16 years old at the material, the learned judge lucidly said that the rule as to corroboration is a rule of prudence. Prudence requires that the evidence of a child be corroborated before being acted upon, but if the court finds no reason why the child should not be believed, it may act upon his testimony even if there is no corroboration.

Concerning the rationale for the need for corroboration as a matter of prudence Wahab Patail showing his awareness of the modern new said:⁶³

“It is often said that children are prone to a fertile imagination. They may not understand the nature of an oath. For these reasons prudence requires that their testimony be corroborated before being acted upon. But it is only a rule of prudence, and not a hard and fast rule. Children these days no longer, brought up on a reading diet of fairy tales, but seeing motion images before their eyes on television or in the cinema, are much less active in imagination and more adept in describing what they perceive from their senses. Indeed, their child like innocence may enable them to describe an un-embellished truth as well as a truthful adult. It would be wrong therefore to reject summarily a child’s testimony whenever there was no corroboration. It would be an injustice to the child, whose faith in the system of justice and even in himself may well be destroyed. The court must consider the whole of the surrounding circumstances. The court must not simply dismiss his evidence, but must go on to consider the evidence of that child witness with utmost care. If the

⁶¹ [1960] MLJ 238, at 240. Similar sentiments were expressed in *Ravamickan v. PP* [1966] 1 MLJ 60; *Liew Wah Ming v. PP* [1963] 29 MLJ 82; *Loo Chuan Huat v. PP* [1971] 2 MLJ 167, FC when Lord Goddard CJ’s statement in *Reg v. Campbell* [1956] 2 QB 432, 438 were cited with approval; and *Tam Kai Yau v. PP* [1977] 1 MLJ 174.

⁶² [1999] 1 CLJ 343.

⁶³ *Ibid* at pp. 352-353.

court finds no reason why the child should not be believed, it may act upon his testimony even if there is no corroboration, provided it has at all times kept in mind the danger of acting on uncorroborated testimony alone.”

SEXUAL OFFENCES

In *PP v. Mardai*,⁶⁴ Spenser Wilkinson J said:

“Whilst there is no rule of law in this country that in sexual offences the evidence of the complainant but be corroborated, nevertheless ... as a matter of common sense, to be unsafe to convict in cases of this kind unless either the evidence of the complainant is unusually convincing or there is some corroboration of the complainant’s story.”

In *Koh Eng Soon v. R*⁶⁵ Murray-Aynsley CJ expressed similar sentiments said:

“In this case the complainant was an adult. In cases of this kind corroboration is desirable though not technically essential. Where the case has been heard by a magistrate or a district judge the appellate court must be satisfied that the court below appreciated fully the desire ability of having corroboration and was not under a misapprehension that something was corroboration which as a matter of law was not.”

The requirement of corroboration in cases of sexual offences also applies where the victim is a male. *R v. Burgess*⁶⁶ an old English case is an example. A modern case is *Kesavan Senderan v. PP*.⁶⁷

The rationale for the requirement of corroboration sexual offences is stated in *Din v. PP*⁶⁸ by Thomson LP that:

⁶⁴ [1950] MLJ 33, at 335.

⁶⁵ [1950] MLJ 52.

⁶⁶ [1956] 40 Cr. App. R 144.

⁶⁷ [1999] 1 CLJ 343.

⁶⁸ [1964] MLJ 300, 301.

“But the desirability for corroboration of the evidence of the prosecutrix in a rape case (which in any event has not yet crystallized into something approaching a rule of law and which is still a rule of practice and prudence) springs not from the nature of the witness but from the nature of the offence. Never has it been suggested that the evidence of a woman as such invariably calls for corroboration. If a woman says her handbag has been snatched and if she is believed there can be no question of a conviction on such evidence being open to attack for want of corroboration. If however she complains of having been raped then both prudence and practice demand that her evidence should be corroborated. Here, however, the necessity for corroboration, generally speaking, is not so imperative with regard to the identity of her assailant as to the fact of the offence itself. It is here that there is danger. The temptations of a woman to exaggerate an act of sexual connection are well-known and manifold. But though it might be dangerous to find the *factum* of rape on the uncorroborated evidence of the prosecutrix, once the *factum* of rape is established there seems to be nothing left to support the view that her identification of the assailant calls for corroboration any more than it would in relation to any other type of offence”.

Again a similar view can be discerned in a case from Brunei, *PP v. Emran b. Nasir*,⁶⁹ where at p. 171 Roberts CJ observed “I warn myself, that on a charge of rape, it is dangerous to convict on the evidence of the complainant alone, since experience has shown that female complainants have told false stories for various reasons”. Again in an earlier English case *R v. Henry; R v. Manning*,⁷⁰ Salmon LJ expressing a similar view said “what the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, ... and sometimes for no reasons at all. Clearly, therefore the need for corroboration caution arises because in sexual cases the danger of convicting without corroboration, is the danger that the complainant may have made a false accusation owing to sexual neurosis, jealousy, fantasy, spite or a girl’s refusal to admit that she consented to an act of which she is now ashamed. In the case of sexual offences the danger may be hidden. Moreover the nature of the evidence may make the jury too sympathetic to the complainant and so prejudice them against the accused.

⁶⁹ [1987] 1 MLJ 166, 171.

⁷⁰ (1968) 53 Cr. App. R 160. Note that now by virtue of section 32 of the English Criminal Justice and Public Order Act 1994 the old English rule requiring a corroboration caution or warning to be given in sexual cases has been abolished. Singapore seems to be learning towards this trend. See an instructive case *Tan Kin Seng v. PP* [1997] 1 SLR 46, 56, 57.

EVIDENCE OF ACCOMPLICE

In Malaysia the law relating to accomplice evidence is found in section 133 read with section 114 illustration (b) of the Evidence Act 1950. Section 133 states that an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, while section 114 illustration (b) says that the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

In a leading Privy Council decision from India on similar provisions of the Indian Evidence Act 1872, *Bhuboni Sahu v. The King*,⁷¹ the Privy Council giving an exegesis of the combined effect of the two sections enunciated the law derived from reading section 133 and section 114 illustration (b) together is that whilst it is no illegal to act upon the uncorroborated evidence of an accomplice it a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused. The evidence of one accomplice cannot be used to corroborate the evidence of another accomplice.⁷² The law in India on the above subject is substantially the same as the law in England although the rule of prudence may be said to be based upon the interpretation placed by the courts in India on the phrase “corroboration in material particulars in section 114.” The Indian Supreme Court has held that the rule laid down in *Rex v. Baskerville*⁷³ respecting the admissibility of uncorroborated evidence of an accomplice is the law in India also so far as accomplices are concerned. The only clarification of the rule is where this class of offence is tried by a Judge without a jury. In such cases it is necessary that the Judge should give some indication in his judgment that he has had the rule of caution in mind and should proceed to give reasons for considering it unnecessary to require corroboration on the facts of the particular case before him and show why he considers it safe to convict without corroboration in the particular case. There is however no rule of law or practice that there must in every case be corroboration before a conviction can be allowed to stand *Rameshwar v. State*.⁷⁴ The Indian Supreme Court has also held that a conviction can be based on the uncorroborated testimony of an accomplice provided the judge has the rule of caution in mind.

On the local scene a similar view was expressed by Woodward Ag. CJ in *R v. Lim Yam Hong*.⁷⁵ “The statute law regarding accomplice evidence is to be found in sections 114 illustration (b) and 133 of the Evidence Ordinance.

⁷¹ (1949) 76 1A 147.

⁷² See *Kuruppiah v. R* [1949] MLJ 75; *Ramachandran v. PP* [1972] 2 MLJ 183; *Mohd. Jamili b. Zaudin v. PP* [1995] 4 MLJ 243, where Malaysian Courts held likewise. In *Goh Ying v. PP* [1989] 2 MLJ 334, at 340. Justice Chua noted that the trial judge failed to realize that one accomplice cannot corroborate another.

⁷³ [1916] 2 KB 656.

⁷⁴ (1952) SCR 377.

⁷⁵ [1919] 1 SSLR 152 154-160 (CA).

It had never been contended, that over local law on this point differs from the law ... in England, and English decisions are therefore clearly relevant as regards general principles and their application to particular cases. The principles to be acted on by a judge ... have be crystallized in Baskerville. Again in *Daimon b. Banda v. PP*,⁷⁶ Foster Sutton CJ said:

“The law here is the same as in the United Kingdom. The uncorroborated evidence of an accomplice is admissible in law, but it is the practice for the judge to direct himself ... of the danger of convicting an accused person on the uncorroborated testimony of an accomplice or accomplices ... this rule of practice has become virtually equivalent to a rule of law. If however after such a direction ... convict the Court of Appeal will not quash the conviction merely upon the ground that the accomplice’s testimony was uncorroborated. Similar views were expressed in *Syed Jaafar*;⁷⁷ *Rattan Singh v. PP*;⁷⁸ *Jegathesan v. PP*,⁷⁹ and many other cases.

Thus the law in Malaysian on accomplice testimony is the judge must warn himself that though he may convict, on the evidence of an accomplice it is dangerous to do so unless it is corroborated.

The main justification for the need for corroboration of an accomplice that he has a motive of his own he will minimize his role and maximize the others role in the crime.

It is important to realize that the accomplice rule applies only to witnesses called for the prosecution. This was clearly emphasized by Thomson CJ in *Daud b. Awang Ngah v. PP*:⁸⁰

“Of Course before a judge can consider whether the witness’s evidence requires the corroboration caution, he has to know whether the witness is an accomplice. The answer to that was provided by the House of Lords in *Davis v. DPP*.⁸¹ In *Re Soo Leot*,⁸² Buhagiar J. adopted the categories of accomplices when he said:

⁷⁶ [1953] 23, 24 CA.

⁷⁷ [1948] MLJ 157.

⁷⁸ [1971] 1 MLJ 162.

⁷⁹ [1980] 1 MLJ 165.

⁸⁰ [1958] MLJ 168-169-170, CA. Where the learned judge referred to *Tan Cheng Seng v. Rex* [1948] MLJ 48, *R v. Barnes and Richards* 27 Cr. App. R 154 and *Davies v. DPP* [1954] AC 378 where Lord Simons LC observed that the rule “applies only to witnesses for the prosecution”.

⁸¹ [1956] 54 1 All ER 507.

⁸² [1956] MLJ 54, 55-56. See also *PP v. Mohd. Jamil bin Yahya* [1993] 3 MLJ 702, 711 per KC Vohrah. Instructive cases that determined who is and is not an accomplice – are *Kuan Ted Fatt v. PP* [1985] 1

The question 'who is an accomplice' has been dealt with by the House of Lords in *Davis v. DPP*:

"The following persons, if called as witnesses for the prosecution, have been treated as falling within the category of accomplice for the purpose of the rule that a judge ought to warn juries about the evidence of an accomplice:-

1. On any view, persons who are participles criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is the natural and primary meaning of the term 'accomplice'. But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purposes of the rule, viz:
2. Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny.
3. When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negating accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration'.

In *Teja Singh v. PP*,⁸³ Spenser Wilkinson J. after surveying the law, held that an agent provocateur cannot be considered an accomplice and his evidence does not require evidence.

In *Lim Guan Eng v. PP*,⁸⁴ Gopal Sri Ram JCA said that "Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious stigma". It is important to note that the corroboration rule relating to accomplice evidence in Singapore has been slightly relaxed, because of the words in illustration 116(b) of the Singapore Evidence Act (since 1976) "unless he is corroborated in material particulars has been dropped".

MLJ 211 FC; *PP v. Abdul Azizsou* [1978] 2 MLJ 165; *Namasiyam v. PP* [1987] 2 MLJ 336 SC; *Goh Ah Yew v. PP* [1949] MLJ 150 is particularly instructive.

⁸³ [1950] MLJ 71, at 74-76 – other cases expressing the same view are *Lionel De Silva v. R* [1956] MLJ 203, and *PP v. Amir b. Mahmood* [1996] 5 MLJ 159.

⁸⁴ [1998] 3 MLJ 14, 46 CA.

Section 157 of the Evidence Act 1950 states:

In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Section 8(2) states:

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1 – The word “conduct” in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2 – When the conduct of any person is relevant any statement made to him or in his presence and hearing which affects his conduct is relevant.

ILLUSTRATIONS

(j) The question is whether A was ravished.

The facts that shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that without making a complaint she said that she had been ravished is not relevant as conduct under this section, though it may be relevant –

- (i) as a dying declaration under section 32(1)(a); or
 - (ii) as corroborative evidence under section 157.
- (k) The question is whether A was robbed.

The fact that soon after the alleged robbery he made a complaint relating to the offence, the circumstances under which and the terms in which the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant –

- (i) as a dying declaration under section 32(1)(a); or
- (ii) as corroborative evidence under section 157.

In *PP v. Paneerselvan & Ors.*,⁸⁵ Edgar Joseph JR. J. said at p. 107 that the word statement in s. 157 means “something that is stated” and the element of communication to another person is not included in it.⁸⁶

It is for the prosecution to establish by clear and unequivocal evidence the proximity of the time between the taking place of the fact and the making of the statement. The primary test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction.⁸⁷

In *Rameshwar v. State of Rajasthan*,⁸⁸ the Indian Supreme Court through K.N. Wanchoo J. said that at p.

“Now the word statement is not defined in the Act. We have, therefore, to go to the dictionary meaning of the word in order to discover what it means. Assistance may also be taken from the use of the word ‘statement’ in other parts of the Act to discover in what sense it has been used therein.

⁸⁵ [1991] 1 MLJ 106.

⁸⁶ The learned judge followed the Indian Supreme Court of *BC. Pandya v. State of Bombay* AIR 1959 SC 356 which held, that notes of attendance prepared by a prosecution witness recording conversations that took place between him and other prosecution witnesses in connection with defalcation made by the accused would be statements within the meaning of s. 157 and would be admissible to corroborate his evidence.

⁸⁷ *Rameshwar v. State of Rajasthan* AIR 1952 SC 15.

⁸⁸ Footnote 3 *supra*.

The primary meaning of the word 'statement' is 'something that is stated' ... unless, therefore there is something in s. 157 or in other provisions of the Act, which compels us to depart from the primary meaning of the word 'statement', there is no reason to hold that communication to another person is of the essence and there can be no statement within the meaning of s. 157 without such communication. The word 'statement' has been used in a number of sections of the Act in its primary meaning of 'something that is stated', and that meaning should be given to it under s. 157 also unless there is something that cuts down that meaning for the purpose of that section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context".

The learned judge said that the word 'statement' has been used in a number of sections in the Act, namely sections 17 to 21, 32, 39, 145 in its primary meaning of 'something' that is stated and that meaning should be given to it under s. 157 also unless there is something that a cut down that meaning for the purpose of that section.

"On a consideration of the primary meaning of the word 'statement' and the various sections of the Act, the conclusion is clear that a statement under section 157 means only 'something that is stated' and the element of communication to another person is not necessary before 'something that is stated' becomes a statement under the section".⁸⁹

The words "at or about the time" must mean that the statement must be made at once or at least shortly after when a reasonable opportunity for making it presents itself. The object of the section seems to be to admit statements made at a time when the mind of the witness is so connected with the events as to make it probable that his description of them would be accurate.

In the useful Indian case of *In re Appadurai Pillai*,⁹⁰ Mockett J. observed at p. 359: "The wording of s. 157, Evidence Act, is to the effect that a statement must be made 'at or about the time the fact took place'. There is a dearth of authority as to the meaning of 'at or about the time'.⁹¹ *Mangat Rai v. Emperor*, shows that proximity of time must be established. In *Emperor v. Ramchandra Ray*,⁹² there was an interval of 20 hours between the event and the statement sought to be put in as evidence of corroboration. The Bench ... considered that this interval was too long and refused to admit this statement. Both these decisions with which I respectfully agree are based,

⁸⁹ *Ibid*, footnote 3.

⁹⁰ 1945 AIR (Madras) 358.

⁹¹ AIR 1928 Lah. 647.

⁹² AIR 1928 Cal 732.

as are the English cases, on the premise that in point of time the fact on the statement must be approximate (emphasis added). I think that 'at or about the time', must mean that the statement must be made at once or at least shortly after when a reasonably opportunity for making it presents itself. Section 157 cannot possibly contemplate the admission of a statement made long after the event. I am not attempting to lay down what is a reasonable time, as this is a question of fact in each case". This statement of the law was by followed by Edgar Joseph JR J. in *Paneerselvan*.⁹³ In *PP v. Teo Eng Chan*,⁹⁴ Justice Coomaraswamy said at p. 161 that the expression ... is not limited in terms of hours and days. It is limited by the terms "first reasonable opportunity" or "as speedily as could be expected".

In re *Appadurai Pillai*,⁹⁵ Mockett J. at p. 359 opined the "The object of the section seems to me to be to admit statements made at a time when the mind of the witness is still so connected with the events as to make it probable that his description of them then would be accurate. For example, if A returns to his house and says to a friend 'I have just seen B in the Mount Road' and later the question arose whether B was in Madras on that day, the statement of A to his friend might be valuable corroboration of A's evidence that he in fact did see B on that day. The more familiar example is in murder cases when a witness who has seen a murder at once tells some third party what he has seen. But if time for reflection passes between the event and the subsequent statement, it not only can be of very little value but may be actually dangerous as such statements can easily brought into being such delayed statements are inadmissible. The section says that the statement must be made "at or about the time" not "at any time after the event" (**emphasis added**).

This view was endorsed in *Paneerselvan* by Edgar Joseph J. In *Ramratan v. State of Rajasthan*,⁹⁶ the Indian Supreme said at p. 426 that ... "there are only two things which are essential for [section 157] to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. If these two things are present, the former statement can be proved to corroborate the testimony of the witness in court. The former statement may be in writing or made orally to some person at or about the time when the fact took place. If it is made orally to some person at or about the time when the fact took place, the person would be competent to depose to the former statement and corroborate the testimony of the witness in court. There is nothing in s. 157 which requires that before the corroborating witness deposes to the former statement the witness to be corroborated must also say in his testimony in court that he had made the former statement to the witness who is corroborating him. ... it is not necessary in view of the words of s. 157 that in order to make corroborating evidence admissible, the witness to be corroborated must also say in his evidence that he had made such and such statement to the witness who is to

⁹³ *Supra* at p. 108.

⁹⁴ [1998] 1 MLJ 156.

⁹⁵ 1945 AIR Madras 358.

⁹⁶ AIR 1962 SC 424.

corroborate him, at or about the time when the fact took place. The words of s. 157 are clear and require only two things indicated in above in order to make the for statement admissible as corroboration.”

Edgar Joseph JR J. emphasized that it is for the prosecution to establish by clear and unequivocal evidence the proximity of time between the taking place of the fact and the making of the statement.

The application of section 157 of the Evidence Act is clearly seen in the useful Indian case of *Bechu v. The King*.⁹⁷ The appellant was convicted of raping a 14 year old girl. The relevant facts here were that immediately after being raped the girl told her mother of what happened to her shortly after the girl was taken to the hospital and examined by two doctors. Late in the same night she and her parents, she went to the police station, where information was lodged, by her mother.

One of the grounds of appeal against the appellants conviction was that the trial judge had erred asking the jury to treat the evidence of the girl’s mother as to what the girl had stated to her immediately after the occurrence as corroboration of the girl’s evidence.

Das Gupta J. at p. 615 said that “The question whether the statement made by the girl shortly after the occurrence has any corroborative value or not depends, however upon s. 157 Evidence Act ... where as in the present case there is no question of any interpretation of a statute, but the question is whether the plain words of the statute would be disregarded and given effect to, ... the court is bound to do the latter, that to hold that the statute, that is the statute should be followed in preference to any opinion of judge. On these considerations I am of the opinion that the judge rightly told the jury to consider the mothers evidence as to what Saraswathy (the rape victim) told her immediately after the occurrence as corroboration. “Whether the corroboration should be considered sufficient or not”, Gupta J. opined “is really a question of fact, and the circumstances under which the statement by the prosecutrix is made and the time which elapses between the occurrence and her statement have to be considered” (*ibid* at p. 615).

Another instructive Indian case on section 157 of the Evidence Act is *Rameshwar v. State of Rajasthan*,⁹⁸ where the appellant was convicted of raping an eight year old girl. Bose J. at p. 58 observed:

⁹⁷ AIR 1949 Cal. 613.

⁹⁸ AIR 1952 S.C. 52.

... the High Court Judges have used Mt. Purni's (the victim) statement to her mother as corroboration of her statement. The question arises, can the previous statement of an accomplice, or a complainant (emphasis added) be accepted as corroboration? That the evidence is legally admissible as evidence of conduct is indisputable because of illustration (j) to s. 8 Evidence Act which is in these terms. The question was whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which, the complaint was made are relevant.

But that is not the whole problem, for we are concerned here not only for its legal admissibility and relevancy as conduct but as to its admissibility for a particular purpose, namely corroboration. The answer is to be found in s. 157, Evidence Act which lays down the law for India.

The section makes no exceptions, therefore provided the condition prescribed, that is to say 'at or about the time etc.' are fulfilled there can be no doubt that such a statement is legally admissible in India as corroboration." Bose J. noted that "The weight to be attached to it is, another matter and it may be that in some cases the evidentiary value of two statements emanating from the same source may not be high, but in view of s. 118 its legal admissibility as corroboration cannot be questioned". Bose J. cautioned that "to state this is, however no more than to emphasise that there is no rule of thumb in these cases. When corroborative evidence is produced, it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand, its weight may be nil".

The learned judge then posed the question as to whether the mother could be regarded as an "independent" witness. "Independent" merely means **independent of sources**⁹⁹ which are likely to be tainted". On the facts, the learned judge held because of the absence of enmity against the accused there was no reason why she would implicate the accused. Thus the previous statement of the child to the mother was rightly admitted.

In another Indian Supreme Court case *Ramratan v. State of Rajasthan*.¹⁰⁰ Ramratan and four others were charged with the murder of one Bhimsen. It appeared Ramratan and his accomplices had gone to Roopram's shop and shot Bhimsen (who shortly after succumbed to his injuries) and wounded Jawanaram who was in Roopram's shop together with Bhimsen. Immediately after the shooting incident Jawanaram told Roopram the names of the five assailants. Then Jawanaram made a police report to a police officer who met him on the way at a short distance from Roopram's shop. The Supreme Court held confirming what the Indian High Court had ruled (overruling the Sessions Judge) that Roopram's statement that Jawanaram had told him

⁹⁹ Emphasis added.

¹⁰⁰ AIR 1962 SC 424.

immediately after the occurrence the names of the five assailants was admissible in evidence and could be used to corroborate the statement of Jawanaram. The Supreme emphasized that there are only two things which essential for section 157 to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place before any authority legally competent to investigate the fact. If these two things are present, the former statement can be proved to corroborate the testimony of the witness in court.

The three Indian cases given above have clearly accepted a witness's previous statement as constituting corroboration of his evidence in court under section 157 of the Evidence Act; though the weight to be given to such a previous statement will depend on the circumstances of the case.

In Brunei too, under the Brunei Evidence Act, section 157, which is in *pari materia* with section 157 of the Indian Evidence Act 1872, the Malaysian Evidence Act 1950, and s. 159 of the Singapore Evidence Act, witness's previous statement has been held to be corroborative of his evidence in court.

In *PP v. Jamlong Manmool*,¹⁰¹ the victim within twenty four hours of being raped by the accused, she made complaint to the police of the incident. Sir Denys Roberts CJ said at pp. 213-214: "Complaints which have been made by the victim, do not in English law, amount to corroboration of her evidence under that system, her complaints amount to no more that what is called evidence of 'the consistency of her conduct'.

In Brunei, however, such evidence may amount to corroboration, section 157 is in general terms and provides that the evidence of a witness may be corroborated by an earlier statement by the witness at or near the time when the fact took place. In the *Abdul Rahman*¹⁰² case it was decided that the evidence of a complainant is admissible as corroboration if the complaint was made as soon as can be reasonably be expected after the incident occurs.

I accept this complaint by miss X as amounting to corroboration of her evidence that she was raped".

¹⁰¹ [1993] ICLJ 212.

¹⁰² Criminal trial No. 7 of 1988 unreported.

CORROBORATION UNDER THE EVIDENCE ACT 1950 AND THE COMMON LAW IN *R V. WHITEHEAD*¹⁰³

The seminal case of *R v. Whitehead* clearly established that corroborative evidence must be independent evidence, thus a witness cannot corroborate himself, a principle vividly highlighted by Lord Hewart C.J. In that case the accused had been charged with unlawful sexual intercourse with the girl under the age of sixteen, the alleged corroboration of the complainant being that she had also told the same story to her mother. Lord Hewart CJ said at p. 102 that what the girl said could not amount to corroboration of her story, because it proceeded from the girl herself; it would be merely the girl's story at second hand. "In order that evidence may amount to corroboration it must be extraneous to the witness who is corroborated. A girl cannot corroborate herself, otherwise it is only necessary for her to repeat the story some twenty-five times in order to get twenty-five corroborations of it". Earlier in *R v. Christie*,¹⁰⁴ the House of Lords quashed a conviction for indecent assault on the grounds that the trial judge had wrongly directed the jury that evidence given by the mother of the victim and a policeman as to the victim's description of the assault could amount to corroboration.

In fact in the *locus classicus* as to what constitutes corroboration *R v. Baskerville*,¹⁰⁵ where Baskerville had been convicted of having committed acts of gross indecency with two boys (who were accomplices because they were freely consenting parties and there was no use of force, Lord Reading CJ said that "corroboration must come from independent sources" i.e. it must be independent testimony.

WHETHER A FORMER STATEMENT CONSTITUTES CORROBORATION

Controversy has raged whether a former statement by a witness may constitute corroboration of his evidence in court. One view is that by giving the section a literal interpretation a former statement of a witness may constitute corroboration of his testimony in court. The opposite view influenced by the *Whitehead* doctrine is that, a former statement of a witness is not of any genuine corroborative value, as a witness cannot corroborate himself. The former statement is merely evidence of the consistency of his conduct with the story told by him in the witness box.

The first view – a former statement is corroboration under section 157 of the Evidence Act 1950.

¹⁰³ [1929] 1KB 99.

¹⁰⁴ [1914] AC 545.

¹⁰⁵ [1916] 2 KB 658.

As far back as 1935, the matter was raised before the Court of Criminal Appeal in two cases. In *R v. Koh Soon Poh*,¹⁰⁶ Justice Terrel observed at p. 121:

“It is argued however that in any event that this book could not be accepted of corroboration of Lim Thye Hock’s evidence in view of the rule laid down in England that a witness cannot corroborate himself (see *Rex v. Whitehead*), ... this court is of the opinion that in view of section 157 of the evidence ordinance, the English rule cannot be accepted without qualifications. Such statements (under section 157 of the Evidence Ordinance) are then by law treated as corroboration, whereas in England any further statement made by the witness himself is inadmissible. The court accordingly accepts the note book as corroborating Lim Thai Hock’s verbal testimony”. In *R v. Velayuthan*,¹⁰⁷ Whitley J. sitting in the court of criminal Appeal after having referred to the law laid down by Lord Hewart CJ. In *R v. Whitehead*, noted that, **“In this colony, however, the position is different inasmuch as s. 157 of the Evidence Ordinance which has no counterpart in the English law of Evidence.”**¹⁰⁸ He accordingly held that a complaint if made immediately was corroboration, although in England it would not be so regarded. The learned judge however took pains to point out that its value and strength as corroboration must depend in every case upon the circumstances under which it is made. Again in *Lim Baba v. PP*.¹⁰⁹ Ismail Khan J. had to decide whether to admit the complaint of the complainant as corroborating her evidence in court, according to the literal interpretation of section 157, or merely as evidence of consistency of her conduct with her story in court, and therefore not corroboration – as by the *Whitehead* test, such previous complaint was not external to her evidence in court.

The appellant in *Lim Baba v. PP* was charged and convicted by Sessions Court President under section 366 of the Penal Code for abducting a nineteen year old woman with intent to have illicit sexual intercourse with her. One of the grounds of appeal against conviction was that the President had misdirected himself in accepting as corroboration the complaint by the victim shortly after the alleged occurrence of the facts complained of Ismail Khan J. ruled that there was no misdirection by the President, in view of the clear provisions of section 157 of the Evidence Ordinance. “It is true that in an English case *Rex v. Job Whitehead*, it was held that a witness cannot corroborate himself. The question of the admissibility of such an immediate complaint was death with in *Rex v. Velayuthan*, a Singapore case. In that case Whitley J. referred to section 157 of Ordinance No. 53 (Evidence), which is identical with section 157 of our Evidence Ordinance”. He said that “this section has no counterpart in the English law of evidence and therefore a complaint if made immediately would be treated as corroboration, although in England it would not be so regarded. The observations of Terrell J. in *Rex v. Koh Soon Poh* are to the same effect”.

¹⁰⁶ [1935] MLJ 120, CCA.

¹⁰⁷ [1935] MLJ 277.

¹⁰⁸ Emphasis added.

¹⁰⁹ (1962) 28 MLJ 201.

In *PP v. Samsul Kamar b. Mohd. Zain*,¹¹⁰ the court (at p. 259), held that a voluntary part of the cautioned statement under section 37A of the D.D.A 1950, may be used by the accused by the accused to corroborate his testimony under section 157 of the Evidence Act 1950. The accused as a witness should not be deprived of his right under section 157 for the purposes of using facts recorded therein, to corroborate such facts in his testimony if indeed such facts were recorded therein and where he himself claims that part of the statement was made voluntarily. In the Singapore case of *PP v. Teo Eng Chan & Ors.*,¹¹¹ the four appellants were jointly tried and convicted of aggravated rape of a girl who was 16 years and 10 months old at the time. Coomaraswamy J. said at p. 161 “I find Kay’s (the complainant victim) evidence more than adequately corroborated. He statement to Dr. Chua and her use of the Mandarin equivalent of ‘gang rape’ in that statement within 14 hours after the events are adequate corroboration. The number of hours are not by itself important. Kay’s complaint was made as speedily as could reasonably in the circumstances be expected of her ... I regard her statements to Dr. Chua as adequate corroboration under our law and going much further other than merely showing consistency.”

In *Wong Thin Yit v. Mohamed Ali*,¹¹² a police report lodged by the appellant after the accident was held to be mere hearsay as he did not testify at the trial Ali F.J. said at p. 180, that, “If he had done so, the report would undoubtedly have some value as corroborative evidence within the meaning of evidence Ordinance”.

In *Karthiyayani & Anor v. Lee Leong Sin & Anor*,¹¹³ the trial judge had held that a previous statement made by the first respondent at the inquest was consistent with the testimony he gave in court. The Federal Court assumed that the trial judge apparently had section 157 of the Evidence Act in mind in his finding on the previous statement. In addressing the issue as to whether a witness can corroborate himself Raja Azlan Shah FJ. Said at p. 120:

“It is settled law that a person cannot corroborate himself, but it would appear that s. 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness’s truthfulness, just as inconsistency is a ground for disbelieving him. However, his lordship noted that it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself”.

¹¹⁰ [1998] 2 MLJ 251.

¹¹¹ [1998] 1 MLJ 156.

¹¹² [1971] 2 MLJ 175.

¹¹³ [1975] MLJ 118.

The later part of the statement reflects the rule lucidly enunciated by Lord Reading C.J. in *R v. Baskerville*,¹¹⁴ that corroboration must come from independent sources and thus ordinarily the testimony of one accomplice cannot corroborate that of another. In *PP v. Paneerselvan & Ors.*,¹¹⁵ Edgar Joseph JR. J was satisfied that the prosecution had adduced sufficient prima facie evidence to satisfy the conditions laid down in section 157 so that technically the statements were admissible. But he excluded the statements on the ground that their probative value outweighed their prejudicial effect in accordance with the principles enunciated by Lord du Parq in the seminal case of *Noor Mohamed v. R.*¹¹⁶

The opposite view that a previous statement under section 157 alone is not corroboration by independent evidence, and therefore does possess any genuine corroborative value.

Proponents of this view take the stance that although section 157 of the Evidence Act has the effect of elevating a recent complaint to corroboration the court should be aware of the fact that corroboration by section 157 alone is not corroboration by independent evidence. It would be dangerous to equate this form of corroboration with corroboration in the normal sense of the word. See *Khoo Kwoon Hain v. PP.*¹¹⁷

This changed trend in judicial thinking can be seen by Justice Ong who was opposed to the view that a previous statement by a witness, though admissible under section 157 was of any genuine corroborative value. In *Mohamed Ali v. PP*,¹¹⁸ the learned judge made his view clear, when he said at p. 231 that:

“It will not be out of place here to say a few words about s. 157 of the Evidence Ordinance Admissibility of a previous statement under that section must not be confused with the weight to be given to it. Corroboration, strictly speaking, means independent corroboration as explained in *R v. Baskerville*. In my opinion true corroboration by independent evidence from an extraneous source should be distinguished from ‘corroboration’ as it appears in s. 157, which rests on the principle that consistency between a previous statement by a witness and his present evidence may afford some ground for believing him. The value of such a statement as corroboration may be infinitesimal, as in the majority of cases it is. On the other hand, by reason of the abundance of detail it may contain as to the facts and circumstances

¹¹⁴ [1916] 2 KB 658.

¹¹⁵ [1991] 1 MLJ 106.

¹¹⁶ [1914] AC 182.

¹¹⁷ [1995] 2 SLR 767.

¹¹⁸ [1962] MLJ 230.

surrounding any relevant transaction, it may be capable of being cross checked for truthfulness against other relevant evidence, in which case, of course, it may be effective corroboration, but only because it has been shown to be true.”

In fact in *PP v. Paneerselvan & Ors.*,¹¹⁹ Edgar Joseph Jr. J. at p. 109 had already to the Singapore Privy Council case of *Lim Yam Hong & Co. v. Lam Choon & Co.*¹²⁰ where Darling said at p. 128 that it is impossible to treat statements by a witness as corroborating his own evidence, these being parts of the very evidence itself. In Malaysia in the celebrated Privy Council case of *Chiu Nan Hong v. PP*,¹²¹ Lord Donovan said that corroboration must be independent of the witness’s testimony. In *Ah Mee v. PP*,¹²² Ong FJ noted that there is a distinction between corroboration in the strict sense and corroboration under section 157 of the Evidence Ordinance. The learned F.J. reiterated that corroboration connotes some independent evidence of some material fact which implicates the accused and tends to confirm that he is guilty of the offence.

In *Morgan a/l Perumal v. Ketua Inspector Hussein b. Abdul Majid*,¹²³ Justice Abdul Malek Ishak opined that gives rise to a strong presumption of consistency. In *YK Fung Securities Sdn. Bhd. v. James Capel (Far East) Ltd.*,¹²⁴ Mahadev Shanker JCA expressed the view that a previous statement could only be used to show consistency or to contradict the testimony of a witness.

In *Commercial Union Assurance v. Ng Chek Hung*,¹²⁵ Gopal Sri Ram JCA observed at p. 195; “I pause to say that while s. 157 of the Evidence Act 1950 allows such previous consistent statement to be used, to support the testimony of a witness, it is confirmation of the weakest kind. Repetition it be made a hundred times over cannot make firm, testimony that suffers from infirmity. Again in *Lim Guan Eng v. PP*,¹²⁶ Gopal Sri Ram JLA at p. 45 again reminded that

“(3) Evidence that requires corroboration, whether as a matter of practice having the force of law or by direction of statute:

- (a) must first be capable of belief before any question of corroboration may arise, for evidence that falls of its own inanity cannot be saved by the presence of abundant corroboration;

¹¹⁹ See *supra* footnote 114.

¹²⁰ AIR 1928 PC 127.

¹²¹ [1965] 1 MLJ 40.

¹²² [1967] 1 MLJ 220.

¹²³ [1996] 3 MLJ 281.

¹²⁴ [1997] 2 MLJ 621, CA.

¹²⁵ [1997] 3 CLJ 189.

¹²⁶ [1998] 3 MLJ 15.

- (b) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding section 157 of the Evidence Act 1950 (emphasis added) and;
 - (c) cannot be corroborated by evidence that itself requires corroboration.
- (4) To constitute true corroboration in the eyes of the law, the corroborative evidence must:
- (b) be independent in the sense mentioned in proposition (3)(c) above;
 - (c) ... it must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.

In fact two years earlier in the leading case *Aziz b. Muhamad Din v. PP*,¹²⁷ Augustine Paul J.C (as he then was) after a comprehensive survey of Malaysian, Singapore and English authorities, ruled that a statement rendered admissible by section 157 of the Evidence Act 1950, cannot be treated as corroboration by virtue of section 73A(7) of the Evidence Act 1950. In *Thavanathan a/l Balasubramaniam v. PP*,¹²⁸ the Federal Court again reconfirmed the proposition that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime.

In *Kesavan Sendevan v. PP*,¹²⁹ Justice Wahab Patail said at p. 359:

“In the absence of, or in addition to, independent corroboration, evidence of the consistency of his complaint cannot amount to evidence of credibility. It is evidence that the complainant has maintained at all times the same story thereby indicating the likelihood that the complaint is true. Otherwise irrelevant, it was made admissible by s. 157 of the Evidence Act 1950. Since the source is the victim himself, it cannot be said to be from a source independent of the evidence to be corroborated, which is the victim’s evidence. Under case law it would have been irrelevant, except as proof of consistency of the complaint. The learned judge then referred to *Ah Mee v. PP* and *Mohamed Ali v. PP* and said at p. 360 that “The court of Appeal in *Liew Wah Ming v. PP* applied *Mohamed Ali v. PP* and Hill JA said ‘section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact’”.

In *PP v. Dato Seri Anwar Ibrahim*,¹³⁰ Justice Augustine Paul at p. 85 agreed with the well-known Sri Lankan writer on the Law of Evidence, ERSR Coomaraswamy in “the Law of Evidence”,

¹²⁷ [1996] 5 MLJ 473.

¹²⁸ [1997] 2 MLJ 401.

¹²⁹ [1999] 1 CLJ 343.

Vol. 11 p. 757, where the writer commenting on a similar provision of the Sri Lankan Evidence Ordinance observed “Nokes points out that Stephen’s conception of corroboration, as seen in section 157 of the Indian Evidence Act, is now regarded as fallacious. Therefore the corroboration in section 157 is only for the purpose of showing that the witness is consistent”. Justice Augustine Paul also refers to the Sri Lankan case *Ariyadasa v. The Queen*,¹³¹ to the judgment of TS Fernando that: the corroboration that section 157 contemplates is not corroboration in the conventional sense in which the term is used in courts of law, but in the sense of consistency in the conduct of the witness tending to render his testimony more acceptable”.

In the wake of these plethora of authorities that a former statement under section 157 of the Evidence Act 1950 is not true corroboration in the sense as propounded in *Whitehead*, came the case of *PP v. Mohammad Terang Amit*¹³² where Muhammad Kamil Awang J. said at p. 163, after having cited *Lim Baba v. PP*, that **“it is abundantly clear that the *Whitehead’s* case could not be said to represent the correct statement of the law applicable to our country”**.¹³³ As such the magistrate must have misdirected himself when he rejected outright the evidence of PW10, PW11, and P12 (the parents of victim PW7, PW8, and P9, who had complained to them of having been incedently assaulted by the accused) by merely relying on the authority of that case. The same sentiment has been expressed by the Federal Court in *Lim Guan Eng v. PP*,¹³⁴ where Zakaria Yatim FCJ **clearly demolished the Whitehouse doctrine in Malaysia** when he said at pp. 597, 598:

“Augustine Paul JC went on to state in his judgment that ‘a statement rendered admissible by s. 157 cannot be treated as corroboration of evidence given by the maker of the statement’. This proposition has the effect of amending or modifying s. 157. Like other provisions of the Evidence Act 1950, s. 157 was passed by Parliament and Parliament alone can modify, amend or repeal the section. So far Parliament has not done anything to the section. Therefore it remains in force in its present form. The court may interpret and apply the section but it cannot change what is stated in the section.

It is our view that under s. 157, a former statement made by a witness is admissible in order to corroborate his testimony. The weight of such a statement for the purpose of corroboration depends on the facts of a particular case. This view is supported by a long line of decided cases. In *Liew Wah Ming v. PP*,¹³⁵ Thomson CJ, said at p. 84:

Section 157 is clear and unambiguous and there can be no doubt that in the circumstances laid down in that section a former statement made by a witness is admissible to corroborate

¹³⁰ (No. 3) [1999] 2 MLJ 1.

¹³¹ (1966) 68 NLR 257.

¹³² [1999] 5 CLJ 156.

¹³³ Emphasis added.

¹³⁴ [2000] 2 MLJ 577. See also *Mohd. Hazrin Md. Sari v. PP* [2003] 1 CLJ 202, 209.

¹³⁵ [1963] 2 MLJ 82.

his testimony and with the object of showing consistency. But the weight or value of such a statement as corroboration must always be a question of fact ... While, therefore, the former statement of an accomplice or ... of a child is admissible to corroborate his testimony and to indicate consistency the weight to be attached to it must vary with the facts of each case.

See also *R v. Velayuthan*;¹³⁶ *R v. Koh Soon Poh*;¹³⁷ *Mohamed Ali v. PP*;¹³⁸ *Karthiyayani & Anor v. Lee Leong Sin & Anor*;¹³⁹ *PP v. Samsul Kamar bin Mohd. Zain*.¹⁴⁰

We wish to add here that despite s. 73A(7), s. 157 as well. In *Karthiyayani & Anor v. Lee Leong Sin & Anor*,¹⁴¹ Raja Azlan Shah FJ, (as he then was), said at p. 120:

It is settled law that a person cannot corroborate himself but it would appear that section 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness' truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s. 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on any vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinize all the infirmities in that evidence before deciding to act upon it.

¹³⁶ [1935] MLJ 277.

¹³⁷ [1935] MLJ 120.

¹³⁸ [1962] 2 MLJ 230.

¹³⁹ [1975] 1 MLJ 119.

¹⁴⁰ [1988] 2 MLJ 252.

¹⁴¹ [1975] 1 MLJ 119.

The question to be considered here is whether s. 157 applies to the present case. In our opinion it does because the provision contained in s. 157 is not contrary to s. 6(1) of the Sedition Act 1948. We, therefore, agree with the submission of the learned deputy that the statement (exh. P6) corroborates Kpl. Stanley Liew's evidence. The weight of the statement for the purpose of corroborating Kpl. Stanley Liew's evidence is a question of fact. The trial judge had considered the value of the statement and made a finding of fact that the statement alone was not sufficient corroboration to convict the appellant. He said, however, that Stanley Liew's evidence was corroborated by the evidence of Zakaria Budin (PW7) and Inspector Lok Yoke Choy (PW13). He added that the credibility of Kpl. Stanley Liew's evidence was enhanced when Insp. Lok confirmed as correct the content of the statement (P6).

The Court of Appeal accepted the finding of the trial judge when it said that although the two other witnesses could not recall every word spoken by the appellant, they confirmed that evidence of Kpl. Stanley Liew in material particulars. The court said, 'This is sufficient corroboration in the eyes of the law'."

The Federal Court has finally put the raging controversy to rest, by refusing to construe the expression provision of section 157 of the Evidence Act 1950, by not being influenced by the previous state of the common law as embodied in *Whitehead* and *Baskerville*. India and Brunei has also taken this approach

Be that as may be it is submitted that section 157, though its speaks of "corroboration" is in reality no more than consistency of conduct; though admissible it has no more probative value than as *res gestae*. Repetition is not corroboration, as emphasized by Lord Hewart in *R v. Whitehead*, and in an appeal from Singapore *Lim Yam Hong v. Lam*¹⁴² Choon Lord Darling held that it is impossible to treat statements by a witness as corroborating his own evidence, these being merely parts of that very evidence itself. It would therefore be improper to treat such evidence as corroboration. This much neglected decisions seems to have escaped the attention it deserves. The expression "corroboration", in the context, is inept and must be regarded as a *lapsus calami*, and rejected as meaningless and inapplicable in its proper setting. As highlighted by Justice Augustine Paul in *PP v. Dato Seri Anwar Ibrahim No. 3*,¹⁴³ that Professor Nokes had pointed that Sir Fitzames Stephens conception of corroboration is now regarded as fallacious, merits much consideration. Perhaps this is the right time to consider removing the section to accord with justice and the modern thinking on the value of the section.

¹⁴² [1931] S.S.L.R. 96, AIR 1928 PC 127.

¹⁴³ See footnote 130 *supra*. In Singapore a previous statement under s. 159 (equivalent to s. 157 of our Evidence Act) of the Singapore Evidence Act, has been held not to constitute corroboration in the *Whitehead* or *Baskerville* sense. See the seminal case of *Tan Kin Seng v. PP* [1997] 1 SLR 46. In England by virtue of section 32(1)(a) of the Criminal Justice and Public Order Act 1994, any requirement whereby at a trial on indictment it is obligatory for a court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is an alleged accomplice of the accused is abrogated.

CRIMINAL LIABILITY FOR ENVIRONMENTAL CRIMES

Shardha Baranwal

Abstract

The risk of environment crimes during peace time is comparatively a new and unfortunately growing fast. Different responses by countries due to – lack of capacity, willingness, culture etc. have made it the situation worse. Such difference leads to difference in standard which ultimate result into common sufferance. This makes it mandatory to analyze the efficacy of deliberations on environment crime in order to ascertain – Whether international standards are there to deal with environmental crime? If yes are they good enough to be replicated in domestic jurisdictions?

In the last few decades one of the most debated issue emerged was – ‘Liability for Environmental Crimes’ the roots of which can be traced way back in 1987, the year of the UN World Commission’s report on Environment and Development, titled *‘Our Common Future’*. Since then lot of new terminologies found place in environmental law jurisprudence such as “*environmental criminality*”, “*criminality of environmental protection*” also “*criminality of the environment*”, “*green crimes*”, “*crimes against the environment*” and “*ecocide*”.¹ In spite of various authors contributing tremendously towards developing liability for environmental crime, till date no international document could have materialized for setting uniform standards of criminal liability for State to replicate in their domestic criminal jurisprudence.

Increasing Threat of Environmental Crimes: Global Evidences

On 5th of October 2010 a toxic leak in Hungary ended up in a state of emergency for nearby countries and the waste (a mixture of water and mining waste containing heavy metal) was considered hazardous as per Hungary’s National Directorate General for Disaster Management (NDGDM). Similar kind of crisis arose in the Ivory Coast in 2006 which ended with 17 lives and over 30,000 injuries. The company managed to bargain ‘no prosecution’ with the cleanup cost paid. Countries rich in resources such as USA have also been forced to witness notorious Oil Spills.² In Italy waste trafficking has replaced drug smuggling, becoming the major source of income for the Italian Mafia. In third world such a major distress was seen during ‘Bhopal Gas Tragedy’. For one or the

¹ Katja Eman, Gorazd Meško, Charles B. Fields, ‘Crimes against the Environment: Green Criminology and Research Challenges in Slovenia, VARSTVOSLOVJE, Journal of Criminal Justice and Security, year 11 no. 4 pp. 574-592

² In the year 2010 the whole world including USA became the mute spectator when nearly 205.8 million gallons of crude oil was released in the Gulf of Mexico. It has been considered as the gravest oil spill in the history which immediately saw 42% of reduction in the share prices of BP Oil. The spill reported to have impact on 68,000 sq. miles of ocean. No doubt that a heavy price was paid for such destruction but as we say environment damage is not 100% repairable! Similar happened in the case of Shell, the Dutch oil giant that could be held responsible for destroying marine environment of Niger delta only after years of struggle by the stakeholders.

other reasons such 'despicable crimes'³ have found heaven in Countries like Belarus.⁴ Transnational environment crimes worth million dollars globally. Unconfirmed estimates of the value of the trade range from US\$31 billion a year (Lauterback, 2005) to US\$40 billion or more (Hayman cited in Lovell, 2002). The fact remains that though eco-crimes to some extent are occasional and opportunistic a major part of the same is highly organized and well financed.⁵ Undoubtedly environmental crimes have emerged as the new business opportunity.

Environment Crimes: The Definition and Identification Hazards

(Nomenclature as well as criteria)

As observed before, devising of policy is subject to the question of precise determination of scope. However, with respect to environmental crimes it has remained a task. Scholars have defined it as per their perception and understanding of environmental harm. For Rob White it is 'Harm' which is trans-boundary and which can be regulated by the states – now it is up to the states to regulate or to join the perpetrator of the harm. To some extent White is right in observing the willingness of states considering the fact of dump grounds voluntarily offered by the third world.⁶ Sometimes capacity also plays a big role.⁷ Defining environmental crime on the basis of intention to earn profit at the cost of ecology also would not be of much help as done by Clifford (1998). The definition would result into exclusion of those accidental crimes which have no intention involved. Hence, imposing no fault liability would be a task. Situ and Emmons (2000) linked it with violation of law. For them it is a forbidden act which is subject to prosecution and sanction. Hence, if countries are unable to devise policy there would not be any violation liable to be prosecuted. Gibbons (1994) simply defined environmental crime as an intentional or well-considered criminal act, which results in actual and material damaging of water, environment, air, soil or countryside. This definition is too broad to segregate serious offences against the environment as against day to day common negligence considering every action small or big does affect the environment in some manner. All the definitions given above suffer from one or the other difficulty hence cannot be taken as fixed

³ Refer statement of Sarah Chare, head of the Environment Agency's National Enforcement Service, available at <http://www.dailymail.co.uk/news/article-1358450/The-gangs-dumping-recycling-Third-World-All-effort-separating-rubbish-waste-time.html#>

⁴ Refer <http://www.euroalter.com/2011/what-are-environmental-crimes/>

⁵ Lorraine Elliott, Transnational Environmental Crime: Applying Network Theory to an Investigation of Illegal Trade, Criminal Activity and Law Enforcement Responses, also refer TRANSNATIONAL ENVIRONMENTAL CRIME PROJECT WORKING PAPER 1/2011, available at http://ips.cap.anu.edu.au/ir/tec/publications/TEC_Working_Paper_1_2011.pdf

⁶ On the outskirts of Ghana's biggest city sits the huge wasteland. The place is called Agbogbloshie which has become the one of the world's digital waste dump site. In China also e-waste has become a big trade. Refer http://www.pbs.org/frontlineworld/stories/ghana804/video/video_index.html for article and video on *Ghana: Digital Dumping Ground*

⁷ Mangai Natarajan, (Ed.) International Crime and Justice, Cambridge University (2011), article by Rob White, 'Transnational Environment Crime', pg. 193-199,

standard. In this regard the work of bodies such as the G8, Interpol, EU, UN Environment Program and the UN Interregional Crime and Justice Research Institute should be appreciated for giving criteria to define environmental crimes.⁸

These include offences under CITES;⁹ trading in ozone-depleting substances (ODS) in contravention to Montreal Protocol,¹⁰ Offences under Basel Convention,¹¹ Illegal Fishing in contravention of international, multilateral and regional arrangements, illegal trade in timber, Bio-piracy and transport of controlled biological or genetically modified material under Cartagena Protocol,¹² Illegal dumping of oil and other wastes in oceans under MARPOL and London Convention on Dumping,¹³ Violations of potential trade restrictions under the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Trade in chemicals in contravention to the 2001 Stockholm Convention on Persistent Organic Pollutants, Fuel smuggling to avoid taxes or future controls on carbon emissions.

Another aspect which is a matter of concern here is, the '*Nomenclature of Environment Crime*'. As discussed before currently lot of different terms are in use to explain environmental crimes. Out of all the nomenclatures the most debated term had been 'Ecocide' which managed to find a place on UN agenda as well. Since the definition of environmental crime is not yet settled the only option left is to proceed on the basis of identified offences treating them as crime.

Criminal Liability: Evolution, Understanding and Imposition of Liability

➤ Evolution and understanding of criminal liability

The founding principles of criminal liability can be seen in the concept of *wite*¹⁴, a sort of tariff which was to be paid for infringement of king's peace in England. A wrong here was regarded as breach of '*grith*' or '*faith*' or '*mund*' of the king.¹⁵ Hence the wrong was not only associated with the injured person it was seen as a breach of a faith against the king. Presently, the attempts have been made

⁸ Gavin Hayman and Duncan Brack, "International Environmental Crime: The Nature and Control of Environmental Black Markets," Workshop Report, Royal Institute of International Affairs (Sustainable Development Programme), 2002, available at

http://ec.europa.eu/environment/archives/docum/pdf/02544_environmental_crime_workshop.pdf

⁹ Refer Lisa Mastny and Hilary French, Crimes of (a) Global Nature, *Excerpted from September/October 2002* WORLD WATCH magazine, (2002) Worldwatch Institute, for a detail discussion on offences in contravention of CITES 1973 available at <http://www.worldwatch.org/system/files/EP155A.pdf>

¹⁰ 1987 Montreal Protocol on Substances that Deplete the Ozone Layer

¹¹ 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Other Wastes and their Disposal;

¹² 2000 Cartagena Protocol on Biosafety to the Biodiversity Convention)

¹³ 1973 International Convention on the Prevention of Pollution from Ships (MARPOL) and the 1972 London Convention on Dumping

¹⁴ *Bot*, *Wer* and *Wite* were the concepts introduced in England to replace the ancient system of remedy through feud.

¹⁵ Inderjit Dube, 'Environmental Jurisprudence: Polluter's Liability', LexisNexis (Butterworths), New Delhi, India, 2007

on the similar logic of faith and obligation which perpetrator has against the world at large. Yet the task in hand is difficult as Sarah D Himmelhoch says –

'The current environmental problems fall under three categories i.e. climate change, waste disposal and resource depletion and the nature of these offence is such that traditional criminal law is inappropriate to deal with the same'.¹⁶

As far as the effect and understanding the criminalizing action of corporate houses is concerned countries have faced diverse difficulties both in theory and practice. Countries like UK, Australia and USA are struggling with the issue of identifying the mind which controls the corporate venture and which is the acting arm of a corporation having no individual identity per se. At the same time these countries cannot ignore the fact that corporations are *persona ficta* hence incapable of having *mens rea* which is one of the essential ingredients of corporate criminal liability. Unlike Western part of the world in third world countries and countries in transition the inclusion of criminal liability could not find relevance for a long time. In China, the Criminal Code did not contain any provision on Corporate Criminal Liability till 1997 when China introduced the concept of 'Unit Crime'.¹⁷ In India though in judicial pronouncements corporations have been treated as a person, the scope is restricted while answering the question – whether a corporation could be attributed with requisite *mens rea* to prove the guilt.¹⁸

➤ Difficulties in imposition of criminal liability

Imposition of criminal liability is a tough task considering degree of evidence it requires, investigation difficulties, identification of crime and criminal etc. The specific difficulties which have been faced so far in bringing big corporate criminals to justice for environmental harm includes –

- Difficulties in regulating business decisions,
- Difficulties in assessing individual control of the business. In this regard while discussing corporate control in a leading Canadian case **Dickson J.** stated as follows,

'The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control can be exercised by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control'.¹⁹

¹⁶ *Ibid.*,

¹⁷ Art 30 of the Chinese Criminal Code reads – 'Any Company, enterprise, institution, state organ, or organization that endangers society, which is prescribed by law as a crime committed by a unit, shall bear the responsibility.'

¹⁸ Standard Chartered Bank and Ors v. Directorate of Enforcement and Ors AIR 2005 SC 2622

¹⁹ R v Sault Ste. Marie (1978) 85 D.L.R. (3d) p 179

- Severance of liability at various levels by multinationals,²⁰
- Difficult to decide extent of degradation and corresponding liability due to unascertained harm and future effects,
- Deep pocket²¹ approach,
- It is difficult to ascertain harm beforehand and hence making companies liable for any future consequences of their present choices would result in an unsustainable financial hazard,²²
- Imposition of strict liability and no fault liability is difficult due to requirement of evidences and expert investigation.

Apart from abovementioned difficulties another difficulty arises with the basic understanding of crime and criminal liability. The difficulties are related and stretched beyond the issues of conclusive knowledge of damage, possibilities of restoration, the prospective victims etc. Traditional criminal law works on a narrow approach and does not take into account series of transactions which is a reality in Environment degradation. Hence fixation of responsibility becomes a gigantic task. Sometimes effect of pollution is seen after a consideration time lapse and hence fixing the liability for on relative basis of harm is next to impossible. We are dealing with relative actions of millions adding to one single effect of climate change and hence convicting one of them as per traditional understanding of criminal law is immature approach. Another difficult task is to increase the role of deterrence instead of restorative justice considering the risk of irreparable loss.

Probably the considerations as discussed above played a pivotal role In the case of **Commission v Council [2006] Env LR 18**, in which the ECJ effectively determined that the commission had the right to define environmental crimes and sanctions. In doing so, the court chose to distinguish environmental crimes – with their essential regulatory, economic and social dimensions – from more traditional crimes. The Court held that the EC treaty gave the Commission the power to lay down common criminal rules for environment crimes and sanctions, which it could use if it could show that there was a need to do so. The Court stated:

As a general rule neither criminal law nor the rules of criminal procedure fall within the community's competence.....however, the last-mentioned finding does not prevent the community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

Why Insistence on International Criminal Liability

²⁰ A very fine example of this can be given by Bhopal Gas Tragedy case litigated in India.

²¹ For companies like BP Oil paying compensation would not be a big task as their profits outnumber the damage they pay for environmental damages. Hence the deterrence effect would be nominal frustrating the entire exercise of imposing criminal liability.

²² Luigi Pellizzoni, 'Responsibility and Environment Governance', Environment Politics (2004)

At present the threat to environment is global hence strengthening laws of one country would not be sufficient. Countries like India and Nigeria remained mute spectators of 'Bhopal Disaster' and continuous damage to Niger Delta²³ respectively. The anti pollution Acts in India²⁴ which contain stipulation for creation of 'environmental crime' clearly treats environmental crime quite differently from traditional criminal actions yet they remained ineffective due to following reasons-

- *Pecuniary penalties are too meager to make an impact*
- *The Act provide for the responsibility of persons who are in charge of the business. Generally the MNCs hire local people who are put in charge of the business this frustrates the whole idea of bringing responsibility for crimes committed by trans-boundary elements.*
- *The Act also fails to impose liability for not following the standards as applicable on the MNCs in their own countries as there are jurisdictional hazard.*

Countries are not well equipped as far as regulation is concerned the exploitation of Nauru which started in 1908 by Germans, later by Australia and some other countries is living example of the same.²⁵ Apart from incapacity and will the precise reasons for international regulation can be summarized as follows –

- I. Trans-boundary effect of harm
- II. Ineffective domestic jurisdictions which can rely on international laws for developing their domestic jurisdictions
- III. Uniformity of laws as much as possible in order to regulate actions of those who take advantage of variance of law and compliance standards in countries
- IV. To ensure action by the unwilling governments by introducing positive inducement
- V. Huge divide in north and south as far as environmental culture is concerned.²⁶

Role of UN and Other Organizations, Adjudicatory Bodies in Developing International Criminal Liability for Environment

➤ United national and Criminal Liability for Environmental Crimes

²³ Refer <http://www.amnesty.org/en/library/info/AFR44/042/2012/en> for a detail report on lack of transparency in investigating pollution in Niger Delta, released by Amnesty International. Also refer <http://www.amnesty.org/en/library/info/AFR44/018/2011/en> for detail report on delay in discovering pollution in Niger Delta.

²⁴ Water (Prevention and Control of Pollution) Act 1974, Air (Prevention and Control of Pollution Act) 1981 and Environment (Protection) Act 1986

²⁵ Nauru has large deposits of phosphate hence was subject to excessive mining by various countries In 1968 Nauru became independent and in the year 1989 it filed claim before ICJ to obtain compensation from Australia for heavy mining which affected the life of residents in the concerned areas. The ICJ found the claim of Nauru admissible but before the same Australia and Nauru reached to a settlement agreement in 1993. As per the settlement Australia awarded Nauru AU\$ 107 million towards environmental damages. In the entire controversy the fact remained obvious that the status of Nauru Island is not going to improve due to irreparable loss to the ecology.

²⁶ Celebrated author Ramchandra Guha points out in his research that the culture of environment is so developed in USA that it finds a substantial place in presidential elections as well. He refers to the remark of George Bush who famously quoted – 'We are all environmentalists now'. Refer Ramchandra Guha, 'The Ramchandra Guha Omnibus', 'Going Green', Oxford University Press (2005), pp 1-2

UN has been instrumental in effecting various international agreements, conventions and instruments which not only brought uniformity in the law but have also provided foundation to many countries to build domestic jurisprudence upon. But as Mastny and French observed - *Forging environmental treaties is difficult enforcing them is even tougher*.²⁷ The UN Environment Programme (UNEP) estimates that there are now more than 500 international treaties and other agreements related to the environment, more than 300 of them negotiated in the last 30 years.²⁸ With the increase in number of treaties, agreements, conventions etc. the methods to bypass and create a loophole in the same have also increased.²⁹

The United Nations had been making an attempt to devise uniform criminal liability regime for environment since 1980s. International Law Commission began its work on the Draft Articles on State Responsibility for wrongful acts. A major contribution of the special *Rapporteur* Roberto Ago, eminent Italian Jurist at that time was the difference he suggested between 'international crimes' and international wrongful acts (*délicts*) within the famous Article 19 of the draft Articles adopted in first reading by the ILC in 1980. Among the international crimes, this Article listed 'environmental crimes'. The biggest difference of the crime and delicts was with reference to crimes even individuals could have brought a claim. It not only recognized the crime committed by the states but also crimes committed by the individuals. As a matter of fact by providing opportunity to any nation to bring a claim irrespective of personal sufferance marked a major breakthrough with respect to jurisdictional boundaries. The only requirement was crime should have been against the society at large. Considering the time was too early to realize effect of such major breakthrough the ICL changed its approach and mellowed down to a breach of obligations *erga omnes*. Another attempt to identify the international environmental crime was made in the nineties when the ILC's Draft Code of Crimes against the Peace and Security of Mankind was discussed. The focus of the project was indeed on individual responsibility. In its original version of 1991, the draft text under Article 26 included provisions relating to *wilful and severe damage to the environment* as an individual crime which was largely objected. Finally, to concentrate on other core crimes the special *Rapporteur* Tomuschat excluded environment crime which faced indiscriminate objects. Later on, the Draft Code itself was abandoned, to speed up the process of drafting the Statute of the International Criminal Court (ICC).

²⁷ Lisa Mastny and Hilary French, Crimes of (a) Global Nature, *Excerpted from September/October 2002 WORLD WATCH magazine*, (2002) Worldwatch Institute

²⁸ *Ibid.*,

²⁹ Smugglers practice concealment in their persons or in vehicles, baggage, or postal and courier shipments, resulting in fatality rates as high as 90 percent for many live species. They may also alter the required CITES permits to indicate a different quantity, type, or destination of species, or to change the appearance of items so they appear ordinary. In February 2000, the U.S. Fish and Wildlife Service arrested a Cote d'Ivoire man for smuggling 72 elephant ivory carvings, valued at \$200,000, through New York's John F. Kennedy airport. Many of them had been painted to resemble stone. (refer Lisa Mastny and Hilary French, Crimes of (a) Global Nature, *Excerpted from September/October 2002 WORLD WATCH magazine*, (2002) Worldwatch Institute

The Statute of Rome includes environmental crime; but only "within the scope of an *international armed conflict*. It has been defined as -

'Intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated'.³⁰

Similar criteria is given under 1977 Additional Protocol I to the 1949 Geneva Convention for punishing the perpetrator hence Rome Statute did not bring any value addition. The Convention on the prohibition of military or any hostile use of environmental modification techniques (ENMOD), concluded on 10 December 1976, in its Article I prohibits the Contracting Parties from engaging in "military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party". Hence there are no possibilities for prosecution of international environmental crimes occurred within the context of a non-international armed conflict and environmental crimes taking place in peaceful situations. As a matter of fact the UN Commission on Crime Prevention and Criminal Justice addressed the issue of environmental crime in 1995 (ECOSOC Resolution 1994/15 (25 July 1994)). At that time, a resolution was adopted on environmental crime urging Member States to "consider acknowledging the most serious forms of environmental crimes in an international convention". But till date no convention could materialize.

Efforts by governments to strengthen response strategies, sometimes through partnership arrangements with NGOs and scientific bodies, include the Coalition Against Wildlife Trafficking (CAWT), the Asia Regional Partners' Forum on Combating Environmental Crime (ARPEC), the Multilateral Environmental Agreements Regional Enforcement Network (MEA-REN), the ASEAN Wildlife Enforcement Network (ASEANWEN), the South Asian Wildlife Enforcement Network (SAWEN), and the International Network on Environmental Compliance and Enforcement (INECE). In March 2011, five international organizations – CITES, Interpol, the UN Office of Drugs and Crime, the World Customs Organization and the World Bank – joined together to form The International Consortium on Combating Wildlife Crime (ICWC). Hence from all the sides UN is trying hard to bring liability for environmental crimes.

- INTERNATIONAL CONFERENCE ON ENVIRONMENTAL CRIME – CURRENT AND EMERGING THREATS, Organized by UNICRI and UNEP, in collaboration with the Ministry for the Environment and Ministry of Justice of Italy, ROME, 29-30 OCTOBER 2012

³⁰ Art. 2(b)(iv) of the Rome Statute, available at [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf)

Recently a conference was organized by UNCRI and UNEP where deliberations relating to environmental crime took place. The expert groups made exhaustive recommendations based on the proceedings. Regarding environmental crimes the expert group responded with following outcomes –

- *Insisted on the need to have a definition of environmental crime at the international level comprising victim's perspective and human rights approach.*
- *Insistence was made to have comparative research on national, regional and international arrangement to make existing policies, agreements more effective.*
- *The group suggested adoption a protocol dedicated to environment crime to the United Nations Convention on Transnational Organized Crime (UNTOC).*
- *The major breakthrough of the conference proceeding was the suggestion to consider feasibility of specific convention on environmental crimes.*
- *The expert committee made it clear that UN also professes the view of bringing in strict criminal sanctions.*
- *One aspect which was long needed was brought by the expert group – the need to build specialist capacity concerning law enforcement.*
- *The expert group expressed the possibility of Applicability of United Nations Convention against Transnational Organized Crime (UNTOC) and the United Nations Convention against Corruption (UNCAC) in combating transnational environmental crime.*
- *The logic of common but differentiated responsibility was acknowledged when expert group admitted the need for recognition of the responsibility borne by industrialized, developed countries that have better capacities to prevent, combat and dismantle the networks of organized crime.*
- *Arguments were advanced towards establishing a multi-agency approach to prevent and combat environmental crime effectively e.g. National Environmental Security Taskforce (NEST) which will have much needed expertise.*
- *Further the expert group also took care of illicit trafficking of waste which was termed as “an international emergency.” The expert committee related such trafficking with the organized crime practiced widely across the nations.*
- *The expert group clearly gives emphasis on international investigations which as per the expert group opinion would be more effective.*
- *The experts also recognized the important role played by International Organizations such as World Customs Organization, Maritime organizations, Europol, Eurojust, Interpol and UNCRI*
- *The expert committee unequivocally recognized that “Criminal legislation can be more clear, effective and dissuasive.”*

➤ European Union and efforts for criminalizing environmental offence

European had always been on the forefront on the issue of environment protection. Constant efforts have been made to bring in uniformity in the environment protection norms. In this regard three instruments are worth mentioning –

- I. Convention on the Protection of the Environment through Criminal Law, drawn up within the council by Committee of governmental experts under the authority of the European Committee of Crime Problems (CDPC), was opened for signature on 4 November 1998
- II. Directive 2004/35/EC

III. Directive 2008/99/EC

The Convention on the protection of Environment through Criminal Law, though embodies scope for radical changes³¹ could not be enforced due to lack of requisite number of countries for ratification.³² Directive 2008/99/EC requires member states to introduce criminal sanctions for the most serious environmental offences. The criteria to establish the guilt is either intention or serious neglect. Further the directives only set minimum standard and the members are free to tighten the norms. In principle, Directive seems to be a fine piece of drafting but the fact that it has not taken care of measures concerning the procedural part of criminal law and has left untouched the powers of prosecutors and judges makes it weak in application. Directive 2004/35/EC is based on polluter pays and is difficult to implement. Due to recent events in the Gulf of Mexico (Deepwater Horizon oil spill) and in Hungary (red mud spill at Ajka) the Commission is re-examining the option of mandatory financial security even before the review of the Directive planned for 2014.

➤ International Criminal Court

According to Argentine Federal Prosecutor Gustavo Gómez, for the establishment of an international environmental crimes court the Rome Statute can be viewed as precedent. He believes such a body is essential to end the impunity that multi-national companies *causing* large-scale, long-term environmental damage enjoy.³³ In spite of suggestion by International Law Commission to include environmental crimes in the statute absence of the same closes all the scopes for the victims to get benefit from ICC Victims Trust Fund. The inclusion would have ensured forfeiture, restitution or orders for compensation and rehabilitation to help victims recover from the environmental damages. Currently the Ecocide campaign is lobbying hard to include “ecocide” in the *Rome Statute*, which has been defined as “the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished”.³⁴

➤ International Court of Justice and Liability for Environmental Crimes

I. SOME EARLY CASE

³¹ The Convention is open to signature for non member countries as well.

³² As on 20th April 2013 only one country has ratified the convention that is Estonia. Refer <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=172&CM=1&DF=&CL=ENG>

³³ <http://www.miningwatch.ca/gustavo-g-mez-need-international-tribunal-address-environmental-crimes>

³⁴ Eileen Skinnider, ‘Victims of Environmental Crime – Mapping the Issues’, International Centre for Criminal Law Reform and Criminal Justice Policy, March 2011

ICJ had opportunity to consider the question of ecology damages in *Corfu Channel* case and the *Trail Smelter Case*. In both the cases ICJ considered the right of nations against trans-boundary pollution. In *Corfu Channel Case*, the ICJ observed that a duty is imposed on all the states not to allow its territory to be used for any acts contrary to the rights of another state. Similarly, in the *Trail Smelter case* the arbitration tribunal concluded that, states do not have right to use or permit the use of its territory for any action which may cause injury to another state when the polluting actions are of serious consequence and the injury is established by clear and convincing evidence. While dealing with the second case the International Court of Justice raised the standard of evidence too high to ensure prosecution as it would demand a high level of expertise.

II. ICJ AND 'ERGA OMNES' NORMS

International law is the law of nations and the efficacy of the same depends on the willingness of the nations itself. Sometimes this willingness is the result of persuasion obtained by creating *erga omnes* norms i.e. obligation said to be owed. The *erga omnes* norms have special relevance as far as international environmental law is concerned. This is not a new concept and had been relied on as early as in the year 1898 when USA claimed over exploitation of fur seals (who migrated from the seal limits of USA to Britain) by Britain. The claim of the USA was said to have based on '*the common benefit of mankind*' i.e. *erga omnes* obligation but this radical argument was rejected by the Arbitration Tribunal.³⁵ In recent again the argument of *erga omnes* was pressed upon in the case of *Australia v. France*³⁶ and *New Zealand v. France*.³⁷ In 1974 both the countries (Australia and New Zealand) tried to stop France from nuclear testing in South Pacific. The argument of Australia and New Zealand was based on *erga omnes* norms unsuccessfully. Nevertheless, judges in the minority gave this argument a good thought and expressed the possibility of bringing such actions on the basis of *erga omnes* norms. The *erga omnes* norm has gone through a journey from a clear rejection (Behring Fur Seal case) to mild acceptance (Australia v. France and New Zealand v. France both in 1974) to complete acceptance (Legality of the Threat or Use of Nuclear Weapons 35 ILM 809 and 1343 (1996)). In this case ICJ clearly recognized existing *erga omnes* norms for countries –

*The existence of the general obligations of states to ensure that activities within their jurisdiction and control respect the environment or other states or of areas beyond national control is now part of the corpus of international law relating to environment.*³⁸

Hence, *erga omnes* norms if accepted to give right to nations for bringing actions against perpetrator of the environment crime irrespective of their jurisdiction and only on the basis of common concern; it would mark a huge success in ensuring liability – both civil as well as criminal.

³⁵ Behring Fur Seals (1898) 1 Moore's Int Arbitration Award 755

³⁶ (1974) ICJ Rep 253

³⁷ (1974) ICJ Rep 457

³⁸ At [29]

III. DIFFICULTIES OF ICJ

Though ICJ has capability to recognize norms for liability yet it suffers from jurisdictional difficulties. Limits of the ICJ's jurisdiction became apparent in the *Fisheries Jurisdiction case*.³⁹ In that case Canada used force to stop Spanish trawler from fishing in the area which was important for Canadian fisheries interest but lay beyond 200 mile limit of its EEZ. Accordingly, Canada amended its coastal fisheries law to allow it to board such vessels if they were violating a law which was for preventing overfishing. The law as made by Canada was inconsistent with the international law. Knowing it fully well before amending the law Canada refused to submit to the jurisdiction of ICJ with respect to cases involving Canadian fisheries conservation matters; i.e. cases similar to present situation. In spite of dubious play by Canada ICJ could not pursue the matter.⁴⁰

➤ Other international Courts and Tribunals

There are other international courts as well which can take the issue of liability such as World Trade Organization (WTO), International Tribunal for the Law of Sea (ITLOS). However, in general these bodies are approached by nations and not by individuals and also till now the jurisprudence regarding criminal liability has not developed.

Conclusion

From the above discussion it is clear that the crime against environment is not only accidental but has become a profit venture and systematic. This has taken the form of organized crime which if not curbed in time would result into gross destruction of ecology. Various forms of liability are in application yet severity of criminal liability would be more effective. Civil liabilities till now could not result into effective deterrence a goal which is sought to be achieved by imposing criminal liability. Along with UN various forums are there which can contribute towards protection of ecology by criminal sanctions yet all the efforts are scattered and rendered non effective due to lack of precision. It is necessary to bring all the efforts in a systematic arrangement so that both the administrator and perpetrator of the crime know their respective powers and duties. If the recommendations as made in the conference on criminal liability in Italy, are realized it would mark a huge success.

In the entire discussion the biggest difficulty arose from the point of view of nations who are vacillating between economy and ecology. Hence insistence on collective efforts is required not only for developing the law but also for suggesting and creating implementation mechanism. UN, ICC, ICJ are few bodies which can stimulate the whole process and come out with a foundation framework

³⁹ Spain v. Canada (1998) ICJ Rep 432

⁴⁰ Stuart Bell & Donald McGillivray, 'Environmental Law', Oxford University Press, New York, USA, 2008, pp. 152-153

so that the countries who are incapable of devising their own law can take advantage of the same in developing their own jurisdiction.

Recommendations

On the basis of research work following (concluding) recommendations are made -

- I. The world has moved from fine and penalty to shaming and naming⁴¹ making it a part of criminal liability would be an effective measure,
 - II. Increase the role of Interpol in investigating Environmental Crimes.
 - III. We need to find out the mandate for enacting criminal sanction in key conventions, agreements such as CITES, MARPOL etc. and prepare and mechanism to enforce the same for signatory countries.
 - IV. For defeating eco-criminals countries have to agree on some fundamental aspects such as defining environmental crimes, consensus on gravity of the offence etc.
 - V. Attempt to create willingness in countries for implementation of laws at regional and domestic level as has been shown in Europe in the Case **C-176/03 Commission v. Council**⁴² In this case it was held that the commission had the right to define environmental crimes – with their essential regulatory, economic and social dimensions – from more traditional crimes. The court held that the EC treaty gave the commission the power to lay down common criminal rules for environmental crimes and sanctions, which it could use if it could show that there was a need to do so. The court stated:
As a general rule, neither criminal law not the rules of criminal procedure fall within the community's competence.....however, the last mentioned finding does not prevent the community legislature, when the application of effective , proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the member states which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.
 - VI. UN should attempt to make a convention dedicated to criminal liability for environment on priority basis.
 - VII. Regular experts meet should take places at international forums in order to trace the trend and developments in environmental crime.
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⁴¹ In 1999, the Environment Agency in UK published a 'league table' of those corporate offenders who had committed environmental crimes in the previous year. Thus there was an attempt to put pressure on companies by directly bringing their goodwill in question by providing information about the green aspects of business. (refer Stuart Bell & Donald McGillivray, 7th Ed., Oxford University Press, (2008), pp 285

⁴² [2006] Env LR 18, ECJ

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Government Regulation of Marriage Laws in Colonial India: A Case-Study of the Special Marriage Act, 1872

Subhasree Ghosh
Publications' Coordinator
Swayam: Ending Violence Against Women
India

Introduction

Laws pertaining to marriage are one of the fulcrums of family laws. Marriage is regarded as one of the most sacrosanct institutions in Indian society. Hindu law recognises marriage as one of the ten *sanskars* or sacraments, necessary for regeneration of men of the twice-born classes, namely the Brahmins, the Kshatriyas and the Vaishyas and the only sacrament for women and *Sudras*. Hindus regard woman as *Prakriti* and man as *Purusha*, and marriage as the ceremony which unites *Prakriti* with the *Purusha*. Without that union, a man and a woman are only half a being. The chief object of a Hindu marriage is the unification of two souls to secure temporal and spiritual happiness and moral perfection. Given the religious, cultural and emotive value of the institution, it goes without saying that any external interference, that too from a foreign authority, would tantamount to stiff opposition. This paper examines, in a broader context, how the colonial administrators tried to make forays into the personal domain of the Indian society vis-à-vis marriage in nineteenth century British India. This would be studied in the context of the passing of the Special Marriage Act of 1872, which aimed to legalise inter-religious marriages as also raise the age of marriage and outlaw bigamy—concepts considered anathema in the light of nineteenth century society steeped in tradition and bound by religious diktat. Did the efforts of the colonial administrators bear fruit or did they have to backtrack due to opposition from the indigenous society? The issue assumes significance in light of the fact that the official policy post-1857 was of non-interference in the spheres considered sensitive and sacred to the Indians. Under such a backdrop, a study of the act would essentially unravel the true picture of this non-interventionist stance of the British government that has somehow eluded the present crop of literary works.

Section—I

By the first half of the nineteenth century, under the combined influence of Evangelicalism and utilitarianism, British rule in India witnessed the phase of 'utilitarian interventionism,' the most notable example of which was the abolition of Sati in 1829, "a clear break from the non-intrusive

phase of colonial practice.”¹ Acting as a catalyst of modernisation—building bridges, roads, railways, harbours—the colonial regime believed that it would pull out India from the depths of despair.² To the Evangelicals, the hand of God was nowhere more visible than in the miraculous subjugation of India by a handful of English. Utilitarianism, the ultimate goal of which was to turn every individual into a free autonomous agent capable of making choices, sought to liberate individuals from the shackles of slavery and custom. The colonial masters had this strong conviction that it was they who would usher in India’s modernisation by introducing modern institutions and ideas and rescue India from being immersed in tradition and morass. Thus as James Stephen, an ex-civil servant, wrote, the British looked upon their rule in India as a vast bridge over which the multitude of human beings would pass from a dreary land of cruel wars, ghastly superstitions, wasting plague and famine on their way to a country orderly, peaceful and industrious. John Stuart Mill, the Utilitarian champion, emphasised a government’s main task required promulgation of a ‘parental despotism’ which trained its subjects in western knowledge and self-government. The British officials in the first half of the nineteenth century worked on the assumption that by ushering in new ideas they would act as the harbingers of change and create an India with modern political public who would be capable of self-government. Thomas Babington Macaulay, the principal think-tank behind the Indian Penal Code, encapsulates the feeling, “We have to frame a good government for a country into which, by universal acknowledgement, we cannot introduce those institutions which all the habits, which all the reasonings of European philosophers, which all the history of our own part of the world would lead us to consider as the one great security for good government.”³

Legal reform, too, was undertaken in this same spirit of liberal imperialism. By the third decade of the nineteenth century uniformity in the legal and judicial system was urgently needed in the interest of just administration. This practicality got merged with the theory that path to modernisation and self-rule lay in the codification of scattered body of laws and a structured judicial system. The outcome was the formation of the Indian Law Commission with the expressed purpose to frame laws for the whole of British India—“...such Laws as may be applicable in common to all Classes of the Inhabitants of the said Territories...”⁴ However at the same time it was stressed that due regard should be accorded to the “...Rights, Feelings and peculiar Usages of the People...”⁵

¹ Tanika Sarkar, “Holy ‘Fire Eaters’: Why Widow Immolation Became an Issue in Colonial Bengal” in Tanika Sarkar, *Rebels, Wives, Saints: Designing Selves and Nations in Colonial Times* (Ranikhet, 2009), p. 34

² George Campbell, *Modern India: A Sketch of the System of Civil Government with Some Accounts of the Natives and Native Institutions* (London, 1853)

³ Rt. Hon. Thomas Babington Macaulay, *Speeches, Parliamentary and Miscellaneous* (London, 1853), p. 172

⁴ “An Act for effecting an Arrangement with the *East India Company*, and for the better Government of His Majesty’s *Indian Territories*, till the Thirtieth Day of *April* One thousand eight hundred and fifty-four” in *Papers Respecting the Negotiations with His Majesty’s Ministers on the Subject of the East India Company’s*

By official avowal, marriage, right from the beginning of the colonial rule was inducted in the personal law domain. During the tenure of Warren Hastings, a clause was inserted in the Plan of 1772, giving the communities the right to be governed by their respective laws, with Maulvis and Pundits attending the Courts to expound the law and assist in passing the decree. These were further chiselled in the Regulation of 1780, where it was explicitly stated that “in all suits regarding inheritance, succession, marriage, caste, and other religious usages and institutions, the laws of the Kuran with respect to Mohammedans, and those of the Shastras with respect to the Gentoos should be invariably adhered to.”⁶ The Cornwallis Code of 1793, too, stated that “in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mohammedan laws with respect to Mohammedans and Hindu laws with regard to Hindus shall be considered as the general rules by which the Judges are to form their decisions.”⁷ Thus by official acknowledgement, the civil rights of Muslim and the Hindu inhabitants were to be governed by their own laws and usages. The Cornwallis Code provided for the appointment of licensed Hindu and Mohammedan pleaders, culled from the students of the Muhammedan College at Calcutta and the Hindu College at Benares. The administration was essentially trying to forge a distinction between matters of personal rights to be dealt with in the civil courts through religious laws of the concerned communities and matters of public interest placed in the realm of magisterial authority. But as Radhika Singha shows, “Disputes about defining the domain of domestic authority constantly put pressure on this distinction.”⁸ Marriage is one of the most potent examples of this blurring of the two domains.

Drawing parallel between the institution of marriage as prevalent in Great Britain and India, Harry Verelst, the Governor of Bengal (1767-1769), commented that the differences lay not only in the ‘forms and solemnities’ but also in the ‘age of contracting’ and the ‘power and dominion of a husband.’ The government, too, acknowledged that “...it is essential to the comfort and welfare of the inhabitants of Hindostan, that the law of marriage should be established on safe principles, adapted to the condition of the population of that country” and that the law of marriage should be ‘local and general, or personal.’⁹

Charter and the Government of His Majesty's Indian Territories for a Further Term after the 22nd of April 1834 (London, 1833), p. 1097

⁵ Arthur Mills, *India in 1858* (London, 1858), p. 96

⁶ A.C. Banerjee, *English Law in India* (New Delhi, 1984), p. 40.

⁷ Banerjee, *op. cit.*, p. 40

⁸ Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (New Delhi, 1998), p. 121

⁹ *Second Report of the Commissioners Appointed to Inquire into the State and Operation of the Law of Marriage: East India Marriages* (London, 1850), p. v

The administrator's dabbling with marital relations of the Indians can be roughly traced to Regulation VII of 1819 which brought marriage under criminal jurisdiction by providing for imprisonment, not exceeding one month, to persons found guilty of deserting their wives and families and wilfully neglecting to support them.¹⁰ On a more concerted level, it is the draft version of the Indian Penal Code that offered a clearer view of the colonial construction of marriage. In the draft code that was submitted in 1837, offences relating to marriage were delineated in Chapter XXIV. Marriage, still very much remained under the purview of Hindu and Muslim personal laws, but the penal code identified certain matters involving 'moral or equitable issues.' The chapter, at that point, underlined three sections, namely 466, 467 and 468, which essentially identified enticements and frauds with regard to marriage as punishable offences—punishments ranging from three months to fourteen years, depending on the degree of the crime.¹¹ No attempt was, however, made to remodel marital practices as was testified by the definition of bigamy as was laid down in section 468, it being applicable to only the Christians in India.

The enactment of the draft code was a long protracted process and after several modifications, alterations it was finally passed into law in 1860—three years after the Revolt of 1857

¹⁰ Clause III of the Regulation states, "Any person amenable to the jurisdiction of the zillah and city courts, who may possess the means of supporting his wife and children, and shall notwithstanding desert them and wilfully neglect to provide for their support, on proof thereof to the satisfaction of the magistrate, or joint magistrate, of the zillah or city in which the party so deserting and neglecting his family may reside, shall be required to provide for the maintenance of his family in a suitable manner, according to his situation and circumstances in life; and on his failing so to do, shall be considered guilty of a misdemeanor, and be liable to imprisonment for a period not exceeding one month. He shall also be liable to a repetition of the sentence, upon any subsequent conviction of a similar misdemeanor, after having been required to provide for the support of his family; provided, however, that nothing in this Section shall render a husband liable to punishment for not maintaining his wife, if it be clearly shown, that the latter has forfeited all just claim to support from her husband, by living in adultery with another person, or by other acts implying willful abandonment of his protection." Clause IV states, "The above Section shall be held applicable to illegitimate, as well as to legitimate children; and may also be applied at the discretion of the magistrate, to secure a proper maintenance for the mothers of illegitimate offspring, whilst in a state of pregnancy, or having the care of an infant child." *Accounts and Papers of the House of Commons, Vol. XVIII, 23 January—11 July, 1821*, p. 23

¹¹ **466.** Every man who by deceit causes any woman, who is not lawfully married to him according to the law of marriage under which she lives, to believe that she is lawfully married to him according to that law, and to cohabit with him in that belief, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

467. Every woman who by deceit causes any man to believe that he is lawfully married to her according to the law of marriage under which he lives, and to cohabit with her in consequence of that belief, shall be punished with simple imprisonment for a term which may extend to one year, or fine, or both.

468. Whoever, with any fraudulent intention, goes through the ceremony of being married according to any law in force in the Territories of the East India Company, knowing that he is not lawfully married, shall be punished with imprisonment of either description for a term which may extend to three years and must not be less than six months, and shall be liable to fine.

that shook the plinth of the British administration to the core and severely dented their conviction that “the natives will not rise against us...there will be no reaction...”¹²

Section—II

The dominant memory for the rulers, post-1857, was arguably one of an elemental fear caused by as yet the most comprehensive challenge to its legitimacy—“a calamity unexampled in the history of British India.”¹³ The participation of the civil population in the Revolt was explained in terms of an inbuilt resistance of a tradition-bound oriental culture against the forces of westernisation and modernisation. Although John Seeley explained the cause of the ‘mutiny’ in terms of military grievances and “not by any disaffection caused by the feeling of our Government as foreign,”¹⁴ Benjamin Disraeli saw the causes of the uprising as not being the ‘conduct of men who were...the exponents of general discontent’ amongst the Bengal army. For him the root cause was the overall administration by the government, which he regarded as having ‘alienated or alarmed almost every influential class in the country.’ This led to a serious rethinking in the official circle on the nature of administration and revisiting the policies and practices pursued so far. The Revolt that produced a crisis of the Raj saw a new ideology now taking over. The avowed policy of the British Government at this stage was the policy of non-interference. They realised through the hard way the price of their reformist zeal. The Proclamation of 1858 specifically sounded, “We disclaim...the Right and Desire to impose our Convictions to any of Our Subjects.”¹⁵ Colonial administrators were seldom willing to embark upon extensive programmes of social and political reform—“the security of the Empire demanded a policy of caution and conciliation.”¹⁶ James Stephen issued a note of warning not to tamper with the social or religious customs of the indigenous people—“I would not touch a single one of them...”¹⁷

This ‘conservative temper’ finds echo in the writings of Sir Henry Sumner Maine, Law Commissioner from 1862-1869 whom Metcalf calls the ‘ideal representative’ of this school. His writings were crucial “...both in terms of providing a methodological foundation for...better ethnographic knowledge of traditional India...”¹⁸ Maine pointed out that the Indians were inherently

¹² Charles E. Trevelyan, *On the Education of the People of India* (London, 1838), p. 193

¹³ John Stuart Mill, “Memorandum of the Improvements in the Administration of India during the Last Thirty Years” in John M. Robson, Martin Moir and Zawahir Moir ed. *John Stuart Mill: Writings on India* (Toronto, 1990), p. 93

¹⁴ John Seeley, *The Expansion of England* (Boston, 1905), p. 268

¹⁵ *Parliamentary Paper 324: Copies of the Proclamation of the King, Emperor of India, to the Princes and Peoples of India, of the 2nd day of November 1858, to the Princes, Chiefs, and People of India*, p. 2

¹⁶ Thomas R. Metcalf, *The Aftermath of the Revolt: India, 1857-1870* (Princeton, 1964), p. 321

¹⁷ James Stephen, *Essays by a Barrister* (London, 1862), p. 53

¹⁸ Karuna Mantena, *Alibis of Empire: Henry Maine and the End of Liberal Imperialism* (Princeton, 2010), p.5

conservative, clinging tenaciously to their traditional ways, “the natives of India are so wedded to their usages that they are not ready to surrender them for any tangible advantage.”¹⁹ In fact they “detest that which in the language of the West would be called reform.”²⁰ India was a stagnant society, and thus social and religious reform could be introduced with extreme caution. Although he did not think it was desirable to arrest progress altogether, he felt it was necessary for the administration to put in a brake to the rapid pace of progress and reform that was set in motion in the pre-Revolt phase. A society where the old customary bonds had not yet dissolved into contractual relationships simply could not be remodelled overnight, “Each individual in India is a slave to the customs of the group to which he belongs.”²¹ Nor could Benthamite ideas be adopted wholesale. Maine dismissed Bentham’s theory of jurisprudence that societies modify, and have always modified their laws according to modifications of their views of general expediency. He argued that “Expediency and the greatest good are nothing more than different names for the impulse which prompts the modification; and when we lay down expediency as the rule for change...all we get by the proposition is the substitution of an express term for a term which is necessarily implied when we say that a change takes place.”²² Maine summed up, “The people of this country were not only welded by custom and religious feeling to complex system of law, but prided themselves on their usages in proportion to the complexity of those usages. If this were so, the foundation of Bentham’s doctrine collapsed and the doctrine itself had no application in India. The Legislature was stopped, by the condition of our tenure of the country, from so simplifying the law.”²³ He blamed the rapid pace with which the modernization of rural India had progressed as the destabilising factor. The Indian peasant villages still nestled and zealously guarded traditions like collective property, joint inheritance and local self-government and these should be reinforced and preserved by officialdom.

Propelled by this new ideology which called for extreme caution and diligence, Metcalf shows that the years following the Revolt witnessed the British Government refraining from enacting measures that directly interfered with Hindu social customs—the only exception, being the prohibition in 1865 of banning hook-swinging during Charak festival and that too only after the Government had convinced itself that such a legislation posed no threat to the Hindu religion. In fact, *Sumachar Chandrika*, one of the leading Bengali newspapers of that period, opined that there was no necessity of the Lieutenant Governor’s passing a law to stop the practice of swinging at the

¹⁹ Sir Henry Sumner Maine, *Village Communities in the East and the West* (New York, 1889), p. 39

²⁰ Metcalf, op. cit., p. 321

²¹ Maine, op.cit., pp. 13-14

²² Metcalf, op.cit., p. 321

²³ Sir M.E. Grant Duff, *Life and Speeches of Henry Maine* (New York, Henry Holt, 1892), pp. 251-252

Charak festival “since the people and Zeminders seem not to care much for it, and since they have in many places given up the practice, there can be no doubt but that in a short time it will cease everywhere.”²⁴ Probably, the best illustration of this distancing from religious and social affairs was the passing of The Religious Endowments Act in 1863 by which the government handed over the superintendence of the Hindu temples and their endowments to local communities headed by the natives. The zeal with which Bentinck steadfastly clung to his mission of rooting out social evils, was subsumed within the British ideology of non-interference, post-1857. As John Kaye warned, “We must be very careful not to give to the Natives of India any reason to believe that we are about to attack their religious feelings and prejudices...”²⁵ Maine justified this non-involvement on the ground “...a part of the community came forward to allege that they were the most enlightened members of it, and call on us to forbid a practice which their advanced ideas lead them to think injurious to their civilization...both as regards themselves and as regards their less informed co-religionists who do not agree with them.”²⁶ Metcalf thus states that the British “...carefully dissociated themselves from comprehensive schemes of social reform...Indian religious belief, and the social customs bound up with it, were to be left strictly alone.”²⁷ Denis Judd corroborates Metcalf, “Fearful to set in motion an Indian reaction similar to the one that had precipitated the great uprising of 1857, the Government avoided drastic political and social change.”²⁸

I argue that, Metcalf offers a somewhat myopic view of a much more nuanced issue. Close on heels of the Queen’s Proclamation, came the Indian Council’s Act in 1861, Section 19 of which, stipulated that with the prior sanction of the Governor General, measures affecting the religion or religious rites and usages of any class of Her Majesty’s subjects in India may be introduced, not only into the Legislative Council, but into the Provincial Councils. After the nightmarish experience of 1857, though the government knelt down on certain issues as elucidated by Metcalf, a careful perusal will show that it would be erroneous to conclude that the administration recast itself in a new mould, post-Revolt. And herein a study of the Special Marriage Act, 1872 is pertinent and significant.

Section—III

In 1868, Keshab Chandra Sen submitted a petition to the Viceroy, pleading for government intervention in passing a ‘measure of relief’ sanctioning what they termed as ‘Brahmo Marriage’ as legal, thereby freeing them from the fetters of ‘idolatrous, superstitious or immoral’ Hindu marital practices. The Brahmos had derived customs and rites in accordance with their own idea of reason

²⁴ *Sumachar Chandrika*, 31 March 1864, *Report on Native Papers For the Week Ending 2nd April 1864*

²⁵ Speech of 1 August 1859, *Hansard*, CLV, p. 781. Quoted in Metcalf, op. cit., p. 93

²⁶ *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

²⁷ Metcalf, op. cit., pp. 107-108

²⁸ Denis Judd, *Empire: The British Imperial Experience, from 1765 to the Present* (London, 1996), p. 76

and religion. Sen was keen to ascribe a separate identity to the Brahmos, distinct from the Hindu religion and reform of marital practices remained his main agenda. Back in 1865, a petition was addressed to the advocate general soliciting his opinion on the validity of Brahmo marriages being defined as "...a holy union between persons professing the Brahmo religion...solemnized with the worship of the One God and with such rites as are not idolatrous."²⁹ His ruling was that "Brahmo marriages not having been celebrated with Hindu or Mahometan rites of orthodox regularity, and not conforming to the usages of any recognized religion were invalid and the offspring of them illegitimate."³⁰ After a meeting on 5 July 1868, a decision was taken to file a petition urging for official recognition of the Brahmo form of marriage.³¹

Accordingly, a bill was introduced in August 1868, which aimed to legalize marriages between 'Natives of British India not professing Christianity' if the marriage was solemnised in the presence of at least three witnesses, if the persons were unmarried and the husband had completed eighteen years of age and the wife fourteen years, if the parties were not related to each other as parents or children or ancestors or descendants of any degree and if the marriage solemnized be certified by a government-appointed Registrar. So long, non-Christian marriages, unless held as per Hinduism, Muhammedanism or some other religion recognized by law were treated as illegal and children of such persons were deemed illegitimate and deprived of their property rights. In other words, Brahmo marriages were not endorsed by law. The Bill sought to rectify this lacuna by taking a broader view of the subject.

While introducing the Bill, Maine argued strongly in favour of such relief to be granted to the Brahmos because "it was not the policy of the Queen's Government in India to refuse the power of marriage to any of Her Majesty's subjects..."³² But at the same time, true to the official policy, he was convinced that in matters pertaining to religion, when any relief was sought it would be judicious to confine the limit to the particular sect or body making the application, instead of taking a sweeping view of the matter. However, in reality when it came to the Native Marriage Bill, he deviated from the said principle. The reason cited was the difficulty in defining a Brahmo. Hence arose the necessity of 'some degree of generality' and thus it was stated that the Bill would legalise

²⁹ Petition from Baboo Keshub Chunder Sen and Others, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, National Archives of India (hereafter referred to as NAI)

³⁰ *Gazette of India*, Supplement 19 September 1868. Quoted in Rochona Majumdar, *Marriage and Modernity: Family Values in Colonial Bengal* (Oxford, 2009), p. 176

³¹ For a detailed background of what necessitated such petition and the fallout of Act III of 1872 on the Brahmo movement, see Rochona Majumdar, op. cit.

³² "Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., Cap. 67," *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

marriages between 'Natives of India not professing the Christian religion and objecting to be married under Hindu, Muhammedan, Buddhist, Parsi or Jewish religion.'

The Bill relieved from all civil disabilities, persons excommunicated from any recognised Indian religion and treated marriage as a civil contract. The other issue that the Bill touched upon was the age of consent. The Penal Code fixed the age at ten, the Native Marriage Bill went a step further and in fact tried to remodel the marital practices of the indigenous population by raising the age of marriage of girls to fourteen. Till then girls could still be married at the cradle but the marriage could not be consummated till she reached the age of ten—any sexual intercourse below that age was a criminal offence to the degree of rape. The 1868 Bill, thus could be construed as a violation of the vow of non-interference. Here Maine was trying to replicate the English model, because in England, fourteen years was held to be the mean age of menstruation and it was considered felony to have sexual intercourse with a girl below that age. In fact the need to reform the 'unsatisfactory state' of marital affairs of the Indians was being articulated by high-ranking British officials right from the 1850s. Sir Barnes Peacock, who succeeded Maine as the Law Commissioner, in his Minutes dated 18th August 1853, was of the opinion, "The law of marriage and divorce in India ought to be amended. It certainly is in a most unsatisfactory state...great improvements in the law may be effected."³³ Buoyed by the anti-polygamy sentiment that was rife among the upper caste Hindus in the early 1850s, the government was seriously contemplating moves in that direction. Metcalf cites the backtracking of the government on the polygamy issue as a potent sign of manifestation of non-interference. However, what he misses out was that Maine was trying to barge into the customs and traditions of the population through the Bill. Another landmark provision of the Bill was making bigamy a punishable offence, "Every person married under this Act who during the lifetime of his wife or husband, contracts any marriage without having been lawfully divorced from such wife or husband, shall be subjected to the penalties provided in Section 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife."³⁴ Whereas the Indian Penal Code of 1860 had outlawed bigamy in a constricted sense. The provisions clearly laid down that second marriage was an offence when "the accused belonged to a country or of a religious creed which does not recognise polygamy..."³⁵ The Native Marriage Bill went a notch higher to criminalise bigamy/polygamy in a wider sense.

³³ Sir Barnes Peacock, *Minutes by Sir Barnes Peacock* (no publisher, 1901), p. 26

³⁴ "Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., Cap. 67," *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

³⁵ W. Morgan and A. G. Macpherson, *The Indian Penal Code (Act XLV of 1860) With Notes* (Calcutta, 1861), p. 433

While introducing the Bill, Maine argued that the proposed Bill was basically an extension of the Lex Loci Act (Act XXI) of 1850, also known as the Liberty of Conscience Act. In essence the 1850 Act meant to relieve from all civil disabilities, dissidents from native religions. That Act, in turn, was an extension of Lord Bentinck's Regulation VII of 1832 passed for Bengal, by which the civil disability consequent on the renunciation of Brahminism was ended. Section 9 of the Bengal Code laid down, "whenever, in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindoo and the other of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled."³⁶ It also clearly stated that the provisions were designed for the protection of the rights of converts and not for the deprivation of the rights of others.

The Native Marriage Bill was seen as a logical extension of the Lex Loci Act. What was amiss in the Act, Maine felt, was the omission of the provision, to contract a lawful marriage because without marriage the question of inheritance would not arise. Although not categorically mentioning marriage, the Lex Loci Act did throw up questions related to the marital status of the convert—When a native renounces his or her ancestral faith, how does the change affect the conjugal alliance? If renunciation of Hinduism or Muhameddanism, as per traditional law, was equated with civil and legal death then was the non-renouncing party at liberty to treat the marriage repudiated, i.e. was the marriage to be deemed terminated? If not so, what steps should be taken, in order to ensure the fulfillment of its obligations? The 1868 Bill was designed answer these questions by introducing civil marriage in India—'an universal institution of the Western World.' The importance of precedence in law-making has been time and again stressed by Maine, "...all real reforms in law grow out of the roots of past legislation and are but continued and developed shoots of it."³⁷ Maine, in fact, questioned the validity of the protection offered by the government to native religions, "...there is some sort of...protection to Native religions given by this state of the law of marriage in the existing condition of the Native society. Now, can we continue this protection? I think we cannot."³⁸ Although acknowledging that the government is bound to refrain from interfering in native religious opinions on the ground that "...those opinions are simply not ours...", Maine passionately argued

³⁶ PP 324, p. 29

³⁷ Henry Sumner Maine, "Ancient Law" *The Crayon*, Vol. 8, No. 4, April 1861, p. 77

³⁸ "Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., Cap. 67," *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

that by “...trampling on the rights of conscience”, the government, in fact was protecting the interests of the sincere believers and for the advantage of ‘native religions.’³⁹

It is true that the structure was provided in the petition forwarded by Keshub Sen and the 1868 Bill was framed more or less in consonance with the concessions demanded by him.⁴⁰ However, Keshub Sen’s demand was limited to the Brahmo sect. But on the pretext of the ambiguity in defining the term ‘Brahmo’ the government seized the opportunity to broaden the radius of the Bill to cover persons of all religious denominations, sans Christianity. Maine’s argument in favour of the Bill reflects the continuity notion vis-à-vis traditional customs and usages. As his biographer Grant Duff points out, Maine did not endorse the interpretation that the Queen’s Proclamation granted the Indian religions the immunity in practicing their customs and rituals unhindered. In fact he considered this power of intervention as “the sole moral justification of our being in the country.”⁴¹ The existence of an undercurrent of civilizing mission is testified by Maine’s vociferous support of advocating civil marriage in India. Maine ardently believed that India was a backward civilisation, because its inhabitants had not moved from status (ascribed position) to contract (voluntary stipulation). The movement of progressive societies had been uniform in one respect, i.e., moving towards a phase of social order in which all relations arise from the free agreement of the individuals. He condemned the Code of Manu governing Hindu society as being a system of law ‘of suspicious authenticity.’ In line with the dominant voice of the period, Maine, too, relied on ethnology, “Ethnology shows that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindu jurisprudence has a substratum of forethought and sound judgement, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities.”⁴² The Hindu

³⁹ Ibid

⁴⁰ Along with the petition, Keshub Sen submitted a draft bill, whereby he demanded the following pre-conditions be fulfilled: 1. The age of the man intending to be married shall exceed 18 years, and the age of the woman intending to be married shall exceed 14 years. In case the woman is a minor, the consent of the father or guardian shall be obtained. 2. The man and the woman shall not stand to each other within the prohibited degree of Consanguinity or affinity. 3. Neither of the persons intending to be married shall have a wife or husband still living. The marriage shall be solemnized with the worship of the One True God in the presence of at least five credible witnesses. The 1868 Bill submitted for discussion and debate in the Legislative Council laid down the following pre-conditions: Every marriage between Natives of British India not professing the Christian religion shall be valid—If the parties are unmarried, and the husband has completed his age of eighteen years, and the wife has completed her age of fourteen years; if, in case the woman has not completed the age of fourteen years, the consent of her father or guardian has previously been given to the marriage; and if the parties are not related to each other as parents and children or ancestors and descendants of any degree, or as brothers and sister of the half as well as the whole blood, whether the relationship is legitimate or illegitimate, or whether it is one of consanguinity or affinity.

⁴¹ Grant Duff, op. cit., p. 229

⁴² Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (London, 1908), pp. 17-18

Customary Law, according to Maine, harboured “some of the most curious features of primitive society.”⁴³ Through this Bill, Maine proposed to remodel marital practices by giving individuals free hands in forming associations with persons of their choice. What Maine envisaged was “...the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family.”⁴⁴ By freeing marriage from being imprisoned by meaningless religious diktat, Maine was trying to facilitate the elevation of native society towards “...a phase of social order in which all...relations arise from the free agreement of Individuals.”⁴⁵ This would help improve India’s position in the ‘scale of civilisation.’⁴⁶

Understandably, the Bill elicited criticism from various sections of the native population—from the Parsi community, the Hindus as also a section of the Brahmos—all of which submitted several petitions disparaging the Government for barging into their age-old religious practice.⁴⁷ The main bone of contention was that the Bill introduced “...disturbing element to unsettle the customs and usages recognized by law of the whole body of the people.”⁴⁸ The proposed law, the British Indian Association alleged, would practically encourage people to dispense of with the sanction of religion while forming a marriage contract. It gave an individual the freedom to choose one’s life-partner in the widest sense since a person could marry outside his caste, creed, or religion. Social organisation would be torn asunder, once the Bill came into operation, since, “...a Mahomedan woman will be introduced into a Hindoo family under the protection of the proposed law.”⁴⁹

The Bill ultimately had to be pared down in the face of furore raised within the native circle and the rising number of signatories opposing it because of its direct bearing on the marriage practices of the native society as also for encouraging ‘immoral practices.’ The Select Committee, to which the Bill was referred, was somewhat guarded, “It is the unanimous opinion of the Local

⁴³ Maine, *Ancient Law*, p. 6

⁴⁴ Maine, *Ancient Law*, pp. 149-150

⁴⁵ Ibid

⁴⁶ James Mill in his seminal work titled *History of British India* analysed various aspects of the Indian society and assessed its place in the ‘scale of civilization.’ Deriding Sir William Jones for exalting Hindu civilization by digging out its past glory, Mill commented, “It is not from one feature, or two, that a just conclusion can be drawn...It is from a joint view of all great circumstances taken together, that their progress can be ascertained; and it is from an accurate comparison, grounded on these general views, that a scale of civilization can be formed, on which the relative position of nations may be accurately marked.” James Mill, *History of British India*, Vol. I (London, 1817), p. 431. The yardsticks for Mill, in judging a nation’s position in the scale of civilization, are form of taxation, form of law and form of government.

⁴⁷ Petitions were submitted by the British Indian Association, Adi Brahma Samaj, Parsi community of Bombay, Members of the Allahabad Institute, Hindu community of Bombay, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

⁴⁸ “Memorial of the Parsees of Bombay against the Native Marriage Bill,” *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

⁴⁹ “Memorial of the Members of the Allahabad Institute,” *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

Governments that the Bill as introduced should not be passed...the Bill would be unobjectionable if confined to the Brahma Somaj, for whose benefit it was originally designed.”⁵⁰ The second draft of the Bill, thus was renamed the “Brahma Marriage Bill.” It took four long years for the Bill to finally become an Act in 1872. The preamble was amended to read that the Act would be applicable to persons, not professing the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion, ostensibly referring that it should be limited to the Brahmos only. By toning down the Bill, the Government no doubt adhered to its ‘play it safe’ policy, but the very fact that the Law Commissioner’s arguments were laced with allusions to interference and civilizing mission as regards native customs, affirm that remodeling of Indian society was very much a part of the scheme of things. Maine’s continuous reference to the pre-1857 acts, namely the Bengal Regulation of 1832 and the Lex Loci Act of 1850 and his open admission of the Bill being an extension of the same, establishes the continuity factor. In fact, the Act, by making bigamy under such marriages a punishable offence under the provisions of the Indian Penal Code, was trying to fulfill one long-standing agenda of the British—banning of polygamy.

Conclusion

The law is a burning testimony as to how the colonial government was determined to grab every opportunity, post-1857, to dictate terms so far as the personal sphere of the Indians are concerned. The House of Lords passed a Bill in July 1858, for the better government of India, which amongst other things, exhorted the Secretary of State in Council, to submit “...a Statement prepared from detailed Reports from each Presidency and District in India in such Forms as shall best exhibit the moral and material Progress and Condition of India in each such Presidency.”⁵¹ The concept was borrowed from Lord Dalhousie, who in 1856 prepared a Minute wherein he narrated the measures undertaken under various heads during his eight year tenure in India (1848-1856). It was during Dalhousie’s reign that a resolution was passed that “...henceforth from the Government of every Presidency, from each Lieutenant-Governor, and from the chief officer of every province, an annual report, narrating the incidents that may have occurred during the year within their several jurisdictions, and stating the progress that may have been made...in each principal department of the civil and military administration.”⁵² Not only was Dalhousie’s idea executed, the fact that such a

⁵⁰ “Report of the Select Committee” *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

⁵¹ A Bill [As Amended by the Lords] Intituled An Act for the Better Government of India, p. 17. The reporting should detail the works done in the spheres of Revenue, Finance, Public Works, Legislation, Judicature and Police, Education, Emigration, Agriculture, Sanitary Measures, Municipalities, Population, Postal Communication, Ecclesiastical Establishment, Native States, Army, Marine, Trade

⁵² Minute by the Marquis of Dalhousie, dated the 28th day of February 1856, reviewing the Administration in India, From January 1848 to March 1856, p. 45

report was required to be submitted annually and titled, Statement Showing the Material and Moral Progress of India attests that somewhere down the line, the administration was trying to project itself as the keeper of native morality and hence was keeping its fingertip on the pulse of the 'moral progress of India.' The Revolt might have caused a serious jolt leading to an evaluation and rethinking of philosophy behind governance. Words like caution, restraint may have echoed at the corridors of power. But an assessment of some of the landmark acts passed during this given period proves a reification of ideological underpinnings of early nineteenth century. The issues that pre-occupied the colonial mind in post-1857, namely, marriage, bigamy, age of consent, have their genesis in the ideological trappings of the first half of the nineteenth century. The seeds of the above-mentioned act were sown at a time when the prevalent sentiment was 'we shall stoop to raise them' and it is in the post-Revolt phase that this took concrete shape. And herein, can one detect the thread of continuity being inextricably woven into the pattern of colonial administration in the nineteenth century and herein lies the significance of the Act.

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Diversities in the Application of Classical Islamic Personal Law in the
International Islamic Society – A Position Review with Special Reference to
Inheritance Matters

Dr.Jyothi Vishwanath*
Assistant Professor of Law

University Law College
& Post Graduate Department of Studies & Research in Law
Bangalore University, Inida

ABSTRACT

Recorded in the medieval legal manuals, Shariat represents a universally and eternally valid stabilized system for the Muslims, enjoying exclusive paramountcy since almost thirteen centuries. Contrastingly, contemporary Islamic society has allowed and accepted deviations from the Divine Text. Distribution of inheritance of a Muslim intestate differs with his nationality. Complete abandonment of Shariat by the Turks and Albanians; weakening bonds of *asabiyaa*; modification of the doctrine of Rudd; exclusion of collaterals by the lineal descendants; daughters preferential right to claim Rudd; introduction of obligatory bequests and representational succession to protect orphaned grandchildren; modification of the rule of dual succession; abolition of the impediments to inheritance; modification of the limits of testamentary bequest indicate astonishing deviations from the classical text. Varying social pressure, attitude and impetus towards reform substantiate absence of a uniform approach in this regard. The Article examines the current diversities in the Islamic inheritance laws in the contemporary international Islamic society; the reasons behind the aforementioned legal reforms and highlights the need for further reforms therein. It emphasizes that the deliberate westernized departures from the divine scripture, to suit the changing needs of the Muslim population, render modern Islamic law an extremely complex and variegated phenomenon.

KEY WORDS

Shariat, Reforms, Modification, Inheritance, Bequests

1. REFORMING ISLAMIC INHERITANCE LAW: GENERAL PERSPECTIVES

Personal laws¹ *i.e.*, family laws are the laws wherein the connecting factor between individual and the law is religion, in contradistinction to the territorial laws.² They govern a person's life not on the basis of residence or nationality but due to his adherence to a particular religion, race, caste, sect or tribe.

The life of a Muslim is largely dominated by the twin sciences of theology and the sacred law. The former, being descriptive, teaches him what he should believe while the latter prescribes his behaviour and all that he should do or abstain from doing. This moral and religious code of duties, *Sharia*,³ evolved in the 7th century A.D., constitutes one of the most prominent legal systems of the world governing the Muslim population. *Shariat*,⁴ forming an important part of the living law, permeates almost the entire social life of around four million Muslims⁵ in Asia, Africa and Europe⁶ and elaborately deals with diverse matters including personal matters. The expansion of the Ottoman Empire in the Asia, Africa and Europe⁷ and the influence of the Mughals in India led to expansion of the Islamic influence throughout the world.

Divine revelation, universal consensus and authorizations imbibed in the doctrine of *taqlid* and idealism render *Shariat* an eternally valid scheme of life.⁸ Unfortunately resounding clash between the stable fortress of *Shariat* and impetus for change confronts the contemporary Islam. Strong foundation of *Shariat* is crumbling due to the changing social and economic needs of the present Islamic society. Validity of the Islamic law in the contemporary society is being questioned time and again. The two world wars, fall of Ottoman empire, abolition of Caliphate in Turkey, colonial expansion of the Great Britain and France, emergence of small sovereign states in West Asia resulting into growth of Arab nationalism, rise of communism in Central Asia and some parts of Europe ceded by the Ottoman rulers, the social reform movement in Egypt, Iran and Indonesia, independence and

partition of India have weakened the reins of traditional Islamic law and have redefined the jurisdiction and scope of the traditional Islamic law, countries being gradually and considerably excluded from the purview of *Shariat*.⁹ Islamic family law has been totally wiped out in few countries while some countries have preserved it in the traditional form and a majority of the rest has reformed its basic tenets. There exists least uniformity in the application of the *Sharia* in the present international Islamic society in the area of family law in general and in matters relating to inheritance in particular.

Though the Islamic jurists have succeeded by ad hoc measures in solving the immediate problems of the family and inheritance laws, much need to be done for evolving firm and systematic principles for effectively dealing with future developments. Muslim jurisprudence is today squarely facing the task of regulating the needs and aspirations of human life. Though a tentative initiative in adapting *Shariat* to the circumstances of modern life, the modern reformers have challenged the traditional doctrine openly and claimed the right to reinterpret the divine revelation in the light of current social needs. The traditional attitude regarding the comprehensive nature of the divine revelation and its derivative principle that any legal rule must stem from divine revelation either directly by being based upon a text of the Quran or Sunna or indirectly by strict analogical deduction arising from it, gradually gave way to the attitude that human intellect is free to determine a legal rule unless the relevant matter has been expressly regulated by the divine revelation. A social practice or institution is justified in the traditional setup only by the positive support of the divine revelation and in the modern set up by the absence of any negative precept of divine revelation. Change in the law has come to be accepted as legitimate and desirable and not merely as a necessary deviation from an immutable ideal standard.¹⁰ Many new changes and modifications based on novel and valid interpretations of the Quranic precepts or the Sunna of the Prophet have been introduced under the idea that divine command itself visualizes a

changing social order and with the purpose to align the terms of Islamic inheritance laws to the present needs and circumstances of the Muslim society.

2. MUSLIM POPULATION AND THE LEGAL FRAMEWORK RELATING TO ISLAMIC FAMILY AND INHERITANCE LAW

Muslims population in various countries, whether theocratic or secular, majority or minority, continue to adhere to the traditional Islamic inheritance laws which are being altered. Vast reforms have been introduced in the Islamic inheritance laws in the Asian, African and European countries. In Saudi Arabia,¹¹ Yemen, Bahrain, Kuwait¹² and United Arab Emirates, till date the classical family law of Islam is followed in its unchanged and uncodified form.¹³ In Saudi Arabia, as per a constitutional direction, all legislation must conform to the Quran and Sunna and the traditional legal system of the Hanbali School operates with full effect. In Yemen, family law of Zaydi School applies while in Southern Yemen, Hanafi Law applies. In Bahrain¹⁴ and Kuwait, traditional Islamic law applies while United Arab Emirates administers uncodified laws of the Sunni school. In Afghanistan, Islam is the state religion and Hanafi doctrines prevail. African countries like Chad, Gambia, Guinea, Mali, Mauritania, Niger, Senegal and Somalia have not undertaken any measures for reforming the Islamic law. In Nigeria,¹⁵ Maliki principles prevail. Thai and the Bangladeshi Muslims, exempt from the secular reforms, continue to be governed by the Shafi family law. Article 14, the Treaty of Sevres, signed by Greece, Europe and Yugoslavia in 1920, provides that in all necessary matters of family law and personal status, Muslims shall be governed by Muslim usage.¹⁶ Thus Greece, having Muslim minority, has left Islamic law unreformed and uncodified.

In Turkey,¹⁷ Albania,¹⁸ Tanzania, Soviet Union, Zanzibar, Kenya Islamic inheritance law is completely abandoned and replaced by modern westernized statutes governing all irrespective of religious affiliations.¹⁹ Ottoman Empire, *i.e.*, Turkey, played a creative role in the reformation of family law in the West Asian region, deserves special mention for

introducing revolutionary changes in the succession laws. Reformation of family and inheritance system during the reign of Sultan Mahmut II by the bureaucrats of the Tanzimat period²⁰ led to enactment of the unsuccessful governmental Decree on Family Law, termed as *Hukuk-i Aile Kararnamesi* of 1917, which embraced all the subjects of Ottoman Empire irrespective of religious affiliation in these matters.²¹ Due to strong reasons,²² Turkish government was forced to abandon the Islamic family law entirely in 1920 after the fall of the Ottoman Empire and replace it with a western law.²³ The Turkish Civil Code, 1926, introducing a novel scheme of intestate succession imported *in toto* from the Civil Code of Switzerland, 1907,²⁴ differs strikingly from the traditional Islamic law, recourse being had to the traditionally authoritative legal manuals only in the absence of a specific relevant provision in the code or difficulty of interpretation.²⁵ It repeals the Hanafi law of succession followed hitherto. Presently Muslim majority citizens in Turkey²⁶ are governed by local general family and inheritance statutes. Tanzania, Kenya, Zanzibar have adopted uniform marriage laws while Philippines and Soviet Union have gradually abandoned the Islamic law.²⁷

The locally prevalent forms of Islamic family law have been legislatively reformed in countries²⁸ like India, Pakistan,²⁹ Lebanon,³⁰ Jordan, Algeria, Iran, Malaysia³¹ and Indonesia³² which have preferred to introduce reforms by evolution rather than by revolution in contrast to Turkey. Egypt³³ introduced large scale reforms through Law of Inheritance, 1943, dealing with intestate succession and Law of Testamentary Dispositions, 1946. Tunisia followed suit through the Law of Personal Status, 1956 and a Supplement thereto, 1959 and Morocco by enacting Code of Personal Status, 1958. Till partition³⁴ Pakistan was governed by the Muslim Personal Law (Shariat) Application Act, 1937 enacted in India which was replaced later by West Pakistan Muslim Personal Law (Shariat) Application Act, 1962. It also introduced reforms in the family law and inheritance through the Muslim Family Laws Ordinance,

1961.³⁵ Lebanon imported the Ottoman Law of Family Rights, 1917 from Turkey and altered the maintenance rights of the wife³⁶ while succession and wills still within domain of the traditional Islamic principles. In Iran,³⁷ the initiatory codification of family and law of inheritance was the Civil Code of the Islamic Republic of Iran promulgated between 1927 and 1935. Law of Personal Status, 1953 governs matters of inheritance in Syria.³⁸ Iraq, with majority Shia population, enjoys the credit of introducing most radical reforms through the Law of Personal Status, 1959³⁹ which abandoned the Islamic law of inheritance and adopted in its place the law of German origin. This bold step was motivated due to the irreconcilable radical differences between the Sunni and Shia systems and unsatisfactory status of women. With Abd al-Karim Qasim being overthrown in 1963, the portion dealing with inheritance was repealed in 1959 and replaced by an amendment applying the Shia system of inheritance to all Iraqis, irrespective of their school or sect, since it best suited their family circumstances.

In contrast to the Muslim world, secular courts in the Indian sub-continent administer general laws to all along with special personal laws applying to the different religious communities.⁴⁰ The British rule in India emphasized minimum alteration of the existing law within the framework of justice and equity. Sir William Jones stated in 1788 that nothing could be wiser than to assure the Hindu and Mussulman subjects of Great Britain that their private laws⁴¹ would not be suppressed by a new system of which they had no knowledge and which they would consider as imposed on them by a spirit of rigor and intolerance. In contrast to the Ottoman Empire,⁴² India has a majority of Hindus, Muslims constituting substantial minority.⁴³ Certain Muslim communities followed local customs contrary to *Shariat* for a long period of time.⁴⁴ Muslim Personal Law (*Shariat*) Application Act, 1937 abolished these customs while strengthening the traditional foundations of the Islamic law. Now the Muslims are governed by *Shariat*, i.e., Islamic personal law in all questions regarding succession, marriage, dissolution of marriage, maintenance, guardianship,

adoption, wills and legacies, gifts, trust, trust properties and wakfs. Amidst amendments to *Shariat* and Islamic criminal law, a few solitary reforms are made in the family law.⁴⁵ Married woman's right to dissolution of marriage by court and her post-divorce maintenance claims stand reformed by the Dissolution of Muslim Marriages Act, 1939 and Muslim Women (Protection of Rights on Divorce) Act, 1986 respectively.

3. EXISTING DIVERSITIES IN THE ISLAMIC INHERITANCE MATTERS IN THE INTERNATIONAL ISLAMIC SOCIETY⁴⁶

3.1. GENERAL MODIFICATIONS:⁴⁷ Islamic Criminal Law and maintenance rules are substantially modified in majority of the countries. Iraq has altered the criminal and commercial Islamic laws.⁴⁸ Women are made free from the institution of compulsory marriages concluded by the guardians. They are allowed to stipulate special terms in the marriage contract enforceable against the husband and to file petition for divorce upon husband being guilty of matrimonial offence or polygamy.⁴⁹

Modification of the doctrine of Ridd; exclusion of collaterals by the lineal descendants; daughters preferential right to claim Ridd; introduction of obligatory bequests and representational succession to protect orphaned grandchildren; modification of the rule of dual succession; abolition of the impediments to inheritance; modification of the limits of testamentary bequest are the recent reforms in the Islamic inheritance laws in world over.

Though the traditional Islamic society, much similar to the pre-Islamic Arabian society, rested upon the agnatic tribal group, the extended family of male relatives tracing their descent through male links from a common ancestor, contemporary Islam has witnessed a progressive decay of tribal solidarity. The traditional extended agnatic family, a notion associated with the tribal ties and organization forming the basis of the traditional Sunni law of inheritance, has given way to smaller familial ties. Bonds of *asabiyaa*⁵⁰ are rendered progressively weaker in the inheritance matters.⁵¹ Presently in many communities, the basic

unit of society is the more immediate family consisting of parents and their lineal descendants and within this group, wife, mother and daughter adorns a more elevated position.⁵²

Compared to the reforms in Marriage laws, relatively fewer reforms have been introduced in the inheritance matters.⁵³ In contrast to the revolutionary and radical Turkish reforms, Egypt, Syria, Jordan,⁵⁴ Iraq, Tunisia, Algeria, Iran, Morocco,⁵⁵ Pakistan and India have introduced substantive and regulatory reforms. The Middle Eastern Muslim countries have followed a mild path of evolutionary legal reforms.⁵⁶ The modified rules of family law have their basis in one or the other juristic opinions or in a combination of two or more such opinions found within the framework of Islam.

3.2. SPECIFIC CHANGES IN INHERITANCE LAWS: The different inheritance matters which have been reformed in the international Islamic society are examined below:

3.2.1. Priorities of Funeral Expenses: Before division of the estate among the heirs, it has to be applied for meeting the funeral expenses, death-bed charges, expenses of obtaining probate or letters of administration, wages for the services rendered to the deceased within three months before his death, debts and legacies, one after the other in order of preference.⁵⁷

There was difference of opinion regarding the priority between funeral expenses over the secured debts. While Hanafi and Hanbali School gives priority to funeral expenses, the dominant opinion in Hanafi did not give priority to such expenses. The Egyptian general law prioritizes funeral expenses.⁵⁸ In India, estate of a deceased person is administered under Indian Succession Act, 1925.

3.2.2. Females Share: Reformation of the family law has gathered momentum throughout the Muslim world. Looking at the extent and nature of the changes introduced, the most striking and significant aspect of all reforms appears to be the progressive improvement in the legal status of woman. In the pre-Islamic Arabian days, woman had no right of inheritance. Islam unanimously conferred on them one half of the shares of their male counterparts. If the

degree of proximity to the propositus is equal, a male takes a share double the female share except father and mother who inherit equally *i.e.*, $1/6^{\text{th}}$ share in the presence of a lineal descendant. As between son and daughter, brother and sister or husband and wife, the male inherits double the share of the female. Land Decree of 1858 was a turning point in the Ottoman inheritance system as it placed men and women on an equal footing with respect to inheritance of land. Daughters of the deceased were entitled to inherit equal to sons and in the absence of the latter, they received shares as if they were males despite existence of the more distant male heirs.⁵⁹ Book III of the Turkish Civil Code, 1926 provides equal shares to the children of the deceased. It boldly gives up the rule of double share for males. Existing Turkish succession laws are diametrically opposite to the traditional Islamic laws. In India, though Article 14 of the Constitution of India cries for equality,⁶⁰ the Muslim daughter inherits only half the share allotted to the son.

3.2.3. Rudd: After satisfying the claims of the Quranic heirs, there being no agnatic heirs, the residue reverts to the former in proportion to their Quranic shares under the doctrine of return. Under traditional Hanafi law, surviving spouse does not take by return even in the absence of any claimant. Syria⁶¹ allows spouse to take by return in the absence of any surviving blood relative and prefers their claim to that of any acknowledged kinsman.⁶² Egyptian Law of Inheritance, 1943 allows the spouse to take the whole property in the absence of any Quranic, agnatic and uterine heirs. Pakistan⁶³ and India have adopted similar modifications.⁶⁴

3.2.4. Daughter's rights: Iraq prioritizes the rights of the immediate family to that of relatives of the extended tribal group and daughter excludes deceased's brother and sisters and more remote male agnates.⁶⁵

3.2.5. Apostasy: Both Shia and Sunni law exclude apostate from inheritance. India and Pakistan have abrogated and superseded this rule by the Caste Disabilities Removal Act,

1850 and no person is inflicted with any forfeiture of rights or property and renunciation or exclusion from any religion does not impair or affect any right of inheritance.⁶⁶ Unfortunately the Middle Eastern countries still subject an apostate to the civil disabilities imposed by *Sharia*.⁶⁷

3.2.6. Missing Person: Rules relating to missing persons are altered in Pakistan and India.⁶⁸ Hanafi doctrine that a period of 90 years should have elapsed from the birth of a missing person before presuming his death and the Maliki principle that a person unheard since 4 years is presumed to be dead and the Shafi rule that period of 7 years and among the Shias, 10 years⁶⁹ has now been superseded by the Sections 107 and 108 of the Indian Evidence Act, 1872.⁷⁰ Civil Code of Iran provides that a person may be judicially declared dead when he has been missing without trace for ten years and would at the end of this period have reached the age of seventy five or when he has been missing for three years where the circumstances of disappearance raise a presumption of death.⁷¹

3.2.7. Children in the Womb: A claimant must be in existence, actually born or presumed to be in existence, at the time the propositus died. A claim made by heir who was born more than a solar year after the death of the propositus is not entertained under Article 42-44, Egyptian Law of Inheritance, 1943 and Article 150, Tunisian Law of Personal Status, 1956. They provide that a child born to a married woman within 270 days of the death of propositus is presumed to have been conceived at the time of demise. Article 299-301, Syrian Law fixes maximum period of gestation at 365 days. India supersedes the traditional law by the Indian Evidence Act, 1872.⁷²

3.2.8. Live birth and inheritance: In Egypt and Syria, the Hanafi rule allowing a child to inherit if it lives when the process of birth is substantially completed has been replaced by the view of the Sunni majority that the child must live when delivery has been completed.⁷³

3.2.9. Ascendants excluding collaterals: Grandfather excludes full or consanguine brothers and sisters under Hanafi law. Under Article 279, Syrian Law of 1953 grandfather does not exclude but brothers and sisters inherit along with him.⁷⁴ Under Article 22, Egyptian Law of Inheritance, 1943 grandfather does not affect the shares of the full sisters when they inherit as Quranic heir and when in competition with brothers and sisters as agnatic heirs, grandfather counts as brother.

3.2.10. Exclusion of Collaterals by descendants: Under Sunni law, daughter or granddaughter, if a sole surviving issue of the deceased, takes only one-half of the inheritance and the residue goes to the brothers or more distant male agnate relatives of the propositus. Under Iraqi Law of 1963⁷⁵ and Article 91, Civil Code of Islamic Republic of Iran, collateral male agnates are totally excluded by the lineal descendants.

3.2.11. Exclusion of Full brothers by uterine brothers: Under Sharia, uterine brothers and sisters take as Quranic heirs while full brothers inherit as residuaries. If the Quranic heirs inherit all the estate, full brothers are excluded while the uterine heirs being the Quranic heirs get their fixed shares, traditionally called as *Himariya* case.⁷⁶ India follows the traditional law without any change. Egyptian Law of Inheritance, 1943 makes full brothers co-sharers with the uterine heirs.

3.2.12. Right of Representation and Orphaned grandchildren:⁷⁷ Under the traditional *Sharia*, son of the propositus excludes not only his own children but also his nephews and nieces. Grandchildren whose link-parent has died before the propositus are totally excluded.⁷⁸ Doctrine of representation is wholly alien to the Sunni school while Shias recognize it for the limited purpose of ascertaining the shares of the heirs. In the tribal setup where the bonds of *asabiyaa* welded all the sons and agnatic grandsons of the propositus into one compact group, passing of inheritance to son of the deceased was consonant with his position as the new head of the family and his responsibilities for the whole family. Due to progressive decay of the

family solidarity and ties, non-recognition of doctrine of representation and its impact on the orphaned grandchildren is extremely serious. Having lost their father, orphaned grandchildren suffer more when the right to inherit their grandparents is denied to them.

The solution offered for removing the hardships of the orphaned grandchildren by Egypt, Syria, Tunisia by the law of 1956, Morocco in 1958, Jordan, Iraq and Algeria is that of obligatory bequest while Pakistan has evolved the rule of representational succession. Even the testamentary liberty has been restricted under the Obligatory bequests system. Article 74 of the Iraqi Law of Personal Status, 1959, Article 257 (1) of the Syrian Code of Personal Status, 1953⁷⁹ presume an obligatory bequest within the *Shariat* limit of bequeathable third in favor of these grandchildren. Syrian Law provides that children of a predeceased son or agnatic grandson are now entitled to either the share their father would have received had he survived the *propositus* or one-third of the net estate whichever is less. These grandchildren are not entitled to a bequest if they inherit from their father's ascendant, whether grandfather or grandmother nor if they received a bequest or a gift *intervivos* without consideration. If they have received a bequest of a lesser amount, they must be granted the balance and if they are bequeathed greater sum, the excess represents a voluntary bequest and if only some of them are made bequest, then an obligatory bequest is due to the others to the extent of their share. The obligatory bequests have priority over the voluntary bequests in payment out of the bequeathable third of the estate.⁸⁰ Syrian modification benefitting only the children of predeceased sons,⁸¹ no provision is made for the children of the predeceased daughter.⁸² Jordan modifies this by Personal Status Provisional Act, 1976 through Article 180-181.

Article 76-79, Egyptian Law of Bequests, 1946 restricts the principle of obligatory bequest to the first generation descendants of predeceased daughter while it operates without limits among the descendants of the predeceased son. If an optional bequest is made only in favor of some of the orphaned grand children, the rest must be given their due within the

limits of one third of the estate.⁸³ It also prioritizes obligatory bequests over the optional bequests. Section 4, Muslim Family Laws Ordinance, 1961 in Pakistan introduced the rule of representational succession of orphaned grandchildren since it did not violate any specific rule of the Quran or Sunna.⁸⁴ Such grandchildren now step into the shoes of his or her predeceased parent and inherit their share from the grandfather's estate.⁸⁵ Unfortunately in India the pathetic situation created by the exclusion of orphaned grandchildren continues.

3.2.13. Disqualifications: Impediments to inheritance like slavery, homicide and difference of religion have been greatly modified in Syria, Pakistan and Egypt.⁸⁶ Under Sunni Law, an heir causing the death of the deceased intentionally, inadvertently, accidentally, mistakenly or negligently is excluded from inheriting him on the ground that a person cannot derive benefits out of his own wrong. Shia Law disqualifies a murderer only if the death was caused intentionally.⁸⁷ Even the descendants of the murderer are excluded.⁸⁸ One is not excluded if death is caused in discharge of a legal duty or if the person causing it stands in the position of parent/*loco parentis*. Same rule applies in India. Article 5, Egyptian Law of 1943 disqualifies an heir if he has intentionally caused the death, whether by himself or as an accomplice or as a false witness whose testimony led to execution of propositus provided that the act was without any legal excuse and the heir was sane and at least fifteen years of age or the act is otherwise legally justified and excess over the proper limits of the right of self-defence will be excused.

3.2.14. Testamentary bequest and limitations: The unlimited testamentary powers enjoyed by the Arabs in the pre-Islamic Arabia⁸⁹ were circumscribed during the Prophet's reign when exercise of such power to the detriment of lawful heirs was disapproved⁹⁰ and limitations⁹¹ were imposed on it. Sunni law prohibits bequest to an heir since he is entitled under inheritance law to take a share in the estate as a legal heir and validates such bequest upon consent of other heirs after testator's death. Maliki School regards such bequest invalid.

Under Shia law, a bequest to an heir is valid if it does not exceed 1/3rd of the estate even without the consent of the other heirs. It is not valid if it exceeds 1/3rd unless the other heirs consent thereto.⁹² This argument that the rules of inheritance as enunciated in *Shariat* ought not to be disturbed by bequest appears outdated in the present times, all the more because these rules can be defeated by a simple *intervivos* gift made by a Muslim. Under the Ithna Ashari School, bequest in favor of an heir is valid irrespective of other heirs consent and this rule has been adopted by Article 37, Egyptian Law of Bequests, 1946⁹³ and Judicial Circular No.53 of 1945 in Sudan.⁹⁴ Article 3 of Egyptian law also stipulates that for a bequest to be valid must not involve any sin and its motives should not be contrary to the purpose of the law-giver.⁹⁵

Syrian law provides that the testator may validly apportion particular items of his estate to his heirs provided they do not exceed in value the heir's share of inheritance.⁹⁶ Iraq allows bequests in favor of whomsoever one desire within the limit of one-third,⁹⁷ thereby allowing the testator to make additional provision for the needful heir. The rule may also be utilized for the benefit of his wife, daughter or granddaughter as against the claims of distant agnatic relatives.⁹⁸ Unfortunately Pakistan and India have remained committed to the traditional rule in this regard.

3.2.15. Murder and Impediment to Testamentary bequest: The traditional *Sharia* has been modified by the Syrian and Iraqi Legislation of 1959⁹⁹ to the extent that legatee should not have killed the testator. Article 17, Egyptian Law of 1946, excluding a legatee for having murdered the testator is similar to Article 5 which excludes an heir on similar grounds.¹⁰⁰

3.2.16. Difference of religion and nationality-Impediment to bequest: The only bar to testamentary succession on the grounds of difference of nationality arises in Hanafi and Shia law where a bequest made by a Muslim testator to a non-Muslim subject of a non-Muslim state is invalid. Modern legislation in this respect is based on the principle of reciprocity.

Article 215, Syrian Law of 1953 provides that legatee being a foreigner, reciprocity of treatment is a condition of validity and this includes Muslim as well as non-Muslim legatees and subjects of a foreign Muslim as well as a non-Muslim states. Upholding the reciprocity principle, Iraqi law introduces a novel element by restricting bequests to movable property in favor of legatees whose religion differs from that of the testator.¹⁰¹

4. WAYS FORWARD

Uniform approach in the Islamic world regarding legal reform of the inheritance matters does not exist. Present international Islamic society is a multi-colored portrayal of the reforms introduced in the traditional *Sharia* since the social pressure, attitude and impetus for reform varies from country to country. The traditional heterogeneity of the Islamic community adhering to various schools and sub-schools has assumed greater altitude by multi-dimensional reforms introduced in various countries. Most of the departures from the divine scripture are deliberately undertaken after an in depth understanding of the problems faced by the Islamic community in the contemporary times. The zeal towards improvement needs to be upheld and taken forward. Many more issues specified hereunder presently demand attention of the jurists and require suitable reforms:

- Under *Sharia*, widow or more than one widow, is entitled to $\frac{1}{4}$ or $\frac{1}{8}$ share which is inadequate. Need exists to increase their share by obligatory bequest or allowing voluntary bequest to them in the form of an heir.
- Rigid and fixed Quranic shares do not consider the individual circumstances.
- Importance attached to agnates under Sunni law needs to be reconsidered. Exclusion of daughter by an unknown distant agnate leads to much heart burn and discomfort.
- Minute fragmentation of the property under Islamic law needs to be taken care of.
- Excluding converts or their descendants causes much injustice in the era where there is need for religious unification.

- Children of pre-deceased daughter are totally excluded from inheriting their maternal grandfather and grandmother. Reforms need to be introduced to protect their interest.
- Traditional Shia Law has done away with the customary distinction between males and females, agnates and cognates by placing all blood relatives in a single category of residuaries. Distinction between cognates and agnates needs to be discarded since it indicates primitive mindset. This legal perspective needs to be extended to the Sunnis and other communities as well.
- Though step-children, half blood, uterine blood or full blood, have mutual rights of inheritance, they do not inherit step parents or *vice versa*. This bar ought to be removed.
- If a person is entitled to inherit in more ways than one, he inherits in each of those ways. This occurs when a person is related to the deceased through different relationships. Muslim Law recognizes polygamy and cross cousin marriages which give rise to consanguine & uterine relations, the possibility of double inheritance exists.¹⁰² Egyptian Law of Inheritance, 1943 confines dual title by relatives of the outer family to those who are both paternal and maternal relatives of the propositus. Further reforms can be introduced in this area.
- Under Hanafi law, illegitimate child¹⁰³ is *matris filius*¹⁰⁴ and has mutual rights of inheritance with the spouse, descendants, mother and maternal relations but cannot inherit the father. Illegitimate child cannot inherit uterine relations¹⁰⁵ and legitimate child of its mother.¹⁰⁶ Blood relationship as a ground of inheritance must be legal. Illegitimate child is *nullius filius*¹⁰⁷ under Ithna Ashari Law and can inherit neither from its parents nor from any of their relations.¹⁰⁸ The above position holds good for the child of a woman divorced by *lian*.¹⁰⁹ Immediate reforms need to be introduced for protecting their interest.

- Amidst weakening family ties, succession rights of the relatives forming part of the nuclear family needs to be prioritized.
- Better inheritance rights needs to be conferred on the women in the family. Under Shia Law, a childless widow is not entitled to a share in her husband's land but is only entitled to 1/4th share in movable property. Again, a child less widowed daughter in law is not an heir. This needs attention.

5. ENDNOTES

* B.A., LL.B., LL.M., M.Phil., Ph.D. Assistant Professor, Post Graduate Department of Studies & Research in Law & University Law College, Bangalore University, Bangalore.

1 Personal law is also designated as customary law & constitutes a branch of civil law. Regulating the personal & family matters of an individual, they are also referred as the family laws. -Sinha, R.K. 1995. *The Muslim Law*. Allahabad: Central Law Agency, edn 3, p.1; Sagade, Jaya. 1996. *Law of Maintenance: An Empirical Study*. Mumbai: N.M.Tripathi Private Ltd, p.11.

2 In territorial laws, the connecting factor is domicile, residence or nationality. -Jaising, Indira. (ed). 1996. *The Politics of Personal Laws. "Justice for Women-Personal Laws, Women's Rights and Law Reform"*. Goa: The Other India Press. edn 1, pp.1,5; Derrett, J.Duncan.M. 1999. *Religion, Law and the State in India*. New Delhi: Oxford University Press, p.39.

3 Anderson, Norman. 1976. *Law Reform in the Muslim World*. London: The Athlone Press, p.3.

4 *Shariat* literally means road to the watering place & denotes the path to be followed & embraces within itself the totality of Allah's commandments *i.e.*, *hukm*. -Diwan, Paras and Peeyushi Diwan. 1995. *Muslim Law in Modern India*. Allahabad: Central Law Agency. edn 6, p.18; it refers to the God's commandments & is a technical term for Islamic law. -*Supra* n.3, p.1, 3; it is an infallible guide to ethics & is not law in the modern sense. -Fyzee, Asaf.A.A. 1974. *Outlines of Muhammadan Law*. Delhi: Oxford University Press. edn 4, p.16; *Shariat* means Islamic law or code while *Shariat Act* means the *Shariat Act*, 1937 passed in India; It refers to the determination of the limitations of human self & is result of a series of revelations to the Prophet & may be referred to as the law of nature. Permanent validity regardless of time & place, common interest of community & observance with sincerity & good faith are its fundamental features. For its comparison with the man-made laws refer Khader, Mohammed Abdul. 1974. *Ijma and Legislation in Islam*. Secunderabad: Shivaji Press. edn 1, p.2; Tandon, Mahesh Prasad and Rajesh Tandon. *Textbook of Mahomedan Law*. Allahabad: Allahabad Law Agency. edn 7, p.7; it is the path of the believer on which Allah desires man to pass through & refers to the commands comprised in the Holy Quran. -Hodkinson, Keith. 1984. *Muslim Family Law Sourcebook*. London and Canberra: Croom Helm Ltd, p.1; what is morally beautiful must be done & what is morally ugly must not be done. This is alone *Shariat*. -Saksena, Kashi Prasad. 1949. *Muslim Law*. Lucknow. edn 3, p.5; Islamic *Sharia* is based on the Quran. -Qureshi, M.A. 1978. *Marriage and Matrimonial*

Remedies. Delhi: Concept Publishing Company. edn 1, p.263; *Sharia* can be traced back to the year of migration *i.e.*, A.D. 622. -Khan, Hamid. 1999. *Islamic Law of Inheritance*. Karachi: Pakistan Law House and London: Platinum Publishing Ltd. edn 2, p.1; it designates the rules & regulations governing the lives of Muslims & covers all aspects of human existence including life after death & represents a comprehensive way of life. -Dien, Mawil Izz. 2005. *Islamic Law*. U.K: Edinburgh University Press, p.36; it is the Islamic code covering matters which the world knows because of the communications to Prophet Mohammad. In regulates the human life in the best way as per the stipulations of God. - Qureshi, M.A. 1995. *Muslim Law of Marriage, Divorce and Maintenance*. New Delhi: Deep and Deep Publications. pp.6-8; it comprises the commands & prohibitions contained in Quran & *Sunna*. For details relating to its contents refer Shah, Nasim Hasan. *Islam and the State*. "Studies in Islamic Law". H.S.Bhatia(ed). New Delhi: Deep & Deep Publications, pp.72-76; it is the traditional law of Islam. -Mahmood, Tahir. 2002. *The Muslim Law of India*. New Delhi: Lexis Nexis Butterworths, p.6; it deals with worship & ritual, political & legal rules. - Schacht, Joseph. 1964. *An Introduction to Islamic Law*. Delhi: Universal Law Publishing.edn 1, p.1.

5 The word 'Muslim' in Arabic is the active participle of *Asalama* which is acceptance of faith. In English, it is used both as a noun & adjective, denoting the person professing Islamic faith & the peculiarity of Muslims in relation to law, culture & art. -Hidayatullah, M. and Arshad Hidayatullah. 1990. *Mulla's Principles of Mahomedan Law*. Bombay: N.M.Tripathi Private Ltd. edn 19, p.xix; the term Muslim means one adopting Islamic faith. -Saiyed, I.A. 1999. *Family Law*. Mumbai: Himalaya Publishing House. edn 1, p.3; R.K.Sinha., *supra* n.1, p.2.

6 Anderson, J.N.D. 1959. *Islamic Law in the Modern World*. London: Stevens & Sons Ltd, pp.ix-x.

7 Ottoman Empire or the Turkish Empire was a state founded by the Turkish tribes under Osman Bey in 1299. With the conquest of Constantinople by Mehmed II in 1453, the Ottoman State became an empire. The reign of the Ottoman dynasty lasted for 623 years from 27 July 1299 to 1 November 1922 when the monarchy in Turkey was abolished. - http://en.wikipedia.org/wiki/Ottoman_empire#cite_note-8 (Accessed 25/3/2013).

8 Coulson, Noel.J. 1969. *Conflicts and Tensions in Islamic Jurisprudence*. Chicago: University of Chicago Press, p.115.

9 Mahmood, Tahir. *Family Law Reform in the Muslim World*. New Delhi: Indian Law Institute, p.2.

10 *Supra* n.8, pp.103, 104, 107, 116.

11 Saudi Arabia has full Muslim population & has left Islamic family law unreformed & uncodified.

12 Kuwait has great majority of Muslim population & has left Islamic law unreformed & uncodified.

13 Abu Dhabi, Ajman, Dubai, Fujairah, Sharjah, Umm al-Quwain & Ras al-Khaimah constitute United Arab Emirates.

-http://en.wikipedia.org/wiki/United_Arab_Emirates (Accessed 29/3/2013).

14 Bahrain has overwhelming Muslim majority & has partly reformed Islamic law.

15 Nigeria having majority Muslims, has left *Sharia* unreformed & uncodified.

16 *Supra* n.9, pp.2-5.

17 Turkey has Muslim majority population.

18 Albania has Muslims in majority & Muslim law is replaced by modern civil code.

19 *Supra* n.3, p.2.

20 Far reaching changes were introduced during this period in marriage, divorce & inheritance & were motivated by the needs of modern life & desired deviations from the moral values created by the closed environment of the traditional family. During the Tanzimat, law had begun to become both standardized & secularized in inheritance matters. Secularization began when both Muslims and non-Muslims showed an actual preference for utilizing the same legal institutions for matters of inheritance. -<http://dergiler.ankara.edu.tr> (Accessed 25/3/2013).

21 For details refer *ibid*; the pressure of organized religious forces abrogated this decree in 1919-
<http://www.answers.com/topic/civil-code-of-1926#ixzz2OY2oLQ9i> (Accessed 25/3/2013).

22 As per Islamic jurisprudence, social need & desirability has never been a proper justification for legal reform. It is for *Sharia* to prescribe & determine social purpose & not for the social purpose to mould & fashion the law. If new & modern social situations desire a change in the law, such a change will represent a legitimate expression of *Shariat* law only if it can be shown to be in conformity with the accepted dictates of the divine will of Allah. Any juristic interpretation which deviates from the divine text is deemed to be in contradiction of the divine law.

23 Coulson, N.J. 1971. *Succession in the Muslim Family*. London: Cambridge University Press, p.136.

24 The Swiss Civil Code [no 210, AS 24 233, dated 29 December 1907] was used as a model since it is based on twenty-five-year community studies of existing norms & mores in Swiss cantons where French, German, Italian & Roman were spoken. The Swiss Code seemed best to accommodate the needs of a country with diverse cultural & linguistic groups. Turkey's Minister of Justice Mahmut Esat Bozkurt had studied law in Switzerland & Swiss Law Professor G. Sausser-Hall was engaged to act as legal counsel to the government of Turkey. On 17 February 1926, the modified version was adopted in a single session of the Turkish Grand National Assembly & it entered into force on 4 October 1926. This code is not accepted fully & Islamic law is still followed in some remote rural regions. -
<http://www.answers.com/topic/civil-code-of-1926#ixzz2OYA4O9n8> (Accessed 25/3/2013);
www.spechboehm.com (Accessed 25/4/2013); David, Rene., and John.E.C.Brierley. 1978. *Major Legal Systems in the World Today*. London: Stevens and Sons, pp.444-445.

25 *Sharia* was codified to make it more accessible to the judiciary, untrained in the skills of interpreting it. -*Ibid.*, p.99.

26 Same situation prevails in Albania also.

27 Republic Act, 1949 in Philippines & Bolshevik Revolution of 1917 in Soviet Union abolished Islamic law.

28 *Supra* n.9, pp.2-3.

29 Pakistan has majority of Muslims & has partly reformed Islamic family law.

30 Lebanon, with majority of Muslim population, has partly reformed Islamic family law.

31 Malaysia, having great majority of Muslim population has subjected them to regulatory legislation.

32 Indonesia has Muslims in majority & has introduced administrative regulations.

33 Egypt has Muslims majority & has partly reformed & codified traditional *Sharia*.

34 India was partitioned & a new territory, Pakistan was carved out in 1947.

35 Government of Pakistan had set up a Family Law Commission in 1955. & based on its recommendations & proposals, Muslim Family Laws Ordinance, 1961 was enacted to improve rights of women in the area of marriage, divorce & maintenance. -*Supra* n.9, pp.247-248.

36 Articles 92-101, Ottoman Law makes provision for the enforcement of wife's right to maintenance & treats maintenance as a debt against husband.

37 Iran has Muslims in majority & partly reformed & codified traditional *Sharia*.

38 It is recently amended in 2003.

39 It is amended in 1963, 1978, 1987 & 1999.

40 India is a land of religious personal laws.

41 The religious personal laws were severally held sacred & their violation was thought the most grievous oppression by the Hindus & Muslims in India.

42 India was governed by a non-Muslim rule for a fairly long period of time & this was to a great extent responsible for avoidance of any interference in matters of religious law & practice.

43 The country was under the Muslim rule for some centuries before the British advent into the country & Islamic criminal law prevailed. -*Supra* n.3, p.19.

44 Communities like Mappillas of North Malabar, Cutchi Memons, Khojas, Sunni Bohras of Gujarat, Molesalam Giarasias of Broach, Halai Memon of Porbandar followed the local

customs in matters of inheritance & wills which were to a great extent contrary to the *Shariat*. -Kader, S.A. 1998. *Muslim Law of Marriage and Succession in India*. Calcutta: Eastern Law House, pp.20-22.

45 Modifications have been introduced in the *Sharia*. In as early as 1790, right of the heirs of blood to pardon one found guilty of deliberate homicide was abolished & the criterion as to whether a homicide was to be regarded as '*deliberate*' was changed from the simple test of the weapon that had been used to a more subjective consideration of whether the accused had or had not actually intended to kill. The close relatives of the victim were free to accept blood-money or even pardon those who had killed him. -*supra* n.3, pp.22-23.

46 *Supra* n.23, pp.138-39.

47 *Ibid.*, p.135.

48 Mawil Izzi Dien., *supra* n.4, p.154.

49 *Supra* n.8, p.97.

50 *Asabiyya* derived from the root word *asaba* is an Arabic word used to describe the solidarity of the extended agnatic family.

51 The reason behind this has been industrialization & migration of the people to the cities.

52 *Supra* n.8, pp.97-98.

53 Tunisia prohibits polygamy. Permission is made necessary for polygamous marriages. The husband has to satisfy the courts in Syria that he is financially able to provide proper maintenance & support for his wives. If the husband divorces his wife by repudiation, courts have discretion to award suitable compensation to wife in Tunisia, Syria & Morocco. Great changes have been introduced in matters of custody by the Egyptian law of 1929 & in Sudan, Syria, Tunisia & Iraq. -*Supra* n.8, pp.102, 108-110.

54 Jordan has Muslims in majority & the traditional *Sharia* is partly reformed & codified.

55 Morocco has majority of Muslims & has reformed & codified *Sharia*.

56 The process of adapting *Shariat* to the modern circumstances was a tentative one at the beginning. The doctrine of *siyasa* invoked by the ruling authorities to restrict the competence of the *Sharia* courts by procedural devices or to order them to apply some variant doctrine from another school did not seriously shake the stability of *Sharia* doctrine. But when the traditional doctrine was reinterpreted in the light of current social needs, change in the law was accepted as legitimate & desirable. -*Supra* n.8, p.102.

57 Beg, M.H. and S.K.Verma. 1966. *Islamic Jurisprudence and Secularism*. "*Secularism: Its Implications for Law and Life in India*" G.S.Sharma., (ed). Bombay: N.M.Tripathi Private Ltd, p.514; Asaf.A.A.Fyzee., *supra* n.4, pp.375-376; under the classical Muslim Law, the deceased notionally survives & continues as the owner of the estate till all his obligations have been discharged. In an insolvent estate, the interest does not pass to the heirs till the debts have been paid. But in India the deceased's estate devolves upon his heirs at the

moment of his death, thereby making the heir's ownership subject to a personal liability to pay the debts in proportion of the his/her share. -Pearl, David. 1979. *A Text Book on Muslim Law*. London: Croom Helm Ltd. pp.114-115; R.K.Sinha., *supra* n.1, pp.258-259; out of *tarika i.e.*, the estate, different costs have to be met before its distribution. -Joseph Schacht., *supra* n.4, p.169; Section 320-323 & 325 of ISA, 1925 deals with administration of estates in India.

58 *Supra* n.9, p.53.

59 This revolutionary rule was confined only to books & practically the *kadis* refused to adhere to this law & females continued to receive only half shares. This continued till the 20th century. -Ortayli, Ilber. *Ottoman Family Law and the State in the Nineteenth Century*, p.8 - <http://dergiler.ankara.edu.tr> (Accessed 25/3/2013).

60 Article 14 of the Indian Constitution declares the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

61 *Supra* n.23.

62 An acknowledged kinsman is no longer regarded as proper heir as his relationship is not established with the deceased. -*ibid.*, p.139-140.

63 *Ibid.*, p.139-140.

64 In 1925, same rule has been adopted in Sudan.

65 *Supra* n.23, p.141.

66 Apostasy being no longer a criminal offence does not operate as a bar to mutual rights of inheritance.

67 *Supra* n.23, p.192.

68 *Ibid.*

69 *Supra* n.44, p.72.

70 Under Section 107 if it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. Under Section 108 when the question is whether a man is alive or dead & it is proved that he has not been heard of for seven years by those who would naturally have heard of him, if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

71 Articles 1011-1030, Book 5, the Civil Code of Islamic Republic of Iran.

72 Section 112, Indian Evidence Act, 1872 presumes legitimacy of a person if born during the continuance of a valid marriage between his mother & any man or within two hundred & eighty days after its dissolution, the mother remaining unmarried.

73 *Supra* n.23, p.212.

74 *Ibid.*

75 *Ibid.*

76 For the details relating to *Himariyya* case pertaining to the conflict between rights of the uterine brothers & full brothers & the tradition associated with Caliph Omar refer David Pearl., *supra* n.57, pp.136-137.

77 *Supra* n.23.

78 This has been remedied in Algeria, Pakistan & Bangladesh.

79 *Supra* n.23.

80 Article 257(2).

81 Article 257(1); *supra* n.23, p.145.

82 *Supra* n.6, p.77.

83 *Supra* n.8, pp.58-59.

84 *Supra* n.8, p.105.

85 Section 4 violates the constitutional directive imbibed in Article 204, Constitution of Pakistan which requires that all legislation must conform to the Holy Quran.

86 *Supra* n.23.

87 For classification of homicide, position relating to minors & lunatics who have committed homicide refer *ibid.*, pp.176-181.

88 *Khan Gul Khan vs Mt.Karam Nishan* [AIR 1940 Lahore 172].

89 M.H.Beg and S.K.Verma., *supra* n.57, p.514; Asaf.A.A.Fyzee., *supra* n.4, p.355; Bharatiya, V.P. 2004. *Syed Khalid Rashid's Muslim Law*. Lucknow: Eastern Book Company, p.304; Jafri, S.I. 1997. *Commentaries on Mohammedan Law*. Allahabad: Law Publishers India. edn 7. p.569; Ali, Syed Ameer. 1986. *Mahommedan Law*. New Delhi: Kitab Bhavan Publications. edn 4. vol.I, p.568.

90 (i) Human interference in the divine law of inheritance is undesirable & one should not affect the shares of heirs. -Paras Diwan and Peeyushi Diwan., *supra* n.4, p.234; if a bequest to an heir is permitted, then portion more than that fixed by Quran will go to him, leading to reduction in the shares of other heirs. These limitations prevent showing favoritism towards any one heir. Even if the bequests are meritorious in purpose, they should not defeat heir's right to the extent of 2/3rds. -*Supra* n.23, p.214; Habibi, Syed Ahmad Moinuddin. *Lectures on Muslim Law*. Allahabad: Allahabad Law Agency, p.103; V.P.Bharatiya., *supra* n.89, p.305; Syed Ameer Ali., *ibid.*, p.569, 590; *according to Hedaya, if the heirs are poor, it is preferable not to leave legacies. Only if they are rich or the share left for them is enough to enrich them, legacies to the extent of 1/3rd can be left for the strangers. According to Quran, generosity towards relatives is better than that towards the strangers.* -Hamilton, Charles.

(trans). 1870. *The Hedaya*. New Delhi: Kitab Bhavan. edn 2, p.673. (ii) Quran II, the Chapter of the Heifer, Verse 180 which permitted a person to bequeath his estate to the extent of 1/3rd. -Muller, F.Max., (ed). 1880. *Sacred Books of the East-The Quran*. Delhi: Motilal Banarsidass Publishers. Part II. edn 1.vol.9, p.25.

91 A Muslim can dispose his entire property by a gift *intervivos* & he has liberty to tie it by creating a family wakf but he does not enjoy absolute freedom while making wills.

92 *Supra* n.44, p.74.

93 Egyptian Law of Bequests, based on the synthesis of rules based on authority of Muslim jurists from different schools, is an elaborate enactment with 82 articles dealing with substantive aspects of wills as well as with the execution & administration of legacies.

94 *Supra* n.3, p.151.

95 *Supra* n.9, p.56.

96 *Supra* n.23, p.258.

97 *Supra* n.44, p.75.

98 It strengthens rights of the more immediate family circle as against those of the tribal heirs.

99 Article 68.

100 Refer 3.2.13. for details.

101 Article 71, Iraqi Civil Code enacts that the will is valid only for movable property when the heir is of a different religion & nationality on the condition of mutual treatment by the heir's country; N.J.Coulson., *supra* n.23, p.231.

102 For details relating to dual relationships & double share refer N.J.Coulson., *ibid.*, pp.164-171; Halsbury's Laws of India, *supra* n.91, p.403; S.I.Jafri., *supra* n.89, pp.475-476; if the spouse is also related to the deceased by blood, he/she is entitled to a share in both capacities. -*Mazirannessa vs Khondakar Golam Kibria* [AIR 1970 Cal 387].

103 Illegitimate child refers to a person born without a valid marriage between its parents. - Hamid Khan., *supra* n.4, p.41; illegitimate child is also known as *walad-ul-zina*.

104 Mahesh Prasad Tandon and Rajesh Tandon., *supra* n.4, p.282.

105 Kashi Prasad Saksena., *supra* n.4, p.948.

106 Halsbury's Laws of India, *supra* n.91, p.392; *Rahmat Ullah vs Maqsood Ahmad* [AIR 1952 All 640 at p.641].

107 Kashi Prasad Saksena., *supra* n.4, p.948.

108 Paras Diwan and Peeyushi Diwan., *supra* n.4, p.232; M.H.Beg and S.K.Verma., *supra* n.57, pp.407-408; Faiz Badrudin Tyabji., *supra* n.91, p.866.

109 M.H.Beg and S.K.Verma., *ibid.*, p.408; Faiz Badrudin Tyabji., *ibid.*, p.866; child of a woman divorced by lian is known as *walad-ul-Mula'inah*. -V.P.Bharatiya., *supra* n.89, p.349; S.I.Jafri., *supra* n.89, p.473.

PROBLEMS OF PERSONAL JURISDICTION AND ACCESSIBILITY BY INDIVIDUALS AND NGOs TO THE AFRICAN REGIONAL HUMAN RIGHTS COURTS: LESSONS FROM THE ECOWAS COMMUNITY COURT OF JUSTICE

Timothy Yerimah

ABSTRACT

*This paper delves into the problems of personal jurisdiction and accessibility by individuals and NGOs to the African Court of Human and Peoples' Rights (African Court) and the African Court of Justice and Human Rights (Merged Court). It focuses on the legal consequences of these problems with particular critiques of the provisions of Articles 5(3) and 34(6) of the Protocol that established the African Court- *pari materia* with Articles 8(3) and 30(f) of the Merged Court Protocol. The paper reveals that these provisions are not only obstacles to individuals and NGOs in accessing the African Court; but also hampers the Court from considering the substance of the cases that have come before it. The paper reveals that the situation may not change even if the Merged Court replaces the African Court. The paper advocates for the measure adopted by the ECOWAS where a Supplementary Protocol was adopted to allow individuals and NGOs have effective access to the ECOWAS Community Court. The paper concludes that unless steps are taken to overcome the obstacles, efforts made in establishing the two Courts will be an exercise in futility. Beyond the ECOWAS approach, the paper recommends other ways forward for effective access to the Courts.*

KEY WORDS: Justice, Accessibility, Personal Jurisdiction, African Courts.

I. INTRODUCTION

The establishment of the African Court of Human Rights (African Court or Court) as well as the African Court of Justice and the eventual merger of the two Courts as African Court of Justice and Human Rights (Merged Court or Court) are very significance in the history of human rights developments in Africa. The idea of establishing a Human Rights Court in Africa was sold since 1961 but it was not widely embraced;¹ and the idea was later dismissed “as not being an African way to resolve disputes.”² When the African Charter on Human and Peoples’ Rights (African Charter or Charter)³ was adopted, the idea was also turned down. The Charter established only the African Commission, with promotional, protective and interpretational mandate.⁴ Since 1987, when the Commission was constituted, it has been severely criticized: its decisions are not binding on State Parties because the Commission has no enforcement power.⁵ Financial predicament also frustrates many activities of the Commission, delay of cases before the Commission is another persistent problem. Yet lack of awareness of the existence and mandate of the Commission are other constraints that cannot sink into oblivion.⁶

It was against this backdrop that African Heads of State and Government in 1998 adopted the Protocol to the African Charter establishing the African Court to complement the protective mandate of the African Commission.⁷ The Protocol defines the jurisdiction and functions of the Court.⁸

During the process and consideration of the draft Protocol, one of the most controversial issues that cropped up for debate was the question of individual and NGOs direct access to the African Court.⁹ But the restriction on access finally emerged after intense pressures from states that were against a mechanism that could be utilized by individuals and NGOs to scrutinize their poor human rights records.¹⁰

However, in 2008 the Statute of the African Court of Justice and Human Rights (Merged Court Statute), was adopted to merge the African Court and African Court of Justice (created under the Constitutive Act of the African Union),¹¹ as African Court of Justice and Human Rights.¹²

The Statute shall replace the African Court Protocol and Protocol of the African Court of Justice when it comes into force.¹³ Any reference to the African Court of Justice under the AU Constitutive Act shall be read as reference to the Merged Court.¹⁴ But the African Court shall remain in force for a transitional period of at least one year or any other period that will be determined by the Assembly to enable it transfer its prerogatives, assets and obligations to the Merged Court.¹⁵ All uncompleted cases pending before the African Court shall be transferred to the Human Rights Section of the Merged Court and be dealt with in accordance with the African Court Protocol.¹⁶ All these are indications that African Human Rights Court may continue to operate for some years before the Merged Court replaces it.

The African Court is mandated to determine cases brought before it directly by some parties. But it requires additional Declaration by State Parties for it to consider cases filed by individuals and NGOs against the State.

Apart from the two *supra*- national enforcement bodies, there also exist in Africa some sub-regional institutions including the Economic Community of West African States (ECOWAS) Court of Justice,¹⁷ East African Community Court of Justice,¹⁸ and South African Development Community Tribunal,¹⁹ and others. They also have mandate to interpret the provisions of the African Charter and have jurisdiction to entertain matters filed directly by individuals.

It is predicated on this note that the choice of ECOWAS Court as a case study is justified.

The Court had experienced worse personal jurisdictional problem. The approach or

approaches the ECOWAS system adopted to overcome the problem serves as a lesson(s) to the African system.

Again, all Member States of the ECOWAS;²⁰ are also Members of the African Union and are signatories to the African Charter. Both African Court and the ECOWAS Court have subject matter jurisdiction to interpret not only the African Charter but also other international, regional and sub-regional human rights instruments ratified by State Parties.

II. THE BURNING ISSUES

The main issue in the establishment of the African Court is whether individuals and NGOs have effective access to the Court and whether the African Court (later the Merged Court) has competent to exercise jurisdiction over cases brought to it directly by individuals and NGOs. These questions are imperative, taking into consideration the fact that these parties are the most victims of human rights violations that should be the most beneficiaries of the Courts. As direct access by individuals and NGOs is determined by the Special Declaration made by State Parties, it is important to evaluate whether since the Court was established, States Parties are willing to make the Declaration. If the answer to this question is in the negative, then will the African Court make a difference to the culture of impunity, and the often deplorable state of human rights in Africa?²¹ Can African leaders achieve their target of establishing the Court to overcome the obstacles that affect the performance of the African Commission? “The mere establishment of a Court empowered legally to condemn State Parties for human rights violations is no guarantee of success. An effective human rights mechanism requires more.”²²

III. CLARIFICATION OF TERMS

A. Jurisdiction

Jurisdiction is the legal stand of any judicial body. It is, "the power of a Court or a judge to entertain an action, or other proceedings".²³ Jurisdiction of a Court determines who should have access to the Court, under what conditions and the type of violations that should be redressed.²⁴ Jurisdiction is the foundation upon which a structure stands. A structure without foundation cannot stand or will ultimately collapse. In the Nigerian case of *Agbiti v. Nigerian Navy*,²⁵ jurisdiction has been defined as "a term of comprehensive import embracing every kind of judicial action."

The issue of jurisdiction is linked with the question of competence of a Court to adjudicate a matter. It has long been established that a Court will be competent to adjudicate over a matter only where:

- (a) It is properly constituted in terms of number and qualification of its members;
- (b) The subject matter of the action is within the jurisdiction in the sense that it has the competence to adjudicate over it; and
- (c) The matter is initiated by due process of law and there is no feature therein to rob the Court of its jurisdiction.²⁶

Jurisdiction is, therefore, the basis foundation and life wire of access to Court in adjudication. Consequently, where a Court lacks jurisdiction to entertain an action the entire proceedings becomes a nullity, no matter how perfectly conducted or brilliantly written the judgment may be.²⁷ That is why Justice Mohammed Bello CJN, compared jurisdiction with blood that gives life to the survival of an action in a Court of law, adding

that without jurisdiction the action will be like an animal that has been trained of its blood.²⁸

In domestic Courts where decisions of trial Courts might be appealed against to the Court of Appeal and even to the Supreme Court, the issue of jurisdiction can be raised at any stage of the trial or even on appeal. It could also be raised for the first time at the Supreme Court by any of the parties or by the Court *suo motu*.²⁹ The Court is duty bound to stay action in the matter until the issue is determined.³⁰

A challenge of jurisdiction must be actual not theory.³¹ It must be based on a question of law, not facts. It is the statute or treaty that created a particular Court that conferred the Court with its jurisdiction.³² Therefore, once the issue of jurisdiction is raised, it is the law in force at the time the cause of action arose that should be examined.³³ No Court is allowed to confer jurisdiction on itself where such jurisdiction does not exist; nor can jurisdiction be conferred on the Court by agreement of counsel; or else the entire proceedings becomes null and void *abinitio*.³⁴

Since the issue of jurisdiction is so important that it can destroy the fabric of a whole process of a case,³⁵ if the Court has no jurisdiction to entertain a matter it cannot even grant a request for *interim* measures;³⁶ it can only make an order striking out the case.³⁷

B. Access to Justice

Access to justice has been considered as the only means of preventing threatened infringement of individual rights or of obtaining remedy for infringement of right already committed.³⁸ Access to justice also means individuals in need of help, find effective solutions or remedies from the justice system, which are accessible and affordable to ordinary people.³⁹ It refers to judicial and administrative remedies and procedures available to a person

aggrieved or likely to be aggrieved by an issue.⁴⁰ It is a human right of an aggrieved person which must be dispensed fairly and speedily without discrimination, fear or favour.⁴¹ It also means simply the right or means of approaching the Court for redress or the right to secure social justice from the State.⁴² In civil matters or criminal proceedings, justice must be done to all the parties.⁴³ Access to justice, therefore, subsumes fair hearing and fair trial.

IV. PERSONAL JURISDICTION OF THE COURT

A. Automatic Jurisdiction and Direct Access to the African Court

Under Article 5 of the African Court Protocol certain parties have direct access to the African Court, namely: The African Commission, State Party and an African Inter-Governmental Organizations. These parties do not require Special Declaration for the Court to entertain petitions filed by them.⁴⁴ Statute of the Merged Court has extended the categories of parties that have direct access to the Court to include the Assembly, the Parliament and other organs of the African Union authorized by the Assembly; the African Committee of Experts on the Rights and Welfare of the Child; and the African National Human Rights Institutions and others.

B. Optional Jurisdiction and Indirect Access by Individuals and NGOs

Like the European system,⁴⁵ (unlike the Inter- American system), individuals and NGOs have standing to bring cases before the African Court.⁴⁶ But unlike in the European system, under the African system, individuals and NGOs have no direct access to the African Court, except the State against which the action is brought has accepted the Optional jurisdiction of the Court by making Special Declaration. The NGO must have observer status with the African Commission. These are the requirements of Articles 5(3) and 34 (6) of the African Court

Protocol. Articles 30(f) and 8(3) of the Merged Court Statute are almost a replication of Articles 5(3) and 34(6) of the African Court Protocol.

C. Legal Consequences of the Denial of Direct Access to Individuals and NGOs

Denial of individual direct access is by far the most controversial feature of both African Court and the Merged Court. This is predicated on the reason that in Africa, individuals are the most victims of human rights violations, who should be the most beneficiaries of any human rights enforcement mechanism; but due to high rate of illiteracy and poverty most of the victims find it difficult to seek redress in Court when their rights guaranteed by domestic laws or international human rights instruments are being violated.⁴⁷ Even those who are aware of their fundamental rights under their domestic laws only pursue them in domestic Courts. That is why most cases that have come before the African Commission were brought by NGOs on behalf of individual victims

The effect of denying individual and NGOs direct access to the African Court is that the discretion to allow direct access to the Courts lies with the African Commission and the target State. Articles 5(3) and 34(6) of the African Court Protocol, limit access to the Court over and above the prevailing limitations like exhaustion of domestic remedies.⁴⁸

Denial of direct access to individuals and NGOs depicts that accessing the Court will be difficult for most victims of human rights abuses in Africa. It is, in fact, *giving justice with one hand and taking it with the other hand*.⁴⁹ No doubt, he who cannot reach the Courts cannot talk of justice from the Courts.⁵⁰ The denial reveals lack of effective legal protection of human rights in Africa. It also shows that the problems of effective access, fair trial, power to give binding decisions, absence of legal representation, which affected and still affect the performance of African Commission will continue to *rear their ugly heads* indirectly under

the Court system. It was rightly pointed out that “if States did, over the years, decide that they wanted to make the Protocol establishing the Court more binding, they could, of course, accept *locus standi* for individuals and NGOs.”⁵¹ It is not surprising, therefore, that though the African Court Protocol entered into force in 2004 only 5 States out of the 26 States that have ratified the Protocol have made the Declaration.⁵² It is predicted on this point that the role of the Court might be relegated to the role of a puppet; and objectives of establishing the Court might be defeated.⁵³ It has been rightly pointed out that denial of direct access to individuals is a major obstacle to assessing the Court.⁵⁴ It is, therefore, not mind-boggling that since it was constituted, the African Court has not grasped the opportunity of considering the merits of cases that have come before it. We now consider some of the missed opportunities in turn.

V. SOME MISSED OPPORTUNITIES SO-FAR

A. *Michelot Yogogombaye v. The Republic of Senegal*⁵⁵

On 15 December 2009 the African Court delivered its first judgment in *Michelot's* case. The applicant is a Chadian National who instituted an action before the African Court against the Government of Senegal to prevent it from conducting the trial of the former Chadian Head of State, Hissene Habre in Dakar, Senegal, for charging him with crimes against humanity, specifically, torture committed in Chad between 1982 and December 1990. The Court declined jurisdiction because Senegal had not made the Special Declaration required by Article 34(6) of the Protocol.

B. *Daniel Amare and Mulegeta Amare v. Republic of Mozambique and Mozambique Airlines*⁵⁶

This was another case that involved violations of torture and freedom of movement under Articles 5 and 12 of the African Charter respectively, which the African Court would have considered on the merit to develop its jurisprudence. The Court declined jurisdiction because the Republic of Mozambique had not deposited the Declaration under the Protocol.

However, the Court invoked its discretionary power under Article 6(3) of the Protocol and transferred the case to the African Commission. The Court observed that in the light of the allegations made in the application the case was an appropriate matter for transfer to the Commission.

C. *Delta International Investment SA, Mr. Agade Lange and Mrs. M. De Lange v. The Republic of South Africa*⁵⁷

In a similar development, the applicant seized the African Court with a petition against the respondent for violations of the right against torture and their rights to dignity, property, information, privacy and discrimination under the South African Constitution and the African Charter. Again, the Court unanimously declared that in view of Articles 5(3) and 34(6) of the African Court Protocol, it manifestly lacked jurisdiction to receive the application and accordingly, struck out the case.

D. *Emmanuel Joseph Uko and Others v. The Republic of South Africa*⁵⁸
and Amir Adam Timan v. The Republic of Sudan⁵⁹

The applicants in the first case (Emmanuel and others) filed an action alleging violations of their rights under Articles 2,3,4,5,6,7,10,11,18 and 19 of the African Charter and Articles 7,

10, 12, 13,14,17,19,23,24, and 26 of the International Covenant on Civil and Political Rights.⁶⁰

In the second matter, the applicant (Amir Adam Timan), alleged violations of his rights under Articles 12(1),2,3,4 and 13 of the ICCPR on the ground that the Sudanese Government accused him of being a member of an opposing force to the legitimate Government of Sudan. As in Uko's case, the Court declined jurisdiction because the Government of Sudan has not made the Special Declaration allowing individuals and NGOs to institute action directly before the Court against it.

***E.. National Convention of Teachers Trade Union v. The Republic of Gabon*⁶¹**

This was a matter brought by the teachers, trade union leaders of the National Convention of Teachers Trade Union (CONASYSED) domiciled in Libreville, the Republic of Gabon to the African Court against the Republic of Gabon, for violations of trade union rights enshrined in the Universal Declaration of Human Rights;⁶² and Articles 10 and 15 of the African Charter. The African Court itself inquired and discovered that Gabon had not made the Special Declaration and the CONASYSED had no observer status with the African Commission as required by Article 34 (6). The Court declared that it lacked jurisdiction to entertain the matter.

***F. Femi Falana v. The African Union*⁶³**

The applicant alleged that he had made several attempts to get the Federal Republic of Nigeria comply with Article 34(6) of the African Court Protocol but to no avail; as a result, he was denied access to the African Court. Having made such fruitless attempts, the applicant filed his case against the African Union, as a representative of its Members, praying the African Court to declare Article 34(6) of the Protocol as inconsistent with Articles 1, 2, 7, 13,

26 and 66 of the African Charter” and “a violation of his right to freedom from discrimination, fair hearing and equal treatment and the right to be heard.” The Court invoked Articles 5(3) and 34(6) and struck out the matter on ground of lack of jurisdiction.

G. Comments

There is no doubt that in *Michelot's* case, if the Court had gone into the merit of the case, the Court would have dealt with the issues raised by the applicant; and this would have helped in the development of international law in Africa. These issues include: “functional immunity of the former Heads of State in relation to serious human rights violations”, the principle of universal jurisdiction; retroactivity of penal laws; status of a political asylum under the law on refugees- particularly the Convention Governing Specific Aspects of Refugee Problems in Africa; issues of access to the Court by individuals under the concept of personal jurisdiction, *et cetera*.

In other cases, the Court would have had the opportunities of considering and comparing some civil and political rights under the African Charter and the ICCPR, including the provisions on the right of individuals to enjoy the rights guaranteed by the African Charter without discrimination (Art. 2), right to equal protection of the law (3), right to life and integrity of person (Article 4), right to dignity of human person and against torture (Art. 5), right to liberty and security of his person (Art. 6), right to fair hearing (7), right to free association (Art. 10), right to assemble freely with others (Art. 11). It would have been an opportunity for the Court to distinguish these rights under the African Charter, which have restrictions (claw-back clauses), and those under the ICCPR that do not contain those clauses.

In *Emmanuel Uko's* case, the Court would have grasped the opportunity of interpreting, for the first time, Articles 18 and 19 of the African Charter dealing with obligation of State Parties to the Charter to protect the family and the duty of State to assist the family. The

golden opportunity of the Court to interpret the provisions on equality to all peoples and their equal enjoyment of respect and rights and the right against domination of a people by another would have also come.

It is difficult to understand why the African Court decided to refer *Daniel Amare's* case to the African Commission after declaring that it had no jurisdiction to entertain the matter.

Lawyers are beginning to wonder whether this was an appropriate step the African Court had taken, arguing that once a Court has no jurisdiction over a matter, the only option available, in the absence of any statutory provision to the contrary, is for the court to strike out the case.⁶⁴

The *National Convention of Teachers Trade Union's* case is significant because the Court declined jurisdiction not only on ground that Gabon had not made the Special Declaration but also that CONASYSED had no observer status with the African Commission as required by the Protocol.

It is important to distinguish *Falana's* case from the other cases. *Falana's* case demonstrates the concern and reaction of individuals to the legal consequence of Article 34(6) of the African Court Protocol. The Court declined jurisdiction not because Nigeria has not made the Special Declaration but because “what is envisaged by Article 34(6) in particular is precisely the situation where applications from individuals and NGOs are brought against State Parties,” not the African Union. But like the other cases, the Court would have had the opportunity of interpreting some provisions of the African Charter, namely: the right to access public property and services (Art. 13(3)); duty of State Parties to guarantee the independence of the Courts (Art. 26); the power to adopt Special Protocols or Agreements to supplement the provisions of the African Charter (Art. 66) and the condition for exhaustion of domestic remedies. These are missed opportunities; some of which the ECOWAS Court of

Justice has grasped to interpret various provisions of the African Charter and other international human rights instruments.

VI. ECOWAS COMMUNITY COURT OF JUSTICE

A. Establishment and Composition

The original Treaty of ECOWAS was aimed at promoting co-operation and development in all fields of economic activity for the purpose of raising the standard of living of the ECOWAS citizens, increasing and maintenance of economic stability, fostering closer relations among member states and contributing to the progress and development of the African continent.⁶⁵

By 1991 a Protocol was adopted,⁶⁶ which created the ECOWAS Court of Justice as the principal organ of the ECOWAS. The Protocol enjoined the Court “to ensure the observance of law and the principle of equity.” This is so as the primary objective of administration of justice is to render justice according to law.⁶⁷

By 1993, the 1975 Treaty was revised and adopted as the ECOWAS Revised Treaty.⁶⁸ Article 3(1) of the Revised Treaty reiterated the objective of ECOWAS under Article 2(1) of the 1975 Treaty. To achieve the objectives, the high contracting parties declared their adherence to the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter. The ECOWAS Court remains the judicial organ of the Organization.⁶⁹

The ECOWAS Court is composed of seven independent judges (not below the age of 40), including a President and a Vice-President, elected from nationals of Member States who are persons of high moral character and possess the qualification required in their respective countries for appointment to the highest judicial offices or who are *juris consult* of

recognized competence in international law;⁷⁰ and versed in areas of community law or regional integration.⁷¹ Although, there is no mandatory requirement for knowledge of human rights for a person to be qualified for appointment, it is my observation that this requirement is necessary.

C. Problems of Personal Jurisdiction and Access to the ECOWAS Court by Individuals and NGOs under the ECOWAS Court Protocol

A perusal of Article 9 of the ECOWAS Court Protocol reveals the following points:

- (i) The ECOWAS Court has jurisdiction or competence in respect of any dispute regarding the interpretation or the application of the provisions of ECOWAS Treaty, when the disputes could not be settled amicably through direct agreement by the parties;
- (ii) Competent parties to the ECOWAS Court are: Member States, the Authority of Heads of State and institutions of the Community;
- (iii) Only a Member State could institute proceedings against another Member State or institution of the ECOWAS on behalf of individuals;
- (iv) In either case, the proceedings can only be instituted after attempts to settle the dispute amicably have failed.

The provisions of Article 9 raised a fundamental issue of access to the ECOWAS Court by individuals. The “narrow field of access,” affected the impact the ECOWAS Court could have had in West African Sub-region.⁷² It also amounted to a denial of fundamental right of ECOWAS citizens. It was, therefore, not surprising that, though the Court commenced operation in July 2002, it was redundant until 2004.⁷³ As in African Commission system, States and institutions of the ECOWAS that had direct access to the Court were not willing to file any case before the Court.⁷⁴

VII. MOVING FROM OBSTACLE TO MIRACLE

A. *Afolabi Olajide v. Federal Republic of Nigeria*⁷⁵-*The Whistle Blower*

The fact that individuals were not given direct access or could only access the ECOWAS Court through State Parties; and NGOs were not even recognized in the scheme of things, did not go well with individuals. The first case that *blew the whistle* was *Olajide's case*. The plaintiff challenged the closure by Nigeria of its border with Benin Republic as violations of his right to freedom of movement under the ECOWAS Protocol on Free Movement of Persons, Right of Residence and Establishment and the African Charter. The defendant raised a preliminary objection that the plaintiff had no *locus standi* to maintain the action. The ECOWAS Court upheld this submission and declared that under the Protocol only Member States were competent to institute matters before the Court. Accordingly, the case was struck out.

The Court missed the opportunity of considering the human rights issues raised by the applicant. This could have been avoided if the ECOWAS Court Protocol or the Revised Treaty had given the ECOWAS Court power to entertain matters filed by individuals.

Some writers have argued that there were sufficient human rights contents in the constitutional and other legislative instruments of ECOWAS to sustain the exercise of human rights competence by ECOWAS institutions.⁷⁶ It was even argued that going by the arguments presented by the parties; “an activist Court could have viewed the matter differently.”⁷⁷ I find it difficult to concur with these arguments on the basis that jurisdiction is a question of law not facts. ECOWAS Court, like other Courts, is a creation of law; it is the law that created a particular Court that conferred the Court with its jurisdiction.⁷⁸ I am rather convinced to say that the ECOWAS Court was right, as it did, in upholding the argument of

the respondent, warning that the Court should not usurp the legislative function of redrafting the clear provisions of the Protocol.⁷⁹

B. the Aftermath of Olajide's case and the Innovations brought by the Supplementary Protocol, 2005

Olajide's case sparked a quick response of the imperative to amend the ECOWAS Court Protocol to give room for individual direct access to the ECOWAS Court. The case catapulted a rethink over “the new visibility of human rights in the Community agenda (that) prompted the amendment of the 1991 Protocol....”⁸⁰ This right thinking direction culminated in the adoption of the Supplementary Protocol, 2005⁸¹ to overcome the obstacle. This was a triumphant step in the human rights movement in West African sub-region. The amendment of the Protocol did not come by surprise. Under the Supplementary Protocol, the ECOWAS State Parties were mindful of Article 33 of the Protocol, which allowed President of the Court, after consultation with other Members, to submit proposals for an amendment of the Protocol.⁸² Thus, judges of the Court did not *leave any stone unturned* on the step towards the new and additional legal framework. The Members of the ECOWAS were also desirous to facilitate the task of the Court by expanding its competence and powers and to ensure the smooth operations of the Court.⁸³

The most important and significant innovations made by the Supplementary Protocol are contained in Articles 3 and 4 dealing with jurisdiction of and access to the ECOWAS Court respectively. Under the new legal regime, Article 9 of the ECOWAS Court Protocol was substituted by new provisions including the “competence of the ECOWAS Court to adjudicate on any dispute relating to the interpretation and application of the Treaty, Convention and Protocols of the Community.”⁸⁴ The new Article 9 also grant jurisdiction to

the ECOWAS Court, “to determine cases of violation of human rights that occur in any Member State.”⁸⁵

In overcoming the obstacle of individual direct access to the ECOWAS Court, Article 4 of the Supplementary Protocol, introduced a new Article 10 of the ECOWAS Protocol. Under Article 10(d), access to the Court is open to individuals on application for relief for violation of their human rights. However, the application must not be anonymous; nor be made whilst the same matter has been instituted before another International Court for adjudication.

Individuals and corporate bodies also have *standi* in “proceedings for the determination of an act or inaction of a community official that violates the rights of the individual or corporate body.”⁸⁶ The Supplementary Protocol also allows domestic courts or any of the parties to the action to refer an issue to the African Court for interpretation.⁸⁷ This is an extension of the advisory jurisdiction of the ECOWAS Court to individuals and domestic Courts.

D. Some Grasped Opportunities and Significant Laid- down Principles

Since 2005, when the Supplementary Protocol was adopted, the ECOWAS Court has grasped the opportunities of laying down some principles. In all, the Court has decided a total number of 64 cases,⁸⁸ ranging from the interpretation of the African Charter, including the civil and political rights- the rights against torture, slavery and slave trading, the right to freedom of movement, right to fair trial, *et cetera*. It is gratifying to say that these are some of the opportunities missed by the African Court.

The Court has also grasped the opportunities of considering and interpreting the socio-economic rights under the International Covenant on Economic Social and Cultural Rights⁸⁹ and the African Charter. These include “the right to a general satisfactory environment favourable to their development.”⁹⁰ According to the Court, “...the duty assigned by Article

24 to each State party to the (African) Charter is both an obligation of attitude and an obligation of result...”⁹¹

Also, the ECOWAS Court has gotten the golden opportunity of interpreting the principle of equal works for equal salary under the right to work under equitable and satisfactory conditions and equal pay for equal work,⁹² stating that it “it also signifies that the employer is bound to offer the same remuneration to salaried workers placed placed under the same conditions.”⁹³ the right to health, adequate standard of living and right to economic and social development of the people, *et cetera*.

In another development, the ECOWAS Court laid down the principle that ECOWAS Court is not competent to adjudicate or revise the decisions of domestic or National Court of Member States. The Court predicated this decision on the notion that the ECOWAS Court is neither a Court of Appeal nor a Court of Cassation (*Courde Cassation*).⁹⁴ The Court has also held similarly that it does not have the mandate to examine the Laws of Member States of the ECOWAS in *abstracto*.⁹⁵

The ECOWAS Court has made the point clear that going by the provisions of Article 10(d) of the Supplementary protocol, the rule of exhaustion of domestic remedies is not applicable before the (ECOWAS) Court. Article 10(d), it was pointed out, is *lex specialis* to the general rule because what it advocates for, derogates from the general principle of international law.⁹⁶ The Court has no duty to add to the Supplementary Protocol conditions that have not been provided for by the texts, as doing so the Court will be violating the rights of the individuals.⁹⁷

In *Maneh v. Republic of Gambia*,⁹⁸ the ECOWAS Court revealed that Articles 9(4) of the 1991 Protocol and 10(d) of the Supplementary Protocol do not only enable an individual to access the Court directly in human rights issues, but also give the Court the competence to

entertain such applications. The Court rejected the request that the absence of the condition of exhaustion of domestic remedies should be filled by the Court's practice, reasoning that since the Community Lawmaker of the ECOWAS has responded to the practice in international law that States may renounce the benefits of the rule of exhaustion of domestic remedies, the renunciation is binding on all the Member States of ECOWAS.⁹⁹

The ECOWAS Court has also explicitly stated that that the question of exhaustion of local or domestic remedies does not arise in matters involving persons enjoying diplomatic immunity from the national Courts;¹⁰⁰ and any dispute between individuals for alleged violation of human rights, the natural and proper venue to plead the case is the domestic Court of the State Party where the violation occurred. But the matter can be brought before an international Court, where there is absence of appropriate and effective forum for seeking redress by individuals at the domestic forum, against a State Party for failure to ensure the protection and respect of the right allegedly violated.¹⁰¹

Though ECOWAS Court applies the provisions of the African Charter, the Court has declared that it glaring that it does not necessarily need to do so in the same manner the African Commission applies the Charter.¹⁰² The Court has also declared that though ECOWAS has not adopted a specific instrument recognizing human rights, the Court's human rights protection mandate is exercised with regard to all international instruments to which the Member States of ECOWAS are parties. This in turn depicts that Member State Parties to the Revised Treaty have renewed their allegiance to the said texts within the framework of ECOWAS.¹⁰³ This broad subject matter jurisdiction of the ECOWAS Court can be compared with the subject matter jurisdiction of the African Court under Article 3 of the Court's Protocol.

It has been established in some cases that provided the right violated or alleged to be violated is enshrined in an international instrument that binds a Member State, the domestic legislation of that State cannot prevail on the international treaty, even if it is the Constitution of the State concerned.¹⁰⁴ The Court considered the invocation of lack of justiciability of socio-economic rights to justify non-accountability as “completely baseless.”¹⁰⁵ It also noted that “... in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing.”¹⁰⁶

The ECOWAS Court has emphasized emphatically that it is not bound by the precedents of other international Courts; the best it can do is to draw some useful lessons from their judgments, especially when the issues are similar- meaning that decisions of other international Courts can only be of persuasive value to the ECOWAS Court.¹⁰⁷

VIII. CONCLUDING COMMENTS: AN ABORTIVE EXERCISE OR STILL A GLIMMER OF HOPE

Since the coming into force of the African Court Protocol till date (2013), African Court has not registered any significant achievement. The question that has come to the fore is whether the Court has come to fruition or its establishment is an abortive exercise.¹⁰⁸ Taking into account the legal consequence of denial of individual direct access and the opportunities missed by the African Court so- far on the one hand; and the positive impact of direct access by individuals and NGOs to the ECOWAS Court and the extent to which ECOWAS Court itself has *blown its own trumpet* to protect human rights in the West African sub-region on the other hand, one may be tempted to conclude that the establishment of the African Court and the Merged Court is an abortive exercise. But such a conclusion may be too soon and too quickly; when considering the trends and developments in the European human rights enforcement mechanisms from 1950, when the European Convention was adopted, to 1998,

when Protocol 11,¹⁰⁹ allowing individuals and NGOs direct access to the European Permanent Court of Human Rights was adopted. The African system is a replica of the European model. When the European Court was created, individuals and NGOs had no direct access to the Court. Individuals filed their cases before the European Commission which served as a filtering mechanism. In 1950, when the European Court was adopted, only 3 out of the 10 States that ratified the European Convention had made the Declaration accepting individual petitions. The number rose to 10 out of 15 in 1960; and continued to increase until the States that were reluctant to make the Declaration became increasingly marginalized. This development ultimately culminated to the adoption of Protocol 11 in 1998.¹¹⁰ The Protocol imposes the individual recourse to all states parties. When these developments are taken into consideration, it is convincing to counter conclude that, though the African Court is not reaching fruition, there is still a glimmer of hope that the Court will do so. It is never too late to make the Court a fruitful human rights enforcement mechanism in Africa. All that is required is to adopt the ECOWAS approach and all the stakeholders should *grasp the nettle and take the bull by the horns*. It is on this basis that this paper proffered the following recommendations:

That at the onset of the adoption of the African Court Protocol, individuals and NGOs are given indirect access to the African Court is a good beginning compared to the ECOWAS system prior to the adoption of the Supplementary Protocol, 2005, where individuals' grievances could only be addressed by their respective States on their behalf. What is needed under the present dispensation is the adoption of additional Protocol to the African Court Protocol or Protocol of the Merged Court, adding individuals and NGOs to the parties that have direct access to the African Court or the Merged Court. The Court should also be given the power to entertain matters filed by individuals and NGOs.

In addition, the requirement of exhaustion of local remedies should be expunged and emphasis should be placed on attempts for amicable settlement. If it is necessary for the condition to be left to exist, the African Court and later the human rights section of the Merged Court should, as the African Commission did, relax the rule.

Even with the current system of indirect access to the African Court by individuals and NGOs, the Court can play pivotal role for these parties to have effective access to the African Court. First, by Article 6(3) of the African Court Protocol, the Court may refer matters to the African Commission. It is suggested that the Court should take advantage of this provision, most especially where the matter is filed against State Party that has not made the Special Declaration. Where, therefore, the Court exercises its discretionary power under Article 6(3) of the African Court Protocol, it should endeavour to “transmit to the Commission copy of the entire pleadings so far filed,”¹¹¹ without delay. The African Court utilized its power of referral in the case of *Daniel Amare and Mulegeta Amare v. Republic of Mozambique and Mozambique Airlines*.¹¹² However, it is suggested that when the African Court intends to transfer a matter to the African Commission, it should not sit on the matter to determine the issue of jurisdiction before the transfer, as doing so, the only option is that of striking out the matter.¹¹³

Another opportunity is for the Court to make an *interim* order in accordance with Article 27 of the African Court Protocol, where irreparable damage is likely to occur. In at least three cases the Court has granted an *interim* relief, even where the African Commission did not request for such relief. In *African Commission v. Great Socialist people’s Libyan Arab Jamahiriya*,¹¹⁴ the African Court unanimously ordered that Libya must “immediately refrain from any action that would result in loss of life or violation of physical integrity of persons.” Also in *African Commission on Human and Peoples’ Rights v. The Republic of Kenya*,¹¹⁵ the African Court ordered that the Republic of Kenya should immediately reinstate the

restrictions it imposed on land transactions in the Mau Forest Complex and refrain from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application. In a more recent case of *African Commission v. Libya*,¹¹⁶ the African Court again ordered Libya to, among other things, refrain from all judicial proceedings, investigations or detention that could cause irreparable damage to the Detainee. In all the cases, the Court ordered that the African Commission must report to it within 15 days from the date of receipt of the Order, on the measures taken to implement the Order.” This step is highly commended and recommended for all cases where the need to prevent irreparable damage arises.

However, as the Court does not have independent enforcement power of its own orders or judgments, African States should be willing to obey the order of the Court or else the best it can do is to report annually to the Assembly.¹¹⁷ Unfortunately, Libyan Government ignored the first order the Court made against it (Libya).¹¹⁸ But whether the African Court is making an *interim* order or referring the matter to the African Commission, it is suggested that the Court should dispense the matters quickly as *justice delayed is justice denied*. The practice of the Commission in delaying cases before discharging them should be abandoned by the African Court.

African Commission was the only implementation mechanism established under the African Charter with a tripartite mandate, including educational or promotional mandate. The Commission should first realize that one of its promotional problems that catapulted the idea of establishing the African Court was lack of effective access to the Commission by individuals. The problem emanated from lack of awareness of the Commission and its activities. This problem should be tackled under the Court system. The promotional mandate

of the Commission should extend to the popularization of the existence of the Court, its jurisdiction- contentious and advisory-and how individuals and NGOs can access to the Court through the African Commission. The method of accessing the Court through the African Commission is potentially very important because the right to access the African Court (or the Merged Court), enables the Commission to have its own non- binding recommendations converted to legally binding decisions.¹¹⁹ The promotional mandate of the Commission should also extend to training of African lawyers on the Law and Procedures of the African Court and later the merged Court. This is very important because a perusal of some of the cases filed by African lawyers reveals that the lawyers are not conversant with the Law and Procedures of the African Court.¹²⁰

In the long-run, the African human rights system should follow the European model by merging the temporary African Court or the Merged Court and the African Commission to form a permanent Court of Human Rights or a permanent Court of Justice and Human Rights. This may take some years; but it is better late than never.

Biography: Timothy F. Yerima hails from Taraba State, Nigeria. He obtained his LL.B., LL.M. and Ph.D. in Nigeria. He attended the Nigerian Law School and has been called to the Nigerian Bar. He is currently an Associate Professor and Dean, Faculty of Law, Kogi State University, Anyigba, Nigeria.

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⁴ *Ibid*, Art. 45.

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⁶ T. F. Yerima, 2011, *Human and Peoples’ Rights: The Efficacy of Enforcement Mechanisms under the African Human Rights System*, Germany: VDM VerlagDr. Muller GmbH, at 129-141.

⁷ African Court Protocol, Art. 2.

⁸ *Ibid*, arts. 2-5.

⁹ See Resolution AHG/8 Dec. 1993, (XXX) (the Cairo Declaration) RADIC 6, at 158.

¹⁰ Wachira, *supra*, note 5.

¹¹ See Constitutive Act of the AU, 2000, OAU Doc. CAB/LFG/23.

¹² Protocol and Statute of the African Court of Justice and Human Rights, available at http://www.hurisa.org.za/Advocacy/AfricanCourt/single_Legal_instrument [hereinafter

Protocol of the Merged Court and Statute of the Merged Court)

¹³ *Ibid.*, Art. 1.

¹⁴ *Ibid.*, Art. 3.

¹⁵ *Ibid.*, Art. 7.

¹⁶ *Ibid.*, Art. 5.

¹⁷ Protocol (A/PI/7/91): on the Community Court of Justice, 1991 (hereafter ECOWAS Court Protocol or Protocol).

¹⁸ East African Community Treaty, 1999, Art. 9(1)(e). The Court is one of the organs and institutions of the revitalized East African Community.

¹⁹ Treaty Establishing the South African Development Community, Aug. 27, 1992, 32 I.L.M. 116 (1993) [hereinafter SADC Treaty], Art. 9.

²⁰ Originally, the ECOWAS consisted of 15 Member States: Benin, Burkina Faso, Cote d'voire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Cape Verde joined in 1975, thereby, increasing the number to 16. See Falana, 2010, *ECOWAS Court: Law and Practice*, Lagos-Nig.: Legal Text Publishing, at 1.

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²² Anne Pieter, 2005, "The New African Court on Human and Peoples' Rights: Towards an Effective Protection Mechanism for Africa?", *Leiden Journal of Inter'l Law*, Vol. 18, No. 1 at 114.

²³ Sheila B., (ed.), 2001, *Osborn's Concise Law Dictionary*, 9th edn. London: Sweet & Maxwell, at 220.

²⁴ *Frank C. Ukor v. Richard Laleye and 1 Anor.*, ECW/CCJ/APP/04/05.

²⁵ (2011) 4 NWLR (Pt. 1236).

²⁶ See *Madukolu v. Nkemdilim* (1962) SC 172; *Sule v. Nigerian Cotton Board* (2003. 38 WRN 85; *CBN v. Auto Import Export* (2013) 2 NWLR (Pt. 1337) 93 at 132; *Madayedupin v. Olaninoran* (2013) 1 NWLR (Pt. 1334) 180 at 204-205.

²⁷ *Etim Moses Essien v. The Republic of Gambia and University of Gambia*, ECW/CCJ”APP/05/05; *United Parcel Service v. Kosoko Adeyesoye* (2011) 5 NWLR (Pt. 1240), 317 at 329 *per* Shoremi JCA). See also *Nwabunwanne v. Okoye* (2013) 3 WRN 119 at 129 *per* Lokulo-Sodipe JCA; *Seven-Up Co. v. Akinware* (2011) NWLR (Pt. 1270) 306.

²⁸ See *Utih v. Onoyivire* (1991) 1 SCNJ 25 at 49, *per* Bello CJN.

²⁹ See *Theobros Auto-Link Ltd. v. Bakley Inter’l Auto Engineering Co. Ltd.* (2013) 2 NWLR (Pt. 1338) 340 at 350.

³⁰ See *Lagos State Water Corporation v. Sakamori Construction Nig. Ltd.* (2011) 12 NWLR (Pt. 1262) C.A.

³¹ *Femi Falana & 1 Anor. v. The Republic of Benin & 2 Others* [2010], CCJLR (PT3), 118 at 126.

³² *Anao v. Sun Publishing Ltd.* (2013) 3 NWLR (Pt. 1341) *per* Shoremi JCA 401 at 412

³³ (2011) (See p. 929 at 951-952).

³⁴ See *Lagos State Water Corporation*, *supra*, 579 at 595. See also *S.C.C. Nig.*, see also *Central Bank of Nigeria v. Auto Import Export* (2013) 2 NWLR (Pt. 1337) 93 at 132.

³⁵ *Falana’s case*, *supra*, note 31, 120 at 132.

³⁶ See *Baghdadi Ali Mahmoudi v. The Republic of Tunisia*, Appl. 007/2012.

³⁷ See *Senator Y.G. Lado & 42 Ors. v. Congress For Progressive Change (CPC) & 47 Ors* (2011) 8 NWLR (Pt. 1229) 699 at 730-731, *per* Onnoghen JSC.

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³⁹ M.T. Ladan, 2005-2006, “Towards an Effective African System for Access to Justice in Environmental Matters”, *Ahmadu Bello Univ. Journ. (ABU L.T.)* Vols. 23-24, at 10.

⁴⁰ M. T. Ladan, 2011, “Enhancing Access to Justice in Criminal Matters: Possible Areas for Reform in Nigeria,” *Nigerian Bar Journal*, Vol. 7, No. 1, at 35.

⁴¹ M.T. Ladan, 2007, *Biodiversity, Environmental Litigation, Human Rights and Access to Environmental Justice*, Zaria: Faith Printers International, at 46.

⁴² Femi Falana, 2004, “Access to Justice, Bill of Rights and Independence of the Judiciary,” in M. M. Gidado, *et al* (eds.), *Constitutional Essays: Nigeria Beyond 1999: Stabilising the Polity through Constitutional Re-Engineering*, Enugu: Chenglo Ltd, at 226.

⁴³ T.F. Yerima, 2002, “Compensation for Victims of Crime in the Administration of Criminal Justice in Nigeria,” *The Univ. of Ado-Ekiti Law Journal*, at 67.

⁴⁴ African Human Rights Court Protocol, Art. 34 (3).

⁴⁵ Protocol 11 of the Revised European Convention, Art.34.

⁴⁶ Inter-American Convention, Art. 62.

⁴⁷ It has been pointed out that a great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. See U.O Umozurike., 1997, *The African Charter on Human and Peoples’ Rights*, The Hague: Martinus Nijhoff Publishers, at 22.

⁴⁸ N. B. Pityana , 2003, “The African Court on human and Peoples’ Rights in Municipal Law,” Seminar for Eastern and Southern African Sates on the “Ratification of the Protocol to the African charter... on the Establishment of the African Court on Human and Peoples’ Rights,” Gaborone, Botsana , available at <http://www.unisa.ac.za/contents/about/principle/docs/municipal> law.

⁴⁹ T. F. Yerima, 2010, “Giving Justice with the Left Hand and Seizing it with the Right Hand: Denial of Individual Direct Access to the African Regional Human Rights Courts,” *Kogi State Bi-Annual Journal of Public Law*, Vol. 3, No. 1, at 47.

⁵⁰ *Attorney-General, Kaduna State v. Hassan* (1985) NWLR, 483 at 522.

⁵¹ Rebecca Wright, 2006, “Finding an Impetus for Institutional Change at the African Court on Human and Peoples’ Rights,” *24 Berbeley Journal of Inter’l Law*, at 482.

⁵² The states that have made the Special Declaration are: Burkina Faso, Ghana, Malawi, Mali and Tanzania, available at <http://www.au.int/en/sites/default/files/992achpr.pdf>.

⁵³ Association for the Prevention of Torture, 2000 “African Court on Human and Peoples’ Rights,” Geneva.

⁵⁴ Wachira, *supra*, note 5.

⁵⁵ Application No. 001/2008 available at <http://www.african.court.org/en/cases/latest-judgment/>.

⁵⁶ Appic. No. 005/2011.

⁵⁷ App. 002/2012.

⁵⁸ App.004/2012.

⁵⁹ Appl. 005/2012.

⁶⁰ International Covenant on Civil and Political Rights, 1966, G.A. Res. 2200 A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16 at 52, U.N. Doc. A/6316, [hereinafter ICCPR].

⁶¹ Appl. No.012/2011.

⁶² Universal Declaration of Human Rights, 1948, G.A. Res. 217 (III), U.N. Doc. A/810 at 70 [hereinafter UDHR].

⁶³ Appl. No. 001/2011..

⁶⁴ This issue cropped up at the forum of Nigerian Bar Association (NBA) for training lawyers on African Regional Mechanisms for the Protection and Enforcement of Human Rights, Enewi-Nigeria, in 2012, where I presented a paper as a resource person on the subject.

⁶⁵ Treaty of the Economic Community of West African States (ECOWAS), May 28, 1975, 14 I.L.M. 1200, 1975(herein after ECOWAS Treaty or Treaty), Art. 2(1).

⁶⁶ ECOWAS Court Protocol, *supra*, note 17.

⁶⁷ M. T. Ladan, 2009, *Introduction to ECOWAS Community Law and Practice: Integration, Migration, Human Rights, Access to Justice, Peace and Security*, Zaria-Nig.: ABU Press, at 253.

⁶⁸ Revised Treaty was signed in Contonou, Benin on July 24, 1993 by all the Member States of the Community. The Revised Treaty entered into force on August 23, 1993.

⁶⁹ Arts. 6 & 15 of the ECOWAS Revised Treaty.

⁷⁰ ECOWAS Court Protocol, Arts. 1,2 & 7.

⁷¹ Supplementary Protocol A/SP.3/06, New Art. 3 in Art. 2.

⁷² ECOWAS CCJ, “Court of Justice of the Economic Community of West African States,” available at <http://www.aict-ctia.org/courts-subreg/ecowas-home.html>

⁷³ Femi Falana, *supra*, 20, at 17. See also A. I. Bappah, 2008-2009, “An Appraisal of the Legal and Institutional Framework of Economic Community of West African States,” *Kogi State University Law Journal*, Vols. 2 &3, at 17.

⁷⁴ Since its inception, the African Commission has heard only one case brought by a State against another State-*DR Congo* against *Burundi*, Rwanda and Uganda.

⁷⁵ Unreported Suit No. 2004/ECW/CCJ/04.

⁷⁶ S. T. Eborah, “A Critical Analysis of the Human Rights Mandate of the ECOWAS Community Court of Justice,” at 17 available at www.escr-net.org/usr-doc/s-eborah.pdf.

⁷⁷ See Franz. Viljeon, 2007, *International Human Rights Law in Africa*, Oxford: Oxford University Press, p. 507.

⁷⁸ See *Anao v. Sun Publishing Ltd*(2013) 3 NWLR (Pt1341), *per* Shoremi J.C.A. 401 at 412; *Okulate v. Awosanya* (2000), 2 NWLR (Pt 646), at 530.

⁷⁹ Viljeon, *supra*, note 77.

⁸⁰ Eborah, *supra* note 76.

⁸¹ Supplementary Protocol A/SP.1/1/05, 2005, Amending the Protocol Relating to the Community Court of Justice, (hereinafter Supplementary Protocol or Protocol).

⁸² *Ibid*, Preamble, para.2.

⁸³ *Ibid*, paras. 9 and 10.

⁸⁴ New Art. 9(1)(a) of the ECOWAS Court Protocol as introduced by the Art. 3 of the Supplementary Protocol, 2005.

⁸⁵ See New Article 9(4) as introduced by Art. 3 of the Supplementary Protocol.

⁸⁶ Supplementary Protocol, Art. 10(c).

⁸⁷ *Ibid*, Art.10(f).

⁸⁸ The breakdown of the cases is as follows: 1 in 2004, 4 in 2005, 2 in 2006, 5 in 2007, 8 in 2008, 8 in 2009, 7 in 2010, 15 in 2011, 17 in 2012 and 1 in 2013. For detail of the list, see Community Court of Justice: “List of decided Cases From 2004 till Date,” available at http://www.courtecowas.org/site2012/index.php?option=com_conte.

⁸⁹ International Covenant on Economic, Social and Cultural Rights, 1966, G.A. Res. 2200 A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16 at 49, U.N. Doc. A/6316, [hereinafter ICESCR].

⁹⁰ *SERAP v. Federal Republic of Nigeria*, ECW/CCJ/JUD/18/12, at 24.

⁹¹ *Ibid*, at 25.

⁹² African Charter, Art.15.

⁹³ *Essien v. Republic of Gambia & Government*, ECW/CCJ/APP/05/07.

⁹⁴ *Moussa Leo Kaita v. The State of Mali*, ECW/CCJ/APP/03/07.

⁹⁵ *Koraou v. Republic of Niger*, ECW/CCJ/JUD/01/07).

⁹⁶ *Femi Falana's case*, *supra*, note 31,120 at 130.

⁹⁷ *Ibid*, 14.

⁹⁸ [2009] C.C.J.L.R[PT.2], 121 at133-134.

⁹⁹ The Court relied on the case of *De Wilde Vlersyp v. Belgium*, 18th June 1971.

¹⁰⁰ *S. I. Ltd v. President, ECOWAS Commission*, ECW/CCJ/APP/01/06..

¹⁰¹ *Ibid*.

¹⁰² *S.I. Ltd' case*, *supra*, note 100.

¹⁰³ *Amouzou Henri v. Rep. of Cote d'voire* (2009); *Aliyu Tasheku v. Fed. Rep. of . Nig.* (2012).

¹⁰⁴ *SERAP v. Federal Republic of Nigeria & Universal Basic Education Commission*, *SERAP v. Federal Rep. of Nig* N EW/CCJ/JUD/18/12.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Manah's case*, *supra*, note 98.

¹⁰⁸ *Wachira*, *supra*, note 5.

¹⁰⁹ Eleventh Protocol was adopted on 11 May 1994 (entered into force on 1 Nov. 1998) [hereinafter Eleventh Protocol].

¹¹⁰ International Federation for Human Rights (FIDR), 2004, *10 Keys to Understand and Use the African Court on Human and Peoples' Rights- A Users guide for victims of human rights violations in Africa and human rights defenders*, available at www.fidh.org.

¹¹¹ See Rule 29(3) of the Rules of Procedure.

¹¹² *Supra*, note 56.

¹¹³ *Falana's case*, *supra*, note 31, 120 at132, *Baghdadi Ali Mahmoudi v. The Republic of Tunisia*, Appl. 007/2012, *Senator Y Lado & 42 Ors. v. Congress For Progressive Change (CPC) & 47 Ors* (2011) 8.

¹¹⁴ APPL. NO. 004/2011.

¹¹⁵ APP. NO. 006/2012.

¹¹⁶ APP. NO. 002/2013.

¹¹⁷ African Court Protocol, Art. 29.

¹¹⁸ Anna Doldze, “African Court on Human and Peoples’ Rights- Response to the Situation in Libya,” *Insights-American Society of Inter;l Law*, Vol. 15, issue 20, available at www.asil.org/pdfs/insights/inights10725.pdf.

¹¹⁹ Anne Pieter, *supra*, note 22., at 21.

¹²⁰ For example in *Youssef Ababou v. Kingdom of Morocco*, APP. NO. 007/2011, where the matter was brought against Morocco, even when the State was not a member of the African Union and had neither signed nor ratified the Protocol establishing the Court.

Predatory Pricing in India: The Uncatchable Prey?

Sandeep Suresh

Abstract

As the aim of Competition Law is to promote economic efficiency by increasing competition between firms, it is crucial to identify abusive practices like predatory pricing and employ strict actions. Predatory pricing i:e the sale of goods at a price below costs to reduce competition in the market, adversely drives out competitors and attains monopolist position for a dominant firm. However, the slender line of difference between valid competitive prices and predatory prices makes the approach of Competition authorities towards predation skeptical. The objective of this paper is to critically evaluate the practice of predatory pricing in India with a comparative approach. The main predicament in identifying predation is the difficulty of differentiating predatory pricing from competitive price reduction. However significant the popular Average Variable Cost Test is, the drawback of using cost based tests alone is that all the firms facing losses could possibly be charged of predation. Therefore, Recoupment and Consumer Betterment tests need more attention. More importantly, appropriate implementation of a three-tier enforcement system including assessment of the market structure, AVC Test and various non-cost tests, and introduction of specialised provisions in the relevant statute can make identification of predatory pricing accurate.

1. Introduction

One of the benefits of competition is the downhill pressure it puts on the pricing policies of business firms. In clearer terms, fair competition in the market leads to regulation of price levels which ultimately benefits the consumers. Competition law aims to make markets more competitive, with the ultimate aim, of low consumer prices, or more generally of high consumer welfare.¹ On these terms, the concept of *predatory pricing* may appear a paradox, because the traditional predatory pricing theory asserts that a low price is anti-competitive.²

To understand this paradox, the nature of predatory pricing needs scrutiny. Predatory behaviour constitutes a class of anti-competitive action where prices are set so low as to eliminate competing firms and thereby, threaten the competitive process itself.³ More specifically, predatory pricing refers to the situation where a dominant firm reduces its price below the cost level for a period of time during which it will be able to eliminate a competitor(s) from the market with the aim of charging higher prices in the long run to gain more profits and monopoly in that market.⁴ In these circumstances, consumers may benefit in the short run from lower prices, but, in the longer term, weakened competition will lead to higher prices, thus, imposing a net long term injury on consumers.⁵ Based on the traditional theory of predatory pricing, it can be noted that this malpractice is an exclusionary practice. The reasoning being that it deters potential rivals from entering the monopolist's market, or existing rivals from increasing their output in response to the monopolist's price increase.⁶ Maher M. Dabbah very aptly describes predatory pricing as '*an investment in future monopoly, as sacrifice of today's profits for tomorrow*'.⁷

However, the reality has shown us that simplicity of such an explanation of predatory pricing is only a disguise of the extremely intricate character of this economic concept. The main concern regarding predatory pricing is that as competition in markets mainly strives towards regulating price levels for the betterment of consumers, the line to be drawn between low prices arising out of predation and those which arise due to fair competition is very slender. In today's globalised world, survival in the market is difficult for each firm due to heavy competition from within the nation and foreign as well. Consequentially, price reductions as a strategy to deal with such market dynamics are common. Therefore, economists today typically approach allegations of predatory pricing with a degree of skepticism because fair competition and its beneficial consequences cannot be thwarted by very strict regulatory measures. The attempts to control predatory pricing may turn out to be a

use of a *double edged sword*. To add more obscurity to the problem of identification of predatory pricing, businesses put forward various justifications for low prices that are alleged to be predatory. Meeting competition, short term promotional offers to familiarise a new product in the market, loss leading, unanticipated shocks due to fluctuations in demand or costs, and mistake are the most common defenses.

Therefore, it is seen that predatory pricing poses a big dilemma for competition regulators. However, this dilemma cannot be kept unsolved. As the aim of competition law is to promote economic efficiency by increasing competition between firms, it is crucial to identify abusive practices like predatory pricing and employ strict actions. Hence, it is the need of the hour to formulate a uniform and fool proof enforcement system to identify and regulate predatory pricing. The aim of this paper is in that direction. The following chapters of this work will engage in analysing the existing tests that are used to identify predatory pricing and in that light formulate a sound enforcement system with a combination of various tests.

2. Conditions precedent for predatory pricing to be rationale strategy

When a firm uses predatory pricing as a strategy to survive in the market by prejudicing other competitors, it sacrifices a lot of revenue in the short run. Even though the firm may receive super profits in the future, it is uncertain in a dynamic market. Therefore, in order to take such risks and make predation a profitable strategy, there are a few conditions that need to be present –

- i. Dominance in the Market** – Due to the risks attached predatory pricing can only be implemented by firms that are dominant. Majority of the countries, thus, place predation as a form of abuse of dominance only.⁸ Only a dominant firm will have the necessary extra reserve capital and resources to meet the losses it will incur in the short run.
- ii. Deep Pocket Requirement** – **This is a factor that flows from the above mentioned.** Only firms possessing adequate financial reserves can be successful in engaging

predatory pricing. The predator's financial capacity must necessarily be greater than the ones of his rival whom he wishes to eliminate so that the latter will may not be as able as the predator firm to withstand losses.

- iii. **Entry Barriers** - The absence of entry barriers, the threat of entry or the impact of frequent entries acts as a check to the adoption of predatory pricing.⁹ Certain level of entry barriers to the market is imperative for the success of predator firms because in the absence of such barriers, the eliminated firms may re-enter the industry once the predator firm raises its prices and by adding their output to that of the predator firm, drive the prices back to competitive level.¹⁰
- iv. **Excess Capacity** – In the course of predatory pricing, when the prices are reduced, the demand for the predator firm's products increase. Another supplementary consequence is the reduction in the demand for the products of the competitor. Therefore, the demand from consumers is increasing from both the sides. If the predator firm does not possess adequate capacity to produce according to the new increased demand, prices will gradually rise again thereby allowing the eliminated competitors to survive again.¹¹

3. Existing tests to identify predatory pricing: Do they suffice?

As mentioned earlier, the dilemma created by the fine line of difference between fair competition and unfair predatory pricing calls for a very cautious approach in evolving methods for establishing the existence of predatory pricing in a market.

i. Cost based test: The popularity of *Areeda-Turner test*

As the basic premise of predatory pricing is that prices below the cost level are unlawful, the economist and scholars have developed various cost based tests to figure out an appropriate measure of cost that can be used as a benchmark for indentifying predation. All the countries use some kind of cost test. But there is no consensus on any one type of measure of cost.

However, the *Areeda-Turner Test (AT Test)* is the most popular among all the cost based tests.

According to this test, predatory pricing is established when the prices are found to be below the Short Run Marginal Cost of providing the product. As marginal cost (MC) is very difficult to measure, Average Variable Cost (AVC) is taken as the reasonable substitute in the AT Test. AVC is the product of Total Variable Cost divided by Total Output during the period of alleged predation. The advantage of such a straight jacket rule with only a price-cost comparison is that it simple and avoids complex analysis of other subjective elements in predatory pricing.¹² Therefore, it stands out as an objective, uniform and standardised test to identify predatory pricing.

However, using this cost based test alone in the process of identifying predatory pricing has attracted lots of criticism. *Firstly*, the simplicity advantage it is this simplicity that has been criticized for ignoring the broader economic and strategic facets of predatory pricing which may be non-cost matters like market situations, whether the economy is such that predatory pricing can be successful, or the strategic intent of the firm may be relevant issues that may determine the presence of predatory pricing. *Secondly*, if cost tests are the only tool used, then any firm making losses for a fairly long period may be accused for predatory actions.¹³ Apart from these practical drawbacks, the AT Test is theoretically flawed as it is based on dubious assumptions. *Firstly*, the assumption that AVC is easier to measure than MC is found to be unconvincing because AVC depends on the particular time period under consideration. And there is no broad agreement over the relevant time period.¹⁴ *Secondly*, the next assumption that AVC can be equaled to MC is applicable only in the long run. In the short run, there are considerable differences such as in a case of industry with over capacity; MC might be very low and below AVC.¹⁵

As the drawback of implementing only cost based tests seemed to be not satisfactory in regulating predatory pricing, various other non-cost tests started emerging.

ii. Recoupment as a sound test for identification of predatory pricing

This test assumes that there is predatory pricing already, in the sense that prices are lower than the cost level. The main hypothesis of this test is whether it is likely for the predator firm to recoup or amass super profits by increasing the prices once the competitors have left the market so as to outweigh the losses it incurred in the short run period.¹⁶ Simon Bishop and Mike Walker argue that it is implicit in the idea of predation that the accused predator firm is trading off short term losses for long term profits.¹⁷ This test is logical and rational because if the firm cannot recoup its losses, then the strategy is worthless. So this test is based on the assumption that firms will only act predatorily if adequate super profits can be earned in the long run. This non-cost seems to be a very prominent and useful tool in catching predatory activities.

In implementing this test, it is to be noted that it is not only the financial ability or capacity of the predator firm that decided whether there are chances for recoupment. The market conditions post the exit of the competitors also influences this event. The entry barriers that exist for the re entry of the competitors, customers' response to the new increased prices etc., are all part of the market conditions that needs to be scrutinised by the competition agencies apart from the ability of the predator before deciding whether recoupment of losses is possible.¹⁸

This test emerged in the United States of America (USA) initially in the case of *Brooke Group Ltd. v. Brown & Williamson Tobacco*¹⁹ wherein recoupment was given the status of 'ultimate objective' of predatory pricing. However, in the Europe, it was once held that whenever there is a risk that competitors will be eliminated, there is no need to prove the possibility of recoupment.²⁰

iii. Predatory intent test: A further step beyond the recoupment test

This particular test is a total contradiction to the cost based test, in the sense that the predatory intent test is very subjective whereas the AT Test is fully objective and uniform. A Predatory intent would be absent where the company's price reduction is backed by any other rationale and thus, predatory intent is essentially the absence of a business justification. The European Union has expressly incorporated 'intent' in its predation analysis (along with PCT), whereas, others, such as the United States, are more skeptical towards 'intent' as an indicator that predatory conduct is occurring or is likely to harm competition.²¹ In the USA, as laid down by the *Brooke's* case, the only two aspects the USA courts look into is the price-cost analysis and the chance for recoupment. Intent has been completely disregarded by this part of the world. Even though it is the *Brooke's* that has prevailed mainly in the USA, it is imperative to take note of a pre-*Brooke* period judgment of the USA Supreme Court that signifies the value of intent as a measure to identify predatory pricing. It is in 1985 that the USA Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corporation*²² held that the defendant's intent is relevant to the question whether the conduct is predatory. The court further went on to uphold that if exclusionary practices are attempted on any basis other than business efficiency, such behavior can be classified as predatory fairly. In the European Union there has been till now no divergence in the view that intent is important in predatory pricing. The case of *AKZO Chemie BV v Commission*²³ is landmark as it mandates intent to eliminate rivals as a necessary element to prove predatory pricing apart from the AT Test.

4. The Indian law on predatory pricing: The prey that has not been captured yet?

In the light of the above discussed theories of predatory pricing and the various tests employed internationally to control it, the author would analyse the Indian law on predatory pricing and its implications.

The Competition Act, 2002 (CA) is the principal legislation that promotes competition and regulates unfair trade practices in the Indian markets. As such, predatory pricing is not governed by any special provision in the Act. Predatory pricing is embodied in section 4²⁴ of the CA that deals with *Abuse of Dominance*. When the High Powered Committee on Competition Policy and Law was formed in 2000, a good number of members of the committee termed predatory pricing as a pernicious practice and therefore, argued that it should be made a *per se* illegal offence. However, as we have seen earlier, the danger of confusing pro-competitive prices with predatory prices is very prevalent. In that light, it was agreed to treat it as an abuse of dominance, only if it is unambiguously established against a dominant entity.²⁵ Section 4 of the Act defines predatory pricing as:

The sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce the competition or eliminate the competitors.

From the provision, it is clearly seen that the Indian legislation follows a 2-stage method to regulate predatory pricing. In the first stage, it is as usual examined whether the price is kept below the cost. The Competition Commission of India (CCI) which is the regulating agency established under the CA has clarified categorically that the measure of cost that will be used under section 4 of the CA will be the AVC, which is in line with the internationally recognised practice.²⁶ If this stage is proved successfully, the predatory intent test is employed to check whether there was malafide intent to eliminate competition.²⁷ In the However, the famous and effective recoupment test has till date, not been implemented by the competition agencies in India.

In India prior to the CA, the governing legislation in the field of completion law was the Monopolies & Restrictive Trade Practices Act, 1969 (MRTP Act). In the MRTP Act, predatory pricing was considered to be a restrictive trade practice under section 33(1)(j). Under this law as well, malafide intent had to be proved by the complainant before a firm

could be booked for predatory pricing. The major change in law governing predatory pricing that happened in the transition from MRTP Act to the CA was that predatory pricing which was restrictive trade practice was modified into a form of abuse of dominance thereby making it applicable only to dominant players.

A lacuna with classifying predatory pricing as only an abuse of dominance is that it rules out the probability that a non-dominant entity may also adopt a predatory strategy to capture a new market. It is possible for newly entering firms which may be financially sound due to its huge initial capital resources, to keep the prices of their goods so low so as to drive out the existing firms in that industry. Under the current Indian law, such firms will go scot free of the liabilities. If the object of predatory pricing law is to restrict harm to competition then dominance shall not be a pre condition.²⁸

As there have not been much cases relating to accusation of predatory pricing under the new regime of the CA, it is not possible to analyse the merit of the current law. However, it is given to understand in the light of the predatory pricing jurisprudence of the MRTP Commission that it has been almost impossible in India to establish predatory pricing.

One of the initial questions on predatory pricing came up in the year 1975 in the matter of *In Re. Tata Engineering and Locomotive Co. Ltd*²⁹ (Telco case). Here, the allegation was that the company was engaged in keeping the prices of transmission gears at a low level without any increase for a long time, notwithstanding increase in the cost of production. However, the MRTP Commission held that there was no allegation that prices were below the cost and therefore, predatory pricing was not established. *In Re. Hyderabad Asbestos Cement Products Ltd*³⁰ was another matter that came up before the Commission wherein it was alleged against the respondent that it was indulged in the practice of excessive reduction in prices even below the cost of production thereby adversely affecting competition among the asbestos manufacturers. As this reduced prices were being benefitted mainly by the

government undertakings, the MRTP Commission held that they should not be deprived of such benefits. In the end, the Commission passed orders without even determining on merit whether the sale price of the product charged by the respondent was in fact lower than the cost of production. A similar case came up before the Commission in 1986 in the form of *In Re. Johnson and Johnson Ltd*³¹. In this matter as well, the allegation raised was that the company was selling products at a very low price only to the Director General, Armed Forces Medical Services Depot, New Delhi. However, the MRTP Commission found that the prices, even though they were low, were not below the cost price. The Commission further went on to say that it is necessary in the eyes of public interest to sell products to government agencies at low prices. The case of *In Re. UP Twiga Fibre Glass Ltd*³² is also an interesting matter in the line of predatory pricing cases before the MRTP Commission. In this issue, *UP Twiga* complained that Deccan Fibre Ltd., was selling fibre glass at unreasonable prices below the cost of production with an aim to drive out the complainant. In the end, the Commission held that as there were only 3 competitors in that field including the parties in this case, the competition was very high and therefore, low pricing was inevitable in the circumstances to fight the competition.

The foregoing paragraphs portray a dismal fact. The paradox is that predatory pricing which makes some firms prey is itself a prey that has not been trapped fully yet. Is there any way out to correct this situation?

5. Will criminalising predatory pricing help to control this malpractice?

The general trend that is seen when a cross jurisdictional study is done is that most of the countries regulate predatory pricing by attaching civil liability only. In the light of various grounds, it is consensually agreed that predatory pricing may be better dealt with civil sanctions rather than criminal sanctions. The first predicament that arises when an offence is attached with criminal liability is that the burden of proof on the complainant increases to a

higher threshold. So, it would not be ideal for a market malpractice such as predatory pricing to be made strict in such a way because it may lead to less number of cases being exposed and controlled. In addition, Skeoch and McDonald have pointed out that criminalisation of offences which have to be economically analysed is not practical.³³ A related practical difficulty that is engrained in an attempt to criminalise predation is that in criminal laws, mostly all the acts which are offences or against public interest is already defined and is a matter of public knowledge. However, competition law involves the study of markets and economy which are dynamic in nature. The uncertainty of market dynamics and its ever evolving nature makes it difficult for the agencies to pre decide what all will constitute a particular offence. For such an economic offence, what is ideally needed are corrective measures that may deter the firms from engaging in that activity in the future. In that respect, economic sanctions such as fines are the best way to move forward. Criminal sanctions do not have any intelligible nexus with predatory pricing or other market related offences.

6. Conclusion: Can this tricky prey be trapped?

The conceptual and factual analysis of predatory pricing in India and elsewhere shows that it is a perplexing issue for any economy and its regulators. The main predicament that has made predatory pricing such a bewildering concept lies in that fact that it is difficult to differentiate predatory pricing from competitive price reductions.

Apart from this, it is found that cost based tests alone would not suffice as it does not cover all the intricate non-cost aspects and norms of predatory pricing. Nevertheless, an appropriate implementation of a *three-tier enforcement system* can ideally work to trap this uncatchable prey. It is suggested as a first step under this proposed system, an analysis of the relevant market structure is conducted to examine whether predatory pricing is possible at all. As a part of this stage, a complex scrutiny of elements such as dominance of the accused firm, existing or probable entry barriers and financial strength of the competitors is necessary. The

dynamics of the market may also be relevant in this course. For example, a market characterised by rapid growth or by decline are said to pose less concern than markets more in equilibrium.³⁴ Only once it is proved that the relevant market is a one which is prone to predatory pricing that the regulator must employ the second tool. In the second stage, what is witnessed is a move from a general and broader parameter check in the first stage to a more specific one when the main focus is stressed on a price-cost analysis. The most popular AT Test has to be implemented to check whether the alleged prices are actually kept below the AVC. This enforcement process moves on to its third stage only when it is evidently shown that the prices are below the AVC of the firm. In the third stage, unlike an objective test as used in the second stage, a more economically logical and rational tool is used to see if the predatory firm has chances of recouping its short run losses in the long run by charging higher prices in the absence of its competitors.

The main advantage of such a system is that it helps in filtering out frivolous claims that may harm fair competition in the initial stages itself. Moreover, a comprehensive system like this one treats predatory pricing wholly by considering most of its aspects, both cost based and non-cost based.

However, it has to be asserted that exceedingly strict regulations with an aim to prevent predatory pricing may have deterrent effects on fair competition and consumer welfare as it may generate fear of accusation in the minds of businesses to reduce prices even with bonafide intent of fairly competing in the market.³⁵ In this context, what Justice Stephen Breyer of the USA Supreme Court mentioned in one of the cases would seem to be relevant. According to him, it is highly worrying when aggressive prohibitory measures are adopted to control predatory pricing as it would throw away a *bird in hand*, which is the lower prices that benefit the consumers, for a *speculative bird in the bush*, which is the alleged or predicted higher prices in the long run.³⁶

Therefore, when the regulatory agencies sit to identify predatory pricing, it is imperative for them to recognise the fact that low prices in the market is the basic objective of competition law as it positively affects the consumers. The larger good of the public³⁷ must be kept in mind by these authorities which definitely indicate that a more liberal examination must be conducted in such cases to identify predatory pricing. Also, the burden of proving predation must be put more on the complainant party so that it may act as a deterrent to prevent vexatious complaints which do not have any commercial or legal merit. Therefore, any system that is formulated to control predatory pricing should thus be able to identify predatory pricing when it occurs yet impose little or no restraint on the ability of firms to compete vigorously on price.³⁸

As far as the Indian scenario is concerned, under the CA, predatory pricing has been clearly defined and attached with a two-pronged test to identify its presence in the markets. As the system under this legislation is very young, there have not been many cases that have come up alleging predatory actions by business firms. Therefore, only jurisprudence developed by the courts in the future can indicate whether the new enforcement system under the CA is practically workable and sound.

Notes

¹ *Reiter v. Sonotone Corporation*, 442 U.S. 330 (1979).

² Edlin, A. (2013) "Predatory Pricing", paper presented at *Third Annual Research Symposium on Antitrust Economics and Competition Policy*, Searle Centre, Northwestern Law, September 24th -25th, 2010.

³ Venkatesh, M.R. (2004) Predatory Pricing: Lessons for India Inc.. *Business Line*. October 20. [online] Available at <http://www.thehindubusinessline.in/2004/10/20/stories/2004102000091100.htm> [Accessed: 15 Apr 2013].

⁴ This is the traditional theory of predatory pricing. This theory is well explained in the landmark case of *Cargill Inc. v. Monfort of Colorado*, 49 U.S. 104 (1986); Bishop, S. and Walker, M. (2002) *The Economics of EC Competition Law*. 2nd ed. Sweet & Maxwell.

⁵ Bishop, S. and Walker, M. (2002) *The Economics of EC Competition Law*. 2nd ed. Sweet & Maxwell.

⁶ Judge Wyzanski in *United States v. United Shoe Machinery Corporation*, 110 F.Supp. 295 (D. Mass. 1953).

⁷ Dabbah, M. (2004) *EC and UK Competition Law: Commentary, Cases and Materials*. London: Cambridge University Press.

⁸ Legal Service India. *It's all Dominance that's crucial in Predatory Pricing*. [online] Available at: <http://www.legalserviceindia.com/article/l267-Predatory-Pricing.html> [Accessed: 15 Apr 2013].

⁹ *Ibid.*

¹⁰ Bishop, S. and Walker, M., *supra* note 5.

¹¹ Viscusi, W. et al. (2005) *Economics of Regulation and Anti-trust*. 4th ed. MIT Press.

¹² P. Areeda and D. Turner. (March, 1975) Predatory Pricing and Related Practices under Section of 2 the Sherman Act. *Harvard Law Review*.

¹³ Agarwal, V.K. (2011) *Competition Act, 2002: Principles and Practice*. Bharat Law House.

¹⁴ Bishop, S. and Walker, M., *supra* note 5.

¹⁵ *Ibid.*

¹⁶ Joskow, P. and Klevorik, A. (1979) A Framework for Analysing Predatory Pricing Policy. *Yale Law Journal*, 89 p.213.

¹⁷ Bishop, S. and Walker, M., *supra* note 5.

¹⁸ *Ibid.*

¹⁹ 509 U.S. 209 (1993).

²⁰ *Tetra Pak International SA v. Commission of the European Committees*, [1996] ECR I-5951.

²¹ Nair, R. and Hussain, A. *Predatory Pricing under the Indian Competition Act, 2002*. [online] Available at http://www.luthra.com/admin/article_images/predatory-pricing-under-ca.pdf [Accessed: 15 Apr 2013].

²² 472 U.S. 585 (1985).

²³ (1991) ECR I-3359; *Newmann v. Reinforced Earth Co.*, 786 F 2d 424(1986).

²⁴ Section 4 - Abuse of dominant position

(1) No enterprise or group shall abuse its dominant position.

(2) There shall be an abuse of dominant position [under sub-section (1), if an enterprise or a group] -

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation - For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market therefore; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access [in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which,

by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favour.

(b) "predatory price" means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

²⁵ Agarwal, V.K., *supra* note 13.

²⁶ Competition Commission of India (Determination of Cost of Production) Regulations, 2008.

²⁷ The words '*with the view to reduce the competition or eliminate the competitors*' shows that intent is necessary to be proved; *In Re Modern Food Industries Ltd.*, RTPE 78 of 1992, decided on February 7, 1996, it was held by the Monopolies & Restrictive Trade Practices Commission that intent is also necessary to be proved for establishing predatory pricing.

²⁸ Legal Service India, *supra* note 8.

²⁹ RTPE 14 of 1975, decided on December 5, 1978.

³⁰ RTPE 8 of 1977, decided on December 26, 1980.

³¹ RTPE 59 of 1985, decided on July 29, 1986.

³² RTPE 117 of 194, decided on October 12, 1984.

³³ Skeoch, L.A. and McDonald, B.C. (1976) *Dynamic Change and Accountability in a Canadian Market Economy*. Ottawa: Queen's Printer.

³⁴ Joskow, P. and Klevorik, A., *supra* note 16.

³⁵ Clarke, J. (2008) Australia's Radical Predatory Pricing Reforms: What business must know. *Deakin Business Review*, 1 p.6.

³⁶ *Barry Wright Corporation v. ITT Grinnell Corporation*, 724 F.2d 227 (1st Cir. 1983).

³⁷ Benthamite theory of '*greatest good for the greatest number*' is the essence of this statement.

³⁸ Organisation for Economic Co-operation & Development. (1989) *Predatory Pricing*. [online] Available at <http://www.oecd.org/competition/abuse/2375661.pdf> [Accessed: 15 Apr 2013].

Is Deviation a Fundamental Breach of the Contract of Carriage by Sea? A Critical Analysis of Current Law

By

Dr George K. Ndi* and Tariq S. Alawneh**

Abstract

The main objective of this article is to critically assess the current status of the legal regime governing the international carriage of goods by sea, with the main focus being on the implied terms which form the foundation of international shipping law in general, and on the doctrine of deviation in particular. This will include a critical review of the rule against unjustified deviation in contracts of affreightment by posing the following questions: (i) Is the rule against unjustified deviation still relevant in the modern context of international carriage of goods by sea? In light of: The development of transport vessels, liberty clauses, different types of charterparties, and held cover clauses? (ii) Should the rule against unjustified deviation be treated any differently from other implied shipping terms? Is the rule against deviation an absolute obligation? Should unjustified deviation amount to fundamental breach of a contract? Should there not be some degree of flexibility in the judicial approach to the law on deviation? (iii) Do we need harmonisation, unification and interpretation of deviation rules? It is hoped that in attempting to answer these questions some light may be shed on this important area of shipping law.

* **Dr George K. Ndi**, (*Licence/ Matrise; LLM; PhD; FHEA*) is Course Director for the LLM in Legal Practice Programme, The Law School, University of Huddersfield, England &

Visiting Professor of Law at Yobe State University, Nigeria.

**** Tariq Alawneh**, (LLB, LLM) is a PhD Researcher at The Law School, University of Huddersfield, England & a Member of Jordanian Bar Association.

1- Introduction: Background and Aims/ Objectives

Carriage of goods by sea constitutes one of the most important elements of international trade transactions, with the bulk of world trade involving sea transit. Historically, carriage of goods by sea constitutes one of the oldest forms of transportation in international commercial transactions. From a legal perspective sea-borne commerce is regulated by the branch of maritime law known as shipping law. The latter, which is rooted in the general principles of English common law and specific principles derived from the law merchant, mercantile customs and subsequently international conventions, now regulates key aspects of the international carriage of goods by sea. These sources prescribe rules which govern specific types of contracts of carriage or affreightment (from the various types of charterparties to consignment carriage). They also regulate specific aspects of maritime contracts, from loading to stowage, the execution of the voyage and discharge and delivery of the cargo to the cargo-owner.

At common law, there is an implied undertaking on the part of a carrier or ship owner that there will be no voluntary or unjustified departure by a vessel from its 'proper course' as affirmed in the case of *Bergerco v Vegoil (1984)*¹ deviation as a doctrine had its roots in cargo insurance. In order for the doctrine to be invoked the deviation must both be 'voluntary' and 'unjustified' *Joseph Thorley Ltd v Orchis Steamship (1907)*². If a ship deviated from its 'proper course', this was deemed to change the nature and character of the contract of affreightment or the risk for which the voyage and cargo were originally insured and as such this could invalidate or oust the insurance policy. In other words, as a consequence of deviation the voyage and the risk involved in it become something fundamentally different from that which the parties had contracted for or envisaged. One of the effects of this is that unjustified deviation automatically discharges both the contract of carriage and the insurer from liability. The strictness of the application of the rule against unjustified deviation at common law partly derives from the need to protect

insurers from the unforeseen risk of a voyage that they had not underwritten, and the shipper or cargo owner from a voyage which they had not contracted for.

The main thrust of this article is to critically enquire into current legal status of the doctrine of deviation within the framework of the modern law on carriage of goods by sea. As part of this endeavour the authors will conduct a critical enquiry into the meaning of voluntary and unjustified deviation, both of which provide the twin pillars on which the law against deviation is premised. Some of the key research questions will include the following: When is deviation deemed to be justified in law? Can the current list of exceptions derived from common law, relevant statutes and contractual provisions which justify a departure from the proper course be considered to be a closed list? Or are they open to the addition of new factors which may provide a carrier with new grounds to justify a departure from the proper course? Establishing culpable deviation also requires an element of intention on the part of the master. But how can such a mental element be established in law?

These and other questions provide the setting for a critical inquiry into some of the legal problems associated with this area of maritime law. Also included in our analysis will be a critical appraisal of the meaning of '*proper course*' as it applies to the law on deviation (see *infra*, section II of the paper. The article will thus undertake a critical review of the evolutionary aspects of the law on deviation from the common law to relevant international conventions and instruments together with decided cases and relevant statutory provisions.

The authors' findings based on a critical review of relevant principles, sources and cases reveal a lack of conceptual clarity in this area of the law. This in turn has led to legal uncertainty concerning the precise normative content, status and value of the principles governing the doctrine of deviation and their application to modern shipping contracts. It is in view of this uncertainty that the authors' have set out to identify the key areas of inconsistency with a view to positing potential legal solutions by putting forward some recommendations and proposals for reform of the current legal framework based on the findings of the research.

II. The Meaning of "Proper Course" as Applied to the Law on Deviation: A Critique

It is both a common law and a statutory requirement that the directness of the route is an implied condition of the contract of carriage of goods by sea. However, for the doctrine of deviation to be invoked, the departure from the proper course of the voyage must be

voluntary and unjustified – in other words, the deviation must be unlawful. Before unlawful deviation can be established it is necessary first of all to determine the proper course or proper route for the particular voyage in question.

The concept of the proper course serves as the litmus test for unjustified deviation. Only by establishing the proper course for a particular voyage can a rational judgement be made as to whether or not the ship has unlawfully deviated from its route. But what is the proper course or route?

The proper course can be defined as the agreed or stipulated route which forms part of the express terms of the contract of carriage (e.g. '*From Hong Kong to New York calling at Singapore, Suez and Liverpool*'). This may be easily ascertainable in a charterparty involving the bulk carriage of goods from its express provisions, but what if no such agreed route has been stipulated by the parties?

In the absence of an express stipulation as to the route, the second proposition is to apply the direct geographical route. However, the problematic with this obvious solution is that there may be more than one geographical route and the parties may not be in agreement as to which of alternative geographical routes to use.

Hence, where there is more than one geographical route, the final proposition presents itself in the form of the usual route. But even with this proposition we encounter yet another problem. Whose 'usual route'? Is it the usual route for the particular shipping line in question, the particular trade or for the shipping industry as a whole? In other words, is the applicable test to be used in determining the usualness of the route an objective or a subjective test? It is for this reason that we may need to go beyond the concept of a 'usual route' by seeking to establish what is the customary or recognised trade route with a view to injecting some measure of objectivity into the relevant criteria for establishing the proper course in the absence of a contractually stipulated route or an agreed geographical route.

The case of *Reardon Smith Line v Black Sea and Baltic Insurance (1939)*³ is illustrative of the legal problems involved in establishing the proper course for a particular voyage. In this case a vessel chartered to sail from the Black Sea port of Poti to a North American port, but after loading the cargo instead of proceeding directly to its intended destination it instead set sail for Constantza with a view to purchasing cheaper bunkering coal. While in Constantza it was grounded and damaged. The question before the courts was whether or not there had been a deviation from the proper course. The defendants argued that the trip to Constantza constituted part of the proper course as it was customary for ships to

undertake this part of the voyage for the purposes of bunkering. The defendants' contention was upheld by the court on the basis that this practice was customary for 25% of ships that sailed this particular route.

Symptomatic of the uncertainty in this area of the law are the inconsistent and sometimes conflicting judgements rendered by the courts and international arbitral tribunals in different jurisdictions on cases which share broadly similar facts. Illustrative examples of this can be found in further cases involving departure from the geographical route for the purposes of bunkering in which a US court on the one hand, and an arbitration tribunal on the other, have both ruled that the departure constituted unjustified deviation.

In the first of these cases, *United States Shipping Board v Bunge Y Born (1925)*⁴ it was held that the carriers could not rely on a liberty clause in the contract to depart from the route for bunkering purposes. Chartered to sail from River Plate in Argentina to Seville via Malaga in Spain, after leaving Malaga the ship deviated first to Gibraltar and then to Lisbon in Portugal for fuel before proceeding to Seville. The court held that the defendants had failed to show that the deviation was reasonably necessary. However the question of whether or not the route taken could be deemed to be the customary route did not arise. Hence, it could thus be argued that this case can be distinguished on this ground from the Reardon Smith Line case.

The second case, that of *Cepheus (MV Cepheus Arbitration (1990))*⁵ is a relatively recent arbitration case on the question of deviation for bunkering purposes. The charter in this case involved a voyage from Freeport, Bahamas to Anchorage in Alaska. The vessel departed from its route and went to Los Angeles to procure inexpensive fuel. The delay occasioned by this deviation meant that the ship arrived late and in very bad weather which caused it to run aground. The arbitration panel held that the deviation to Los Angeles was unreasonable as the ship already had sufficient fuel for the voyage to Anchorage.

From a critical point of view, the problem of uncertainty in this case stems from the use of different criteria in different jurisdictions. Whereas English law requires voluntary and unjustified deviation, the US approach appears to be based on the criterion of "reasonableness". The carriage of goods by sea being by its very nature a global cross-jurisdictional activity, there is clearly a need for consistency in the articulation and application of relevant concepts for the governing law. We would submit that the judgement of the English court in the Reardon Smith Line case gives rise to some measure of uncertainty in view of the fact that it is not clear if the main legal issue is whether there

was no deviation (i.e. the ship was on its proper customary route), or if there was indeed deviation but it was justified. Given that the ship did in fact depart from the geographical route by sailing backwards to Constantza rather than proceeding forward from Poti to North America, we would argue that the correct position would have been that there was in fact deviation, but that this was justified by custom.

In concluding this section it should be noted that in all cases the route taken must be reasonable, practical and commercial and should further rather than frustrate the commercial purpose of the adventure (Reardon Smith, 1939)⁶.

III. When is Deviation Deemed to be “Voluntary” and “Unjustified”: An Appraisal of the Historic and Current Legal Position.

From a legal perspective early mercantile law principles identified main two factors as defining the basis of the law on deviation; these are: (i) the specific kind of act of deviation which constitutes breach - i.e. a voluntary and an unjustified departure from the agreed voyage or the ‘proper course’. In *Clayton v Simmonds* (1741)⁷ for example it was held by Lee CJ that if a ship departs from the proper course by calling at an unstipulated port or stays it is unjustified deviation. And (ii) from a legal perspective, the interrelationship between the various ‘cargo interests’ and the carrier, the legal nature of this relationship prevents the carrier from embarking on a voluntary and an unjustified deviation the effect of which may be to frustrate the commercial purpose which is common to both parties in the adventure. In the case of *Glynn v Margetson* (1893)⁸ it was held that the liberty clause which was included in the bill of lading did not cover this particular deviation. Due to the delay occasioned by the deviation the cargo of oranges belonging to the cargo owner became damaged. It was held that the main object and intent of the charter party was the carriage of oranges from Malaga to Liverpool, and the deviation was therefore unjustified in view of the fact that the commercial purpose of the adventure had become frustrated.

a) When is Deviation Justified?

When the goods are carried by sea, carriers may, for various reasons, find their vessels deviating from the proper course agreed upon in the contract of carriage. Some of these acts of deviation, however, are considered justified in law *J & E Kish*

*v Charles Taylor Sons & Co (1912)*⁹ Under common law departure from the proper route is justified in the case of saving human life, communicating with a vessel in distress, avoiding danger to the ship or cargo or when the deviation is made necessary by some unforeseen eventuality *Scaramanga & Co v Stamp (1880)*¹⁰. Two more justified circumstances were added by The Hague and Hague-Visby Rules under Article IV: to save or attempting to save property at sea and any reasonable deviation (The Hague Visby Rules- The Hague Rules as amended by the Brussels Protocol 1968 Article IV (4)). Similarly Article IV (4) of Carriage of Goods by Sea Act 1971 provides that any deviation to save or attempting to save life should not to be considered a breach of the contract of carriage. Such deviation will be considered to be justified in law.

Article 49 (1) of the Marine Insurance Act 1906 includes a list of events and circumstances under which deviation can be justified. The article states as follows:

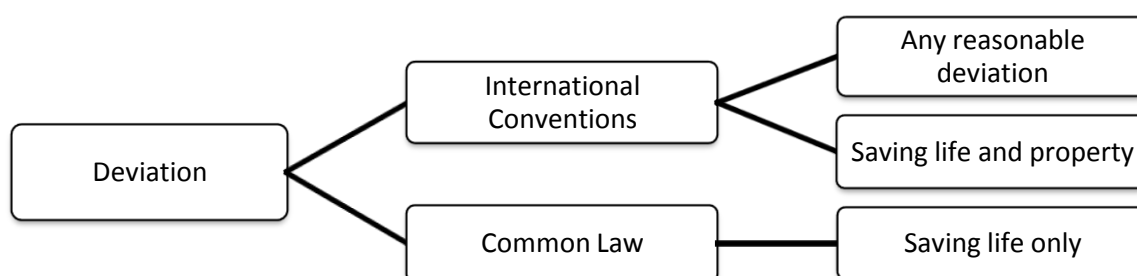
“Deviation or delay in prosecuting the voyage contemplated by the policy is excused:

- (a) Where authorised by any special term in the policy; or
- (b) Where caused by circumstances beyond the control of the master and his employer; or
- (c) Where reasonably necessary in order to comply with an express or implied warranty; or
- (d) Where reasonably necessary for the safety of the ship or subject-matter insured; or
- (e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or
- (f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or
- (g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.”

Subsection (2) of the same Article affirmed that when the grounds for justifying the

deviation ceases to exist, the vessel must return to her proper route and prosecute her voyage with due dispatch. From the above it is quite evident that Marine Insurance Act 1906 provided additional grounds for justifying deviation when compared with common law and subsequent statutory sources. For instance, pursuant to subsection (g) above, the ship-owners are excused of deviation where the deviation caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against. Indeed it could be argued that paragraph (b) which allows deviation in circumstances beyond the control of the master and his employer allows the carrier a great deal of latitude and discretion in prosecuting the voyage.

Similar to Article IV (4) in The Hague-Visby Rules, it is also the case under 2008 convention that the ship owner is not liable for any loss, damage or delay where the later is attempting to save life and/or property at sea.



It can be concluded from the above discussion that there are slightly different positions of common law and relevant conventional and statutory provisions vis-à-vis the relevant criteria for justifiable deviation. The common law position is far more restrictive than the statutory/ conventional approach.

But do these various lists of exceptions to deviation comprise in themselves a closed category, or are they amenable to further additions? It has been suggested by some commentators that there are indeed other circumstances in which deviation may be considered to be justifiable (Singh 2011)¹¹. Amongst the suggested exceptions is where a charterer does not provide the carrier with a full cargo as stipulated by the terms of the contract of carriage. In such a case the carrier may deviate to an

intermediary port in order to obtain additional cargo for the purpose of being able to run his ship in a cost efficient and profitable manner. Judicial support for this view comes from the case of *The Batavia (1927)*¹² in which the court in its judgement held that there had been no deviation because the ship owners had an implied right to minimize the loss caused by the charterer's default and to load additional cargo to fill up the space in the ship left vacant by the charterers.

Deviation may also be justified by the terms of a specific clause in the bill of lading or charterparty giving the ship-owner a 'liberty' to either deviate from the agreed or proper route, or to call at additional ports during the voyage. It is worth noting, however, that courts tend to construe such liberty clauses very narrowly (Debbattista 1989)¹³.

Another example of justified deviation arises where there is significant danger from capture of the ship by hostile vessels through acts of warfare or piracy (*Pacific Basin IHX Ltd v Bulkhandling Handymax AS 2011*)¹⁴. In the case of *The Teutonia (1872)*¹⁵, the deviation was justified on the grounds that the intended purpose was to avoid capture by pirates and thus to protect the crew, the ship and its cargo. As seen above, under common law deviation was not considered justified to be justifiable on the grounds of saving the cargo or the ship. However, as this case illustrates, it is often difficult in practice to separate the crew (human life) from the ship and its cargo. It will be quite often the case that the intention of the master in deviating under such circumstances is to protect not just the crew, but also the ship and its cargo. Given that the three elements are often inseparable it could be argued that the common law restriction which prescribed only the saving of human life was in practice unworkable. In *J & E Kish*, there was a similar rationae to that in *The Teutonia* when it was decided that where there were adverse weather conditions, the ship's master was not only justified in deviating but that it was his duty to do so (even if it was his fault in the first place for sailing with an unseaworthy vessel) because if he had continued the voyage he could have breached his duty in protecting the lives on board; in other words, it would have been negligent of him to continue in such circumstances. In such cases where a ship is forced to deviate

because of its unseaworthy condition, the proper cause of action for the cargo owner to pursue would be a claim for unseaworthiness, not deviation.

In another case, *Anderson, & Co v The Owners of San Roman (1873)*¹⁶, the judge held that “an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay”. The effect of this judgment is that where safety is of paramount concern and requires that the master should depart from the agreed or proper course, such a departure would be justified and it would be reckless of the master not to do so. In the case of *Phelps, James & Co. v Hill (1891)*¹⁷, on a voyage from Swansea to New York, the ship and the cargo were damaged in bad weather. The ship took refuge at Queenstown and was then sunk in a collision while heading for repair at the ship owner’s yard at Bristol, rather than going back to Swansea which would have been nearer. It was held that proceeding to Bristol was not a deviation, in spite of the objection of the cargo owners, who claimed that there had been no prior consultation. The judgement in the case leaves some unanswered questions as to whose interest is paramount – that of the carrier or the cargo owner? What is good for the ship-owner is not necessarily in the interest of the cargo owner. The difficulty in such cases involves striking an acceptable balance between the conflicting interest of the carrier and that of the cargo owner.

b) The Criterion of “Voluntariness”

One of the key pre-requisites for culpable deviation is that the deviation must be voluntary. The law regarding this issue is not well settled, due to different interpretation of the meaning of “voluntary”. In *Tait v Levi (1811)*¹⁸ for example, the court was divided on the question of whether there was deviation. The master had taken the vessel into Barcelona in the belief that it was Tarragona. As a result the ship was captured and restrained by French forces. The case is problematic on two related grounds: firstly because the court could not agree if there had been unjustified deviation; and secondly because the court was not unanimous as to what amounts to “voluntariness” in relation to deviation. In the case of *Hain Steamship*

*Co. Ltd v Tate & Lyle Ltd (1936)*¹⁹, on the other hand, the ship owners failed to inform the shipmaster that he had been ordered to the port of San Domingo to load a second cargo, due to the default of the agents and post office authorities in Cuba. For this reason the ship's master set sail for England from Cuba without the second cargo belonging to the same charterer. Realising his mistake, the master then returned to San Domingo to pick up the second cargo, during which time the ship ran aground. It was nonetheless held by the then House of Lords that the deviation had been both voluntary and unjustified.

Two further cases have dealt with the question relating to the “mental element” of deviation – i.e. voluntariness. In *Rio Tinto v Seed Shipping (1926)*²⁰, the master misinterpreted the navigational instructions due to illness, leading to a departure from the prescribed route. It was held that this did not amount to unjustified deviation. Although the rationae in this case may seem obvious, there remains a difficulty in applying the law in this area vis-à-vis the required burden of proof for “voluntariness”. This difficulty has been further compounded by the case of *Lavabre v Wilson (1779)*²¹ where it was held that a mere departure or failure to follow the contract route is not necessarily unjustified deviation. The dictum in this case has brought further confusion into what is already an uncertain legal landscape. Various statutory interventions since then have sought to clear up this confusion. The next sub-section is aimed at a critical appraisal of these statutory sources.

b) A Critical Analysis of Statutory Sources of the Law on Deviation

Apart from common law, the guiding statutory provision for the rule against unjustified deviation comes from The Hague Visby Rules (1968)²² which were ratified into UK law by The Carriage of Goods by Sea Act (1971)²³. Article IV (4) of this Act states as follows:

“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these

Rules of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”

As seen above, this provision signals a departure from the common law position under which deviation could only be justified if the purpose was to save life, not property (Scaramanga 1880). At the level of judicial construction this raises a key question: does the use of the word “life” include the life of animals such as pets, or should the provision be restricted to the saving of human life? A similar problem which arose at common law related to the prohibition against deviating to save property. This prohibition led to practical difficulties in the application of the law as people may sometimes take property along with them while leaving a distressed ship. And what about sister ships which may both be carrying part of the same cargo? If one was in distress was it not to be expected that the other ship will provide assistance in order to salvage the other part of the cargo? It is in view of this perceived inflexibility of the common law that the above statutory provision included the saving of property amongst its criteria for justified deviation. In the absence case law authorities on the question, it is difficult to envisage how the provision regarding the saving of life would be interpreted by the courts. It could be nonetheless being argued that this is an area of vagueness which could lead to difficulties of implementation of this provision in the future.

In 1992, the Hamburg Rules came into force through a convention in the United Nations. Both The Hague Visby Rules and Hamburg Rules came as a response to criticisms of The Hague Rules of 1924 which were perceived to be in favour of cargo-carrying states (Mankabady 1978). According to Article 5(6) of the Hamburg Rules 1978²⁴, deviation with the aim of saving lives and reasonable measures for saving property at sea are not considered as unjustified deviation. This article is more restrictive than The Hague Visby Rules in its use of the words “reasonable measures” with reference to the saving of property.

Article 17 (3) (l), (m), (n) in the Rotterdam Rules (2008)²⁵, states that the carrier is relieved of all or part of his liability, if he proves that loss, damage or delay occurred due to the following events or circumstances:

“(l) Saving or attempting to save life at sea.

(m) Reasonable measures to save or attempt to save property at sea.

(n) Reasonable measures to avoid or attempt to avoid damage to the environment.”

In addition to the above sources, Article 46(1) of the Marine Insurance Act (1906)²⁶ states that “*Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs*”. This, in fact, shows that any unlawful departure from the proper route will be considered as unjustified deviation; this in effect automatically discharges the insurer and the underwriters from liability under the policy of indemnity. The effect of this provision can indeed be far reaching in as much as it would seem to suggest that the contract of carriage is invalidated from the moment of the unjustified deviation and that any subsequent attempt at regaining the proper course will be of no effect.

c) Other Legal Considerations in Relation to the Doctrine of Deviation

Apart from the difficulties which have arisen regarding the meaning of “voluntariness”, or what constitutes justified or unjustified deviation, there are a number of other legal issues which require consideration in relation to the doctrine. The first of these relates to the question of causation. What weight should be given to deviation when there are other concurrent or competing causes which may have caused the damage to or loss of the cargo? This question has come before the courts in a number of key cases. In the first of these cases, *International Guano v Robert MacAndrew (1909)*²⁷, the initial damage to the cargo was due to its inherent nature but the delay occasioned by the deviation increased the damage. It was held that the carriers were liable for the unjustified deviation. In *Davis v Garrett (1830)*²⁸, on the other hand, the court held that the deviation, which was unjustified, was not the real cause of the damage to the cargo – and the loss to the cargo owner arose from the storm. In the court’s view the loss would still have occurred even in the absence of the deviation. A review of the cases on the question of causation shows that there

is no general rule as to whether or not deviation takes precedence over other competing causes, with each case being assessed on its own merits.

The second question that could be asked is whether or not deviation is an absolute doctrine. The acceptance by courts (albeit subject to the rule of narrow construction) of the inclusion of liberty clauses in contract of carriage leads us to conclude that the doctrine is not an absolute rule of law – the effect of liberty clauses or prior agreement to deviate being to set aside the rule against unjustified deviation. Thus in *The Al Taha (1990)*²⁹, it was held that a deviation planned before a voyage and before the bill of lading was issued was reasonable. Also relevant in this connection is the effect of “held covered” clauses, the effect of which is to validate a deviation for insurance purposes but on condition that notice of the deviation has been brought to the attention of the insurers (*The Institute Voyage Clauses (Hulls) 1995 Section 2; McAsphalt Marine Transport Ltd v Liberty International Canada 2005*)³⁰. Given the various exceptions and grounds for justification which are available under the doctrine it is therefore evident that the principle is not an absolute one and could even be set aside through agreement of the parties to the contract of carriage.

The third issue concerns the application of the doctrine of deviation to consecutive voyage charterparties. Where, for instance, a charterer has hired the services of the same ship for a consecutive number of voyages, would an unjustified deviation during one of those voyages frustrate the whole of the contract of carriage including any voyages which are yet to be undertaken, or should the effects of the deviation be limited to the specific voyage in question? Judicial authority on this question would seem to suggest that the whole of the adventure would be frustrated, including any unperformed voyages. The case of *Companie Primera de Navigazione Panama v Compania Arrendataria de Monopolio Petroleos S.A (1940)*³¹, involved an unauthorised deviation of the ship on her first voyage. It was held that the deviation, being voluntary and unjustified, was a breach and a repudiation of the contract of carriage and thus freed the charterer from any further obligations in relation to the second voyage which was yet to be performed.

The above discussion constitute only a selected sample of the many legal issues which require further research both in relation to the doctrine of deviation and to the other implied terms in the contract of carriage by sea. Some of these issues will be the subject of further research by the present author.

V. Is the Special Status of the Rule Justifiable?

One of the objectives of this paper is to explore the relationship between the rule against unjustified deviation in modern shipping law and the concept of ‘fundamental’ breach of contract. Is there a recognised doctrine of ‘fundamental’ breach which may be applied to unjustified deviation? And can the strictness of the common law approach to deviation be justified?

Even before the rule was put on statutory footing through the enactment of the (COGSA) 1971, the effect of unjustified deviation at common law was to oust the contract of carriage and thus deprive the ship owner of any exception clauses in the contract of carriage by sea James (*Cunard Steamship Co Ltd v Buerger (1927)*)³². This in turn raises the question as to whether or not unjustified deviation may be considered to be a ‘fundamental breach’ of the contract of carriage – a condition, as opposed to a warranty or an innominate term. A critical review of both decided cases and scholarly postulations indicates that there is no common agreement on this question. In *Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd (1970)*³³, for example, it was held that there are certain fundamental breaches of contract that end the contract and invalidate all exclusion clauses available for the party in breach. However, the judges overturned the decision in *Harbutt’s* in the latter case of *Photo Productions Ltd v Securicor Transport Ltd (1980)*³⁴, and denied that there is a rule of law as to fundamental breach, thus reaffirming the view adopted in the *Suisse Atlantique Soc. D’Armement Maritime SA v N.V. Rotterdamische Kolen Centrale (1967)*³⁵ case. In the *Photo Productions* case the court was of the view that everything depended on the true construction of the contract terms and that a breach does not automatically deprive the defendant of reliance on exception clauses.

Turning now to scholarly opinions, Professor Coote (1981)³⁶ has argued that deviation cases are essentially premised on bailment obligations. In his view the

correct interpretation of the rule against unlawful deviation can be said to derive from the relationship between the bailor and the bailee. Another author, Mills (1983)³⁷, expresses the same view by stating the contract of affreightment can be regarded as being of the same legal status as carriage by land as well as bailment. He further argues that it would be against the spirit of law to say that deviation is still of much relevance given the judgements in *Photo Productions v Securicor*. Cashmore (1989)³⁸ provides further support for this view by positing that one cannot depart from general bailment theory when dealing with cases of deviation, whether in relation to carriage of goods on land or by sea.

Other authors have adopted a contract law approach to the problem. Examples of this school of thought include Dockray (2000)³⁹, Livermore (1990)⁴⁰, Girvin (2007)⁴¹, Debattista (1989)⁴² and Baughen (1991)⁴³ who all clearly favour the notion that deviation rules should not be separated from the general principles of contract law. Charles Debattista, a proponent of the contract theory approach, strongly argues that the view which is based on bailment theory and thus in favour of separating deviation doctrine from general contract law appears to be “slightly too elegant for comfort” (Debattista 1989)⁴⁴ Simon Baughen also follows the views espoused in *Photo Production v Securicor* and supports the amalgamation of deviation rules with general contract law. He argues that deviation rules should be “speedily buried” and that any problem concerning geographical deviation “should be dealt with by the ordinary law of contract (Baughen 1991)⁴⁵.”

What impact have advances in shipbuilding technology had on the application of the doctrine of deviation? In considering the term “proper course” historically sailing ships had certain routes which they customarily followed, *Reardon Smith Line* (1939) such routes were often based trade custom borne out of the influence of trade winds and navigational safety. In the days of sailing ships voyages were subject to innumerable and often uncontrollable hazards which frequently occasioned deviations from the envisaged route and sometimes resulted in delays in the execution of the voyage (Uncitral Yearbook(2003)⁴⁶, It could be argued that it is in view of this unpredictability associated with maritime adventures that to this day the Hague-Visby Rules do not engage the liability of the carrier for delay in delivery caused by natural factors.

However, as a result of scientific advancement in modern shipping technology, the proper charting of the oceans as well as sophisticated and efficient methods of navigation, voyages have become less subject to unpredictability and consequent delays. This advancement in marine technology has led shippers and cargo owners to rely on, and expect compliance with, undertakings by carriers to deliver goods within a specified period of time. From a legal point of view this raises the question whether such increased party expectation deserves or attracts protection from the law on the basis of the contract law theories of reliance and expectation. From an empirical perspective the research will pose the question whether a link can be established between technological advancement in shipbuilding and the principal evolutionary features of shipping law.

VI. Conclusion

In this concluding section of the article an attempt will be made to propose a number of recommendations based on the conclusions which may be drawn from the foregoing analysis. There are three main conclusions which we may draw from the study. The first conclusion relates to the multiplicity of sources governing the implied obligation against unjustified deviation; the presence of some many sources each prescribing slightly different factors and criteria for what is justifiable deviation has long been the source of confusion. For example, a comparative study of the provisions of relevant international conventions and those of the Marine Insurance Act 1906 would seem to suggest that there are slightly different criteria for unjustified deviation for the law governing carriage of goods by sea on the one hand and for marine insurance purposes on the other. This leads us to the view that there is a need for harmonisation and unification of the rules in this area of law.

Secondly, a comparative analysis also leads us to the view that there are jurisdictional differences in the way deviation is perceived and interpreted in different jurisdictions, for example under English law and American law. Some of the cases reviewed as part of this study serve to highlight these differences, with American law adopting and promoting a much wider scope for deviation within the context of carriage of goods by sea (*US cases Jones v Flying Clipper (1954)*).⁴⁷ To

promote greater certainty there is a need for further harmonisation of the law across different jurisdictions both in terms of the substantive content and its judicial interpretation.

Thirdly, there is still a great deal of uncertainty as whether unjustified deviation amounts to a fundamental breach of the contract of carriage. From an English law point of view, there is even the question as to whether or not there is such a concept as the fundamental breach of contract which forms part of English contract law. The case law appears to be divided on this issue (*Suisse Atlantique* 1967; *Photo Production* 1980)⁴⁸. Despite the dictum in the *Suisse Atlantique* case which seemed to reject the existence of such a concept in English contract law, later cases including that of *Photo Production v Securicor* appear to suggest that deviation could be treated differently from other breaches of contract in view of the fact that it has special rules derived from its commercial and historical background. This leads to the question whether deviation ought to indeed be treated any differently not only from other breaches of contract, but from the other terms which are implied into contracts of carriage of goods by sea, such as for example, seaworthiness and due despatch. Is there something special about the character of a breach involving deviation which might lead to such a breach being considered as a repudiation of the contract of carriage?

It could be argued that unjustified deviation in voyage charters does have such a character in view of the fact that the subject matter of the contract is the agreed or stipulated route. But what about a time charter or consignment carriage in which the subject matter of the contract is not the agreed or stipulated route? Should there not be some degree of flexibility in the judicial approach to the interpretation and the application of the law on deviation? Is it time perhaps for deviation to be considered more of an intermediate or innominate term in view of the different situations and contexts to which the principle could be applied? Related to this question is that of whether or not the principle of deviation is still relevant to shipping law in the modern era. These are some of the questions which will be the subject of further research and study.

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³ [1939] AC 562

⁴ (1925) All E.R. 173

⁵ (1990) AMC (1058)

⁶ *Reardon Smith Line v Black Sea and Baltic Insurance* [1939] AC 562

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⁸ [1893] AC 351, HL

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¹⁰ (1880) 5 CPD 295, CA

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¹⁷ [1891] 1 QB 605 (CA)

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²⁰ (1926) 24 Lloyds 316

²¹ (1779) 1 Doug 284

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- ³² [1927] AC 1, HL; See also *James Morrison v Shaw, Savill, and Albion* [1916] 2 KB 783 CA
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“Imprisonment,” as an alternative method of punishment.

M.K.Geethani Jeewanthi

Lecturer(Probationary),Department of Legal Studies, Faculty of HSS,
Open University, Nawala, Sri Lanka

Abstract

Crime is an unacceptable behavior and society can act against crime in different ways. Punishment is considered as a one formal form of reaction to crime. While the theories of punishment describe the rationale behind the punishment, the modes of punishment explain the ways and means of execution of the punishment. Imprisonment is considered as the famous mode of punishment and objectives of punishments can be identified as incapacitation, deterrence and rehabilitation. On the other hand there are several other modes of punishments which have been developed as an alternative to imprisonment such as community sentencing, probation, suspended sentences, which are not popular as imprisonment. However, several advantages can be identified of the usage of non custodial modes of punishments when comparing with the imprisonment. This is very much crucial when we discussed these advantages in line with the objectives of criminal justice system of a country.

Key words: Punishment, imprisonment, community based corrections, objective of a criminal justice system.

CRIME AND REACTION TO CRIME.

Although the concept of crime is as old as human civilization, the definition of crime has not been easy, since crime is a combination of several factors. Crime can be considered as a social problem leading to social disorganization as offenders are engaged in activities which threaten the basic of government, law, order and social welfare. Crime also can be seen as a physiological problem as some human beings who are considered criminals act in ways that are condemned by law. The psychological angle of crime can be seen in most cases where

criminals are inherited some psychological defects. Moreover, crime can be viewed from a legal- social view point where crime is defined as any act or failure to act which is forbidden by or prescribed by law, the failure to abide by such law, being punishable by fine, imprisonment, banishment or any other punitive treatment as the particular state may prescribe.¹ Different criminologists have tried to identify the causations for crime from different angles and Classists have explained crime under the free will theory and pain and pleasure theory. Positivists have identified crime as part of human nature based on biological, sociological and economical aspects. Sociologists have rejected the idea of born criminals and they tend to point out the sociological aspects which are causes for criminal activities. However, in the current context it is impossible to identify a one reason for crime; rather a mixture of reasons can be found.

Whatever the reason for crime it can create a huge impact in different contexts. Crime is a threat to social organizations. It is a threat to people's property as it can create adverse psychological problems for people. Crime can be a threat to security, liberty and freedom of people and it stands as a burden to the economy of a country. Crime can easily make a situation where people are vulnerable. In this scenario, the criminal justice system of a country has a vital role to play in reducing the crime rates of a country. The Criminal justice system is a collection of many agencies that are independent, but closely relating to each other and what one agency or institution does has consequences for another agency in the process. The way the criminal justice system reacts to crime can be taken as a reflection of the attitude of a particular society toward a crime and this reaction can be either formal or informal. Informal reaction to crime can be identified in modes such as labeling, ignoring, warnings, and similar acts. The formal way of reaction to crime is initiated by different criminal justice agencies of the criminal justice system and this reaction can be seen mainly in three ways; namely punitive, therapeutic and preventive. Punitive approach can be

considered as a traditional way of reaction to crime and it considers the offender as basically a bad and a dangerous person who cannot be reformed and the objective of this approach is to inflict punishment on the offender in order to protect the society from his onslaughts.² The therapeutic approach considers the criminals as a victim of circumstances and a product of various factors within the criminal and society.³ The preventive approach seeks to eliminate those conditions which are responsible for crime causation.⁴

PUNISHMENT.

Everybody in society has an individual liberty and States are obliged to secure this right. If there is any threat to this security and liberty from any individual, the State has to react. One form of reacting to crime is enforcing punishment for wrong doers for the protection of individuals from the threat of crime. Function of punishment is to uphold the criminal laws norms of appropriate behaviors through ensuring and attaching unpleasant consequences to those who are found to have breached these norms.⁵ In analyzing the objectives or rational of punishment attention should be drawn back to the different viewpoints stated by different schools of crime causation in relation to punishment. The Classical school of crime causation uses punishment as a tool to make a person suffer. They always encourage having a higher level of pain/suffering than the pleasure the offender gets by committing a crime. Jeremy Bentham's argument was that since the offender is benefited by committing a crime there should be a method of balancing it by way of compensating victims. Utilitarian views punishment as a means to achieve certain ends with the aid of criminal law. In neo-classicism there was vast improvement by identifying diminished responsibility and the reformative methods for offenders. Positivists are also holding the view of implementing harsh punishment for any type of crime. While the jurists like Cesare Lombroso, Raffaele Garofalo and Enrico Ferri have identified the protection as the main feature of punishment, the

Chicago school/Sociological school has identified reformation as the main objective of punishment.

THEORIES OF PUNISHMENT.

Four theories can be identified, which provide justifications for punishment; namely, retribution, deterrence, incapacitation and rehabilitation. Retribution comes under retributive justice and it reflects the punitive approach. The rationale of this is that punishment is always deserved due to the harmful act and pain. This is a theory which considers punishment as a morally acceptable response to crime, with a view to the satisfaction and psychological benefits bestowed to the aggrieved party and to society. The purpose of the approach can be considered as to teach a lesson to the offender about the wrong which he did. Different forms of method can be identified under the retribution theory. Expiation is one form and it comes under the fulfillment of religious value. The other form of retribution is denunciation, which explains the disapproval of society towards the act done by the offender. The magnitude of the punishment will always speak about the social disapproval of society for the particular act. Reparation is one form of retribution which is expected to repair the harm done by the offender by compensating the victim. Earlier this was a concern of civil law and now it can be seen even in criminal law regime as a mode of restitution. Just desert also can be considered as a more effective form of retribution where it provides provisions to impose punishment proportionate to the crime.

The key element of Deterrence theory is to make the people afraid of committing crimes. This theory believes that a man will not engage in the same activity or similar activity again due to the unpleasant experience and fear. There are two forms of deterrence expected under this theory; namely general and individual. The objective of general deterrence is the creating of fear in the minds of members of society by imposing adequate punishment on the offender to deter them from criminally. This can be done in a way where a harsh punishment is

imposed even for a petty offence. In the case *Piyasena vs Attorney General*⁶ the court specifically mentioned the objective of punishment as general deterrence. In the case *Chandrasena vs Liyanage Cyril*⁷ court held that even an offence like contempt of court should be considered as a severe offence and there must be severe punishment to deter other people from committing such an activity.

Under the theory of incapacitation, mainly there can be two ways of incapacitation: physical and geographical. Death penalty and imprisonment can be considered as methods available in the Sri Lankan penal system. Apart from these methods, taking away the license and taking away a job can also be considered as a form of incapacitation. The most common way of making offenders incapacitation is imprisonment. Rehabilitation theory comes under the reformatory theory of punishment. Clinical and sociological school of thought has explained rehabilitation or 'treatment of the offender' as the principle aim of punishment. The main objective of rehabilitation theory is to make the offender a 'better person', capable of being re-integrated into society by improving the offender's character. Under this theory, an opportunity is provided for the state to take steps to reform offenders and so to control crime.⁸

MODES OF PUNISHMENTS.

There are two main statutes dealing with punishment in Sri Lanka: Penal Code No 02 of 1983 and Code of Criminal Procedure No 15 of 1979. Apart from these two codes, Community Based Correction Act No 46 of 1999 and the Probation ordinance No 42 of 1944 also play a role in modes of punishment. Section 52 of the Penal Code is the key provision which sets out the main modes of punishment. Although the Sri Lankan penal systems impose life imprisonment for several offences, it has not been expressly mentioned in the section 52 of Penal Code. While four theories provide justifications for punishment, the modes of

punishment provide different ways and means in which a punishment can be executed. Different modes of punishments can be seen as follows. Corporal punishment (death penalty), Custodial punishment (imprisonment), monetary punishment (fine, compensation, forfeiture of property), and Community Punishment/ Alternative punishments (Community based correction, probation, Conditional discharge, suspended sentence, verbal sanctions).

IMPRISONMENT.

The growth of imprisonment can be justified by a number of sentencing purposes, the principles of which are as follows.

- Prevention/incapacitation: while the person is in prison he is not committing crimes that would otherwise have been committed.
- Retribution/ denunciation: it is the offender's 'just deserts', that he suffer this serious penalty in recognition of the seriousness of the offence, and so that the populace generally should associate serious consequences with grave crimes.
- Deterrence: Either the population generally should be deterred by the prospect of imprisonment, or the individual prisoner should in future be deterred by the experience of it.
- Rehabilitation/ treatment: the prisoner should, in some sense, benefit remedially from the experience of imprisonment generally or some program provided within the prison such that his criminally tendencies are reduced on release.⁹

These objectives should be clear in mind when sentencing offenders to imprisonment and for the purpose of prison administration. If not it is impossible to achieve these objectives. However, when looking in to the ground situation of prison administration, it can be noticed that most of the objectives of imprisonment are not being fulfilled in most

countries. Sri Lanka is also not an exception to this as there are many defects and practical problems can be identified in the prison system.

PRISON SYSTEM OF SRI LANKA.

The Sri Lankan prison system was established during the British rule and in very early stages the prisoners had to undergo hard labour. Eventually ideas about severely punishing the wrongdoers changed into rehabilitating them. As a result prison administration introduced a regulatory life style for prisoners currently the prison system is functioning under the Ministry of rehabilitation and Prison reforms, and the vision is to make Sri Lankan prison service the best service in the South East Asia. Prison department consists of the Headquarters, Center for Research and Training in Corrections, Closed prisons, Remand Prisons, Work camps, Open Prison Camps, Training schools, correctional centers for Youthful Offenders and Lock-ups.

Prisoners can be directly divided into two groups as convicted and Un-convicted. It can be noted that every year the number of un- convicted prisoners are higher than the convicted prisoner's number and the average ration is 1:3 and the 75.1% belongs to the un-convicted prisoners group in the year 2011.

Year	Convicted			Un- convicted			Ratio		Un-convicted %
	Male	Female	Total	Male	Female	Total	C	U	
2006	27,755	977	28,732	83,446	5,744	89,190	1	3	75.6%
2007	30,292	1,014	31,306	92,242	7,271	99,513	1	3	76.1%
2008	32,558	1,008	33,566	95,170	7,075	102,245	1	3	75.3%
2009	36,590	1,282	37,872	101,294	7,574	108,868	1	3	74.2%
2010	31,096	1,032	32,128	93,895	6,596	100,491	1	3	75.7%
2011	26,245	773	27018	75,942	5,898	81,840	1	3	75.1%

(Sources: Department of Prison, available in the www.prisons.gov.lk)

Convicted prisoners are the persons who have been found guilty before a court of law and those who have been sentenced for the term of imprisonment. Although there are two

categories of imprisonment in the statutory book, namely rigorous and simple, currently the rigorous imprisonment is not functioning in that nature. According to the length of sentencing, around 90% of prisoners are subjected to the category of “2 year or less than two year “period (short term imprisonment), while the balance 10% belong to the long term imprisonment as an average of year 2006-2011 statistics.¹⁰ The highest number of convicted prisoners is imprisoned due to the nonpayment of fines and this number was calculated as around 56.7% (15,306 out of 27,018) in the year 2011.¹¹ Out of the total convicted prisoners, 41.6% (11,238) are first offenders, while the reconviction rates as to 36.7% (9,912) the recidivism rate as to 21.7% (5,868) in the same year.¹² Narcotic drug offence can be considered as the most populated offence among convicted prisoners, with 39.1% (10,568) and 22.9% (6,174) belonging to the Excise offences. Balance is covered by the offences such as criminal offences against persons, offences against property, offences against public Tranquility State law, and order and child abuses. Although the highest numbers of prisoners belonged to age group between 22 and 30 during the years of 2006-2008, the 2009 to 2011 statistics reveal that the highest number belongs to the age group between 30- 40 years. When considering the literacy level of convicted prisoners, year 2011 data revealed that 19.46% (15.06% + 4.40%) of prisoners have completed their O/L and A/L examination and 4.99% (1350) of prisoners have not attended school. The number of married prisoners were 14,470 (53.55%) and 11,107 (41.10%) are never married according to the data available in prison website. Others (1,441- 5.33%) belong to the categories of widowed, divorced and legally separated.

The other category of prisoners are considered as un- convicted and the total number of un-convicted prisoners were 100,491 in the year 2010, as the combination of 93,895 (93.44%) male prisoners and 6,596 (6.56%) of female prisoners. The total number for year 2011 was 81840 and the number of un-convicted prisoners who were in the New Magazine Remand

Prison were not included in this calculation due to the fire occurred in the prison while prisoners riots was taking place. Un-convicted prisoners are the persons who are awaiting trial and who have not been convicted of any offence. They are entitled to the right of presumption of innocence. The rights of un-convicted prisoners also can be limited to a certain extent, but not as much as those of convicted prisoners. A un- convicted prisoner is entitled to wear his/ her own clothing, receive meals from home and even receive treatment from his own medical officer. When analyzing the data of year 2010 in relation to un-convicted prisoners, it can be noted that 36.14% (36,212 out of 100,191) belong to the age group 22-30 years and 26.78% (26,832) un- convicted prisoners are educated up to grade 8. In addition, 59,129 (59.01 %) of un-convicted prisoners are married and 35,529 (35.46%) were unmarried, while others belonged to the widow, divorced and legally separated categories in the year 2010.

Prison authorities conduct many programmes for the better re- interrogation of offenders to society. The open prison concept based on self discipline and individual responsibility towards the group in which the inmates live was introduced in 1950. Selected prisoners serving long terms of imprisonment who have already been in prison for a considerable period of time are sent to open camps. Moreover, the mechanisms such as Release on Licence Scheme and Work Release Scheme were introduced by prison authorities. Since the rehabilitation is one major purposes of imprisonment, some rehabilitation programs are initiated in prison. The present situation in prison, the increasing rate of the reconvicted and the recidivism demonstrate that the prison system in Sri Lanka is not be able to successfully reach its main goal of adequate rehabilitation of offenders and sufficient protection of their rights.¹³

The most serious problem that the prison administration faces today is severe overcrowding which is amount to 400% approximately. It is not only a question of space, it is a problem of

not having enough water, toilet facilities, essential items of equipment such as bedding, plates, mugs, towels and clothing. Moreover this can lead to create a danger with in prison for both prisoners and officers. Solutions to the problem of overcrowding, however, do not lie within the prison system alone. They also lie with the other branches of the criminal justice system such as the police, judiciary and state policy. There are two principal ways of solving the problem: by reducing the number of prisoners or building new prisons.¹⁴ Building new prisons is a very expensive process that may not serve the objective of criminal justice system. Therefore, a country like ours has to depend more on reducing the numbers admitted to prisons. This can be done by allowing the opportunity of community sentences for those low-risk offenders and undertake proper work only for higher risk offenders who should be held in custody.

Moreover the idleness of the prison officers, political influence in appointing prison officers and also lack of collection of data about prisoners can be considered as problems that have occurred in the Sri Lankan context. Particularly, most rights of prisoners which have been recognized by several international standards are deprived in the Sri Lankan prison system. There are international legal instruments in relation to the rights of prisoners namely; Universal Declaration of Human Rights in 1948, International Covenant on Civil and Political Rights in 1966, Standard minimum Rules for the Treatment of Prisoners in 1955, Body of principles for the Protection of All Prisoners under Any form of Detention or Imprisonment in 1988, The Basic Principles for the Treatment of prisoners in 1990 and many more. Only being a party to international document will not be effective and, rights which are contained in these documents should be implemented in domestic level for the protection of the rights of the prisoners. Moreover, rights of the prisoners have been recognized by some Indian judgments. In *Sunil Batra v Delhi Administration*¹⁵ case recognized the protection against torture in the prison and the right not to be put in solitary confinement. This case

further recognized the three principles which are relating to prisoners as; maintaining dignity, rights of prisoners and classification of prisoners. In the case *Hussinara Khatoon V Home Secretary*¹⁶, State of Bihar recognized the rights to speed trial.

COMMUNITY SENTENCING/ ALTERNATIVE SENTENCING.

It is hard to find a single generic term for punishment that does not involve imprisonment. The most commonly used terms are ‘alternative to custody’ or ‘non- custodial sentences’, but word ‘community sentencing’, ‘community correction’ also now widely used recognized term.¹⁷ There are several modes of punishments which have been developed as an alternative to imprisonment. Among these method, Community service orders and probation will be discussed as methods of community sentencing as the objective of this paper. These community sentencing methods allow offenders to undertake rehabilitative programs and work in the community whilst under the supervision of the probation service. Community sentence can avoid negative social and personal implication to the offender in imprisonment such as loosing employment, psychological trauma and depression, social stigmatization, loosing self confidence and family bonding. In the Canadian case *R. v. Proulx the court held that, by increasing the use of community service orders, offenders will be seen by members of the public as paying back their debt to society. This will assist in contributing to public respect for the law...*¹⁸

Community service orders.

Community services orders as a penal sanction in Sri Lanka was first introduced by the Code of Criminal Procedure Act No. 15 of 1979. The sentence, however, was not imposed effectively by our courts due to procedural difficulties. With the introduction of the Community Based Corrections Act, No. 46 of 1999 the sentence is now being used in several courts.¹⁹

According to the section 05 of the Act, courts can grant community based correction except cases where the offender has to serve a mandatory minimum sentence and for the offence which the penalty prescribed for which includes a terms of imprisonment exceeding two years. Moreover it provides provisions to consider the nature, gravity and the circumstances of offence when implementing a community based correction order. Section 06 of the Act gives power to the magistrate to make a community based correction orders and section 9 explains about the details which should contain in an order. Main three ways of serving community sentencing orders can be identified in Sri Lanka as community work corrections, rehabilitation for drug offenders, and work under trained supervisors of the project. For implementing Community Based Correction orders written consent of offender is required. A number of working hours that they have to work will depend on term of imprisonment or amount of fine. They are directed for working under government institutions like Ministry of Justice, railway department, universities, temples, hospitals, schools etc. however there will be special places for drug offenders.

Probation.

Probation is developed in a manner to provide value to the community sentencing method. Selected offenders are placed by courts under the personal supervision and guidance of probation officer and given treatment aimed at their complete and permanent social rehabilitation, to fulfill the function of probation. Conditions of probation require an offender to allow certain rules. Failure to comply may result in the revocation of probation and a subsequent prison term. In addition to staying out of trouble and reporting periodically to a probation officer, probationers may be required to abstain from using alcohol, to undergo substance abuse treatment and drug testing.

Sri Lankan law relating to probation is dealt with the Probation ordinance no 42 of 1944. There is a major practical defect noticed with the probation ordinance as it has been restricted only to children and young persons, although the ordinance had opened it for any person. Moreover, there is allegation that most of the probation officers are not well trained. This can lead to diminish the expected objective of probation. There is no specific probation ordered relating to women offenders and also the lacks of well trained female officers have led to the less effectiveness of probation orders. Furthermore, there cannot be seen any kind of aftercare service for people who have undergone probation. However to make better use of probation it is necessary not only to improve the probation services, but steps also must be taken to educate the judges and the community the benefits of Probation. It will help to reduce the prison overcrowding to a great extent and offer the courts the use of a more humanitarian form of punishment.²⁰

IMPRISONMENT VS COMMUNITY SENTENCE: COMPARISON WITH THE OBJECTIVES OF CRIMINAL JUSTICE SYSTEM.

The criminal justice system of any country will serve several objectives namely; ensuring the protection of the people in society, bringing wrongdoers before the law, proceed a fair trial, deter people from committing crimes, impose appropriate degree of punishment on the offender, rehabilitate, re-integrate the prisoners. At the same time criminal justice system has a responsibility to protect of rights of the suspects, accused, witness, victim and offender.

Maintaining the protection of individual and society from criminals can be considered as a major objective of the criminal justice system. Punishment such as imprisonment can be considered as an effective way of obtaining this protection, since the offender is taken away from society for a period of time. However when comparing this with community sentencing,

it can be noted that there can be even a lesser danger for individuals, specially for victims, since the offender may have a chance to be in the free society.

Deterring people from committing crimes in future can be considered as another objective of the criminal justice system. Although most of people earlier believed in a huge deterrent effect of imprisonment, recidivism and reconvicted rates have shown a less deterrent effect of imprisonment. There can be several people who do not fear committing any crime and they may not be concerned about seeing others receiving punishment in prison. In addition, released prisoners who are back in society knowing more advanced methods of committing crimes and implication of general deterrence are also less. In community sentencing it can be noted that offenders get a chance to reflect about the wrong which he/she did while being in the same society. So there can be a sound prediction that he/she may get a better chance to be good than being in custody. However, by imposing a community sentence others in the society may not be serious about the punishment and they may take it as a soft option.

Re- interrogation of offender to the society as better persons is another main objective of the criminal justice system. Re- interrogation may be defined as the process of preparing both the community and offender for the latter's return as a productive and accepted citizen.²¹ It cannot be said that imprisonment is not working in this regard effectively. It is not the problem of imprisonment and it is the practical defects of prison administration. Imprisonment can be used as the best correctional method if we have a better rehabilitation system called as a "peno- correctional method". To rehabilitate prisoners, first there should be a classification of offenders as provided in part I of the Standard Minimum rules for the treatment of prisoners(1957). There are several ways implementing rehabilitation of offenders such as social, educational, religious, health and economic approaches/methods²². Under social rehabilitation there are methods such as receiving visits from family, writing letters, home leave and family gathering to build the relationship between family while

sports, cultural activities, recreation activities are helping to develop relationship with other inmates. For educational rehabilitation English classes, literacy, computer knowledge and library facilities should be improved. Inmates should be rehabilitated according to the values of their religion. Health rehabilitation is very important as problematic health condition could be the cause of the crime. For example, if there is a person who cannot control himself, who has angered mind set for period of time he may tend to do harmful activity once they feel that condition. So counseling, meditation and other necessary medical treatment should be available to understand the problem and to implement correction. Finally, economic rehabilitation is also very important since some might have committed crimes due to financial problems. He/she may not have a job or possess the necessary skills to find a job. If the prison can act as a correctional institution which provide necessary guidance, inmates can find a job to suit their skills. To achieve these long term goals of rehabilitation of prisoners, prison authorities themselves can't work along. There should be supportive mechanisms from other institutions; National Apprentices and Industrial Training Authority to provide vocational training, Ministry of Education should help in educational programs, volunteers and trained counselors provided by the Ministry of Health and Ministry of Social Services can support the counseling program and self realization programs. However, the problem that has arisen here is the finances needed by the State to implement such rehabilitation programs. So one can reasonable argue that is it worthwhile to spend money on offenders who have already done wrong to the society, than developing the education, health and other services which are available for law binding person. Community sentencing rehabilitation program will be more effective when the offender is in the community, rather than in custody. The resources also will be less when compared to the custodial rehabilitation.

Restoring the balance between the victim and the offender, a balance which has been disturbed by the commission of a crime is one main objective of criminal justice system.

According to restorative justice, the victim has a major role in the criminal justice process. In the case *R. v. Proulx*, the court stated that

[Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence... the victim, the community and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victims and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims and to the community.]

While adversarial justice aims to establish blame and administer punishment, restorative justice aims to establish obligations and promote healing.²³

Reduction of the crime rate is an objective of the criminal justice system. The recidivism and re-conviction rates of Sri Lanka show that imprisonment has not been a good method of reduction of crime rate. Imprisonment too often serves only to prevent the offender from committing crimes for a period of time. Once the offender is back in society he/she may engage in more severe crimes repeatedly. However, the community sentencing method may work to address the deep-seated problem of offenders and this can lead to a reduction of crime rate to a certain extent than imprisonment.

Moreover, community sentencing can reduce government expenditure incurred on prison and the state can use free labour for development activities in the country. Additionally, community sentence is aimed at changing offending behaviors of treating mental health, drug and alcohol problems. Such programs address the cause of crime and show the victim that offenders are encouraged and supported to manage their own problems. Most of the convicted prisoners in

Sri Lanka are imprisoned for the default payment of fines. Payment of fines is a punishment for petty offences but most of the poor offenders are unable to benefit from this alternative scheme and as a result they become a burden to the State by going to prison. Judges should consider the socio- economic backgrounds of the offender when sentencing and for offenders who are unable to pay a fine, an alternative method such as community service order or probation should be used.²⁴

However there can be some obstacles of implementing community sentence. Firstly, the public and media perception that the demands of punishment can only be properly met by imprisonment. Secondly, the unfair or inconsistent sentencing in community sentencing. There are persons who are relatively advantaged: who have money to pay a fine, who are well employed, and persons who are perceived by probation officers as being able to benefit from supervision; in other words community sentencing run the risk of being discriminatory. The third obstacle is the enforcement of community sentence. Until the entire stake holders of the criminal justice system are aware of community sentencing, the methods may not function effectively. Fourthly the concept of ‘net-widig’, which says community sentencing will simply draw more and more people in to the ‘net’ of the criminal justice system and thereby increase the like hood that they will eventually end up in prison.²⁵

CONCLUSION.

As discussed earlier every punishment which is imposed by courts can serve different objectives. While some serve for one particular theory, most of the punishments in modern context can be viewed from the perspective of having mixed objectives. Imprisonment and other two modes of community sentence also serve to achieve several objectives of criminal justice system as method of reactions to crime. It can be noted with above discussion that imprisonment is not serving according to the restorative justice, unless it is mixed with proper

rehabilitation process. Also it can be said that community sentence will be more effective for petty offences other than imprisonment.

It is my suggestion that it is an opportunity to transfer the sentence of “alternative to imprisonment” to “imprisonment as alternative”. There should be guidelines which provide provisions to select alternative sentencing prior to imprisonment. However the gravity of the offence also should be considered in this regard. There can be exceptional situations where imprisonment should be imposed for very serious crimes where no other proper punishment is available and if there is a threat for the protection of public if the system allows the offender to remain in the society. In that situation, prison system has to be re arranged by implementing more advanced rehabilitation mechanisms.

When implementing a punishment, the judge has to first select the punishment and later decide the gravity of the punishment. Judges cannot just impose a sentence. Moreover they are limited by statutory provisions. They are guided by prevailing philosophical rationales, by organizational considerations, and by the presentence of investigation reports. They are also influenced by their own personal characteristics.²⁶ Several guidelines can be suggested to selecting a sentence. Firstly there should be uniformity in selecting the sentence. If there is a wide disparities in sentencing for similar factual and legal situations people will loss the trust of law. So there can be a tendency to take law into people hand. Secondly, there should also be consideration of the objectives of punishment before selecting a punishment. It is always good if a judge can write the objectives of punishments in their judgments. Thirdly, the cruelty of punishment should be considered by the judge. Later, restitution to the victims of crime, special circumstances such as plea bargaining can be considered when implementing the punishment. Finally, as mentioned earlier, non- custodial measures should be the first priority unless it belongings to the exceptional two situation mentioned earlier. Non custodial sentence should not be viewed merely as alternative to prison but should be understand as

representing a different sphere of penal regulation which is based on enabling and requiring offenders to take responsibility for changing their own lives and behavior without physical constraint of imprisonment.²⁷

After selecting the form of punishment the gravity of it has to be decided. For that, factors such as culpability of the offender, harm the offence actually caused or could caused, the impact on victims or the general public and the circumstances of the offence can be considered. Moreover factors such as sex, age, and other factors of the offender, the victim's perspective and imprecation of the society should be considered before deciding on the appropriate gravity of the punishment.

The Sri Lanka context doesn't have any specific framework which provide a guidelines either to selecting a punishment or to decide the gravity of the punishment. Only exception that can be traced here is the mandatory sentencing provision which takes away the discretion of the judge. Moreover there is no victim protection law and the suggested law is still served in the bill stage. The judges of the lower courts are specially bound with restrictions to follow the judicial precedent, although they see some loopholes in the sentencing policy in Sri Lanka. Judges must be encouraged to justify the punishment which they impose in their judgments.

Sentences have to be effective not only in punishing the offender, but also in ensuring that the underlying reasons for the offender's behavior are addressed. According to restorative justice, when punishing also there should be a concern for all the parties such as offender, victim and society. The State should try as much as possible to make the offender a good person. At the same time, the State should take necessary harsh actions against those who cannot be rehabilitated by any form of punishment. If not the social contract between State and individual will collapse, leading to several more problems which cannot be healed for a long period of time

¹ Elliott, MA 1952. *Crime in Modern Society*. Harper & Brothers, Newyork, p.p 11-16

² Paranjape, NV 1999, *Criminology and Penology*, 9th ed, Central law publication, Alahabad, p 110

³ *Ibid*

⁴ *Ibid*

⁵ Sanders A & Young R 2000, *Criminal justice* ,2nd ed, Butterworths, London. p6

⁶ ([1986] 2 SLR 388)

⁷ ([1984] 2 SLR 193)

⁸ J. Niriella, 2010, "Effective prison rehabilitation system, special reference to Sri Lanka", *US.China law Review* Vol 7, No.3, p17

⁹ Morgan R, 2000, 'Proper use of imprisonment' ,in .Shankardass R D (ed), *Punishment and the prison Indian and international perspectives*. saga publication. p.142

¹⁰ Available in < <http://www.prisons.gov.lk/Statistics/Statics/Title4/4.25.pdf>>(Acceded on 02-03-2013)

¹¹ Available in < <http://www.prisons.gov.lk/Statistics/Statics/Title9/9.2.pdf>>(Acceded on 02-03-2013)

¹² Available in < <http://www.prisons.gov.lk/Statistics/Statics/Title4/4.8.pdf>>(Acceded on 02-03-2013)

¹³ *Supra* note (viii) p15

¹⁴ H.G.Dharmadas, A general overview of the prison system in Sri Lanka since independence. http://www.lawandsocietytrust.org/PDF/resource/prison_system.pdf acceded 16-03-2013

¹⁵ ([1978] SC 1976)

¹⁶ (AIR[1982] AC 1167)

- ¹⁷ A.Worrall, *Punishment in the community*. C.Hale, K.Hayward et al, Criminology (Oxford,2001)_p527
- ¹⁸ ([2000] 1 S.C.R. 61)
- ¹⁹ *Supra* note (xiv)
- ²⁰ *Supra* note (xiv)
- ²¹ R.M. Carter et al ,Program models: Community Correctional centers (Washington DC: U.S. Government printing office, 1980) p.7
- ²² N.De Silva, ”Report on effective prison Rehabilitation systems for Sri Lanka”*FES/SLFI Research paper No 1*(Sri Lanka Foundation),2004,pp14-20
- ²³ R.J.Berger et al,*Crime Justice and Society,An introduction to Criminology*,(Viva Books, 2nd edition)p49
- ²⁴ *Supra* note (xxii),p40
- ²⁵ A.Worrall, ” *Punishment in the community. The future of Criminal Justice*”(USA,1997)p14
- ²⁶ R.M.Bohm & K.N.Haley, *Introduction to Criminal Justice* (Newyork,Mcgrawhill). P11
- ²⁷ A.Worrall, ” Punishment in the community”. C.Hale, K.Hayward et al, Criminology (Oxford,2001)_p527

Registration of Musical Compositions and Sound Recording- Critical overview under Copyright Act

Kavisha Inamdar
Student of 9th Semester
Institute of Law, Nirma University
India

CHAPTER 1

INTRODUCTION AND RESEARCH METHODOLOGY

1.1 INTRODUCTION

Copyright Registration for Musical Compositions

The copyright law of the United States provides for copyright protection in “musical works, including any accompanying words,” that are fixed in some tangible medium of expression. Musical works include both original compositions and original arrangements or other new versions of earlier compositions to which new copyrightable authorship has been added. The owner of copyright in a work has the exclusive right to make copies, to prepare derivative works, to sell or distribute copies, and to perform the work publicly. Anyone else wishing to use the work in these ways must have the permission of the author or someone who has derived rights through the author.

Note: Copyright in a musical work includes the right to make and distribute the first sound recording. Although others are permitted to make subsequent sound recordings, they must compensate the copyright owner of the musical work under the compulsory licensing provision of the law (17 U.S.C. §115). For more information, see Circular 73, Compulsory License for Making and Distributing Phonorecords.

Exploring music Copyright, and specific considerations that apply to song writers and composers.

1. What copyright exists in music?

There are principally 2 types of copyright to consider when we talk about *music copyright*.

- The traditional ©, ‘C in a circle’ copyright, applies to the composition, musical score, lyrics, as well as any artwork or cover designs, as all of these are individually subject to copyright in their own rights, (though when you register, you can include them all in a single registration provided they have the same copyright owner(s)).
- The second type of copyright applies to the sound recording itself, and is signified by the ‘P in a circle’ .

How does this work?

Suppose you want to record and sell your own version of Tchaikovsky’s 1812 Overture. This would not present a problem as Tchaikovsky has certainly been dead for over 70 years*, the work itself would now be out of copyright, and available as a work in the public domain. Provided you performed and recorded the work yourself, no infringement would have occurred. * Actual duration may vary due to national laws.

You would however be justifiably annoyed if someone else simply copied your recording and started selling it themselves. This is where the copyright in the sound recording comes into play. Copyright law recognises the problematic nature of this situation which is unique to sound recordings, and gives sound recordings distinct protection in their own right that is separate from that in the underlying work. The copyright in the sound recording will run for 50 years from the year of recording, or 50 years from date of release if released in that time. Again actual duration may vary slightly from one country to another depending on national laws.

Duration of Copyright

	A	B	C	D	E
	Published, performed or made publicly available during the author's lifetime.	Published, performed or made publicly available posthumously	Unpublished Works	Created anonymously or under a pseudonym	Copyright expired if...
Musical Works	Life of the composer + 70 years.	70 years from the end of the year first published, performed or made publicly available.	Copyright lasts perpetually until the work is first published, performed or made publicly available and then either A or B applies.	70 years from the end of the year the work was first published, performed or made publicly available.	Composer died before 1 January 1955 and the work was published during the composer's lifetime.
<p>Note: Arrangements of early music are not necessarily copyright free. If the creator of the <i>original</i> arrangement died before 1955, the <i>original</i> score will be out of copyright. However, if someone has created a new arrangement, the new arrangement may still be in copyright.</p>					

1.2 RESEARCH PROBLEM

Copyright in a musical work includes the right to make and distribute the first sound recording. Although others are permitted to make subsequent sound recordings, they must compensate the copyright owner of the musical work under the compulsory licensing provision of the law (17 U.S.C. §115).

1.3 HYPOTHESIS

Suppose you want to record and sell your own version of Tchaikovsky's 1812 Overture. This would not present a problem as Tchaikovsky has certainly been dead for over 70 years*, the work itself would now be out of copyright, and available as a work in the public domain. Provided you performed and recorded the work yourself, no infringement would have occurred. * Actual duration may vary due to national laws.

1.4 AIM AND SCOPE OF THE PROJECT

The main aim of my research area is the protection related to the copyright whether it is a musical work or literary works. How the specific considerations are applied to the music composers and those who do recordings in which way their works and rights are being protected.

1.5 RESEARCH DESIGN

The quality and value of research depends upon the proper and particular methodology adopted for the completion of research work. Looking at the nature and importance of research topic doctrinal legal research methodology has been adopted.

To make an authenticated study of the research topic “Tax implication on SEZ “enormous amount of study material is required. The relevant information and data necessary for its completion has been gathered from both primary sources as well as secondary sources which are appropriate and available in the books, research articles and proceedings of the books.

In the need of the present research various cases and articles have been referred and critically analysed which has also been used as a source of information.

Researcher proposes to critically analyse the topic of the study and tries to reach the core of the topic of the subject.

CHAPTER 2

Copyright and its related Laws

2.1 Meaning

Copyright is a legal concept, enacted by most governments, giving the creator of an original work [exclusive rights](#) to it, usually for a limited time. Generally, it is "the right to copy", but also gives the copyright holder the right to be credited for the work, to determine who may adapt the work to other forms, who may perform the work, who may financially benefit from it, and other [related rights](#). It is a form of [intellectual property](#) (like the [patent](#), the [trademark](#), and the [trade secret](#)) applicable to any expressible form of an idea or information that is substantive and discrete.¹

Copyright initially was conceived as a way for government to restrict printing; the contemporary intent of copyright is to promote the creation of new works by giving authors control of and profit from them. Copyrights are said to be territorial, which means that they do not extend beyond the territory of a specific state unless that state is a party to an international agreement. Today, however, this is less relevant since most countries are parties

to at least one such agreement. While many aspects of national copyright laws have been standardized through [international copyright agreements](#), copyright laws of most countries have some unique features.² Typically, the duration of copyright is the whole life of the creator plus fifty to a hundred years from the creator's death, or a finite period for anonymous or corporate creations. Some jurisdictions have required formalities to establishing copyright, but most recognize copyright in any completed work, without formal registration. Generally, copyright is enforced as a [civil](#) matter, though some jurisdictions do apply [criminal](#) sanctions.

2.2 Scope

Copyright may apply to a wide range of creative, intellectual, or artistic forms, or "works". Specifics vary by [jurisdiction](#), but these can include [poems](#), [theses](#), [plays](#), other [literary works](#), [movies](#), [dances](#), [musical compositions](#), [audiorecordings](#), [paintings](#), [drawings](#), [sculptures](#), [photographs](#), [software](#), [radio](#) and [television broadcasts](#), and [industrial designs](#).

Graphic [designs](#) and industrial designs may have separate or overlapping laws applied to them in some jurisdictions.³

Copyright does not cover ideas and information themselves, only the form or manner in which they are expressed. For example, the copyright to a [Mickey Mouse](#) cartoon restricts others from making copies of the cartoon or creating [derivative works](#) based on [Disney's](#) particular [anthropomorphic](#) mouse, but does not prohibit the creation of other works about anthropomorphic mice in general, so long as they are different enough to not be judged copies of Disney's⁴. In many jurisdictions, copyright law makes exceptions to these restrictions when the work is copied for the purpose of commentary or other related uses (See [fair use](#), [fair dealing](#)). Meanwhile, other laws may impose additional restrictions that copyright does not — such as [trademarks](#) and [patents](#).

In all countries where the Berne Convention standards apply, copyright is automatic, and need not be obtained through official registration with any government office. Once an idea has been reduced to tangible form, for example by securing it in a fixed medium (such as a drawing, sheet music, photograph, a videotape, or a computer file), the copyright holder is entitled to enforce his or her exclusive rights⁵. However, while registration isn't needed to exercise copyright, in jurisdictions where the laws provide for registration, it serves as [prima facie](#) evidence of a valid copyright and enables the copyright holder to seek [statutory damages](#) and attorney's fees. (In the USA, registering *after* an infringement only enables one to receive actual damages and lost profits.)

Copyright, like other [intellectual property rights](#), is subject to a statutorily determined term. Once the term of a copyright has expired, the formerly copyrighted work enters the public domain and may be freely used or exploited by anyone. Courts in the United States and the United Kingdom have rejected the doctrine of a [common law copyright](#). Public domain works should not be confused with works that are publicly available. Works posted in the [internet](#) for example, are publicly available, but are not generally in the public domain. Copying such works may therefore violate the author's copyright.

2.3 Copyright registration for musical composition and sound recordings

A musical composition consists of music, including any accompanying words and is normally registered as a work of the performing arts. The author of musical composition is generally the composer, and the lyricist, if any. A musical composition may be in the form of a notated copy (for example, sheet music) or in the form of a phonorecord (for example, cassette tape, LP, or CD). Sending a musical composition in the form of a phonorecord does not necessarily mean that there is a claim to copyright in the sound recording.

A sound recording results from the fixation of a series of musical, spoken, or other sounds. The author of a sound recording is the performer(s) whose performance is fixed, or the record producer who processes the sounds and fixes them in the final recording, or both. Copyright in a sound recording is not the same as, or a substitute for, copyright in the underlying musical composition.⁶

2.4 Registration of a Musical Composition and a Sound Recording with a Single Application

Although they are separate works, a musical composition and a sound recording may be registered together on a single application if ownership of the copyrights in both is exactly the same. To register a single claim in both works, give information about the author(s) of both the musical composition and the sound recording.

An application for copyright registration contains three essential elements: a completed application form, a nonrefundable filing fee, and a nonreturnable deposit—that is, a copy or copies of the work being registered and “deposited” with the Copyright Office.⁷

Advantages to Copyright Registration

There are, however, certain advantages to registration, including the establishment of a public record of the copyright claim. Except for certain foreign works, copyright registration must generally be made before an infringement suit may be brought in the United States. Timely registration may also provide a broader range of remedies for an infringement of copyright.

Registration is not required for valid copyright

First, understand that you don't need to register your copyright with the United States Copyright Office in order to have a valid copyright. You have a valid copyright as soon as your song or sound recording is "fixed in a tangible medium of expression". This is a term used by the Copyright Act and means that your song or sound recording must be written down or recorded.

Although registration with the Copyright Office is not required to have a valid copyright, registration does provide several benefits:

- the establishment of a public record and evidence of your claim as the valid copyright owner of your songs and sound recordings
- the ability to file a federal lawsuit against someone who uses your song or sound recording without your permission
- eligibility to receive statutory damages and attorneys' fees in the event you file and win a copyright infringement lawsuit

Registering your copyright is fairly straightforward. To register your copyright, you must send three items in the same package to the Copyright Office:

1. a completed application,
2. A deposit of your song or sound recording, and
3. the filing fee which is currently \$45.

It will take the Copyright Office approximately six months to process your application and send you a certificate of registration. However, the effective date of your registration is the date on which the Copyright Office receives your completed application package.⁸

What is the difference between a musical work and a sound recording ?

A [musical work](#) is the composition of a song (the actual melodies and harmonies), the arrangement of the instruments (what parts the guitar plays, etc.) and the lyrics, whereas a [sound recording](#) is an actual recording. Thus, the author of a musical work is the musician who composes the music and writes the lyrics, whereas the author of a sound recording is the musician who actually records the music (or possibly the record label producing the recording).

So CDs generally have two copyrights for every song - one for the musical work, and one for the actual sound recording embodied on the disc. Thus, when someone sells a pirated CD, they are actually infringing two copyrights - the musical work copyright and the sound recording copyright. However, when someone makes an unauthorized cover of a song, they are only violating the musical work copyright.

When the issue of [copyright infringement](#) relates to sampling, this implicates the sound recording copyright, since a sample comes from the actual recorded musical track. The musical work copyright may or may not be implicated in this situation, depending on the nature of the sample used.

Musical Compositions & Sound Recordings

Imagine turning on the radio and hearing your own song, music or lyrics - that somebody has stolen! How can you prove ownership of your creative work? Copyright registration is the proper legal protection for your original music.

If you create and record music, it is important to understand that there are actually two separate works that are subject to copyright protection:

1. Musical Compositions

First is the musical composition. This consists of music, including any accompanying words. The author of a musical composition is generally the composer, and the lyricist, if any. Copyright in a musical composition is not the same as, or a substitute for, copyright in the sound recording of that composition.

2. Sound Recordings

The second copyright is the sound recording itself. This copyright protects the particular sounds that have been recorded including the arrangement and production. If you record a

new version of a song you've written, you would have a new copyright of the sound recording, but not in the original composition (because it's the same song).

For copyright purposes, the "author" of a sound recording is the performer(s) whose performance is recorded, or the record producer who processes the sounds, or both.

Copyright in a sound recording is not the same as, or a substitute for, copyright in the underlying musical composition.⁹

If you are both songwriter and recording artist of a musical work you can claim complete ownership of these two separate copyrights on a single application - for one fee! This provides you with total ownership of your work.

For a band, or musical group, if all band members have contributed to the musical composition and the sound recording, a single copyright registration may be made for both the musical composition and the sound recording.

Although they are separate works, a musical composition and a sound recording may be registered together on a single application if ownership of the copyrights in both is exactly the same.

If you've written and recorded the entire work, you will own all the legal rights to both the song and that recording. (This is the typical situation for most independent artists, songwriters and bands.)

If you have original artwork for the cover of your CD or a logo for your band, you may also consider copyrighting that on the same application to protect all of your creative work.

A single application can protect:

- The sound recording.
- The musical composition.
- Lyrics, if any.
- The individual performances on each song.
- The arrangement within that particular recording.
- The design or artwork of the CD packaging.

Separate Registrations

In some situations you might want to register your works separately instead of on a single application. A separate copyright registration for each musical composition or recording can be beneficial because it will result in a separate entry of the individual titles in the catalogues and indexes of the Copyright Office. Works registered together will be recorded in the records of the Copyright Office¹ only under the collective title.

Individual titles will appear in Copyright Office records only if each work is registered separately or if an application for supplementary registration is submitted to specify the individual titles in a collection. An application for supplementary registration may not be submitted until a certificate of registration has been issued for the collection.

Separate registration may simplify identification of the work for purposes of licensing, transfer, permission, and distribution of royalties. If you are currently involved in any of these activities, or expect to be in the near future, you might consider separate registrations for each individual song or recording.

However, for most song writers and bands, a single registration is usually sufficient as long as there is common ownership of both the composition and the recording.¹⁰

Who can Register ?

Generally, only the author of an original work or someone who has obtained rights through the author can rightfully claim copyright. If created during the scope of employment, the work is then considered a "work made for hire" and the employer - not the employee is considered the author.

The creators of joint works are equal co-owners of the copyright unless they have agreed to the contrary. Minors can file a copyright application; however state laws would regulate their business dealings.

The following persons are legally entitled to submit a copyright application:

- **The Author.** This is either the person who actually created the work or, if the work was "made for hire", the employer or whomever the work was prepared for.¹¹

- **The Copyright Claimant.** This is either the author of the work or a person or organization that has obtained ownership rights from the author either by written contract, assignment, will or other transfer of all rights by the author.
- **The Owner of Exclusive Rights.** Any of the exclusive rights that make up a copyright can be transferred and separately owned. An owner of any of these individual exclusive rights may apply for registration of his or her claim in the work.
- **The Authorized Agent.** Any person or organization duly authorized to act on behalf of the author, other copyright claimant, or owner of exclusive rights may apply for copyright registration.

Joint Works

The creators of joint works (songs written by a band) are equal co-owners of the copyright unless they have agreed to the contrary. Whoever contributed to the composition of the work has an equal claim to the entire copyright as a joint author¹². The copyright is not divided up according to who did what. Each joint author owns the copyright and each author has rights to use or license the work as long they split any money earned. One joint author cannot prevent another from using the copyrighted work.

For example, if you collaborate with someone on a song - one writes the lyrics and the other composes the music - both of you are considered contributors to a "joint work" if your intention was to combine the elements into a single work - the completed song. Each contributor would have an undivided ownership interest in the entire copyright and would have the right to perform, reproduce or license the work (or any art of it) without the others' consent, provided each copyright owner is paid a share of any revenue. However, a collaborator to a joint work cannot license the "exclusive rights" to the work without the written consent of the others.

Generally, when one writes the music and someone else does the lyrics - there's a 50/50 split of copyright ownership, unless there is a written agreement to the contrary.

Registration by a Band

Many (if not most) bands create their music and recordings together as a group and then proceed to obtain legal protection for that original work by registering the copyrights. When songs have been written by a band, each member is usually considered co-owner of the

copyright unless the individual members have agreed to the contrary. Each contributor to the work must be identified as an "author" on the copyright application.

Typically, whoever contributed to the composition of the song (melody or lyrics) has an equal claim to the entire copyright as a joint author. The copyright is not divided up according to who did what. Each joint author owns the copyright and each author has rights to use or license the work as long they split any money earned.

Compilations of Musical Works

A "compilation" is a work formed by the collecting and assembling of preexisting materials that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

If you contribute a certain minimum amount of authorship in the selection and ordering of preexisting musical compositions, you have created a copyrightable compilation. The copyright in the compilation of the musical compositions is separate and distinct from copyright (if any) in the musical compositions themselves. Protection in the compilation extends only to the selection and ordering of the musical compositions. If you are registering an album of new, original music - that is not a compilation.

Derivative Sound Recordings

A derivative sound recording is one which incorporates some preexisting sounds--sounds which were previously registered, previously published, or which were fixed before February 15, 1972.

The copyright in a derivative work covers only the additions, changes, or other new material appearing for the first time in the work. It does not extend to any preexisting material and does not imply a copyright in that material. Only the owner of copyright in a work has the right to prepare, or to authorize someone else to create, a new version of that work. The owner is generally the author or someone who has obtained rights from the author.

When a work contains preexisting sounds, the application must contain brief, general descriptions of both the preexisting material and the added material.

For example, you might identify the preexisting material as "sounds previously published" and indicate something like: "remixed sounds." This new material must result from creative new authorship rather than mere mechanical processes; if only a few slight variations or

purely mechanical changes (such as declipping or remastering) have been made, registration is not possible.

CHAPTER 3

Conclusion

Thereby, to conclude Copyright refers to the bundle of exclusive rights vested in the owner of copyright by virtue of section 14 of the act. Copyright protection is conferred on literary works, dramatic works, musical works, artistic works, cinematograph films and sound recording.

[Copyrights](#) protect a work of authorship. There can be a different copyright on a musical composition and on a sound recording of the same song. The copyright in the sound recording protects the contributions of the performers and that of the record producer, and prevents anyone else from copying the recording.

If a musician is attempting to copyright both the composition of music, and a sound recording at the same time, he or she files a longer sound recording form. That means the specific performance and the material performed are now copyrighted and subject to copyright law. Many musicians work as primarily songwriters, though, and they may only include a recorded song in a performing arts song to further their claim that they have in fact written the material.

¹ World Intellectual Property Organisation

² International Copyright Law Survey

³ Peter K, Yu (2007). [Intellectual Property and Information Wealth: Copyright and related rights](#)

⁴ Simon, Stokes (2001). [Art and copyright](#). Hart Publishing.

⁵ Berne Convention for the protection of Literary and Artistic works

⁶ www.copyright.gov

⁷ [ibid://](#)

⁸ www.legaljungleguide.com

⁹ Music.directlegal.com

¹⁰ Section 9 of the Indian Copyright Act, 1957

¹¹ Section 2(d) of the Indian Copyright Act, 1957

¹² Section 2(z) of the Indian Copyright Act, 1957

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- www.wipo.int
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ACTS/LEGISLATION REFERRED:

- CopyRight Protection Act, 1956
- CDPA(CopyRight, Design and Patent Act) 1988.
- Circular 73
- Section 14

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Internet Censorship in India-A detailed study

Jacob George

Student, School of Law, Christ University, India

ABSTRACT

The internet is being seen as a powerful tool to reach out to the masses as seen in recent times. As many as 700 million Indians of a total population of 1.2 billion have access to the internet at least once a month as of Jan 2012 a large number when compared to 0.5 million in 2000. There have also been an alarming number of instances of internet censorship in India in the last decade. Law enforcement agencies have come under the hammer by the media and the general public for restricting a citizen's right to speech by adopting such measures which have been termed 'selective censorship'.

Article 19 of the United Nations Declaration on Human Rights, 1948 seeks to secure for every person the right to freedom of expression of opinions and ideas. Such an objective is also found in Article 19(1) (a) of the Indian constitution which confers upon every citizen the right to free speech and expression. However such a right is by no means absolute. The right is subject to certain 'reasonable restrictions' mentioned under Article 19(2) which can be enforced by means of enactment of legislation.

Through this paper, it is sought to investigate and examine the need for such measures of censorship and regulation of the web.

INTRODUCTION

India is frequently described to be one of the most democratic countries. However in the recent past several instances of government inadequacy have caused this perception to be challenged. Despite being one of the largest democracies in the world and having a comprehensive constitution that encompasses a fundamental right to speech and expression a number of recent incidents beg to differ.

One such instance has been the latest regulation of the Internet by the central and state government. Several instances of policing the internet have been carried out citing a host reasons such as inciting communal violence and anger, seditious nature etc. Although India's internet penetration rate of less than 10 percent is low by global standards, the country is nonetheless home to over 100 million users, placing it third behind only China and the United States as of early 2012.¹ It must be noted that 10 percent of a population of 1.2 billion is more than the total population of many countries. Since the 1991 policy that facilitated great reforms in the telecommunication sector, India has come a long way in the development of telecommunication. The new Internet policy introduced in November 1998 allowed private companies to become ISPs and either lease transmission network capacity or build their own, thereby ending the monopoly over domestic long-distance networks of the Department of Telecom. Many private Internet Service Providers (ISPs) have set up as they see immense potential in such a country where nearly a third of the population remain below the poverty line.

In the past, instances of the central government and state officials seeking to control communication technologies and censor undesirable content were relatively rare and sporadic. However, since the November 2008 terrorist attacks in Mumbai, which killed 171 people, the need, desire, and ability of the Indian government to monitor, censor, and control the communication sector have grown.² It is in this context that the legislature made amendments to the Information Technology Act in 2008 in order to facilitate greater content regulation. This has also led to several social media applications and social networking applications being asked by government officials to filter content posted by users that can be classified as 'offensive'. In conflicts between castes and religious groups, and in the ongoing Dispute with Pakistan over Kashmir, the state routinely censors material it believes could incite violence. Threats to journalists and bloggers come from political, religious or ethnic

¹ Eric Ernest, "India To Be World's Third Largest Internet Market," PC World, November 8, 2011

<http://www.pcworld.in/news/india-be-worlds-third-largest-internet-market-57792011>.

² Joshua Keating, "The List: Look Who's Censoring the Internet Now," Foreign Policy, March 24, 2009

http://www.foreignpolicy.com/articles/2009/03/23/the_list_look_whos_censoring_the_internet_now.

nationalist groups. However, journalists are rarely detained as a means of censoring the press, and when they are held they are often quickly released.³

India guarantees freedom of speech and expression in its constitution but reserves the authority to impose restrictions in the interests of national sovereignty, state security, foreign relations, public order, decency, and morality.⁴ Thus each form of media — print, film, and television is governed by its own regulatory apparatus. An example of this is the Press Council of India (PCI) set up under the Press Council of India Act 1978 which as its main objective seeks to regulate content in print media.⁵

In the case of the internet however, the power to regulate remains with the police and to some extent with government officials. CERT-In is a body created in 2003 to ensure internet security around the country⁶. Even though its role is not clearly defined with regards to participation in Internet Censorship as defined under the Act, it is seen that through several incidents in the past the police have acted on the recommendations of this body.

Thus through this submission it is sought to study the law relating to internet censorship in India, the circumstances under which such regulation can be carried out, the process of such regulation etc. The role of the Information Technology Act 2000 and Cert-in as a body of regulation shall also be touched upon.

DISCUSSION

KEY STATISTICS:

GDP per capita, PPP (constant 2005 international dollars) 2,970⁷

Life expectancy at birth, total (years) 64⁸

Literacy rate, adult total (percent of people age 15+) 70⁹

³ Internet Censorship in India

<http://access.opennet.net/wp-content/uploads/2011/12/accesscontested-india.pdf>

⁴ Article 19, Constitution of India

⁵ Press Council of India Website

<http://presscouncil.nic.in>

⁶ CERT-In Website

<http://www.cert-in.org.in/>

⁷ World Bank 2009

⁸ World bank 2008a

Human Development Index (out of 169) 119¹⁰

Rule of Law (out of 5) 2.5¹¹

Voice and Accountability (out of 5) 3.0¹²

Democracy Index (out of 167) 40

Digital Opportunity Index (out of 181) 124¹³

Internet penetration rate (percentage of population) 5.1

Internet Use in India

Close to half of the Indian population of India live in rural areas. Agriculture happens to be the main occupation of these people, as a result the literacy rate remains rather low at 74.44%¹⁴. It is estimated that by the year 2020, close to half of the illiterate people in the world would live in India.

Internet use in India reveals a great imbalance between urban and rural regions, although the gap has been diminishing during the past few years. Nearly 25 percent of India's population lives in cities (266 million), and 20 percent (52 million) of those are active Internet users as of the year 2010 (meaning they have used the Internet at least once in the past month).¹⁵

By contrast, only 4.18 million among the rural population are active users; 54 percent of these rural users access the Internet through Internet centres more than ten kilometres away from their villages.

Seventy-eight percent of nonusers indicate that they are not aware of the Internet.¹⁶

⁹ World Bank2008b

¹⁰ UNDP 2010

¹¹ World Bank Worldwide Governance Indicators 2009

¹² Economist Intelligence Unit 2010

¹³ ONI Country Profile

¹⁴ UNESCO website

<http://www.unesco.org/new/en/education/themes/education-building-blocks/literacy/>

¹⁵ Internet and Mobile Association of India (IAMAI), "I-Cube 2009 – 2010: Internet in India," April

2010, http://www.iamai.in/Upload/Research/icube_new_curve_lowres_39.pdf.

¹⁶ IAMAI, "Internet for Rural India: 2009," August 2010,

http://www.iamai.in/Upload/Research/Internet_for_Rural_India_44.pdf.

Language is another obstacle to using the Internet. Although there are 22 primary regional languages in India, most online content is in English, a language only 11 percent of the population speaks.¹⁷

With approximately 61 million Internet users, India has an overall Internet penetration rate of 5.1 percent. However, its Internet subscription rate is low, at only 1.3 percent.¹⁸

Most Indians who access the Internet do so from Internet centres. Home and work connections and school access points are less popular. Most Internet users in the country are male, middle-class, and young.¹⁹

Almost half of the country's users are online at least four to six times per week.

As of December 2009, approximately 370 Internet service providers (ISPs) were licensed to operate in the country.

According to an official Telecom Regulatory Authority of India report, Bharat Sanchar Nigam Limited (BSNL) and Mahanagar Telephone Nigam Limited (MTNL) were the market leaders, holding 57.84 percent and 13.81 percent of the market share respectively in June 2010.²⁰

In 1995, VSNL became the first service provider to provide Internet services to the country. In April 2002, the government authorized ISPs to offer Voice over Internet protocol (VoIP) services.

In January 2007, the Department of Telecommunications (DOT) announced that it would install filtering mechanisms at India's international gateways. The head of the Internet Service Providers Association of India (ISPAI) said that these new "landing stations" would

¹⁷ IAMAI, "I-Cube 2009 – 2010: Internet in India."

¹⁸ International Telecommunication Union (ITU), "Internet Indicators: Subscribers, Users and Broadband Subscribers," 2009 Figures, <http://www.itu.int/ITU-D/icteye/Reporting/ShowReportFrame.aspx?ReportName=/WTI/InformationTechnologyPublic & ReportFormat=HTM>

L4.0 & RP_intYear=2009 & RP_intLanguageID=1 & RP_bitLiveData=False .

¹⁹ IAMAI, "I-Cube 2009 – 2010: Internet in India."

²⁰ Telecom Regulatory Authority of India, "Indian Telecom Services Performance Indicators April/June 2010," October 2010, <http://www.trai.gov.in/WriteReadData/trai/upload/Reports/52/5octoberindicatorreporton13oct.pdf> .

be able to block both select websites at the subdomain level and unauthorized VoIP telephone systems.

Internet Censorship under the I.T. Act

In June 2000 the Indian Parliament created the Information Technology (IT) Act to provide a legal framework to regulate Internet use and commerce, including digital signatures, security, and hacking. The act criminalizes the publishing of obscene information electronically and grants police powers to search any premises without a warrant and arrest individuals in violation of the act.

In 2003, an organization named Indian Computer Emergency Response Team (CERT) came into being, under the IT Act 2000. A list was created as to who could raise concerns about online content. This list contains certain individuals in the government sector thereby limiting the power to raise objections on Internet content available in India. The work of CERT was to issue examine such objections and issue BLOCK notices to all ISPs.

The role of CERT is to enhance the security of India's Communications and Information Infrastructure through proactive action and effective collaboration.²¹ CERT-IN serves as a nodal agency for accepting and reviewing requests from a designated pool of government officials to block access to specific websites. When it decides to block a site, it directs the Department of Telecommunications (DoT) to order all licensed Indian ISPs to comply with the decision.

Under the 2008 amendment of the IT Act, CERT-IN was assigned "the task of oversight of the Indian cyberspace for enhancing cyber protection, enabling security compliance and assurance in Government and critical sectors."²²

Section 69 of the IT Act empowers the central government to designate agencies and issue orders for interception, monitoring, and decryption in the interest of national security, public order, or preventing incitement of illegal acts. More specifically, Section 69B of the IT Act authorizes the central government to "monitor and collect traffic data or information through

²¹ CERT-IN website:

www.certin.org

²² Vikas Asawat, "Information Technology (Amendment) Act, 2008: A New Vision through a New Change," March 17, 2010, <http://ssrn.com/abstract=1680152>.

any computer resource for cyber security”. Within this authority, the law mandates that any intermediary or any person in charge of said computer resource called upon must “provide technical assistance and extend all facilities to such agency to enable online access”, “intercept, monitor, or decrypt the information” and “provide information stored in computer resources”.²³ Similar to Section 69A, the law requires that procedures and safeguards be applied when the government exercises such power, though the details of such procedures are not clear.

The Government being concerned that terrorists may take advantage of the encryption in smart phones threatened to ban BlackBerry messaging and corporate e-mail services by August 31, 2010, unless Research in Motion (RIM) granted regulators access to encrypted user data. The deadline was extended to October 2010, then further to January 2011, for RIM and regulators to work on a mutual, feasible solution to address the national security concerns. As an interim solution, RIM agreed to host local servers and proposed a manual solution for messenger service. In December 2010, India agreed to work with individual carriers to access data from BlackBerry devices, acknowledging RIM’s assertion that they do not have access to individual users’ encryption keys.

According to Indian officials, the government also sent notices to Google and Skype, requiring them to set up local servers to allow full monitoring of encrypted e-mail and messenger communications.²⁴

Section 66 A of the I.T. Act 2008 states:

Punishment for sending offensive messages through communication service, etc..- Any person who sends, by means of a computer resource or a communication device,-

(a) any information that is grossly offensive or has menacing character; or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device,

(c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages

²³ Section 69 A

²⁴ Devidutta Tripathy, “India to Decide on More Time to RIM for Data Access, ” Reuters, October 26, 2010, <http://www.reuters.com/article/2010/10/26/india-rim-idUSSGE69P0IU20101026>.

*shall be punishable with imprisonment for a term which may extend to three years and with fine.*²⁵

This provision has been adopted from Section 127 of the English Communications Act 2003 which states:

Improper use of public electronic communications network

(1) A person is guilty of an offence if he—

(a) sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character; or

(b) causes any such message or matter to be so sent.

(2) A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—

(a) sends by means of a public electronic communications network, a message that he knows to be false,

(b) causes such a message to be sent; or

(c) persistently makes use of a public electronic communications network.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both.

*(4) Subsections (1) and (2) do not apply to anything done in the course of providing a programme service (within the meaning of the Broadcasting Act 1990 (c. 42))*²⁶

Thus this section expressly confers power on the executive to arrest any person who acts in a way that is opposed to this section. This has led to a lot of problems and potential for misuse in a legal system that sees politicians sparring with each other every day in order to gain an advantage.

Section 69 of the I.T. Act 2008 states:

Directions of Controller to a subscriber to extend facilities to decrypt information.-

(1) If the Controller is satisfied that it is necessary or expedient so to do in the interest of the sovereignty or integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable

²⁵ Section 66A, Information Technology Act 2008

²⁶ Section 127, Communications Act 2003 (England)

offence, for reasons to be recorded in writing, by order, direct any agency of the Government to intercept any information transmitted through any computer resource.

(2) The subscriber or any person in charge of the computer resource shall, when called upon by any agency which has been directed under sub- section (1), extend all facilities and technical assistance to decrypt the information.

(3) The subscriber or any person who fails to assist the agency referred to in sub- section (2) shall be punished with an imprisonment for a term which may extend to seven years.

Thus it is not just the person who posts the offensive material who can be arrested but also the service providers and other intermediaries who can be held liable for failing to assist in cleaning it up.

This has also led to several discrepancies as there is no notification sent to the user on deletion of the content posted. This is against the principles of natural justice as he is not able to seek further legal remedies as no reason is given to him.

CONCLUSION:

It remains rather unclear whether the government has exercised its powers responsibly in this circumstance. The blocking of websites, twitter accounts and other domains could be justified to a large extent when one considers the circumstances that are prevalent.

Consider the rumours spread in Aug 2012 where a large number of people from the North Eastern part of India fled the city of Bangalore as a result of the fear and panic created by a series of rumours that incited violence against the community. Although such rumours originated from a series of text messages, it must be said that it gained momentum using social media sites such as Facebook and Twitter, emails, blogs and other websites on the Internet. The consequences of this were adverse, both economically and socially.²⁷ Thus for the government to step in and regulate the internet where the situation can be potentially of national emergency, it can be justified as the rights under Article 19(1) are not absolute as mentioned under Article 19(2).

²⁷ Times of India, Aug 16th 2012
http://articles.timesofindia.indiatimes.com/2012-08-16/bangalore/33232302_1_guwahati-rumours-top-cop

However, in recent times there is no denying that this power has been subjected to blatant misuse by the authorities. A comprehensive example of this has been the case of Shaheen Dada, where a young girl had only uploaded a Facebook status that expressed her disagreement with how the whole city of Mumbai came to a standstill as a result of the death of a prominent politician. She was soon arrested along with a friend who liked the post and later let out on bail against a security of Rs. 15,000.²⁸

SUGGESTIONS:

Thus although there is immense potential for the laws to be misused, it can be inferred that the existing laws are sufficient. The problem lies in the Execution and with the Interpretation. The following are the recommendations provided:

- The owner of the content be notified when content is blocked along with reasons, thus enabling further legal measures to be sought.
- CERT-IN be made the exclusive body responsible to delete content rather than independent intermediaries.

Further I seek to recommend that more frequent amendments be made to the I.T. Act 2000 to keep pace with the rapid changes in technology and other determining factors.

²⁸ Times of India, November 11th 2012,
http://articles.timesofindia.indiatimes.com/2012-11-20/india/35226892_1_facebook-post-shiv-sainiks-police-action

**A CRITICAL ANALYSIS: DISCRETIONARY POWERS OF THE JUDICIARY IN DRUG RELATED CASE WITH
SPECIAL REFERENCE TO NARCOTIC DRUG PSYCHOTROPIC SUBSTANCES ACT**

Heli Pathak

**Student of 9th Semester, Institute of Law
Nirma University, Gujarat India**

The Indian judiciary have a wide ambit of power in judgement delivering. The judicial proceedings differ from case to case as there are many aspects to be taken into consideration while framing of a judgement because all but evidence cannot be the merits of the case. The Narcotic Drugs and Psychotropic Substances Act of 1985 was introduced to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and for matters connected therewith. This Act also provides for the forfeiture of narcotic drugs psychotropic substances and to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances.

The courts not only have to restore the normalcy but also to deliver a deterrent judgement but at the same time the Court will have to safeguard the life and liberty of the innocent persons so that they may not be the victims of the crime which they have not committed. The Judiciary also has to take into consideration the procedural aspect. The objective of my research study is to have a better understanding of the role of the judiciary and its attitude towards the cases related to substance abuse and drug pedalling.

KEYWORDS

Narcotic Drug Regulation, Judiciary, Criminological theory

CHAPTER: 1

INTRODUCTION AND RESEARCH METHODOLOGY

1.1 INTRODUCTION:

The Indian judiciary have a wide ambit of power in the circus of judgement delivering. The judicial proceedings differ from case to case as there are many aspects to be taken into consideration while framing of a judgement because all but evidence cannot be the merits of the case. Criminology being introduced in the recent times gives an insight on how there are other facts and circumstances which lead to a making of a criminal along with commission of an offence under principal Act or any other criminal offence defining Act.

The Narcotic Drugs and Psychotropic Substances Act of 1985 was introduced to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and for matters connected therewith. This Act also provides for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs psychotropic substances and to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances.

The problem of drug addicts in International circuit of elites and the mafia is working throughout the world. This is not only a crime but also crime against the whole world. This being such a grave crime it needs to be dealt with iron hands of the Judiciary. The courts not only have to restore the normalcy but also to deliver a deterrent judgement but at the same time the Court will have to safeguard the life and liberty of the innocent persons so that they may not be the victims of the crime which they have not committed. The Judiciary also has to take into consideration the procedural aspect and question the authorities the reason of each and every step taken by them.

1.2 HYPOTHESIS:

- The Judiciary has not been given wide powers in respect to drugs related cases by the NDPS Act.
- There is no nexus established between the Judiciary and the executives in the understanding the concept of this Act

1.3 OBJECTIVE:

The objective of my research study is to have a better understanding of the role of the judiciary and its attitude towards the cases related to substance abuse and drug pedalling. I also want understand through various tools of Data Collection the mind-set of the judiciary on specially these cases.

1.4 SCOPE FOR FURTHER RESEARCH:

The scope of my research study is to have a better understanding of the role of the judiciary and its attitude towards the cases related to substance abuse and drug pedalling. I also want understand through various tools of Data Collection the mind-set of the judiciary on specially these cases.

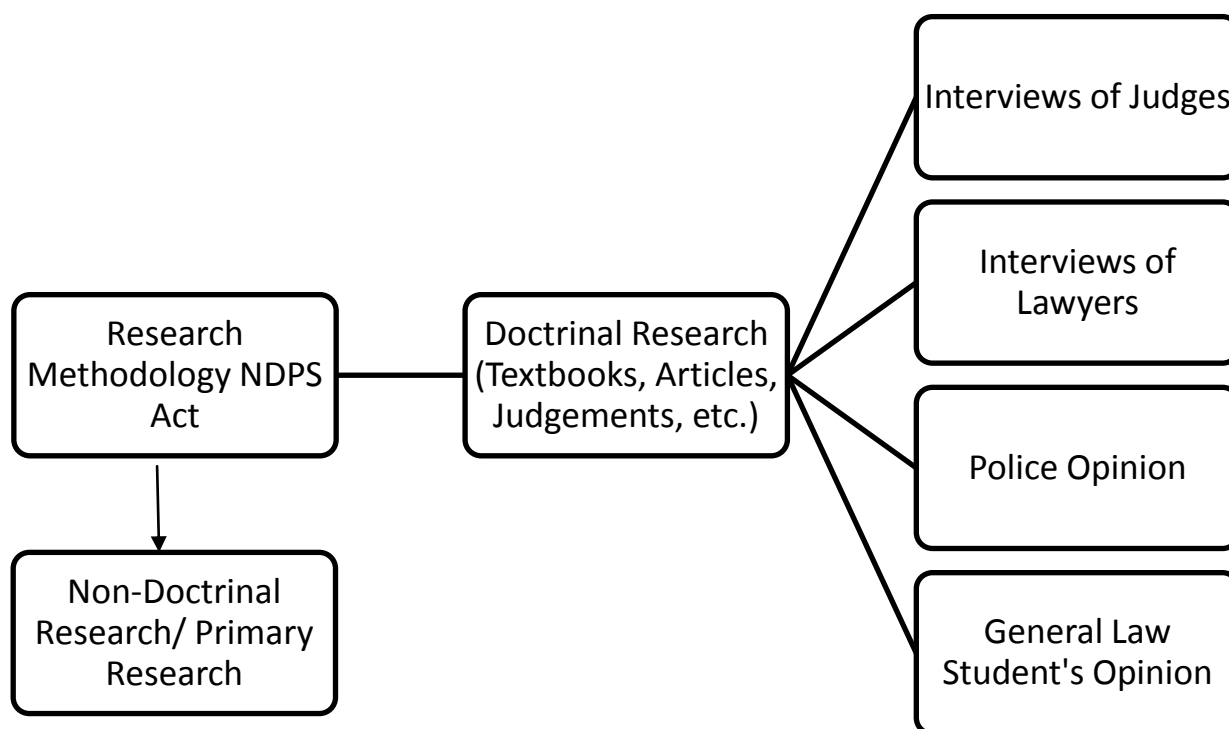
1.5 RESEARCH METHODOLOGY:

1. Tools Of Data Collection:

- Secondary data (Books, Articles, Journals, Reports, etc.)
- Interviews from Judges and lawyers.
- Case Laws
- Reports by the UN

2. Area Of Research:

My area of research is limited to the role of the Judiciary in cases related to drugs with special reference to NDPS Act.



CHAPTER-2

A CRITICAL ANALYSIS: DISCRETIONARY POWERS OF THE JUDICIARY IN DRUG RELATED CASE WITH SPECIAL REFERENCE TO NDPS ACT

2.1 PURPOSE OF NARCOTIC DRUG RELATED LAWS:

The term **narcotic** originally referred medically to any [psychoactive](#) compound with any sleep-inducing properties. In the [United States of America](#) it has since become associated with [opioids](#), commonly [morphine](#) and [heroin](#) and their [derivatives](#), such as [hydrocodone](#).

The term is, today, imprecisely defined and typically has negative connotations.¹ When used in a legal context in the US, a *narcotic* drug is simply one that is totally prohibited, or one that is used in violation of strict governmental regulation, such as heroin or morphine.

From a pharmacological standpoint it is not a useful term,² as is evidenced by the historically varied usage of the word. In 1909, highly addictive substances were freely traded across borders in

unregulated markets. The consequences were devastating as the numbers of drug addicts increased and drug trade was at the centre of international tensions that resulted in wars. Throughout the 1900s, opium production and trade reached catastrophic levels. Tens of millions of Chinese became addicted and China's unilateral efforts to control the situation were not crowned by long-term success.

At the turn of the 20th century, humanity was facing the worst drug problem in history: the Chinese opium epidemic and it became clear that the problem required an international approach. A forum that became known as the International Opium Commission, held in Shanghai in 1909, laid the groundwork for the first international drug control treaty, the International Opium Convention of The Hague of 1912.³ The Convention of 1925 established the Permanent Central Opium (Narcotics) Board to manage the statistical information provided by countries on narcotics and to monitor international trade. The Board was an impartial body whose members were not government representatives but served in their personal capacity. The 1931 Convention established a Drug Supervisory Body to monitor the operation of an estimates system that would limit the manufacturing of drugs to scientific and medical purposes. Over the years, the international drug control system became increasingly complex with a multitude of treaties and agreements, which in 1961, were consolidated into the Single Convention on Narcotic Drugs. The Single Convention also established the International Narcotics Control Board, merging the Permanent Central Narcotics Board and the Drug Supervisory Body.⁴

Today, the three international drug control treaties in force have near universal adherence and while challenges remain, one hundred years of international drug control deserve to be remembered and commemorated. Thus these laws were required in order to prevent narcotic drug abuse as it was not only harmful for the health but also till a certain extent was lethal in nature.

2.2 NARCOTIC DRUG LAWS IN INDIA:

The menace of drug addiction leads to the vicious cycle of immense human misery and illegal production, distribution and consumption of drugs. The unlawful distribution and consumption of drugs have given rise to criminal activities and violence worldwide. There are many reasons that make drug abusers out of people; it includes peer pressure, loneliness, depression, and the feeling that using drugs is “cool.” The abuse of drugs often results in physical and mental disorders, such as physical dependence on drugs, withdrawal symptoms and damage to the nerve cells.⁵ The government of India has enacted the Narcotic Drugs and Psychotropic Substances Act, 1985, to regulate and control operations related to narcotic drugs and psychotropic substances. The government of India has enacted the Narcotic Drugs and Psychotropic Substances Act, 1985, to regulate and control operations related to narcotic drugs and psychotropic substances.

The Narcotic Drugs and Psychotropic Substances Bill, 1985 was introduced in the Lok Sabha on 23 August 1985. It was passed by both the Houses of Parliament and it was assented by the President on 16 September 1985. It came into force on 14 November 1985 as THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985 (shortened to NDPS Act). Under the NDPS Act, it is illegal for a person to produce/manufacture/cultivate, possess, sell, purchase, transport, store, consume any narcotic drug or psychotropic substance. Under one of the provisions of the act, the [Narcotics Control Bureau](#) was set up with effect from March 1986. The Act is designed to fulfill India's treaty obligations under the [Single Convention on Narcotic Drugs](#), [Convention on Psychotropic Substances](#), and [United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#).

The Act has been amended twice - in 1988 and 2001. The Act extends to the whole of India and it applies also to all Indian citizens outside India and to all persons on ships and aircraft

registered in India. The Act describes itself as "An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances and for matters connected therewith."⁶

Causes of Drug Addiction:

- Rapid industrialization and urbanization have ushered a new way of life with new values like permissiveness. This leads to defiance to the age old values inhibitions and traditional social control mechanisms. Even unemployment is the major factor contributing to drug addiction among youth.
- The concept of nuclear family taking over the household leads to disintegration of joint family system and acts like a contributory factor to encourage the vice of drug addiction.
- With the advancement technology and development in the pharmaceutical industry invention becomes an integral part. This leads to invention of various drugs which can act as a boon or a bane to the human life.
- People often take drugs for relief from painful illness and ultimately it results in to the addiction of such drugs. There are some addicts whose neurological heritage is such that the find it difficult to survive without the use of alcohol of narcotic drugs and this ultimately makes them habitual to drug addicts.
- Frustration and emotional stress due to failures, sorrows or miseries, diverts people to join the company of addicts. For them drugs or alcohol is a medicine- a blessing in disguise.⁷

- Hippie culture also detracts youngsters to drug addiction and the start it as a 'fun' or enjoyment. They start consuming the same on the experiment basis for the mere enjoyment purpose.
- Social Disorganizations is also a contributing factor for the menace of drug abuse or misuse. Frequent family strikes and break downs due to poverty, temperamental differences, neighbourhood influences etc may divert an individual to drug consumption to overcome his domestic and family problems. This may itself be a cause of tension or quarrel in the family.⁸

The above factors are highly contributing to drug consummation in India. But these factors are variant in nature and might change with changing circumstances.

2.3 JURISPRUDENTIAL ASPECT OF NDPS CASES:

Michael Machado Vs. Central Bureau of Investigation

Honourable Supreme Court observed that when trial was almost over, even there was some suspicion against the person sought to be arraigned as on accused, it would not be permissible to start the trial afresh. In this case also almost all witnesses have been examined by the prosecution and now the investigating officer alone is still to be examined and at that stage, the present petitioner by virtue of the order impugned came to be arraigned as an accused to stand trial along with opponent No.2 afresh. In view of the decision of Supreme Court in Michael Machado Vs. Central Bureau of Investigation (supra), this is also not permissible.

Ravindra vs Union on 1 October, 2010 (recent judgment)

Custom Invitation of application: The Commissioner may invite applications for the grant of such number of licences as assessed by him, to act as Customs House Agents in the month of January every year by means of a notice affixed on the notice board of each Customs Station as well as through publication in at least two newspapers having circulation in the area of his jurisdiction specifying therein in the last date of receipt of application. Such application shall be for clearance work within the jurisdiction of the said Commissioner.

Sardarsingh Nagsingh Rajput ... vs State Of Gujarat 1993 CriLJ 3473

Whether for any alleged lapse or default committed by the Investigating Agency in not submitting Chargesheet within the prescribed time-limit of 90 days as warranted under Section 167(2)(a) of the Criminal Procedure Code, 1973, particularly in matter of the offences punishable under the NDPS Act, the accused are straightway entitled to be released on such default bail, altogether overlooking and ignoring the limitations imposed by the Legislature on Courts on exercise of such powers under Section 37 (amended) of the said Act?

Whether any Court can refuse to accept the charge-sheet submitted to it by the Investigating Agency on the alleged two grounds viz., (i) that the same was not presented on either of the two days of a week so earmarked for the purpose for particular Police Station, and (ii) that the FSL report/muddamal was not forwarded along with it?

Whether any lapse or default committed by the learned Magistrate in contravening Section 36-A(1)(b) of the NDPS Act in not forwarding the accused to Special/ Session Court immediately on expiry of 15th day confers any legal right upon the accused to earn mechanical default-bail on the alleged ground that as his further continued detention in judicial custody on expiry of the said 15th day, have been rendered illegal and unauthorised, turning blind eyes to the gravity and seriousness of the offence and deaf-ears to the concern voiced by the Legislature in imposing limitations on granting bail under Section 37 (amended) of the said Act.⁹

An offence is, almost without exception, only judged to be minor if the amount of heroin is less than 0.05 gram. In all cases where imprisonment is a possible outcome it is possible to sentence the person to probation if certain conditions are fulfilled. In choosing a sanction, the court shall, as a reason for imposing probation, give consideration to whether such a sanction can contribute to the accused refraining from continued criminality.¹ This is the take taken by the European council on Drugs and policies for improving the quality of judgement delivery system in Narcotic Drugs cases. Guidelines have been laid down.

Observing the above cases it can be well be inferred that Drug related cases should be handled gently and very delicately. These cases have immense depth and secrecy attached to it so much so that even the executives should be careful in dealing with these cases. The problem that we deal here is lack of nexus between the Judiciary and the Executives. As a researcher I observed during the court proceedings that Judiciary always emphasizes more on the procedural aspect rather than giving merits to the facts of the case. This is not the fault of the Judiciary but of the law that when it comes to punishing the accused the things that are taken into consideration are that of the loopholes in the procedural aspect.

¹ Julien, Robert M. *A Primer of Drug Action*. 11th edition. Claire D. Advokat, Joseph E. Comaty, eds. New York: Worth Publishers: 2008. page 537.

² Mangione MP, Matoka M: *Improving Pain Management Communication*. "How Patients Understand the terms "Opioid" and "Narcotic." *Journal of General Internal Medicine* 2008; vol 23:9 1336-1338.

³ <http://www.incb.org/incb/en/a-century-of-international-drug-control.html>

¹

<http://www.emcdda.europa.eu/html.cfm/index5174EN.html?pluginMethod=eldd.countryprofiles&country=SE>

⁴http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2008/03/12/000158349_20080312084905/Rendered/PDF/wps4553.pdf

⁵ <http://www.lawisgreek.com/drugs-prohibitions-under-the-narcotic-drugs-and-psychoactive-substances-act>

⁶ <http://india.gov.in/allimpfrms/allacts/2482.pdf>

⁷ George Caltin. E.G : *Alcoholism in the Encyclopedia of Social Science* (1930) p. 155

⁸ Prof. Paranjape P.V., *Criminology & Penology with Victimology*, Cental Law Publication, New Delhi, 15th Ed., 2011, pp. 209

CHAPTER 4

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Books referred:

Criminology & Penology with Victimology by Prof. N.V. Paranjape, Cental Law Publication.

The above mentioned book has been referred for understanding Drugs as a cause of crime. Pg nos. 209 to 222 specifies about the same and how it affects the society and also its stand under gin Indian Law. The topics essential for the project work are as follows:

- Causes of Drug Addiction. Pg 209
- Drugs and Crime. Pg. 215
- Indian law perspective Pg. 217

Kataria R.P., "Law Relating Narcotic Drugs & Psychotropic Substance Act", 2nd edition, Orient Publishing Co., 2008.

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Human Trafficking and Smuggling of Migrants: The International Instruments and Domestic Laws of Malaysia*

ASHGAR ALI ALI MOHAMED

AHMAD IBRAHIM KULLIYAH OF LAWS

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSA

Introduction

Human trafficking and smuggling of migrants is a global problem, a major crime against humanity and a sheer violation of the basic human rights. It involves illegal trade of human beings for commercial purposes such as sexual exploitation, prostitution, slavery, servitude, forced labour or illegal organ removal. People are being bought and sold and are transported, transferred, harboured or received through use of force, coercion or other means for the purpose of exploitation and this problem is faced by most of the third world countries.¹ Further, victims of smuggling are often promised attractive jobs in destined country however, on arrival they find themselves exploited or coerced into forced labour. They are forced to live in sub-human conditions, confiscation of passport, and made to work extremely long hours with menial wages, among others.

In order to prevent and combat human trafficking and smuggling of migrants, the United Nations General Assembly had, in 2000, adopted inter alia, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air. The above Protocols were enacted pursuant to the United Nation's Convention against Transnational Organised Crime which came into force on 29 September 2003 and are enforced by the United Nations Office on Drugs and Crime (UNODC).

For its part, the Malaysian authority does not condone human trafficking for all purposes and this would include slavery, forced labour, prostitution or other human right abuses. It had shown its full support in combating and preventing trafficking in persons and smuggling of migrants by enacting the Anti-Trafficking in Persons Act 2007 (Act 670). The long-title to this Act was amended in 2010 and is now called the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. Parts I, II, ss. 66 and 67 of the said Act came into force on 1 October 2007,² while Parts III, IV, V and VI, except ss. 66 and 67, came into effect on 28

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¹ In *Bahurudeen Mohamed Yusoff Ghaney v Public Prosecutor* [2011] MJU 46, Mohd Amin Firdaus Abdullah, JC observed: "most of the Third World countries, their mass media report that countries all over the world count drugs trafficking, firearms trafficking, and human trafficking, as common major offences faced by them".

² PU(B) 339/2007.

February 2008.³ Having said the above, this paper discusses the international instruments and domestic laws of Malaysia on human trafficking and smuggling of migrants. Further, some reference is also made to the Islamic approach to this subject. At this juncture, it would be worthwhile to note that exploitation, oppression and wrongdoing, among others, are forbidden by the Quran and the Sunnah of the Prophet (s.a.w.), the primary sources of Islamic law.

Human trafficking: The International instruments

United Nations Convention Against Transnational Organized Crime

The primary aim of the United Nations is to maintain international peace and security. In order to fight against transnational organized crimes, it adopted the Convention against Transnational Organized Crime. The said Convention was adopted by the United Nations General Assembly resolution 55/25 of 15 November 2000. The Convention came into force on 29 September 2003 and was ratified by the Malaysian government on 26 February 2009.⁴

The State parties to this Convention recognise the seriousness of transnational organised crime which not only endangers the lives and liberties of their citizens, but also affects the very foundations of peace, progress and well being of nations and their societies in an increasingly globalised world. The Convention thus, requires the State parties to fully cooperate in order to effectively prevent and combat the various forms of organized crime with transnational character such as money-laundering, corruption human trafficking and smuggling of migrants, among others.

The purpose of this Convention as set out in article 1 is "to promote cooperation to prevent and combat transnational organized crime more effectively." Further, article 3(2) provides that an offence is deemed transnational in nature if: "(a) it is committed in more than one State; (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State."

Apart from the above, the State parties to this Convention are required to adopt in their national legislation or to take other measures as may be necessary to establish as criminal offences for participating in an organized crime group, money laundering, corruption and obstruction of justice. By becoming parties to this Convention, the States parties also have access to "a new framework for mutual legal assistance and extradition, as well as a platform for strengthening law enforcement cooperation. States parties should also be committed to

³ PU(B) 86/2008.

⁴ See 'Signatories to the United Nations Convention against Transnational Crime and its Protocols' at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en

promoting training and technical assistance to strengthen the capacity of national authorities to address organized crime.”⁵

Having said the above, it is noteworthy that the Convention Against Transnational Organized Crime is complemented by three different Protocols, which targets specific areas of organized crime: (i) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; (ii) the Protocol Against the Smuggling of Migrants by Land, Sea and Air; and (iii) the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. In relation to the above, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air are further discussed below;

(i) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter referred to as the ‘Protocol on Trafficking in Persons’) was adopted by the United Nations General Assembly resolution 55/25 in Palermo, Italy on 15 November 2000 and came into force on 25 December 2003. This Protocol was adopted to supplement the United Nations Convention Against Transnational Organized Crime. The relationship between this Protocol and the Convention Against Transnational Organized Crime is explained in articles 1, 2 and 4 of the Protocol.

(a) Definition and purpose of Trafficking in Persons Protocol

The Protocol on Trafficking in Person is intended to prevent and combat trafficking, particularly, women and children who are the most common victims of trafficking, to protect and assist victims and to promote international cooperation.⁶ It provides measures to prevent trafficking, to punish the traffickers and to accord the victims their internationally recognized human rights. The intention or purpose of the Protocol on Trafficking in Persons is provided in article 2, namely: “(a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among States Parties in order to meet those objective.”

‘Trafficking in persons’ is defined in article 3(a) as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of

⁵ See ‘The UN Convention against Transnational Organized Crime and the Protocols thereto’ at <https://www.unodc.org/unodc/en/organized-crime/index.html>

⁶ See “Protocols – Counter Trafficking” at <http://www.countertrafficking.org/protocols.html>

deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

As from the above definition, trafficking in person contains the following three elements: (i) Activity: recruitment, transport, transfer, harbouring, receipt; (ii) Purpose: sexual exploitation/prostitution, slavery, servitude, removal of organs, forced labour/services; and (iii) Means: threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability or giving or receiving of payments or benefits to achieve the consent of a person having control over another person. In other words, trafficking in person consist of actions in which offenders gain control of victims 'by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.' The agreed definition of 'trafficking in person' is primarily intended to synchronise with the national laws of the State Party with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting 'trafficking in person' cases.

Article 3(b) provides: "The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used." The recruitment, transportation, transfer, harbouring or receipt of a child, who is under the age of eighteen years, for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in article 3(a) above.⁷ Article 4 provides: "This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences."

Article 5 requires that the conduct set out in article 3(a) should be criminalised in the domestic legislation of the member countries. Criminalization is also required for the following acts: (a) attempts to commit a trafficking offence; (b) participation as an accomplice in such an offence; and (c) organizing or abetting others to commit trafficking. In particular, article 5 provides:

⁷ See Article 3(c) and (d) of the Protocol of Trafficking in Persons.

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

(b) Protection of trafficked persons

Article 6 requires the State Parties to provide victims of 'trafficking in persons' the necessary protection and assistance as follows:

- (i) privacy and identity, including, inter alia, by making legal proceedings relating to such trafficking confidential;
- (ii) information on relevant court and administrative proceedings;
- (iii) assisting them in the presentation of their views and concerns at appropriate stages of criminal proceedings ;
- (iv) to provide for their physical, psychological and social recovery, in particular, the provision of:
 - (a) Appropriate housing'
 - (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
 - (c) Medical, psychological and material assistance; and
 - (d) Employment, educational and training opportunities.
- (v) endeavour to provide the victims of trafficking in persons their physical safety while they are within its territory.
- (vi) ensure that victims of trafficking in persons are offered the possibility of obtaining compensation for damage suffered.

In addition to taking measures pursuant to article 6 above, each State Party is required to consider adopting legislative or other appropriate measures that permit victims of 'trafficking in persons' to remain in its territory, temporarily or permanently, in appropriate cases. For the said purpose, the State Party concern is required to give appropriate consideration to humanitarian and compassionate factors.⁸ Repatriation of victims of trafficking in persons is provided in article 8. It provides:

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for

⁸ See article 7 of the Protocol

the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

(c) Prevention, cooperation and other measures

In order to prevent and combat trafficking in persons and further, to protect victims of trafficking in persons, especially women and children, from re-victimisation, article 9 requires the States Parties to establish comprehensive policies, programmes and other measures necessary for the said purpose. This includes research, information and mass media campaigns and social and economic initiatives. Policies, programmes and other measures established where appropriate shall include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society. The above article further provides that the States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity. The States Parties is also required to adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10 requires the law enforcement, immigration or other relevant authorities of States Parties to co-operate with one another by exchanging information, in accordance with their domestic law, to enable them to determine: (i) whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons; (ii) the types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and (iii) the means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

It further requires the States Parties to provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

Article 11 requires the States Parties to strengthen, to the extent possible, their border controls as may be necessary in order to prevent and detect trafficking in persons. The State Party must adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol. The measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State. The State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the above obligation. Further, the State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol. This article also provides that the States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Further, article 12 requires the State Party to take such measures as may be necessary to ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused, falsified or unlawfully altered, replicated or issued. Further, they are to ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use. Article 13 provides that at the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

(ii) Protocol against the Smuggling of Migrants by Land, Sea and Air

The Protocol against the Smuggling of Migrants by Land, Sea and Air was adopted by General Assembly resolution 55/25 and came into force on 28 January 2004. This Protocol aimed at preventing and combating the smuggling of migrants by land, sea and air. This Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.⁹ It requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels. The need to provide migrants with humane treatment and full protection of their rights is also recognised. The above Protocol shall apply to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational

⁹ See article 2.

in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.¹⁰

(a) Smuggling of migrants and illegal entry

'Smuggling of migrants' is defined in article 3(a) as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident. Illegal entry is further defined in article 3(b) as "crossing borders without complying with the necessary requirements for legal entry into the receiving State". 'Fraudulent travel or identity document' means "any travel or identity document: (i) that has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or (ii) that has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or (iii) that is being used by a person other than the rightful holder".¹¹

(b) State Party to legislate criminal liability for smuggling of migrants

Article 6(1) requires the State Party to adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (i) the smuggling of migrants, that is, procuring the illegal entry of a person into a State of which he is not a national or a permanent resident;
- (ii) producing fraudulent travel or identity documents;
- (iii) the use of a document by a person other than the rightful holder;
- (iv) procuring, providing or possessing fraudulent documents;
- (v) enabling a person to remain in a country without complying with the necessary requirements

However, the victims of the smuggling of migrants shall not be liable to criminal prosecution.¹² Further, article 6(2) provides that each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) attempting to commit an offence established in accordance with paragraph 1 of this article; (b) participating as an accomplice in an offence established in this article and; (c) organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article. Article 6(3) further states that each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with this article (a) that endanger, or

¹⁰ See article 4.

¹¹ See article 3(c).

¹² See article 5.

are likely to endanger, the lives or safety of the migrants concerned; or (b) that entail inhuman or degrading treatment, including for exploitation, of such migrants.

(c) Measures against the smuggling of migrants by sea

The States Parties are required to cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.¹³ If a State Party has reasonable grounds to suspect that a vessel with a foreign registration is smuggling migrants, it shall notify the flag State and requests confirmation of registry and authorisation. The States Parties so requested shall render such assistance to the extent possible within their means.¹⁴ If the suspicions prove to be justified, the requesting State can board and search the vessel, and then take appropriate measures with respect to the vessel and the persons and cargo on board. They must ensure the safety and the humane treatment of the persons on board. If no imminent danger is found, no additional measures can be taken without the express authorisation of the flag State.

Once the above measures have been taken, the State Party shall promptly inform the flag State concerned of the results of that measure. Article 8(4) requires that a State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with this article. Article 8(7) provides that “a State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.” Where a State Party takes measures against a vessel in accordance with article 8 above, it shall: (a) ensure the safety and humane treatment of the persons on board; (b) take due account of the need not to endanger the security of the vessel or its cargo; (c) take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State; (d) ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.¹⁵ Further, article 9(2) provides that where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

(d) International cooperation

Article 11 provides that the States Parties must work towards strengthening their borders and are entitled to deny entry to persons implicated in the smuggling of migrants. This

¹³ See article 7.

¹⁴ See article 8(1).

¹⁵ See article 9(1).

include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State. Article 12 further requires that the State Parties shall take such measures as may be necessary to ensure: (a) that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and (b) the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use. Article 13 provides that at the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

Article 14 requires that the immigration officials and other competent agents shall be properly trained in preventing the smuggling of migrants, in the humane treatment of such persons and in protecting their rights. To this end, the States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society to ensure that there are adequate personnel training. Further, the States with relevant expertise and appropriate technical resources should help States that are frequently countries of origin or transit for migrants.

Article 15 requires the State Party to take measures to ensure that it provides or strengthens information programmes to increase public awareness of the the conduct constituting smuggling of migrant as set forth in article 6 of this Protocol. Further, the States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups. The State Party is also required to promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

Article 16 requires the States Party to take necessary measures to protect the rights of migrants who are victims of smuggling in particular, the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Further, they must take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol. In applying the provisions of this article, States Parties shall take into account the special needs of women and children. Article

16(5) further provides that in the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Lastly, article 18 provides that the State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of the return. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory. The States shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person. States Parties may cooperate with relevant international organizations in the implementation of this article.

Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ACT 670)

In Malaysia, to ensure that the country is free from human trafficking and smuggling of migrants, the legislature had, in 2007, enacted the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670). The purpose of the said Act is to prevent and combat trafficking in persons and smuggling of migrants and to provide for matters connected therewith. It is worthwhile noting that initially, the long title of Act 670 was Anti-Trafficking in Persons Act 2007. It was only in 2010 where the scope of the Act was widened to include "Anti-Smuggling of Migrants" *vide* the Anti-Trafficking in Persons (Amendment) Act 2010.¹⁶ This amended Act came into force on 15 November 2010 and is known as the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. The inclusion of 'smuggling of migrants' into Part IIIA of the Act essentially criminalised the facilitation of irregular migration into or out of Malaysia.

¹⁶ The explanatory statement to the Bill provides: "The amendment is necessary to deal with the current influx of illegal migrants from conflict countries who are seeking better life either in Malaysia or third countries and who, in particular, are using Malaysia as a transit point while they await their onward journey to possible countries. These migrants are distinct from trafficked persons in that they normally seek and finance the illegal migration themselves and the only danger of exploitation faced is cruel or inhuman or degrading treatment or being endangered in the course of their journey. Further, under international law, Malaysia is under a humanitarian obligation to ensure the safety of such migrants while they are on Malaysian territory. The influx of these illegal migrants also posed a security threat to Malaysia as their methods of entry and exit are generally illegal."

Having said the above, it is worthwhile noting that Part I, II, sections 66 and 67 of the said Act came into force on 1 October 2007.¹ Meanwhile Part III, IV, V and Part VI, except sections 66 and 67, came into force on 28 February 2008.² It may be further added that pursuant to section 5(1) of the Act, the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other written law relating to trafficking in persons and smuggling of migrants. This would include the Penal Code (Act 574) and Immigration Act 1959/63 (Act 155). Section 5(2) further provides that in the event of any conflict or inconsistency between the provisions of this Act and those of any other written laws, the provisions of this Act shall prevail and the conflicting or inconsistent provisions of such other written laws shall, to the extent of the conflict or inconsistency, be deemed to be superseded.³

Section 2 of the Act defines 'trafficking in persons' as 'all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person.' Meanwhile 'smuggling of migrants' means arranging, facilitating or organising, directly or indirectly, a person's unlawful entry into or through, or unlawful exit from, any country of which the person is not a citizen or permanent resident either knowing or having reason to believe that the person's entry or exit is unlawful and recruiting, conveying, transferring, concealing, harbouring or providing any other assistance or service for the purpose of carrying out the acts mentioned above. The official portal of the Ministry of Home Affairs Malaysia has differentiated 'trafficking in persons' and 'smuggling of migrants' with reference to the table below.⁴

TRAFFICKING IN PERSONS	SMUGGLING OF MIGRANTS
The instrument/international law involved is Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children under UN Convention on Transnational Organised Crime	The instrument/international law involved is Protocol against the Smuggling of Migrants by Land, Air and Sea under UN Convention on Transnational Organised Crime.
The main element to prove any offence relating to trafficking in persons is exploitation and it may happen in a country without being a cross-border offence. It may also happen at the domestic level.	The important element in the smuggling of migrants is the cross-border occurrence.
Involving the elements of exploitation, manipulation, threat against victims. Continuous and repeated exploitation	Involving consent of the smuggled persons and profits for the people smuggling syndicates. The smuggling activity ends upon arrival at the

¹ See PU(B) 339/2007.

² See PU(B) 86/2008.

³ The other Acts that may be relevant are as follows: Malaysian Maritime Enforcement Agency Act 2004 (Act 633), Customs Act (Act 235), Evidence Act 1950 (Act 56), Courts of Judicature Act 1964 (Act 91), Child Act 2001 (Act 611), Penal Code (Act 574), and Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613).

⁴ See the official portal of the Ministry of Home Affairs Malaysia at <http://www.kdn.gov.my/index.php/en/akta-antipemerdagangan-orang-dan-penyeludupan-migran-2007/sekretariat-akta-perbezaan>

destination.

Section 3 of the Act provides that:

The offences under this Act apply, regardless of whether the conduct constituting the offence takes place inside or outside Malaysia and whatever the nationality or citizenship of the offender, in the following circumstances:

- (a) if Malaysia is the receiving country or transit country or the exploitation occurs in Malaysia; or
- (b) if the receiving country or transit country is a foreign country but the trafficking in persons or smuggling of migrants starts in Malaysia or transits Malaysia.

The extension of the Act to extra territorial offences is provided in section 4. The above section provides:

Any offence under this Act committed-

- (a) on the high seas on board any ship or on any aircraft registered in Malaysia;
 - (b) by any citizen or permanent resident of Malaysia on the high seas on board any ship or on any aircraft; or
 - (c) by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia,
- may be dealt with as if it had been committed at any place within Malaysia.

The offences involving trafficking in persons in the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 are as follows.

TRAFFICKING IN PERSONS		
SECTION	OFFENCE	PENALTY ON CONVICTION
12	Trafficking in persons not being a child for the purpose of exploitation	Imprisonment not exceeding fifteen (15) years and shall also be liable to fine
13	Trafficking in persons not being a child for the purpose of exploitation by one or more of the following means: (a) Threat; (b) Use of force or other forms of coercion; (c) Abduction; (d) Fraud; (e) Deception; (f) Abuse of power; (g) Abuse of the position of vulnerability of a person to an act of trafficking in persons; or (h) The giving or receiving of payments or benefits to obtain the consent of a person having control over the trafficked person.	Imprisonment not less than three (3) years but not exceeding twenty (20) years and shall also be liable to fine
14	Trafficking in persons being a child for the purpose of exploitation	Imprisonment not less than three (3) years but not

		exceeding twenty (20) years and shall also be liable to fine
15	Offence of profiting from exploitation of a trafficked person	Imprisonment not exceeding fifteen (15) years and shall also be liable to a fine of five hundred thousand ringgit but not exceeding one million ringgit and shall also be liable to forfeiture of the profits from the offence
15A	Offence of bringing in transit a trafficked person through Malaysia (land, sea or air) or otherwise arranging or facilitating such act	Imprisonment not exceeding seven (7) years and shall also be liable to fine
18	A person who makes, obtains, gives, sells or possesses a fraudulent travel or identity document for the purpose of facilitating an act of trafficking in persons	Imprisonment for a term not exceeding ten years, and shall also be liable to a fine of not less than fifty thousand ringgit but not exceeding five hundred thousand ringgit.
19	Recruiting, or agreeing to recruit, another person to participate in the commission of an act of trafficking in persons	Imprisonment for a term not exceeding ten years, and shall also be liable to fine.
20	(a) The owner, occupier, lessee or person in charge of any premises, room or place, knowingly permits a meeting to be held in that premises, room or place; or (b) the owner, lessee or person in charge of any equipment or facility that allows for recording, conferencing or meetings via technology, knowingly permits that equipment or facility to be used.	Imprisonment for a term not exceeding ten years, and shall also be liable to fine.
21	Any person who, directly or indirectly, provides or makes available financial services or facilities ⁵ - (a) intending that the services or facilities will be used, or knowing or having reasonable grounds to believe that the services or facilities will be used, in whole or in part, for the purpose of committing or facilitating the commission of an act of trafficking in persons, or for the purpose of benefiting any person who is committing or facilitating the commission of an act of trafficking in persons; or (b) knowing or having reasonable grounds to believe that, in whole or in any part, the services or facilities will be used by or will benefit any person involved in an act of trafficking in persons.	Imprisonment for a term not exceeding ten years, and shall also be liable to fine

⁵ "Financial services or facilities" include the services or facilities offered by lawyers or accountants acting as nominees or agents for their clients, see s 21(2) of the Act.

<p>22</p>	<p>Any person who- (a) harbours a person⁶; or (b) prevents, hinders or interferes with the arrest of a person, knowing or having reason to believe that such person has committed or is planning or is likely to commit an act of trafficking in persons.</p>	<p>Imprisonment for a term not exceeding ten years, and shall also be liable to fine.</p>
<p>23</p>	<p>Any owner, operator or master of any conveyance who:- (a) knowingly permits or has reasonable grounds to believe that such conveyance is used for purposes of bringing a person into a receiving country or transit country without travel documents required for the lawful entry of that person into the receiving country or transit country; or (b) knowingly permits or has reasonable grounds to believe that such conveyance is being used for purposes of committing any offence of trafficking in persons.⁷</p>	<p>Liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both.⁸</p>
<p>24</p>	<p>Any person who knowing or having reason to believe, that any offence under this Act has been or will be committed, intentionally omits to give any information respecting that offence.</p>	<p>Liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding five years, or to both</p>

It is worthwhile noting that section 16 of the Act provides that for an offence under sections 12, 13 or 14, it shall not be a defence that the trafficked person consented to the act of trafficking in persons. Further, section 17 provides that the past sexual behaviour of a trafficked person is irrelevant and inadmissible for the purpose of proving that the trafficked person was engaged in other sexual behaviour or to prove the trafficked

⁶ "Harbour" means supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension: see s 22(2) of the Act.

⁷ The above section further provides that any person convicted of an offence under this section shall be liable to pay the costs of the trafficked person's detention in, and removal from, the receiving country or transit country. Further, the owner, operator or master of the conveyance used shall be jointly and severally liable for all expenses incurred by the Government in respect of the detention and maintenance of the trafficked person and his removal from Malaysia and such expenses shall be recoverable as a debt due to the Government.

⁸ The above section also provides that it shall be a defence for such owner, operator or master to prove that- (a) he has reasonable grounds to believe that the travel documents of the person travelling on board are travel documents required for lawful entry of that person into the receiving country or transit country; (b) the person travelling on board possessed travel documents required for lawful entry into the receiving country when that person boarded, or last boarded, the conveyance to travel to the receiving country or transit country; or (c) the entry of the person into the receiving country or transit country occurred only because of illness or injury to that person, stress of weather or any other circumstances beyond the control of such owner, operator or master.

person's sexual predisposition. For purposes of a prosecution for the offences as above, section 17A provides that the prosecution need not prove the movement or conveyance of the trafficked person but that the trafficked person was subject to exploitation.

Apart from the above, section 25 provides that a trafficked person shall not be liable to criminal prosecution in respect of- (a) his illegal entry into the receiving country or transit country; (b) his period of unlawful residence in the receiving country or transit country; or (c) his procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering the receiving country or transit country, where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been committed or was committed.

The protection to informers or whistleblowers contained in section 26 provides:

(1) Except as provided in this section, no complaint as to an offence under this Act shall be admitted in evidence in any civil or criminal proceedings whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.

(2) If any book, document or paper which is in evidence or liable to inspection in any civil or criminal proceedings whatsoever contains any entry in which any informer is named or described or which might lead to his discovery, the court before which the proceedings is had shall cause all such entries to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery.

(3) If in a trial for any offence under this Act, the Court, after full enquiry into the case, is of the opinion that the informer willfully made in his complaint a material statement which he knew or believe to be false or did not believe to be true, or if in any other proceedings the court is of the opinion that justice cannot be fully done between the parties without the discovery of the informer, the Court may require the production of the original complaint, if in writing, and permit enquiry and require full disclosure concerning the informer.

(4) Any person who gives the information referred to in this section, knowing that the information is false, commits an offence.

The offences involving smuggling of migrants in the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 are as follows.

HUMAN SMUGGLING		
SECTION	OFFENCE	PENALTY ON CONVICTION
26A	Offence of smuggling of migrants	Imprisonment not exceeding fifteen (15) years and shall also be liable to fine, or to both
26B	Aggravated offence of smuggling of migrants involving: (a) intention to exploit the smuggled migrant after entry into the receiving country or transit country	Imprisonment not less than three (3) years but not exceeding twenty (20) years and shall also be liable to

	whether by the person himself or by another person; (b) subjecting the smuggled migrant to cruel, inhuman or degrading treatment; or (c) the person's conduct gives rise to a risk of death or serious harm to the smuggled migrant.	fine, or to both
26C	Offence of bringing in transit a smuggled migrant through Malaysia by land, sea or air or otherwise arranging or facilitating such act.	Imprisonment not less than seven (7) years and shall also be liable to fine, or to both
26D	A person who profits from the offence of smuggling of migrants.	Imprisonment not less than seven (7) years and not exceeding fifteen (15) years and shall also be liable to a fine of not less than five hundred thousand ringgit but not exceeding one million ringgit, or to both, and shall also be liable to forfeiture of the profits from the offence.
26E	A person who makes, obtains, gives, sells or possesses a fraudulent travel or identity document for the purpose of facilitating an act of smuggling of migrants.	Imprisonment for a term of not less than seven years (7) but not exceeding fifteen years (15), and shall also be liable to a fine of not less than fifty thousand ringgit but not exceeding five hundred thousand ringgit, or to both.
26F	(a) The owner, occupier, lessee or person in charge of any premises, room or place, knowingly permits a meeting of persons to be held in that premises, room or place; or (b) the owner, lessee or person in charge of any equipment or facility that allows for recording, conferences or meetings via technology, knowingly permits that equipment or facility to be used for the purpose of committing an offence under this Part.	Imprisonment for a term not exceeding ten years (10), and shall also be liable to fine, or to both.
26G	Any person who, directly or indirectly, provides or makes available financial services or facilities ⁹ :- (a) intending that the services or facilities be used, or knowing or having reasonable grounds to believe that the services or facilities will be used, in whole or in part, for the purpose of committing or facilitating the commission of an act of smuggling of migrants, or for the purpose of benefiting any person who is committing or facilitating the commission of an act of	Imprisonment for a term not exceeding ten years (10), and shall also be liable to fine, or to both

⁹ For purposes of this section, "financial services or facilities" include the services and facilities offered by lawyers or accountants acting as nominees or agents for their clients.

	smuggling of migrants; or (b) knowing or having reasonable grounds to believe that, in whole or in part, the services or facilities will be used by or will benefit any person involved in an act of smuggling of migrants.	
26H	A person who conceals or harbours, ¹⁰ or prevents, hinders or interferes with the arrest of any person knowing or having reason to believe that such person is:- (a) a smuggled migrant; or (b) a person who has committed or is planning or is likely to commit an act of smuggling of migrants.	Imprisonment for a term not exceeding ten years (10), and shall also be liable to fine, or to both.
26I	A person who provides material support or resources to another person and the support and resources aid the receiver or any other person to engage in conduct constituting the offence of smuggling of migrants. ¹¹	Imprisonment for a term not exceeding fifteen years (15), and shall also be liable to fine, or to both.
26J	A person being the owner, operator or master of any conveyance who engages in the conveyance of smuggled migrants	Imprisonment for a term not exceeding five years (5) and shall also be liable to a fine not exceeding two hundred and fifty thousand ringgit, or to both.
26K	Any person being the owner, operator or master of any conveyance that engages in the conveyance of goods or people for commercial gain shall ensure that every person travelling on board is in possession of travel documents for the lawful entry of that person into the receiving country or transit country and if not, shall refuse to convey such person. If a person contravenes the above shall be deemed to have committed an offence. ¹² Where there is no prosecution or conviction under this section, the owner, operator or master of the conveyance used shall be jointly and severally liable for all expenses	Liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding five years, or to both. ¹³

¹⁰ In this section, "harbour" includes supplying a person with shelter, food, drink, money or clothes, arms, ammunition or means of conveyance, or assisting a person in any way to evade apprehension.

¹¹ For the avoidance of doubt, a person is deemed to have committed an offence under section 26I(1) even if the offence of smuggling of migrants is not committed.

¹² Any person convicted of an offence under this section shall be liable to pay the costs of the smuggled migrant's detention in, and removal from, the receiving country or transit country.

¹³ Subsection 3 of section 26K provides : "In any proceeding for an offence under this section, it shall be a defence for such owner, operator or master to prove that:-

(a) he has reasonable grounds to believe that the travel documents of the person referred to in subsection (1) are travel documents required for lawful entry of that person into the receiving country or transit country; (b) the person referred to in subsection (1) possessed travel documents required for lawful entry to the receiving country or transit country when that person boarded, or last boarded, the conveyance to travel to the receiving country or transit country; or (c) the entry of the person referred to in subsection (1) into the receiving country or transit country occurred only because of illness or injury to that person, stress of weather or any other circumstances beyond the control of such owner, operator or master."

incurred by the Government in respect of the detention and maintenance of the smuggled migrant and his removal from Malaysia and such expenses shall be recoverable as a debt due to the Government	
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Commission of offence under this Act where no penalty is expressly provided

Apart from the above, section 63(1) provides that any person who commits an offence under this Act for which no penalty is expressly provided shall, on conviction, be liable to a fine not exceeding one hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both. Where an offence under this Act is committed by a body corporate, section 63(2) provides that the body corporate shall, on conviction:-(a) where a fine is specified under the relevant section, be liable to a fine of not less than three times the maximum fine specified; and (b) where no fine is specified:- (i) in relation to sections 15A and 26C, shall be liable to a minimum fine of five million ringgit; and (ii) in any other case, shall be liable to a minimum fine of one million ringgit.

Enhanced penalty for repeated offender

Section 63(3) further provides that where, after having been convicted of any offence under this Act, a person subsequently commits another offence under this Act, he shall, on conviction, for that subsequent offence, be punished with an enhanced penalty which shall not be less than the penalty that had been imposed on him for the earlier offence.

Person who acted jointly with one or more persons in the commission of the offence

Section 63(4) provides that where an offence under this Act has been committed by a person who has been proved to the court to have acted jointly with one or more persons in the commission of the offence, the person shall, on conviction, be punished with an enhanced penalty which shall be a more severe penalty than that which would have been imposed on him if he had acted individually.

Offence by body corporate

Section 64 provides that where any offence against any provision of this Act has been committed by a body corporate, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity, or was in any manner responsible for the management of any of the affairs of such body corporate, or was assisting in such management, shall also be guilty of that offence unless he proves that the offence was committed without his knowledge, consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

Offence by employee or agent

Section 65 provides that where any person would be liable under this Act to any punishment or penalty for any act, omission, neglect or default, such person shall be liable to the same

punishment or penalty for every such act, omission, neglect or default of any employee or agent of his or of the employee of such agent, if such act, omission, neglect or default was committed by the person's employee in the course of his employment, or by the agent when acting on behalf of the person, or by the employee of such agent in the course of his employment by such agent, or otherwise on behalf of the agent.

Council for Anti-Trafficking in Person and Anti-Smuggling of Migrants

The Council for Anti-Trafficking in Persons was established under the Anti-Trafficking in Persons Act 2007. However, with the inclusion of 'smuggling of migrants' vide the Anti-Trafficking in Persons (Amendment) Act 2010, the Council was renamed as Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants. The setting up of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants was pursuant to section 6(1) of the Act. The objective of the establishment of the Council is to make Malaysia internationally accredited as being free of illegal activities in connection with trafficking in person and smuggling of migrants. The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants is headed by the Ministry of Home Affairs Secretary General. The functions and powers of Council as provided in section 7 are as follows:

- (a) coordinating the implementation of this Act;
- (b) formulating policies and programmes to prevent and combat trafficking in persons and smuggling of migrants;
- (c) formulating protective programmes for trafficked persons;
- (d) initiating education programmes to increase public awareness of the causes and consequences of the act of trafficking in persons and smuggling of migrants;
- (e) monitoring the immigration and emigration patterns in Malaysia for evidence of trafficking in persons and smuggling of migrants and to secure the prompt response of the relevant government agencies and non-governmental organizations to problems on trafficking in persons and smuggling of migrants brought to its attention;
- (f) advising the Government on the issues of trafficking in persons and smuggling of migrants including developments at the international level against trafficking in persons and smuggling of migrants;
- (g) making recommendations to the Minister on all aspects of the prevention and combating of trafficking in persons and smuggling of migrants;
- (h) coordinating the formulation of policies and monitoring the implementation of such policies on issues of trafficking in persons and smuggling of migrants with relevant government agencies and non-governmental organizations;
- (i) cooperating and coordinating with governments and international organizations on trafficking in persons and smuggling of migrants;
- (j) collecting and collating data and information, and authorising research, in relation to the prevention and combating of trafficking in persons and smuggling of migrants;
- and
- (k) performing any other functions for the proper implementation of this Act.

The Minister may, from time to time, give the Council directions not inconsistent with this Act as to the performance of the functions and powers of the Council and the Council shall

give effect to such directions.¹⁴ For the performance of its functions, the Council shall meet as often as may be necessary at such time and place as the Chairman may determine.¹⁵ Section 10(1) further provides that the Council may establish such committees as it deems necessary or expedient to assist it in the performance of its functions and the exercise of its powers under this Act. Lastly, section 11 provides that the Minister shall appoint a public officer to be the Secretary of the Council and such other public officers as may be necessary to assist the Council. The Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants is headed by the Ministry of Home Affairs Secretary General.

Care and protection of trafficked persons

The provisions regulating the care and protection of a trafficked person are contained in Part V of the Act. This Part however, does not apply to a smuggled migrant unless such smuggled migrant was a trafficked person.¹⁶

(i) Place of refuge to be declared by Minister

Section 42(1) empowers the Minister, by notification in the *Gazette*, to declare any house, building or place, or any part thereof, to be a place of refuge for the care and protection of trafficked persons. The Minister is also empowered to declare that such place of refuge ceases to be a place of refuge. This section also authorized the Minister to direct the separation of different categories of trafficked persons, among others, according to age and gender either at the same place of refuge or at different places of refuge. The Minister is also vested with the power to remove a trafficked person from one place of refuge to another. Apart from the above, section 57 provides that the Minister may, at any time, for reasons which appear to him to be sufficient, by order in writing direct the removal of any trafficked person from a place of refuge to any other place of refuge as may be specified in the order.

The Malaysian government has established several places of refuge to place victims of human trafficking. The victims will be protected at the places of refuge until the process of recording evidence is completed. This is in line with the provisions under sections 44 and 51 of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. The place of refuge is established to protect victims who have been issued with an interim protection order and subsequently a protection order (PO) until the process of recording evidence is completed.

(ii) Appointment of Protection Officers

The appointment of Protection Officers is regulated by section 43. The above section provides that the Minister, upon consultation with the Minister charged with the responsibility for women, family and community development may, by notification in the *Gazette*, appoint such number of Social Welfare Officers or any other public officers to exercise the powers and perform the duties of a Protection Officer under this Act subject to

¹⁴ See section 8.

¹⁵ See section 9(1).

¹⁶ See section 41A of the Act.

any condition as may be specified in the notification. The Protection Officer's duties and responsibilities are as follows:

- (a) control over and responsibility for the care and protection of the trafficked person at the place of refuge;
- (b) carry out an enquiry and cause to be prepared a report of the trafficked person as required under this Act;
- (c) power to supervise the trafficked person upon order by the Magistrate or direction by the Minister; and
- (d) such other powers, duties and functions as the Minister may prescribe.

(iii) Temporary custody and interim protection order

Section 44 provides that an enforcement officer may, on reasonable suspicion that any person who is found or rescued is a trafficked person, take that person into temporary custody. The enforcement officer is then required to produce him before a Magistrate within twenty-four hours, exclusive of the time necessary for the journey to the Magistrate's Court, for the purpose of obtaining an interim protection order. The Magistrate would then make an interim protection order of the person to be placed at a place of refuge for a period of fourteen days for the purpose of carrying out an investigation and enquiry under section 51. Upon obtaining the interim protection order, the enforcement officer shall surrender the trafficked person to a Protection Officer to place that trafficked person at the place of refuge specified in the order.

(iv) Medical examination or treatment of a trafficked person

If a suspected trafficked person who had been taken into temporary custody pursuant to section 44(1) was in need of medical examination or treatment, the enforcement officer may, instead of taking that person before a Magistrate, present him to a medical officer.¹⁷ However, if at the time of being taken into temporary custody, the person is a patient in a hospital, the enforcement officer may leave that person in the hospital. The medical officer before whom a person is presented shall conduct or cause to be conducted an examination of the person. The medical officer may in examining the person and if so authorised by an enforcement officer, administer or cause to be administered such procedures and tests as may be necessary to diagnose the person's condition. The medical officer may also provide or cause to be provided such treatment as he considers necessary as a result of the diagnosis.¹⁸ Where the person taken into temporary custody under subsection 44(1) is a child, the medical officer who examines him is of the opinion that his hospitalization is necessary for the purpose of medical care or treatment, an enforcement officer may authorise that person to be hospitalised.¹⁹ Section 48 provides that where the person taken into temporary custody under subsection 44(1) is hospitalised, the enforcement officer shall have control over, and responsibility for, the security and protection of that person.

¹⁷ See section 45 of the Act.

¹⁸ Ibid. section 46.

¹⁹ Ibid. section 47

Upon the completion of such examination or treatment, he/she must be produced before a Magistrate within twenty-four hours. If the person was hospitalised, he must be produced before a Magistrate within twenty-four hours his discharge from the hospital.²⁰ If it is not possible to bring that person before a Magistrate within the time specified as above, that person shall be placed in a place of refuge until such time as he can be brought before a Magistrate.

The enforcement officer who authorises the examination or treatment, the medical officer who examined or treated the person, and all persons acting in aid of the medical officer, shall not incur any liability at law by reason only that a person is examined or treated.²¹ Section 50(2) provides that "Nothing contained in subsection (1) relieves a medical officer from liability in respect of the examination or treatment of the person taken into temporary custody under subsection 44(1), which liability he would have been subject to had the examination or treatment been carried out or administered with the consent of the parent or guardian of the person or person having authority to consent to the examination or treatment."

(v) Investigation and enquiry of case to determine whether the person is a trafficked person

Section 51(1) provides that where an interim protection order was made by the Magistrate pursuant to section 44(2), the enforcement officer shall, within fourteen days from the date of such order, investigate into the circumstances of the person's case for the purpose of determining whether the person is a trafficked person. The Protection Officer is also required within the aforesaid period to enquire into the background of that person.

(vi) Report of the investigation and enquiry submitted to Magistrate

Upon completion of the investigation and enquiry, the enforcement officer and the Protection Officer shall jointly prepare a report and produce the report together with the person before a Magistrate's Court for the purpose of satisfying the Magistrate that such person is a trafficked person under this Act. If the Magistrate, after having read the said report, was satisfied that the person brought before him is a trafficked person and in need of care and protection, the Magistrate may make a Protection Order-

- (i) in the case of a trafficked person who is a citizen or permanent resident of Malaysia, ordering that such trafficked person be placed in a place of refuge for a period not exceeding two years from the date of the order; or
- (ii) in the case of a trafficked person who is a foreign national, ordering that such trafficked person be placed in a place of refuge for a period not exceeding three months from the date of the order, and thereafter to release him to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63,

²⁰ Ibid., section 49(1).

²¹ Ibid., section 50(1).

However, where the Magistrate was satisfied that the person is not a trafficked person, the Magistrate may-

- (i) in the case of a person who is a citizen or permanent resident of Malaysia, order that person to be released; or
- (ii) in the case of a person who is a foreign national, order that person to be released to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63.

Section 51(4) provides that the Magistrate may at any time, on the application of an enforcement officer or a Protection Officer, as the case may be, extend or revoke the Protection Order made under this section. Where the trafficked person is a foreign national, section 51(5) provides that an extension of the Protection Order may only be granted for the purpose of completing the recording of his evidence under section 52 or for any exceptional circumstances as determined by the Magistrate.

(vii) Recording of evidence of trafficked person

In relation to the recording of evidence of trafficked person, section 52(1) provides that: "At any time during the period of the Protection Order made under subparagraph 51(3)(a)(ii), where a criminal prosecution has been instituted against any person for an offence under this Act, the Public Prosecutor may make an oral application for the production of the trafficked person before a Magistrate's Court for the purpose of recording that trafficked person's evidence on oath. (2) The Sessions Court Judge may, upon such application, issue a summons or order directed to the person in charge of the place of refuge where such trafficked person is placed, requiring him to produce the trafficked person at the time and place specified in the summons or order. (3) The Sessions Court Judge shall record the evidence of the trafficked person and complete such recording within seven days from the date of the production of that trafficked person before him. (4) In the course of the recording of evidence of the trafficked person, he shall be examined in accordance with the provisions of the Evidence Act 1950. (5) The Sessions Court Judge shall cause the evidence taken by him to be reduced into writing and, at the end of that writing, shall sign the same. (6) the evidence recorded under this section shall be admissible in evidence in any proceedings under this Act and the weight to be attached to such evidence shall be the same as that of a witness who appears and gives evidence in the course of a proceeding.

(viii) Committing a trafficked person into the custody of parent, guardian or relative

Section 53(1) provides that where a trafficked person placed in a place of refuge is a citizen or permanent resident of Malaysia, the parent, guardian or relative of that person may, at any time, make an application to the Magistrate's Court to commit that person into the custody of the parent, guardian or relative. A copy of the said application must also be served on the Protection Officer. In order to enable the Magistrate to determine the application in the best interest of the trafficked person, section 53(3) provides that the Protection Officer shall cause a report to be prepared in relation to - (a) the trafficked person; (b) the status of any investigation or prosecution for any offence under this Act in relation to the trafficked person; (c) the background of the trafficked person, his parent,

guardian or relative; or (d) any other matter as the Protection Officer deems relevant. Section 53(5) provides that if the Magistrate is satisfied that it is in the best interest of the trafficked person, he may- (a) commit the person into the care and protection of the parent, guardian or relative of the person, upon such conditions as he may deems fit to impose; (b) require the parent, guardian or relative of the person to enter into a bond; or (c) require the person to be placed under the supervision of a Protection Officer, for a period to be determined by the Magistrate. The Magistrate may, at any time, revoke any order pursuant to subsection 5 above.

(ix) Release of trafficked person

In relation to the release of a trafficked person, section 54(1) provides: "Upon revocation of a Protection Order or expiry of the period specified in a Protection Order, the Protection Officer shall- (a) in the case of a trafficked person who is a citizen or permanent resident of Malaysia, release that person; or (b) in the case of a trafficked person who is a foreign national, release that person to an immigration officer for necessary action in accordance with the provisions of the Immigration Act 1959/63. Subsection 2 provides that the immigration officer shall take all necessary steps to facilitate the return of that trafficked person to his country of origin without unnecessary delay, with due regard for his safety. Subsection 3 provides that notwithstanding paragraph (1)(a) above, the court may, upon an application made by the Protection

(x) Trafficked person escaped or removed from place of refuge without lawful authority

Where a trafficked person escapes or was removed from place of refuge without lawful authority, section 55 provides that he/she may be taken into custody by any enforcement officer and shall be brought back to the place of refuge; and shall be placed for such period which is equal to the period during which he was unlawfully at large and for the unexpired residue of his term in the Protection Order originally made by the Magistrate. Section 56 further provides that a person who: (a) removes a trafficked person from a place of refuge without lawful authority; (b) knowingly assists or induces, directly or indirectly, a trafficked person to escape from a place of refuge; or (c) knowingly harbours or conceals a trafficked person who has so escaped, or prevents him from returning to the place of refuge, shall be deemed to have committed an offence.

(xi) Media restriction on reporting and publication

Section 58(1) provides that any mass media report regarding any step taken in relation to a trafficked person or smuggled migrant in any proceedings be it at the pre-trial, trial or post-trial stage, or any trafficked person in respect of whom custody or protection is accorded pursuant to this Act or any other matters under this Act, shall not reveal the name or address, or include any particulars calculated to lead to the identification of any trafficked person or smuggled migrant so concerned either as being the trafficked person or as being a witness to any proceedings. The picture of any trafficked person or smuggled migrant or any other person, place or thing which may lead to the identification of the trafficked person or smuggled migrant shall not be published in any newspaper or magazine or transmitted

through any electronic medium. A person who violates the above restrictions shall be deemed to have committed an offence

Having said the above, it is noteworthy to highlight the cases involving trafficking in persons and smuggling of migrants. Table A below provides the statistics of cases involving trafficking in persons for the period from 28 February 2008 until 31 August 2012. Meanwhile Table B contains the statistic of cases involving smuggling of migrants, from 15 November 2010 until 31 August 2012.

Table A

BIL	CASES	YEAR					TOTAL
		2008	2009	2010	2011	2012	
1	TOTAL CASE	17	151	132	116	141	557
2	TOTAL NO. OF ARRESTED	20	217	195	159	164	755
3	TOTAL NO. OF VICTIM (INTERIM PROTECTION ORDER)	85	956	870	445	710	3066
4	TOTAL NO. OF VICTIM (PROTECTION ORDER)	29	206	471	218	245	1169

Table B

BIL	CASES	YEAR					TOTAL
		2008	2009	2010	2011	2012	
1	TOTAL CASES			3	19	18	40
2	TOTAL NO OF ARRESTED			2	30	20	52
3	TOTAL SMUGGLING OF MIGRANTS			18	409	326	753

(Source: The official portal of the Ministry of Home Affairs Malaysia at <http://www.kdn.gov.my/index.php/en/akta-antipemerdagangan-orang-dan-penyeludupan-migran-2007/sekretariat-akta-perbezaan>)

Islamic approach to human trafficking

Islam is a religion that promotes the concept of brotherhood among people of different tribes and communities. Further, it promotes peace and prosperity among people. Human rights of various types are recognized in the divine laws such as the right to life regardless of race, religion, and nationalities; woman's rights and economic rights of the poor and the needy, among others. Slavery which was prevalent from the days of ignorance in the pre-Arabian society was gradually abolished.²² Islam had thus elevated all humans as the best of the creation. The prohibition of slavery is reiterated in the Universal Islamic Declaration of Human Rights.

Apart from the above, Islam also prohibits all forms exploitation of a fellow human beings. Muslims are repeatedly warned against oppressing others including those vulnerable in the society, such as women, children and orphans among others.²³ Article 7 of the Universal

²² It is inaccurate to state that Islam condones or sanctions slavery. It is noteworthy that verses of the Quran must be interpreted with its *asbab-ul-nuzul*, or the immediate cause that precedes the revelation of the verse. In other words, it is necessary to know when the verse was revealed, how it was revealed, and whom it was revealed for, among others. What needs to be emphasised here is that certain verses on slaves in the Quran refers to slavery that was prevalent from the days of ignorance in the pre-Arabian society. Islam gradually elevated their status which then brought their freedom and this subsequently led to the total abolishment of any future enslavement. In Chapter 4 verse 25, the believers were allowed to take their servant girls as their wife. In the said verse, Allah (s.w.t.) said, which may be translated as: "...Ye...may wed believing girls from among those whom your right hands possess...wed them with the leave of their families, and give them their dower...". Further, it is important to be good to servants as mentioned in Chapter 4 verse 36 where Allah (s.w.t.) said: "...do 'Ihsan' (goodness) to parents ...and (to) what your right hands possess." Then, there are verses which encouraged the freeing of those in bondage in order to alleviate their economic status: "Alms are for...those in Bondage.." (Chapter 9 verse 60); "...But it is righteousness...to spend of your substance out of love for Him...for the ransom of slaves."(Chapter 2 verse 177); "And whoever kills a believer by mistake, it is ordained that he should free a believing slave.." (Chapter 4 verse 92); "He will call you to account for your deliberate oaths: for expiation...give a slave his freedom.." (Chapter 5 verse 89). Apart from the above, there are verses in the Quran which states to the effect that where a slave asks for his freedom, the believer is to accede to his request including helping him financially in order to free the slave. "And if any of your slaves ask you for a deed in writing (for emancipation) give them such a deed; If ye knew any good in them: yea, give them something yourselves out of the means which Allah has given to you..."(Chapter 24 verse 33).

²³ See for example Chapter 4 verses 10 and 75 and Chapter 7 verse 33.

Islamic Declaration of Human Rights states: "No person shall be subjected to torture in mind or body, or degraded, or threatened with injury either to himself or to anyone related to or held dear by him, or forcibly made to confess to the commission of a crime, or forced to consent to an act which is injurious to his interests."

Further, Islam honours workers and their rights highlighted even in the divine laws. They must be treated fairly in the workplace, not overburdened with work, wages must be paid promptly and adequate rest and leisure should be accorded to them, among others. It must be emphasised that Islam does not condone the act of forcing another to work against his or her will, under threat of violence or other punishment, with restrictions on their freedom. While forced labour is still practiced in some Muslim countries, the act cannot be affiliated to the Islamic belief or practice. Similarly, abuses or discrimination of workers could not be associated with the teaching of Islam. It must be admitted that there are some Muslims who have chosen to ignore the Islamic teachings or the religious practices in order to achieve their selfish gains.

Similarly, human trafficking for purposes of sexual exploitation or prostitution is prohibited in Islam. In relation to prostitution, Allah (s.w.t) says in the Quran, in chapter 24 verse 33, which can be translated to mean: "But force not your maids to prostitution when they desire chastity, in order that ye may make a gain in the goods of this life. But if anyone compels them, yet after such compulsion, is Allah Oft-Forgiving, Most Merciful (to them)." It was reported in Sahih Muslim, book 043, Number 7180, that the above verse of the Quran was revealed in connection to a certain practice prevalent then in Mecca. Jabir reported that 'Abdullah b. Ubayy b. Salul used to say to his slave-girl: Go and fetch something for us by committing prostitution. It was in this connection that Allah (s.w.t.) revealed the above verse. As noted earlier, the Quran had prohibited slavery gradually. In another hadith, Abu Huraira (May Allah be pleased with him) narrated that the Prophet (s.a.w.) said, "Allah says, I will be against three persons on the Day of Resurrection: (i) One who makes a covenant in my name, but proves treacherous; (ii) One who sells a free person and eats his price; and (iii) One who employs a labourer and takes full work from him but does not pay him for his labour."²⁴ In short, intentionally exploiting another person or inciting, assisting or condoning human trafficking through force, threat, deceit, influence or any other illegal means, among others, are not within the tenets of Islamic teachings.

Conclusion

²⁴ Sahih Bukhari, vol (3), hadith No. 470.

Human trafficking and smuggling of migrant for purposes such as sexual exploitation / prostitution, illegal organ removal, slavery, servitude or forced labour are major crimes against humanity. The State parties to the Convention against Transnational Organized Crime recognises the seriousness of transnational organised crime which not only endangers the lives and liberties of their citizens, but also affects the very foundations of peace, progress and well being of nations and their societies in an increasingly globalised world. The State parties are therefore required to fully cooperate in order to effectively prevent and combat the various forms of organized crime with transnational character such as money-laundering, corruption and human trafficking, among others. Along with the Convention, the United Nations adopted three different Protocols, which targeted specific areas of organized crime namely, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children; the Protocol Against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of Firearms, their Parts and Components and Ammunition. On its part, the Malaysian government viewed **human trafficking and smuggling of migrants** as one of the most serious threats to human rights and human security. Comprehensive measures had been taken to combat and prevent the human trafficking and smuggling of migrants. This includes the implementation of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. The Malaysian authority view trafficking in persons and smuggling of migrants as major crime and where the evidence is overwhelming, the offender will be prosecuted in court.²⁵ The concerted effort of the Malaysian government in combating trafficking in persons is further manifested with the adoption of the 'National Action Plan against Trafficking in Persons (2010 -2015)'. According to Dato' Sri Mahmood Adam, Chairman of the Council for the Anti-Trafficking in Persons, "the Action Plans acts as a guidance in addressing the problem of trafficking in persons while complementing the existing Anti-Trafficking in Persons Act 2007."

²⁵ See 'Malaysia gets praises for battling human trafficking' at <http://www.nst.com.my/nst/articles/27traf/Article/#ixzz1HrjyIVSD>; 'Don't mess with Malaysia, human traffickers warned' at <http://thestar.com.my/news/story.asp?file=/2010/3/31/nation/20100331200207&sec=nation>

‘SUSTAINABLE DEVELOPMENT’- NEED TO THINK AND ACT BEYOND IT

Anand Swaroop Das

National Law University Odisha

ABSTRACT

The paper deals with the dilemma of use of natural resources for present day development while conserving the same for future generations and argues that sustainable development as an operational factor in preserving the natural resources is a far cry, and is rather counter-productive. The paper points out that we are obligated to preserve the nature and natural resources for the future generations but it cannot be done without methodical researches to determine the future generation's needs and availability of the resources now and in the future, or how much of resources required to be apportioned for future, and how much can be appropriated now etc. As of now, there is neither such objective study nor any parameters in that respect, to rely on. The paper emphasizes that instead of sustainable development there should be strictly need-based development for proper consumption and conservation of natural resources, and suggests that preservation of natural resources for future generations should be an essential function of environmental laws which primarily deal with control of pollution or degradation of the environment and that globalization of environment laws and a world body to enforce them is also imperative to achieve the desired conservation of natural resources.

KEYWORDS: environment, sustainable development, globalization

INTRODUCTION

According to William James, “The most significant characteristic of modern civilization is the sacrifice of the future for the present, and all the power of science has been prostituted to this purpose.”³⁷²

In the name of development and well being, the mankind has, within a span of few centuries, denuded forests, degraded the biosphere and relentlessly exploited natural resources, almost to the point of exhaustion, which the nature has taken millions of years to create; when it is obligated to conserve these natural resources for future generations. The dichotomy of development on the one hand and conservation of natural resources, particularly the non-renewable natural resources on the other is suppressed and ignored under the cloak of the concept of sustainable development. Sustainable development as an operational factor is totally inapt in the matter of conservation of non-renewable natural resources, assuming that the renewable natural resources are infinitely conservable. The non-renewable natural resources are the mainstay of present day development. They will also be indispensable for development in the future. The future generations and their needs is an important aspect in the context of conservation of these resources. The purported applicability of sustainable development hitherto for conservation of non-renewable resources has been of no avail and it cannot be considered any more as an operational factor in the conservation of such resources. It is high time to adopt new developmental models under integrated legal regime in order to make conservation of non-renewable resources for the future generations an achievable goal.

NON-RENEWABLE NATURAL RESOURCES- THE CATALYST FOR DEVELOPMENT

The environment is an all encompassing term. It includes all living and non-living things found on earth. Apart from the resources like air, water, plants and animals it comprises of the not so obvious resources like minerals, fossil fuels, ground water etc. The natural resources in the environment can be categorized in various manners depending on their

origin, nature, use, abundance *et cetera*. Adopting the categorization of natural resources as renewable and non-renewable resources is appropriate for the purpose of this paper.

The natural resources are classified as renewable or non-renewable depending on the factor whether the rate of their replenishment/recovery exceeds that of their rate of consumption or vice-versa³⁷³. Natural resources like air, water, sunlight etc. are ubiquitous and abundant in the earth and can be replenished by nature. These are renewable irrespective of the rate of their replenishment and do not cause any serious concern for their preservation. The non-renewable natural resources like minerals and fossil fuels were formed by natural processes over millions of years. These resources cannot be replicated by nature and therefore cannot be replenished. Their availability on the earth is quantifiably limited.

Whatever quantities of these non-renewable natural resources the nature has created are what are available to the mankind for all times to come. During the last few centuries western population shed its agrarian lifestyles to become gradually industrialized and after the industrial revolution and with the advancement of science and technology in a fast pace it advanced further to become modern and developed now. This trend of development also spread to all the nooks and corners of the earth. The basic catalyst for such transformation was development of processes for extraction of natural resources from the earth's crust, conversion of minerals into metals for manufacture of things which formed the basic infrastructure for modern cities, developed countries and economical progress.

Our industrial lifestyle paradigm is enabled by non-renewable natural resources (NNRs)—energy resources, metals, and minerals. Both the support infrastructure within industrialized nations and the raw material inputs into industrialized economies consist almost entirely of NNRs. NNRs are the primary sources of the tremendous wealth surpluses required to perpetuate industrialized societies. The term “industrial” as used here includes all post-agrarian societal designations such as “post-industrial”, “advanced”, “modern”, and

“developed”; all of which describe human populations that rely heavily upon non-renewable natural resources.³⁷⁴

DEPLETION OF NON-RENEWABLE NATURAL RESOURCES

With the progress of science and technology easier ways and means were found out to extract the natural resources and their demand also increased with the growth of population which hankered for material comfort and development. During the last century and up till now there has been mindless and relentless extraction of the non-renewable resources to cater to the ever expanding market driven economies, to satisfy the ever growing culture of consumerism and profitability, and to pander to the yearning of the populace for material comfort and luxury, resulting in depletion of these resources to alarming lows.

Verhulst Function³⁷⁵ is used to explain mineral depletion, that is, there is an exponential growth in the rate of extraction of a mineral followed by a peak after which the extraction rate declines exponentially. Thus, a typical non-renewable resource cycle is characterized by a period of ‘continuously more and more’, which signifies the easily accessible, high quality, low cost extraction of resources, followed by a period of ‘supply peak’, that is, maximum attainable extraction level, and beyond that remains the period of decline or ‘continuously less and less’, when the resource becomes less accessible, lower in quality and requires higher cost to extract.³⁷⁶

This phenomenon which happens in case of all non-renewable natural resources is further simply explained in respect of oil by James Howard Kunstler³⁷⁷. Kunstler explains the concept of global oil production peak. He says that it is the point at which humans have extracted half of all the oil that ever existed in the world. This half was easier and economical to get, best quality and could be refined cheaply. The inaccessible half lies in the Arctic and

deep under the ocean. That half is difficult to extract and refine. It requires huge expenses which make the remaining half of the world's original oil supply unrecoverable.

Irrespective of the quantities of non-renewable natural resources available, once the peak is attained the resource is virtually lost. It is now well documented that most of the non-renewable natural resources have either peaked or are going to very soon in the present rate of extraction/production. Chris Clugston in his above referred analytical work 'Increasing Global Non-renewable Natural Resource Scarcity—Prelude to Global Societal Collapse', assessed the probability of a permanent global supply shortfall of 26 non-renewable natural resources by the year 2030 basing on the data of US Geological Survey (USGS) and US Energy Information (EIA), as given in the tables reproduced below :

TABLE-1

PERMANENT GLOBAL NON-RENEWABLE NATURAL RESOURCES SUPPLY SHORTFALL (BY 2030) PROBABILITY SUMMARY

Nearly Certain Probability (5)	Very High Probability (8)	High Probability (10)	Low Probability (3)
Cadmium	Cobalt	Chromium	Bauxite
Gold	Lead	Coal	REM
Mercury	Molybdenum	Copper	Tin
Tellurium	PGM	Indium	
Tungsten	Phosphate Rock	Iron Ore	
	Silver	Lithium	
	Titanium	Magnesium Compounds	
	Zinc	Natural gas	
		Nickel	
		Oil	

TABLE-2

NNR	Global NNR Extraction Data and Estimates	Projected Peak	Probability of a
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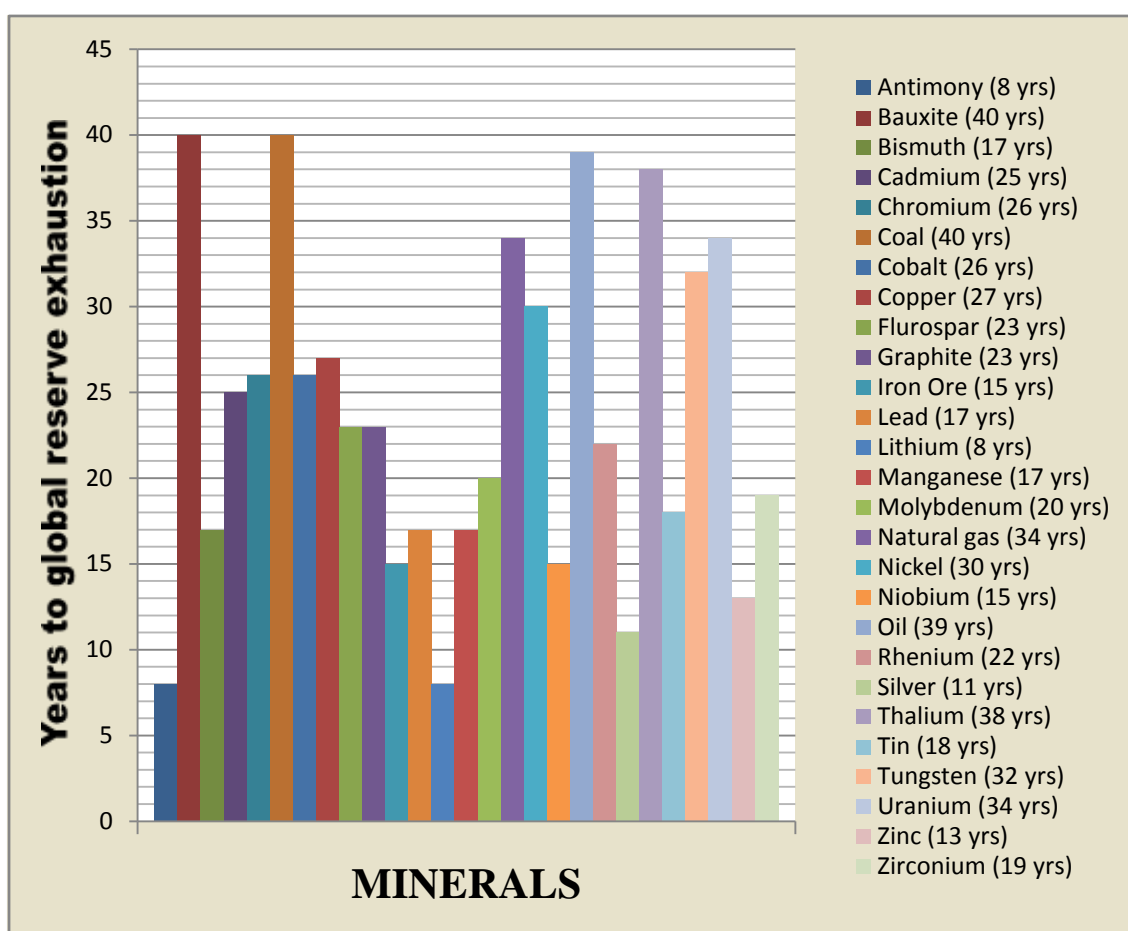
	Current Annual Extraction Level	2000-2008 Annual Extraction Growth Rate	Projected 2030 Annual Extraction Level	Global (Annual) NNR Extraction Level³⁷⁸	Permanent Global Supply Shortfall by the Year 2030
Bauxite	205M MT	5.3%	639M MT	1400M MT	Low
Cadmium	20.8K MT	Global Extraction Has Likely Peaked		21.9K MT	Nearly Certain
Chromium	6.6M MT	4.0%	19.5M MT	8.5M MT	High
Coal	6900M ST	6.0%	26300M ST	11000M ST	High
Cobalt	71.8K MT	9.0%	478M MT	70K MT	Very High
Copper	15.7M MT	2.2%	25.3M MT	20M MT	High
Gold	2.3K MT	Global Extraction Has Likely Peaked		2.6K MT	Nearly Certain
Indium	568 MT	6.8%	2415 MT	830 MT	High
Iron Ore	2.2B MT	9.4%	15.9B MT	3.9B MT	High
Lead	3.8M MT	2.2%	6.1M MT	3.4M MT	Very High
Lithium	27.4K MT	9.6%	206M MT	57K MT	High
Manganese	14M MT	9.1%	95M MT	73M MT	High
Mercury	1K MT	Global Extraction Has Likely Peaked		10.4K MT	Nearly Certain
Molybdenum	212K MT	5.8%	733M MT	180K MT	Very High
Natural Gas	110T MT	2.8%	207T CF	140T CF	High
Nickel	1.6M MT	2.8%	2.9M MT	1.85M MT	High
Oil	31.5B bbls	1.4%	43.3B bbls	35B bbls	High
PGM	504 MT	4.8%	1481 MT	440 MT	Very High
Phosphate Rock	167M MT	3.0%	320M MT	150M MT	Very High
REM	124K MT	4.0%	294K MT	3050K MT	Low
Silver	20.9K MT	1.8%	31K MT	16K MT	Very High
Tellurium	<95 MT	Global Extraction Has Likely Peaked		212 MT	Nearly Certain
Tin	333K MT	2.3%	549K MT	730K MT	Low
Titanium	9.6M MT	6.2%	39M MT	9M MT	Very High
Tungsten	54.6K MT	Global Extraction Has Likely Peaked		66.5K MT	Nearly Certain
Zinc	11.3M MT	3.2%	23M MT	10.3M MT	Very High

Chris Clugston in his later celebrated analytical work³⁷⁹ has analyzed the criticality and scarcity of 89 non-renewable natural resources, basing on reliable data from USGS, EIA, UN, World Bank *et cetera* and has given findings that an overwhelming majority of 63 such resources out of 89 were considered scarce globally in 2008, that 16 out of 89 have peaked

and are almost certain to remain permanently scarce, and that a sizable number are at risk considering the remaining years of their global reserves exhaustion as depicted in the figure below.

FIGURE-1

PERMANENT GLOBAL NNR SUPPLY SHORTFALL PROBABILITIES (BY THE YEAR 2030)



Similar situation of scarcity is also reported with the seventeen rare earth metals though they are mainly concentrated in China.

However, we need not go into details of their status here except stating that the rare earth metals play indispensable role in the production of electronic items, computers, mobiles,

satellites, optic cables, communication systems, military weapons, and health and medical applications.

It is pertinent to point out that there have been views opposing as pessimistic the proposition that non-renewable natural resources are soon going to be exhausted due to over exploitation. Some propose that there are huge untapped reserves of minerals and earth has enough bounty to last for a long time. Some even go further to speculate about harnessing of resources from deep sea beds and asteroids. John E Tilton argues that nature of depletion process if assessed by the fixed stock paradigm returns a pessimistic view as the fixed stock paradigm starts with the observation that the earth is finite and this means that the supply of any mineral commodity must also be finite and hence is a fixed stock³⁸⁰. Tilton finds several shortcomings in this paradigm and proposes the opportunity cost paradigm which assesses the availability of mineral commodities by considering what society has to give up in order to obtain another barrel of oil or ton of copper, rather than by estimate of the remaining stock.

The contrary views about availability of undiscovered reserves, and speculations about harnessing these resources from deep sea beds, asteroids or any other place or source are discounted as the same are not relevant for the purpose of this paper. We also do not subscribe to the proposition of Tilton to camouflage depletion by use of opportunity cost paradigm. Because the grim and irrefutable fact remains that the reserves of non-renewable natural resources are finite, and these reserves are dwindling and fast approaching their exhaustion levels.

In the words of Richard Heinberg³⁸¹, “Without metals and a host of other non-renewable minerals, industrial economies could not function. Metals are essential for energy production; for making factory tools, transportation vehicles, and agricultural machinery; and for building the infrastructure of highways, pipes, and power lines that enables modern civilization to function. Hi-tech electronics industries rely on a host of rare metallic and non-metallic

minerals ranging from antimony to zinc. All are depleting, and some are already at economically worrisome levels of scarcity.”

IMPACT OF DEPLETION OF NON-RENEWABLE NATURAL RESOURCES

The bleak future without non-renewable natural resources is worth picturing as a motivational influence to think about conserving the resources. This will also give a glimpse of what will be in store for the future generations and may inspire the world community to evolve laws to conserve these resources through judicious use.

The effects of fast depletion of non-renewable natural resources are graphically described in Chris Clugston’s above referred work. Basing on his extensive analysis he states that the situation of non-renewable natural resources becoming continuously less and less is constraining our life style to evolve into new paradigm. As availability of these resources become gradually scarce and they become expensive due to short supply, the demands of our over-expanding, industrialized economy cannot be met. This will result in gradual and increasing decline and ultimate collapse of the global economies which are dependent on these resources. This will further lead to collapse of global human society as the failing economies cannot provide the basic amenities for sustaining life. While all industrialized and industrializing nations bite the dust with crumbling economies, the aid dependent and non-industrialized nations will collapse in after shock.

In the best case scenario depicted by Chris Clugston, ‘a surviving global human population of a few million will remain to scavenge among the remnants of decimated natural resource reserves and severely degraded natural habitats’, and in the worst case scenario we annihilate ourselves through global nuclear war. He predicts that permanent shortfalls in global non-renewable resources are inevitable and will eventually lead to complete global societal collapse within the next two generations.

Way back in 1972 a group of experts published the classic ‘Limits to Growth’³⁸² in which they presented a world model called ‘World3’, a system dynamic model, basing on five major trends of global concern- accelerating industrialization, rapid population growth, widespread malnutrition, depletion of non-renewable resources, and a deteriorating environment and their behaviour modes that is, tendencies of these variables in the system to change as time progresses. By interpolation values and variables for a certain period they propounded: ‘The behavior mode of the system is that of overshoot and collapse. In this run the collapse occurs because of non-renewable resource depletion. The industrial capital stock grows to a level that requires an enormous input of resources. In the very process of that growth it depletes a large fraction of the resource reserves available. As resource prices rise and mines are depleted, more and more capital must be used for obtaining resources, leaving less to be invested for future growth. Finally investment cannot keep up with depreciation, and the industrial base collapses, taking with it the service and agricultural systems, which have become dependent on industrial inputs such as fertilizers, pesticides, hospital laboratories, computers, and especially energy for mechanization. For a short time the situation is especially serious because population, with the delays inherent in the age structure and the process of social adjustment, keeps rising. Population finally decreases when the death rate is driven upward by lack of food and health services. The exact timing of these events is not meaningful, giving the great aggregation and many uncertainties in the model. It is significant however, that growth is stopped well before the year 2100.’

After 30 years the same expert group found not much improvement in the situation and observed: “While the past 30 years has shown some progress, including new technologies, new institutions, and a new awareness of environmental problems, the authors are far more pessimistic than they were in 1972. Humanity has squandered the opportunity to correct our

current course over the last 30 years, they conclude, and much must change if the world is to avoid the serious consequences of overshoot in the 21st century.”³⁸³

The impact of running out of fossil fuel will probably be most severe as it will bring the progress and development everywhere into a grinding halt. Wars have been fought over oil and will be fought to get control of the dwindling reserves of oil. James Howard Kunstler depicts the bleak but the inevitable future without oil. Kunstler says that a military competition over oil could lead to another World War which would leave the oil production infrastructure of many countries tattered. He says that this tussle will continue till the middle of the twenty-first century and will give rise to the end of industrial growth, falling standards of living, economic desperation, declining food production, and domestic political strife. This might also lead to the non-functioning of nuclear weapons which depend on other technologies. Anarchy will take the reins again and even countries like the United States will disintegrate into smaller autonomous units. Kunstler adds that no combination of fossil fuels will permit man to operate a substantial fraction of the systems currently running.³⁸⁴

OUR OBLIGATIONS FOR THE FUTURE GENERATIONS AND INTERGENERATIONAL EQUITY

When we paint such disturbing and dismal picture for ourselves what about conserving these resources for the future generations? The life of the earth can be considered as infinite and the mankind will continue infinitely, unless it bombs itself out or annihilates itself by some other devious means. Therefore, when we speak of future generations we cannot think in terms of decades or centuries or even millennia but in terms of an infinite time frame.

On the other hand, when we consider the non-renewable natural resources we are faced with the reality of just the opposite that is, finiteness. This raises the issue of sharing these finite resources with the future generations and in this context we have to consider intergenerational equity, which is a concept or idea of fairness or justice in relationship

between the generations, particularly in terms of treatment and interactions.³⁸⁵ It is appropriate to understand the concept relying on the authoritative work of Edith Brown Weiss.³⁸⁶

As per Weiss, the theory of intergenerational equity states that we, the human species, hold the natural environment of our planet in common with other species, other people, and with past, present and future generations. As members of the present generation, we are both trustees, responsible for the robustness and integrity of our planet, and beneficiaries, with the right to use and benefit from it for ourselves. Two relationships must shape any theory of intergenerational equity in the environmental context. The first is our relationship with our natural system of which we are a part. The second is our relationship with other generations. The natural system is not always beneficent. Deserts, glaciers, volcanoes and tsunamis are hostile to humans, but we alone, among all other living creatures, have the capacity to significantly shape our relationship with this system. We can use its resources on a sustainable basis or we can degrade the system and destroy its integrity. Because of our capacity for reason we have a special responsibility to care for it. The second fundamental relationship is that which exists among the different generations of people. All generations are linked by the ongoing relationship with the earth. The theory of intergenerational equity states that all generations have an equal place in relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system.

Three normative principles of intergenerational equity are propounded. First, each generation must conserve options. This means conserving the diversity of the natural and cultural resource base, so that each generation does not unduly restrict the options available to future generations in solving their problems and satisfying their own values. Second, each generation should be required to maintain the quality of the planet so that it is passed on in a condition no worse than that in which it was received. Third, each generation should provide

its members with equitable rights of access to the legacy of past generations and conserve this access for future generations.

Thus, we have obligations towards the future generations as trustees of the earth for the present to conserve its resources for future generation's use. However, as beneficiaries of the same we are exceeding our limits or proportions in the name of development and well being. The nature has endowed these resources in finite quantities and all generations of the mankind to come have inherent rights to enjoy such endowment, yet, as discussed earlier exploitations for our development have brought about scarcity situation in respect of the most important and most precious non-renewable natural resources.

Intergenerational equity as a theory is progressive but in real sense never has any impact without force of law. It has been used occasionally as a defence in courts of law to further some cause for conservation of environment, much like the doctrine of res communes or the public trust doctrine.

This brings us to the crossroad of development for the present and preservation of the non-renewable resources for the future. This also brings us to 'sustainable development', as coined by the [Brundtland Commission](#), that essentially conceptualizes the theory of intergenerational equity.

SUSTAINABLE DEVELOPMENT: MEANING AND SPIRIT OF THE CONCEPT

To *sustain* means "to maintain; keep in existence; keep going; prolong."³⁸⁷

As early as the 1970s, "sustainability" was employed to describe an [economy](#) "in equilibrium with basic ecological support systems."³⁸⁸ Ecologists have pointed to [The Limits to Growth](#)³⁸⁹, and presented the alternative of a "[steady state economy](#)"³⁹⁰ in order to address environmental concerns. According to Hasna Vancock, sustainability is a process which tells of a development of all aspects of human life affecting sustenance³⁹¹. However, the concept

of sustainability dates back to the time of the Greeks around 400 B.C. when Aristotle referred to a similar concept with regards to household economics. This Greek household concept differed from modern ones in that the household had to be self-sustaining at least to a certain extent and could not just be consumption oriented³⁹².

The term 'sustainable development' was used by the [Brundtland Commission](#) which coined the definition of sustainable development as: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."³⁹³

According to the same report, the above definition contains within it two key concepts:

- the concept of 'needs'; in particular the essential needs of the world's poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs³⁹⁴.

Sustainable development has also been defined as "the kind of human activity that nourishes and perpetuates the historical fulfilment of the whole community of life on earth."³⁹⁵

There has generally been recognition of three aspects of sustainable development³⁹⁶:

- 1) Economic;
- 2) Environmental; and
- 3) Social.

However, sustainable development, as a concept has grown to include within its ambit, material, ecological, legal, cultural, political and psychological aspects as well. The idea of sustainable development has also been enshrined in the outputs of the Rio Conference namely the Earth Charter and the Agenda 21.

Furthermore, Agenda 21 emphasizes that broad public participation in decision making is a fundamental prerequisite for achieving sustainable development³⁹⁷.

The meaning of sustainability is the subject of intense debate among environmental and resource economists. Perhaps no other issue separates the traditional economic view of the natural world from the views of most natural scientists. The debate currently focuses on the substitutability between the economy and the environment — or economic goods and services, or “natural capital” and “manufactured capital” —, a debate captured in terms of “weak” versus “strong” sustainability. A development is said to be weakly sustainable if the development is non-diminishing from generation to generation. This is by now the dominant interpretation of sustainability. The alternative to weak sustainability is strong sustainability, which is seen as non-diminishing life opportunities. Under the strong sustainability criteria, minimum amounts of a number of different types of capital e.g, economic, ecological, social should be independently maintained, in real physical/biological terms. The major motivation for this insistence is derived from the recognition that natural resources are essential inputs in economic production, consumption or welfare that cannot be substituted for by physical or human capital. A second possible motivation is quasi-moral, namely acknowledgment of environmental integrity and ‘rights’ of nature. In either case it is understood that some environmental components are unique and that some environmental processes may be irreversible over relevant time horizons.³⁹⁸

NON-PERFORMANCE OF SUSTAINABLE DEVELOPMENT

The concept of sustainable development was propounded apparently for protection from degradation of renewable natural resources, bio diversity, climatic conditions *et cetera* and it was obviously not intended for conservation non-renewable natural resources. The idea has never really translated into reality even after so many years. During the last few decades this concept or rather the idea of this concept has become a flaunty catchword in national and international debates, discourses, seminars, conferences and conclaves on topics ranging from

business, diplomacy, economics, ecology and environment, growth and development, poverty and GDP, to irrelevant ones, by describing or paraphrasing the concept to suit the particular topic or event.

In the words of Bac Dorin Paul, “Sustainable development has become the ‘buzzword’ of both the academic and the business world. ‘Sustainability’ has been present for the last decades in academic papers, syllabuses of Faculties, boardrooms of local authorities and corporations and offices of public relations officers. Unfortunately, sustainability has become a ‘fashionable’ concept in theory, but it is considered extremely expensive to be put in practice by major corporations, firms and local or national governments.”³⁹⁹

There are a myriad of reasons why this rather *bonafide* and evocative idea though generally accepted, failed to bring about the intended changes. Some of the reasons mentioned in the background paper⁴⁰⁰ prepared for the high level panel on Global Sustainability for its first meeting held on 19th September, 2010 were that sustainable development calls for a convergence between the three pillars of economic development, social equity and environmental protection. This concept, however, still remains elusive and challenging. Another reason for the hindrance in the growth of sustainable development is that, development is being defined primarily as economic growth. Such an approach leaves the Natural Resources vulnerable to exhaustion. Institutions governing environmental and social issues must be given importance both at the national and international level.

The UN Secretary General, Ban Ki-Moon remarked on the failure of sustainable development as an impetus for change. He said, “In the twenty-first century, supplies are running short and the global thermostat is running high. Climate change is also showing us that the old model is more than obsolete. It has rendered it extremely dangerous. Over time, that model is a recipe for national disaster. It is a global suicide pact.”⁴⁰¹ He said that to come out of such a challenging situation and restore balance again requires rethinking. He

suggested that people have to make major changes in their lifestyles, economic models, social and political lives. And that they should connect the dots between climate change and water, energy and food.

Failure of implementation of sustainable development in general proves that it is not a viable proposition for preservation of environment as one of three operational factors. So far as conservation of non-renewable natural resources for future generations is concerned such a development model is totally inappropriate because no viable sustainability can be achieved without methodical researches to assess the future generations' needs and the availability of these finite resources and the extent of their requirement now, how much of each of these resources need to be conserved for future use *et cetera*. As of now, there is no such empirical study or objective survey in respect of non-renewable natural resources, except their depletion rates.

DEVELOPMENT AND WHO BENEFITS FROM IT

It is apposite to discuss about the present day development which strains the non-renewable resources to the extreme to show that such development whether with the sustainability agenda or without it does not benefit the majority.

Development encompasses continuous 'change' in a variety of aspects of human society. The dimensions of development are extremely diverse, including economic, social, political, legal and institutional structures, technology in various forms (including the physical or natural sciences, engineering and communications), the environment, religion, the arts and culture⁴⁰².

The quantitative and qualitative changes in the economy are termed as economic development. It encompasses development of human capital, critical infrastructure, regional competitiveness, environmental sustainability, social inclusion, health, safety, literacy and other initiatives. However, it is pertinent to distinguish between economic growth and

economic development. In the words of Amartya Sen, “economic growth is one aspect of the process of economic development.”⁴⁰³ The scope of economic development includes the process and policies by which a nation improves the economic, political, and social well-being of its people⁴⁰⁴.

It can be deducted that sustainability is to be considered inherent in any development process because it is purportedly for the welfare and well being of the people in general. Development is however, does not turn out to be so benevolent for all as the fruits of development do not reach those who need it most.

The conventional development is primarily about increasing production and consumption with economic growth as its supreme goal. Its capitalist nature caters to the rich and rich begets rich. It seeks to maximise the freedom of enterprise and scope for market forces. This means allowing those with capital and those with most money to spend, to produce, buy and sell and develop whatever suits them. This explains the most glaring contradictions in any country, rich or poor. Everywhere great and unmet need exists alongside development of frivolous, luxuries and wasteful industries and products, and production that is only for the rich. This happens because those with capital are allowed the freedom to produce what is most profitable for them. This is most obvious where millions go hungry in countries exporting large quantities of luxury crops to rich countries.

However, to develop what is appropriate in view of the needs of people and their environments would be to make sure the productive capacity went into the right purposes, not into those ventures that would maximise profits -- but this is precisely what does not happen when the conventional, capitalist development path, with its emphasis on freedom for corporations, is taken. If market forces are allowed to determine resource distribution, the rich will get almost all of them and those in most need will get few if any. This is why one-third of the world's grain production goes to feed animals in rich countries while at least 800

million are hungry. If you allow market forces to determine what is developed the result will be mostly the development of inappropriate industries.⁴⁰⁵

India's case can be taken as a point. India's per capita income increased at only around [1% annualized rate](#) in the three decades after Independence⁴⁰⁶. Since the mid-1980s, India has slowly opened up its markets through [economic liberalization](#). After more fundamental reforms since 1991 and their renewal in the 2000s, India has progressed towards a [free market economy](#)⁴⁰⁷. In the late 2000s, India's growth reached 7.5%, which will double the average income in a decade⁴⁰⁸. Since the economic liberalization of 1991, India's GDP has been growing at a higher rate.

The major challenge, which the country faces, is however the skewed distribution of the benefits of economic development. The fruits of economic development have simply failed to reach the hinterland of the nation where more than 70% of people still reside⁴⁰⁹. The phrase 'inclusive growth' has remained a mere buzz word in discussion rooms and seminars. The ever rising disparity between the wealth and income of the rich and the poor in urban India and even more importantly, the rising disparity in wealth and income between urban and rural India, has the potential of disrupting the congenial social atmosphere needed for sustained economic growth⁴¹⁰.

This is the case in most third world countries. Even in developing and developed countries there remain huge disparities between poor and wealthy, though their poor can pass off as far better off than the poor in other countries. There is no sense of equity in present day development which is exploitative of the natural resources for the benefit of a section of society. Without equity the present day development is not sustainable for long.

THE LEGAL ASPECT

Exploitation of non-renewable natural resources to the point of their scarcity in the name of development, that only caters to the already privileged, and the possible impact of non-availability of these resources in the future has been elaborately discussed in the earlier chapters to drive home the point that we have no time to lose if we want to conserve these resources for the future as we are obligated to. It has also been discussed that the concept of sustainable development which was proposed to conserve the natural resources and prevent degradation of environment while achieving development has not worked as desired even after three decades. Several reasons for failure of sustainable development have been mentioned earlier. But probably the most significant one is that sustainable development has remained as a concept or at best a principle with some indeterminate value. It is not a legal principle having prescriptive values like the human rights. It has not been incorporated as a law or legal principle enforceable by judicial processes. Its status in the international law and domestic laws remains debatable. The concept of sustainable development is too vague and ambiguous to be classified as a legal principle. It has only been used as a point of reference in international treaties on environment and pollution and also in judicial decisions to undo or restrain actions considered harmful for the environment under some codified environmental laws.

For example, the Supreme Court of India in the case of *A.P. Pollution Control Board v. Prof.M.V.Nayudu (Retd.)And Ors*⁴¹¹ while dealing with the issue of establishment of an industry near natural reservoirs observed: ‘There is building up, in various countries, a concept that right to healthy environment and to sustainable development are fundamental human rights implicit in the right to 'life'... The right to sustainable development has been declared by the UN General Assembly to be an inalienable human right (Declaration on the Right to Development, 1986). The 1992 Rio Conference declared that human beings are at

the centre of concerns for sustainable development. Human beings are entitled to a healthy and productive life in harmony with nature. In order to achieve sustainable development, environmental protection shall constitute an integral part of development process and cannot be considered in isolation of it.’ In the case of T.N. Godavaraman Thirumulpad v. Union of India And Ors ⁴¹² involving the issue of establishment of an industry in a tribal area with wild life habitat it was observed that, ‘As a matter of preface, we may state that adherence to the principle of Sustainable Development is now a constitutional requirement. How much damage to the environment and ecology has got to be decided on the facts of each case. The courts are required to balance development needs with the protection of the environment and ecology. It is the duty of the State under our Constitution to devise and implement a coherent and co-ordinated programme to meet its obligation of Sustainable Development based on inter-generational equity.’

It need be emphasized here that notwithstanding such ostensible adoption of the idea of sustainable development, the same cannot be accepted as an operational factor for preserving any natural resource because of absence or non-availability of data based on empirical study on the national as well as global scales to strike out any semblance of a balance between preservation of natural resources and development. What have hitherto been achieved are sporadic actions to curb some pollution or environmental degradation referring to the concept of sustainable development.

RECOMMENDATIONS

1. NEED BASED DEVELOPMENT: THE NEW APPROACH

According to Mahatma Gandhi, “There's enough in the world to meet the needs of everyone but there's not enough to meet the greed of everyone.”⁴¹³

The paper argues that we require need based development that will fulfil everyone’s need and help conserve the natural resources for the future. Since exploitation would be strictly need

based there would be no stress on the natural resources as profit motivated exploitation will stop. To achieve this, development should be from the grass root levels to the top and not the other way round. This may seem to affect the GDP and the GNP but it will bring the multitude into the fold of development, which will be uniform and equitable. Such development process should ensure:

1. Stabilisation of population;
2. Grass root level participation;
3. Collective decision;
4. Slow but steady growth of economy;
5. Conservation of natural resources;
6. Development of cottage industries;
7. De-urbanisation;
8. Public awareness drive;
9. Recycling;
10. Minimising waste *et cetera*.

Ted Trainer, the proponent of 'De-growth'⁴¹⁴ proposed similar ideas about less affluent lifestyles which would have to be a non-affluent, a very frugal way of life, in which the concern is to produce and consume only as much as is needed for comfortable material living standards. It must be stressed that this does not mean deprivation or hardship. It is about being content with what is sufficient for a high quality of life within small but highly self-sufficient local economies and in more communal, cooperative and participating ways.

This seems to be the way by which we can conserve whatever non-renewable resources are still left on this earth for the future without depriving ourselves of our basic needs.

2. GLOBAL LEGAL REGIME: NEED OF THE HOUR

Present international regime for protection and conservation of the environment are sought to be achieved through multilateral treaties and agreements, the implementation of which generally depends upon interstate negotiations and conciliations or through adjudication by the international Courts of Justice. There is no adequate mechanism for enforcing the international environment laws except by economic sanctions or military action against the non-conformist, which are counter-productive. Non-confirmation results from the diverse needs of the states to utilise or exploit natural resources, which is again the result of disparities in development levels. Therefore, with the present development models unanimity among the states for any global action plan is difficult to attain until development becomes uniform and that can be if the same is strictly need based as the basic needs are similar for everybody.

The transition from the conventional to need based development may not be easy especially for the developed and certainly will not be voluntary until some catastrophic situation develops. However, such change can be tried to be enforced by way of legal sanctions. Environmental laws everywhere are framed and implemented with the basic objective to control pollution of the environment in general. These laws do not provide for preservation of the environment or the natural resources. Environment encompasses everything around us, that is, everything above the earth – air, water, forest, flora, fauna etc, and everything below the earth – minerals, oils, underground water *et cetera*.

We are not concerned with the role of the environmental laws in the matter of controlling pollution of environment and let us assume that these laws are adequate for that purpose. But we emphasize that preservation of the natural resources should also be a function of the environmental laws and that these laws should provide for use of natural resources strictly to meet the basic needs rather than for economic development. This is indispensable in respect

of non-renewable natural resources. It is seen that there are laws to deal with the conservation forests, a renewable natural resource which, to some extent, also helps in preserving the wild life by maintaining their habitats. Various other laws which deal with the non-renewable natural resources, particularly the minerals, coal etc., do not provide for their preservation but only lay down the modalities to regulate their extraction.

Since non-renewable resources are scattered over the earth in different countries, which have different economies, development processes, needs of their populace *et cetera*. We need a global environmental law regime with power of sanction which can regulate use of natural resources through the law formed for that purpose.

CONCLUSION

This paper has highlighted the problem of depletion of non-renewable natural resources for mindless and aimless development processes to cater to our material comfort and luxurious lifestyles, failure of the sustainable development concept to translate into reality to have any appreciable impact and the need to adopt new model of development under an integrated global legal regime. It is high time to shed the defunct and unworkable concept of sustainable development and to move ahead if we want to fulfill our obligations to the future of the mankind.

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- ⁴⁰⁶ *Economic survey of India 2007:Policy Brief*, OECD, Available at <http://www.oecd.org/eco/surveys/39452196.pdf> (Last accessed on 12th April, 2013)
- ⁴⁰⁷ *Ibid*
- ⁴⁰⁸ *Ibid*
- ⁴⁰⁹ Samir K. Barua, Jan 4th 2008, *Uneven Distribution of Benefits of Economic Growth*, The Economic Times, Available at http://articles.economictimes.indiatimes.com/2008-01-04/news/27692084_1_rupee-appreciation-indian-economy-economic-growth (Last accessed on 12th April, 2013)
- ⁴¹⁰ *Ibid*
- ⁴¹¹ (1999) 2 SCC 718
- ⁴¹² (2006) 13 SCC 689
- ⁴¹³ Mahatma Gandhi
- ⁴¹⁴ Ted Trainer, 2012, *De-growth: Do you know what it means*, Available at degrowth.org/wp-content/uploads/2012/11/Trainer-2012.pdf (Last accessed on 12th April, 2013)

The Paradox of Prospect for NGOs: Space for Greater Institutional Avenue in the International Human Rights Regime

-S. M. Atia Naznin¹

Abstract: Notwithstanding the dominance of non-governmental organizations (NGOs) to uphold human rights, skeptics constantly allege that NGOs' involvement in global politics and human rights is a threat towards *Westphalian* paradigm of state sovereignty. However, in this era of mutual collaboration and peaceful coexistence undoubtedly, we are in the midst of 'associational revolution' that requires active presence of NGOs. Hence, other related thoughts should be analyzed which advocate for the greater institutional role of NGOs in framing the circle of international human rights. To scrutinize these arguments and counter arguments this paper focuses on the international human rights system as articulated by United Nations (UN) as opposed to the three (3) regional human rights arrangements, i.e., European, Inter-American and African, although they are complementary to the UN human rights mechanisms and denote the masterpiece of international human rights. After speculating the potentials of NGOs in editing the grammar of human rights this paper concludes by contending that world would possibly not be a better place if we fail to open a wider institutional platform to NGOs within the UN. Specifically, it also explores the challenges before the UN in accommodating NGOs and argues for effective ways of reconciliation. The article, therefore, concludes by contending that twenty-first century represent a whole different world. Besides, over the years, the effortless journey of NGOs in the path of human rights justifies their stand to retain voice for a strong institutional platform in the UN. Therefore, undoubtedly, NGOs are on the world stage to stay.

Key Words: Sovereignty, Global Governance, Intergovernmental Organization, Institutionalization.

1. Introduction:

Let us start with confusions....

Amnesty International (hereinafter, AI), the winner of Nobel Peace Prize 1977 is a worldwide recognized non-governmental organization (hereinafter, NGO) in human rights arena which also has been assisting in some of the functions of the UN since its journey began in 1961. Although AI claims to have a million or more members in 150 countries and national sections in 54 countries, its presence in the south stands on a low profile, instead it is mostly visible in north, especially in Western Europe and North America. Truly speaking, in many instances, AI's national sections in developing countries consist only of a few hundred members and small local representatives. In addition, AI has been seen effective only propagating selected aspects of human rights, i.e., civil, political and judicial rights.²

¹ Lecturer, School of Law, BRAC University, Dhaka, Bangladesh.

² Winston, Morton E., "Assessing the Effectiveness of International Human Rights NGOs: Amnesty International", in *NGOs and Human Rights: Promise and Performance*, Welch, Claude W. (ed.), University of Pennsylvania Press, 2001, pp. 32, 33.

The above observation to some extent reflects the tension on the issue of ‘representation’- whom does AI represent actually or for which category of right it stands? Among others, these two confusions that are also true for other NGOs mark a shadow on the hope for their greater institutional role in the horizon of international human rights system. For example, as per the accountability issue it is observed that NGOs become vulnerable to challenges to their accountability as they are often found to be fierce competitors not only in terms of ideology but also for market shares, donor funds and clients.³

Since the end of the World War II, number of NGOs has risen dramatically. Especially in the past two decades⁴, both national and international NGOs have blossomed as the operational arm of the civil society by providing a backbone to the international human rights movement. Another observation shows that the end of Cold war has created immense opportunities for NGOs to become a significant part of political landscape in a growing number of third world countries and former Soviet bloc.⁵ William De Mars explained this current NGO bloom from three dimensions, i.e., *firstly*, NGOs are proliferating quantitatively in establishing issue areas that largely includes the aspects of human rights. *Secondly*, the increase in NGO number is a global phenomenon affecting all regions from Asia to Middle East where governments have maintained relatively tight control over civil society for decades. *Thirdly*, NGOs are also proliferating qualitatively, by taking the initiatives to create new issues where hitherto they have exerted limited influence.⁶ Such a proliferation in number and influence, in effect, demonstrates a significant power shift in the world politics as in all its dimensions, the very presence of NGOs represents an alarm to the government policy. However, could this line of thought be stretched to rationalize the claim for increasing institutionalized power sharing in the UN, as much as Boutros Boutros-Ghali, the former UN Secretary General implied an agenda for development?⁷ According to his assertion, “over the past decade, the growth of NGOs in number and influence has been phenomenal. They are creating new global networks and providing to be a vital component of the great international conferences in this decade. This time has arrived to bring NGO and United Nations activities into an increasingly productive relationship and cooperation.”⁸

However, notwithstanding the growing salience of NGOs critics argue that they are differentiated and lack of government support⁹; their status in international law is not clearly defined¹⁰; their independence has long been a debatable issue as states on many occasions try to utilize or control NGOs to indirectly place them in the service of national policies¹¹; NGOs are viewed as unelected and unaccountable special interest groups which may disrupt global

³ Clifford, Bob, ‘Marketing Rebellion: Insurgent Groups, International Media, and NGO Support’, *International Politics*, Volume 38, No. 3, 2001, pp. 311–33.

⁴ According to the 2002 UNDP Human Development Report nearly one-fifth of the world’s thirty seven thousand INGOs, retrieved from <http://hdr.undp.org/en/reports/> on 15/03/2013; See also, “Between 1983 and 1993 the total number of international human rights NGOs doubled, and their budgets and staffs grew dramatically”, Keck, Margaret E. and Sikkink, Kathryn, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, Ithaca, NY, 1998, p. 90.

⁵ Donnelly, Jack, What are Human Rights, retrieved from <http://usinfo.state.gov/products/pubs/hrintro/donnelly.htm> on 28.03.2013.

⁶ Mars, William De, *NGOs and Transnational Networks*, Pluto Press, London, 2005, p. 37.

⁷ Duner, B. (1997) “The Fight for Greater NGO Participation in UN”, *Security Dialogue*, Volume 28, p. 302.

⁸ Boutros Boutros-Ghali, *An Agenda for Development*, United Nations, New York, 1995, p. 53.

⁹ Cakmak, Cenap, “The Role of Non-Governmental Organizations in the Norm Creation Process in the Field of Human Rights”, *Turkish Journal of International Relations*, Volume 3, No. 1, 2004, p. 106.

¹⁰ Martens, Carstin, “Examining the (non) Status of NGOs in International Law”, *Indiana Journal of Global Studies*, Volume 10, Issue 2, 2003, p. 16.

¹¹ Keynote address by Secretary General Boutros Boutros-Ghali to the 4th DPI/NGO Conference, *Transnational Associations*, No. 6, 1995, p.345-349, at p. 347.

governance¹²; they often compete for their own visibility, clients and influence leaving behind the issue of democracy, transparency and representation far behind¹³; the issue of deficiency of accountability in NGOs is well-documented¹⁴. To bolster their position these critics also portray NGOs as agents of foreign influence who use human rights laws to attack no-western culture¹⁵ and ‘foster a new type of cultural and economic colonialism’¹⁶. The tendency of these NGOs is to set the agenda without understanding the society, culture, politics and other issues that actually affect on ground the human rights and development of the people. In other words, in socio structural terms, the proliferation of NGOs thus reflects the emergence of a new petit bourgeois class who thrive on international gatherings lacking solid organic support even within the country.¹⁷ As per the southern NGOs, one critique notes an interesting observation. While many southern NGOs are serious about their business, quite a few have been established with the primary or even the sole purpose of gaining access to the flows of foreign financing that now, after implementation of structural adjustment policies, by-pass third world governments. It is often questionable whether these NGOs have any progressive purpose whatsoever. In fact, many southern NGOs are urban based and their members are for the most part from the upper and middle classes.¹⁸ Consequently, they tend to display no grass-root level contact.¹⁹ Critics also note that NGOs from North and South have failed to prove a homogenous identity among themselves which is particularly evident from their concentration of human rights discourse. For example, unlike, NGOs in South, the first world NGOs concentrate more on civil and political rights, individualistic rather than group rights and believe in a pluralistic society functioning within a framework applicable to individuals against state interference.²⁰ However, apart from all these, the most serious complain against NGOs is- their over increasing involvement in global politics and human rights poses a threat to the *Westphalian* state-centric paradigm of sovereignty²¹ or the traditional concept of nation-state. To support their view, critics argue that whereas once only sovereign states had a say in world affairs, non-governmental organizations- as well as individuals now have a right to be heard.²² As state’s own policy making by itself is a dynamics of state’s sovereignty, hence undoubtedly, it is a sign of inference.

¹² Holmen, H.; Jirstrom, M., “Look Who’s Talking: Second Thoughts about NGOs as Representing Civil Society”, *Journal of Asian and African Studies*, No. 44, p. 430.

¹³ *Ibid.*, p.429, 433.

¹⁴ Edwards, M. and D. Hulme, ‘Too Close for Comfort? The Impact of Official Aid on Non-governmental Organizations’, *World Development*, Volume 24, Number 6, 1996, pp. 961–73; Hudson, A. (2001) *Advocacy Rules? NGO Search for Development Alternatives*, ID21 Society and Economy, retrieved from <http://www.id21.org/society/s8aahlg1.html>, accessed on 13.03.2013.

¹⁵ *Ibid.*

¹⁶ Petras, James, NGOs: In the Service of Imperialism, *Journal of Contemporary Asia*, Volume 29, Number 4, 1999, p. 434. (429-440)

¹⁷ *Ibid.*, p. 439, 440.

¹⁸ *Supra* note 13, at page 433.

¹⁹ Arnesen, O., V. Kapelrud and R. Øygard (2002) *Support for Organizing Producers in Southern and Eastern Africa: Status and Possibilities for Norwegian Assistance*. Final draft. Oslo: NORAD, p. 14, cited in *Ibid.*, p. 433.

²⁰ *Ibid.*

²¹ “Since the treaties of Westphalia in 1648, the doctrine of unconditional Sovereignty has been a central pillar in international law-states were not to interfere with each other’s handling of matters within their jurisdiction, including their treatment of individuals within their borders.” On the contradictions and violations of this principle see, Krasner, Stephen D., *Sovereignty: Organized Hypocrisy*, Princeton, 1999 cited in Volume 2, Number 2, p.392.

²² Cassese, Antonio, *Human Rights in a Changing World*, Temple University Press, Philadelphia, 1990, p. 174.

Apart from all these perceptions, in this era of mutual collaboration and peaceful co-existence it is an undeniable fact that we are in the midst of ‘associational revolution’²³, we are in the era of NGOs. United Nations, the main global policy making body has been unusually open to NGO input over the years.²⁴ In the words of the UN former Secretary General Kofi Anan, ‘NGOs are the conscience of the humanity’.²⁵ This statement gives an indication of the increasing visibility of NGOs in the global governance process. As an obvious result, presently, NGOs are claiming the right to take part in the formal decision making process of the intergovernmental organizations as delegates.²⁶ Besides, numerous recent literatures on NGOs are exceedingly optimistic on the officialization of NGO at the international forum.²⁷ So, we need to look at the other side of mirror where logics stand for greater institutional role of NGOs in framing the circle of international human rights regime.

To be specific and concise, this paper will focus on the international human rights system articulated under United Nations (hereinafter, UN) as opposed to the three (3) regional arrangements for protection of human rights, i.e., European, Inter-American and African system, though they are complementary to human rights efforts of the UN and often considered as the masterpiece of international human rights block. Within the UN, scope of international human rights system is circumscribed by the core human rights instruments, i.e., the UN Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, etc. and monitoring bodies, i.e., Human Rights Council, Office of the High Commissioner for Human Rights, etc. that have been spawned by the UN.²⁸ The numerous dynamics, through which this system operates, in broad terms, include norm innovation, information gathering, monitoring, and implementation on human rights aspects.

2. What if- look at the other side of the spectrum?

At the end of the twentieth century, alongside states, world politics postulates the active presence of NGOs in human rights sphere. The mutual interaction among NGOs and human rights can be speculated by the following words- “The issue of human rights is one that inspires not only politicians, religious organizations, and trade unions, but also private individuals and non-governmental organizations that strive to secure conformity with the international standards to protect human rights.”²⁹

The term NGO (Non-governmental Organization) came into currency in 1945 because of the need for the UN to differentiate in its Charter between participation rights for

²³ Lester M. Salamon, “The Rise of Non-profit Sector”, *Foreign Affairs*, Vol. 73, No. 4, July/August 1994, pp. 109-122, cited in Supra note 8 at page 302.

²⁴ Paul, J.A. (1999b) NGO Access at the UN. Global Policy Forum, July. <http://www.globalpolicy.org/ngos/analysis/jap-accs.htm>, accessed on 12.10.2012.

²⁵ Paul, J.A. (2000) NGOs and Global Policy-making. Global Policy Forum, June. <http://www.globalpolicy.org/ngos/analysis/anal100.htm>, accessed on 12.10.2012.

²⁶ Supra note 13, at page 431.

²⁷ Jordan, L. and P. van Tuijl (2000) ‘Political Responsibility in Transnational NGO Advocacy’, *World Development*, Volume 28, Number 12, 2000, p. 2051.: 2051–65, cited in Supra note 13, at page 431.

²⁸ Meron, Theodor, “The Humanization of Human Rights”, 2006, 510-517, cited in “The Evolving International Human Rights System”, Buergenthal, Thomas, *The American Journal of International Law*, Vol. 100, No. 4, October, 2006, at p. 801. (783-807)

²⁹ *Ibid.*

intergovernmental specialized agencies and those for international private organizations.³⁰ However, the foundation of UN-NGO relationship is embedded in Article 70 and 71 of the UN Charter that stretches consultative status and a right to participate in the UN deliberations to NGOs within the domain of Economic and Social Council (ECOSOC).³¹ By providing a secondary role to NGOs this status enable them only to attend public sessions, make oral statements under different agenda items and present written submission in the UN.³² Although over the past years, NGOs have shifted their bonding with the UN more intensely and the boundary of consultative status has been elaborated to national NGOs³³ but still now they are devoid of the formal legal stand to participate in the deliberation of the principal organs of the UN, i.e., General Assembly or Security Council. In addition, NGOs with consultative status are largely from the north that extremely indicates an uneven access of the south.³⁴ In this backdrop, especially after the end of cold war considerable demand has gathered momentum for structural reform of the UN by incorporating within its scope the condensed institutionalization of NGOs. Institutionalization in this context, may include shaping structural access for NGOs, enhancing their legal status or engaging them in decision making process. But, what are the justifications behind the demand?

From theoretical perspective, following strengths of NGOs will rationalize their more visible presence in international human rights regime, i.e., *firstly*, their small size and flexible administration allow them to avoid complex procedures. *Secondly*, diversity is their strength in effectively addressing human rights issues. Being decentralized they proceed with a speed and decisiveness and range of concerns impossible to imagine for most of the work of bureaucratic and politically cautious organizations. *Thirdly*, their inherent neutrality, independence sketch their credibility and sharply distinguish them from government which ultimately enable them ‘to focus on a particular subject’³⁵. In such a case, the possibility to obtain satisfactory result is notably high. *Fourthly*, long term grassroots-level involvement of many international NGOs in a country, particularly developing one, gives them familiarity with the people that donor countries couldn’t match³⁶; *lastly*, the major reason why NGOs exist and should exist in the UN is their ability to promote issues that are not currently being undertaken by the government. It is believed that government in most cases pursue narrow and egoistic interests while NGOs are believed to have an outspoken humanitarian focus and to constitute a democratic alternative.³⁷ Therefore, their most important claim for inclusion

³⁰ Willetts, Peter, What is a non-governmental organizations, Advance reading for participants of Human Rights NGO capacity-Building Programme- Iraq, available at <http://www.staff.city.ac.uk/p.willetts/CS-NTWKS/NGO-ART.HTM>, accessed on 12.11.2012.

³¹ See, “The Economic and Social Council may make arrangements of the specialized agencies to participate, without vote in its deliberations and those of the commissions established by it and for its representatives to participate in the deliberations of the specialized agencies.”, Article 70, Chapter 10, UN Charter, 1945; “The Economic and Social Council may make suitable arrangements for the consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and where appropriate, with national organizations after consultation with members of United Nations.”, Article 71, Chapter 10, UN Charter, 1945.

³² Almost two decades ago *Jerome J. Shestack* reiterated that the consultative function of NGOs was largely an empty ritual. See, *Supra* note, at page 308.

³³ See, ECOSOC Res. 1996/31, 25th of July, 1996, Security Council Resolution (Consultative relations between United Nations and non-governmental organizations).

³⁴ “NGOs in Consultative Status by ECOSOC in Region”, Global Policy Forum, 2009, retrieved from <http://www.globalpolicy.org/tables-and-chart-ql/ngos-tcql/32120.html> on 28.08.2012.

³⁵ Donnelly, Jack, What are Human Rights, retrieved from <http://usinfo.state.gov/products/pubs/hrintro/donnelly.htm> on 28.03.2013.

³⁶ Sinnar, Shirin, “Mixed Blessings: The Growing Influence of NGOs”, *Harvard International Review*, Vol. 18, Issue 1, 1995/1996, p.56.

³⁷ *Supra* note 13, at page 429, 430.

within the UN structure rests on norms of democracy and civil participation which historically have been weak at the UN level.³⁸ NGOs have come to claim that their importance resides in the role as monitors of government perceived as unlikely or unable to resolve global problems. For example, in the areas of women, environment and human rights, NGOs view government as among the causes of current problems and themselves as part of the solutions. As the Vienna NGO forum report concluded, “In the face of government action or duplicity.... it was up to NGOs to take a stringer stand”³⁹. Peter J. Simmons, therefore, rightly observed, ‘where governments have turned a blind eye, groups such as Amnesty International and Committee to Protect Journalists call attention to violations of the UN Declaration of Human Rights’.⁴⁰ Implying these inherent potentials in mind, the founders of the UN long before these days, in 1945, enacted positive provisions in the UN Charter on NGOs’ participation within the UN structure.

However, apart from these strengths, practical implication of NGOs’ contribution in international human rights system will rationalize the argument for their more institutional engagement in the UN. Viewing the positive practical implication of NGOs contribution Lisa Jordan and Peter Van Tuijl observed that NGOs have tested the boundaries of political system by assuming the right to mobilize and serve a public, the right to organize, the right to monitor and comment on the governance process.⁴¹ Based on this observation, numerous efforts of NGOs through which they have been consistently continuing to strengthen the UN human rights system to can be sketched from three dimensions- norm generation, monitoring and enforcement on the international human right aspects.⁴²

History reveals that NGOs played a pivotal role in promoting the international standard of human rights. They created appropriate conditions in which those conditions were developed and came up with new ideas and proposals of implementation.⁴³ These efforts include drafting international instruments to establish new procedures and machineries to identify specific governments as violators through constant campaigns by mobilizing public opinion and lobbying government support.⁴⁴ For example, their effort to secure the inclusion of human rights language in the final draft of the UN Charter is widely recognized. After the Second World War, they involved in the adoption of Universal Declaration of Human Rights (UDHR) which for the first time listed rights and freedoms to which all human beings are entitled.⁴⁵ But, when both the UN Charter and UDHR felt short behind meeting the expectations, NGOs again came forward to fill up the vacuum. Subsequently, their continued effort has culminated in the adoption of two significant covenants on civil, political rights and

³⁸ Clark, Marrie Ann, Friedman, Elizabeth J. and Hochstetler, Kathryn, *The Sovereign Limits of Global Civil Society: A comparison of NGO Participation in UN World Conference on Environment, Human Rights and Women*, World Politics, Volume 51, No.1, October, 1998, p. 6. (1-35)

³⁹ "Addendum 2 to the final report of the NGO-Forum, UN Document A/Con?157/7/Add 2 of 24 June 1993," and "Analytical Report of Working Group A," in Nowak (fn. 37), 105

⁴⁰ Simmons, Peter J., “Learning to Live with NGOs”, *Foreign Policy*, 1998, p. 87, in *NGOs in International Politics*, Ahmed, S; Potter, D., Connecticut: Kumarian Press Inc., 2006, p. 84.

⁴¹ Jordan, Lisa and Van Tuijl, Peter (eds.), *NGO Accountability: Politics, Principles & Innovations*, 2006, p. 6.

⁴² Thakur, Ramesh, “Human Rights: Amnesty International and the United Nations”, *Journal of Peace Research*, Volume 31, No. 2, 1994, pp. 143-160.

⁴³ Cassese, Antonio, *Human Rights in a changing world*, Temple University Press, Philadelphia, 1990, p. 173.

⁴⁴ Steiner, Henry J. and Alston, Philip, *International Human Rights in context: Law, Politics and Morals*, Clarendon Press, Oxford, pp. 456, 457.

⁴⁵ Rapporteur of the Commission of Human Rights stated, “*They (NGOs) were profoundly concerned, especially the religious among them, whether Jewish, Catholic or Protestant, in the fate and dignity of man in the modern world; they kept in close touch with us, and we received them and adopted many a sound counsel from them, and you can trace in the text of declaration a word here, a clause there, or a whole article, back to their inspiration.*”, *Supra* note 2, at page 113.

economic, social and cultural rights.⁴⁶ During 1970s and 1980s, Amnesty International's campaigns at national and international level crucially influenced the UN initiatives to adopt the convention against torture, cruel, inhuman or degrading treatment or punishment. NGOs' participation in drafting of United Nations Conventions of the Rights of the Child (UNCRC), the '*Magna Carta for children*' denotes another glaring instance. In the Vienna conference, numerous human rights NGOs defended the principle of universality, interdependence and indivisibility from possible retrograde movement while pushing concrete proposals for better implementation of human rights measures. Consequent to their effort, thereby, the principle of "*one set of rights cannot be used to bargain for another*" was included to the text of Vienna Declaration and Programme of Action 1993. Besides, evidence abounds to demonstrate that active pursuit by NGOs has placed crucial human rights issues in the UN policymaking agenda. Through information dissemination, media attention, mobilization and lobbying NGOs routinely bring issues to agenda setting process. It is now widely recognized that issues like human rights, women's rights and environmental protection that have dominated the UN human rights norms are the outcome of vigorous role of influential NGOs. For example, the Vienna Conference witnessed a great advancement on the recognition of women's human rights as a culmination of strong lobbying from the global NGOs. Particularly, the Women NGOs directly lobbied the participants of the conference to include their concerns the network had borne to the conference agenda.⁴⁷ The concern was to make it clear that discrimination against women or violations against women are not different or less important than any other human rights violations.⁴⁸

Besides norm innovation by influencing the legislative process, NGOs also assume significance for monitoring and implementing those norms by creating pressures on target groups to adopt new policies. In fact, their extensive monitoring functions lead to the implementation of government compliance to its national and international human rights obligations. The supervisory organs established in connection with the UN human rights treaties have a great need for independent information when they evaluate the periodic reports submitted by the treaty ratifying states.⁴⁹ This 'information vacuum' is substantially supplemented by NGOs through their in-depth investigations. For example, the UN Human Rights Committee which is the implementing organ of the ICCPR is almost totally dependent on NGO briefings, documentation and advice.⁵⁰ It was observed that virtually, in every instance, before the UN decided to appoint rapporteurs on Guatemala, Bolivia, El Salvador, Poland, Afganistan, Iran, Cuba, Myanmar, Sweden, Ziare and following emergency sessions in 1992, 1993, former Yugoslavia and Rwanda, NGOs stepped forward with detailed documentary evidence of abuses.⁵¹ They are also entitled to participate to a certain extent, in the implementation of some conventions, i.e., provision for NGOs to monitor the implementation of the UNCRC is a significant breakthrough in this regard which in other way recognizes their immense contribution.⁵² As the 'UN monitoring machinery is little more

⁴⁶ Ibid., p. 114.

⁴⁷ Keck, Margaret E. and Sikkink, Kathryn, *Activists Beyond Borders: Advocacy Networks in International Politics*, Cornell University Press, Ithaca, NY, 1998, p. 186.

⁴⁸ Martenas, Kerstin, *NGO participation in International Conference: Assessing Theoretical Accounts*, *Transnational Associations*, No.3, 2000, p. 124. (115-127)

⁴⁹ *Supra* note 8, at page 306.

⁵⁰ See, "Israel: Submission to the Human Rights Committee", Amnesty International, 99th Session, July, 2010, AI Doc. MDE 15/010/2010.

⁵¹ Gaer, Felice D., "Reality Check: Human Rights NGOs Confront Governments in UN", in *NGOs, the UN, and Global Governance*, Weiss, Thomas G. and Gordenker, Leon, Boulder, CO: Lynne Rienner, 1996, p.3.

⁵² "In order to foster the effective implementation of the convention and to encourage international co-operation in the field covered by the convention: (a)... [T]he Committee may invite the specialized agencies, the United Nations Children's Fund and *other competent bodies* as it may consider appropriate to provide expert advice on

than a system of international information exchange⁵³ and bound by the sovereignty of state parties, hence NGOs can activate the UN monitoring process by entering the human rights violations as a complaints.⁵⁴ Due to their increasing visibility and credibility in the field of monitoring ‘today few criticize the outcome of Amnesty International or Human Rights Watch when they document and highlight human rights violations around the world’⁵⁵. Former Secretary General of the UN, therefore, rightly reiterates that NGOs are an indispensable part of legitimacy. NGOs thus have proven adept in developing a monitoring system of their own which is professional, comprehensive and mostly accurate. To cite another example, incredibly detailed report of Human Rights Watch on human rights situation of the world, not only describes the way in which a government may breach its international human rights obligations, but also supply the international community with evidence. As a result, states often work with these organizations to demonstrate good faith and to make sure that their actions are properly reflected.⁵⁶ Due to the immense efforts and contribution of NGOs and INGOs, states have come to realize that ‘partnership with NGOs contribute to some more efficient project implementation and a lower rate of failure, a better public image and more political support’⁵⁷. Irene Khan, former Secretary General of Amnesty International rightly argues that the legitimacy of international NGOs to act is based on universally recognized freedom of speech, assembly and association, on the trust people place upon us and on the values we seek to promote. NGOs are playing an increasingly prominent role in setting the agenda in today’s globalised world.⁵⁸ Considering this contribution of NGOs through monitoring, it would not be an overstatement to say that if the UN treaties and their enforcement mechanisms are the cornerstones of future international human rights then NGOs stood and still stand at the cutting edge of early initiatives that would make that future possible.⁵⁹

However, question may come, by proving greater institutional place to NGOs in the UN what line of difference would be drawn? Obviously, the answer to this question will elaborate and rationalize the core question of the essay- why NGOs should be given a larger institutional part to play? To begin with, the statement of the former UN Secretary General can be reiterated who expressed his faith in NGOs in the following words—

“I am convinced that NGOs have an important role to play in the achievement of the ideal established by the Charter of the United Nations: the maintenance and establishment of peace. . . I believe NGOs can pursue their activities on three fronts. In the search for peace,

the implementation of the convention in areas falling within the scope of their respective mandates.” Article 45, United Nations Convention on the Rights of the Child 1989.

⁵³ Supra note 43, at page 148.

⁵⁴ Taylor, Paul and A. John R. Groom (eds.) *Global Issues in the United Nations Framework*, London: Macmillan, 1989, p. 295.

⁵⁵ Ibid.

⁵⁶ Supra note 49, at page 125.

⁵⁷ Michael, Edwards, *NGO Rights and Responsibilities, A New Deal for Global Governance*, London: The Foreign Policy Centre, 2000, p. 11.

⁵⁸ Khan, Irene, Secretary General of the Amnesty International on the launching of international NGO accountability charter, June 6, 2006, Press Release, Amnesty International, *NGOs Lead By Example: World’s International NGOs Endorse Accountability Charter (June 6, 2006)*, <http://www.amnesty.org/en/library> (search title field for “NGOs lead by example”; then follow the hyperlink).

⁵⁹ Korey, William, *NGOs and the Universal Declaration of Human Rights: a curious grapevine*, Palgrave, New York, 2001, p.5

they must obtain the means—and we must help them to do so—to engage in assistance, mobilization, and democratization activities, all at the same time.’⁶⁰

For NGOs, firm institutional role undoubtedly will enhance their political legitimacy and capacity to engage efficiently with the UN⁶¹, i.e., recognition of voting right of NGOs in final decision making within the UN will open the door to insert their ideas more successfully. Conversely, for the UN, more NGO engagement will broaden its effectiveness in holding state parties accountable to international human rights standards. NGOs will provide additional channels of popular representation to the UN by creating a fairer distribution of power in international human rights spectrum. So, the consequent relationship between them is not a linear, rather circular- both the UN and NGOs have to gain from one another.

Lastly, to answer the critics on their argument that greater institutional role of NGOs in international human rights system will enhance the current parameter of threat to state sovereignty’, it is worthy to mention that the roots of NGOs are founded more or less in deficiencies of states. Although ‘since 1980s’, especially in 1990s’ NGO have been increasingly involved in the law making⁶² and shaping of the global policy, however, states are still dominant in global arena. It is not the UN or NGOs, but the states that ultimately sign and ratify human rights instruments. NGOs in this context closely resemble with domestic and international lobbies or ‘pressure groups that are commonplace and provide expertise and informal policy advice to governments’.⁶³ Furthermore, the evolving NGO repertoire reflects the changes in state expectation about the NGO role.⁶⁴ In fact, states have an incentive to respond positively to NGOs efforts to participate in the institutional forum of the UN because they can act as representatives of popular opinion or as informed observers on governance issues at international level as well as helping governments in the implementation of international agreements.⁶⁵ Therefore, it is purely legitimate to say, NGOs are not the counterparts, rather in contemporary world they are indispensable and supplementary to states to work with human rights. That is why established democracies that respect human rights and rule of law are relatively in favour of NGO campaigns.⁶⁶ This practice is also underlined by the realization that NGOs have made society more conducive to the spread of democracy and respect for human rights.⁶⁷ Most strikingly, the proclamation of the UDHR as to “we, the peoples of the United Nations” not only highlights the emergence of a global civil society⁶⁸ but also rebuts the states’ unilateral claim of prevalence in the UN on their emphasis on the principle of non-intervention.

Furthermore, NGOs’ increasing number, their commitment and contribution to human rights immensely outweigh all the other tensions as mentioned in the first part of the essay.

⁶⁰ Boutros Boutros-Ghali, Foreword in *NGOS*, cited in *NGOs, The UN and Global Governance*, Thomas G. Weiss, Thomas G. and Gordonker, Leon (eds.), 1996, p. 104.

⁶¹ Keynote address by Secretary General Boutros Boutros-Ghali to the 47 DPI/NGO Conference, *Transnational Associations*, No. 6, 1995, pp. 345-349, p. 347.

⁶² Cakmak, Cenap, *The Role of Non-governmental organisation in the norm creation process in the field of human rights*, *Turkish Journal of International Law*, Volume 3, No. 1, p. 107.

⁶³ Willietts, Peter, *Pressure Groups in Global System: The Transnational Relations of Issue Oriented Non-Governmental Organizations*, Sent Martin’s Press, New York, 1982, cited in Warkentin, Craig; Mingst, Karen “International institutions, the State and Global Civil Society”, *Global Governance*, 2000, Volume 6, No. 2, p. 238.

⁶⁴ *Supra* note 39, at page 4.

⁶⁵ *Ibid.*

⁶⁶ *Supra* note 64, at page 238.

⁶⁷ *Ibid.*

⁶⁸ *Supra* note 60, at page 6.

Obviously, backdrops surrounding NGOs internal and external structure are not out of modification or change. Their loopholes, thereby, wouldn't be a weapon in depriving them of attaining erected institutional status in the UN.

3. Concluding Note:

Our world is totally different from the days when NGOs were given consultative status in the UN. Over the last few decades the effortless journey of NGOs in the path of human rights justifies their stand to retain voice for a strong institutional platform in the UN. Therefore, undoubtedly, NGOs are on the world stage to stay. By transforming the prevailing top-down approach of the UN on human rights to a bottom-up direction, NGOs imply the potentials to edit the grammar of international human rights system. Hence, it is appropriate to mention the former UN Secretary General Kofi Annan's statement who envisioned a greater role for NGOs at the UN by saying, "We aspire to a United Nations that recognizes and joins in a partnership with, an even more robust global civil society..."⁶⁹ "...peace and prosperity cannot be achieved without partnerships involving government, international organizations, the business community and the civil society".⁷⁰ However, NGOs should be held to a higher standard of representation, efficiency, transparency, accountability and other related issues to qualify themselves in the way of the long-desired stand for institutional corridor. However, 'north-south differences and concomitant differences in philosophy remain a significant source of unequal social division in NGO frames which suggest that the globality of NGOs is still somehow tentative, even when states are left out of the equation'⁷¹. In addition, institutional reform must be implemented by maintaining a balance between the NGOs of South and North Poles. To conclude, this paper aspires to conclude by stating that world would possibly not be a better place if we fail to articulate the new language of institutionalization to NGOs within the UN.

⁶⁹ UN Secretary-General Kofi Annan, address to the 52nd Session of the General Assembly (Sept. 22, 1997).

⁷⁰ UN Secretary-General Kofi Annan, address to the World Economic Forum (Davos, Switzerland, Jan. 31, 1998).

⁷¹ *Supra* note 39, at page 23.

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A comparative view of Forum shopping in the current decade

Author : Craig Schofield

Abstract

Much has been said on the subject of forum shopping and much has been done to try to limit its use via the implementation of international agreements and stricter use of rules on jurisdiction in national courts.

However, its continued and regular use suggests that there is much more to be done if legal systems are to make any headway in curtailing the concept in a major way.

Questions such as “how effective are the current rules in preventing forum shopping?” And as forum shopping is beneficial to certain forums “is there either the legal or political will to change the rules in any major way?” are the main questions that this paper will attempt to answer.

Also, perhaps more controversially, the perceived application of law in some jurisdictions is not seen to be as procedurally quick or as uniformly applied as it perhaps could be.

With the above points in mind, it is perhaps time to take stock of current international legislation governing forum shopping and to see how the current legal rules can be changed to address the problems created not just between countries (and the concept of comity that should be shown in the interests of diplomacy) but between individuals who may feel threatened by appearances in an alien forum.

Introduction

In light of current legislation which can come from either National legislation, group blocs of countries such as the European Union or ASEAN for example or attempts at global agreement by the WTO, forum shopping remains a part of the litigation scene.

There are various definitions used to describe forum shopping. One definition is provided by *Carroll, Hensler & Gross* who describe it as a place;

“Where a litigant makes a claim to a court with which he or she has little or no connection for the sole purpose of obtaining a more beneficial outcome”.

Schuz however described it as;

“...where a plaintiff bypasses his natural forum and brings his action in an alien forum which would give him relief or benefits which would not be available to him in the natural forum.”

As can be seen from these two definitions the former has connotations of someone maybe using the international legal market purely for their advantage and without thought for a just outcome or comity between nations whereas the latter definition provides perhaps a less

judgemental view of forum shopping in that a claimant is merely trying to do the best he can for himself rather than the view that it is necessarily wrong.

Whatever term we use for forum shopping it has been around as a concept for over a thousand years. Going back to the 9th to 12th centuries a lack of court structures in the Islamic empires of that time was used by litigants to move from one forum and have that case tried *de novo* in another forum. In fact, the leaders in these states encouraged this as they saw it as a key to their legitimacy as well as placing a curb on power of local officials. *Benton* (2001)

In India during the 19th century in the Calcutta Mayor's Court Indian citizens would tend to litigate in British courts. Similarly, *Benton* also talks about Brazil at the end of the 19th and beginning of the 20th century when Caudillos and their dependants would hop over the Brazilian border to engage in forum shopping.

In English case law, in *Wells* (1697), a legal principle was put forward saying that "anyone who is not an enemy alien can sue in England under the protection of The King. In effect whether one was English or not, the court system was available to all.

Although the term forum shopping is thought to come from the United States, its use in England was first made in the case of *Boys v Chaplin* (1971).

It is also known that certain courts did nothing to quell forum shopping but in many ways encouraged it. There is no doubt about Lord Denning's view on the subject from the *Atlantic Star* case in 1974 in which he said;

"You may call this forum shopping if you please, but if the forum is England, it is a good place to shop in both for the quality of the goods and the speed of the service".

Indeed, as late as 2007, Master of the Rolls, Sir Anthony Clarke, made a statement to the KPMG annual law lecture in London at which he said that because of London's importance in the financial world it should also be seen as a centre for excellence for legal disputes and indeed commented upon the "excellence" of the English courts.

Comments such as these can be seen purely as harmless praise for one's local courts or their systems but could also be seen as an advertisement for forum shopping.

So, as can be seen above, historically, forum shopping has been around for a long time in one form or another and despite its generally poor image it continues to flourish in the 21st century.

Why is forum shopping seen as a problem?

Having looked at what forum shopping is and its history, it is seen generally as a negative aspect of litigation. Over the years, forum shopping has been used around the world for plaintiffs/claimants to gain an advantage in the courts of countries other than their own.

Of course the perceived problem remains that if it is an advantage to the claimant it is clearly a disadvantage to the defendant and vice versa.

It could be argued that if a claimant's own forum applies laws that offer less generous compensation payments, this is unfair to a potential claimant and therefore that claimant should seek redress in a more claimant friendly court. This is of course dependent upon whether a party is the claimant or defendant. The defendant may challenge jurisdiction to stay proceedings because he is disadvantaged in such a court and apply to have his case held in a more defendant friendly forum.

In England for example, as late as 2006, in the case of *Harding v Wealands*, the House of Lords set a ruling that in all cases, irrespective of a foreign element, damages would be assessed under English legal rules. In effect, this basically says to foreign litigants from less generous jurisdictions that English law will be used to calculate compensation and that anyone from one of these jurisdictions would benefit more by using the courts of England.

However, in the interests of comity, forum shopping tends to be viewed dimly by governments who see their sovereignty being challenged by the laws of other countries, particularly when those laws are used against them. It is understandable why this should be. Democratically elected governments are law making bodies and have a right to make the law within their boundaries. The law is made on behalf of the people within the boundaries of a nation state and as such governments are reluctant to let other countries decide the outcome of cases affecting their citizens.

But of course, if those citizens can gain a better advantage in the courts of another sovereign state they may well decide to do so and as mentioned above, the value of any damages for example or indeed other monetary gain may not be the only consideration. Things such as time for a case to get to court or quality and knowledge of legal professionals may also be a major factor when considering forum shopping.

In view of the above, and the fact that forum shopping seems to be unwanted by countries generally, why does it continue to flourish as it does? Or more importantly, how is it allowed to flourish as it does? Also, it makes the assumption that all forum shopping is bad which is shown by several commentators not to be the case.

The writer will look at several areas where attempts have been made to change the law in recent times but where commentators almost universally agree that these changes have not made a significant (if any) effect upon the incidence of forum shopping.

The remainder of this paper will look at the currently topical issues of international insolvency law and Intellectual Property law and in the interest of brevity will contain itself to the civil aspects of those laws. It will also limit the analysis to regulations applying in the European Union which is an institution that supposedly has already done much to regulate the use of forum shopping.

In addition, the paper will look at the various players on the global international scene such as the WTO and World Bank among others. These institutions are all used by countries to forum shop, not necessarily in the sense of choosing the best rules, but from countries trying to

influence the rules within them for their own advantage which in a sense is little different to forum shopping.

Insolvency Law

This section will look at current rules on insolvency under legislation set by the European Union. *Regulation 1346/2000* on Insolvency Proceedings came into effect among member states of the EU (with the exception of Denmark) on 31st May 2002.

In brief terms, the legislation's purpose was to make Insolvency proceedings more uniform when they involved a cross-border element and the idea of standardising these rules was to ensure that the incentives for forum shopping were removed or at least lessened.

The main thrust of this regulation was that legal proceedings should be brought in the forum where the debtor had his/her "Centre of Main Interest" or COMI. By the introduction of the COMI principal, the forum was basically set and as such, this would remove the option to shop for an alternative forum.

Since the regulation's inception, many writers have considered its effectiveness in regards to forum shopping prevention. In order to provide up-to-date information in keeping with this paper's title the writer has taken articles from several leading authors on the subject all of whom have written articles within the last three years.

Alexander Kastrinou argues that whilst the COMI is a "significant" step towards meeting the aims of the regulation, the lack of clarity in the description of the COMI has actually led to greater incidences of forum shopping.

Under article 3 of the regulations, the definition of the Centre of Main Interest is "the place of the debtor's registered office". However, *Kastrinou* argues that it is possible to engineer the finances of a company to a particular state and he cites the *Wind Hellas* case as being an example of this. This was a company which moved its registered office from Luxemburg to London thus allowing it to use a controversial financial tool known as "pre-packaged administration proceedings" available under English law. The result of this was that a group of the firm's creditors were left with losses of well over a billion pounds.

So the question raised here is why would a company move to England and the answer is quite simple. The fact that the UK has a debt restructuring system that is flexible often encourages companies to move registered office from jurisdictions which have less favourable arrangements for debtors and *Kastrinou* therefore highlights two problems in his article. The first problem being the lack of a clear definition for the COMI and the second being the difference in insolvency laws within member states of the European Union.

Another commentator, *Marek Szydlo*, also looks at EU Regulation 1346/2000 to ascertain ways in which forum shopping can be prevented. He too cites the "Centre of Main Interest" principal and again raises the issue of its definition and how easy it is to change in order to suit the debtor.

Szydlo argues that one potential way to prevent forum shopping under the EU regulation is to set the specific moment in time when the COMI is determined i.e. the relevant date when someone's COMI is recognised by the courts. At the moment, it is not clear under Regulation 1346/2000.

The reason why this is important to *Szydlo* is because of the number of points in time that are possible to set the Centre of Main Interest. For example, should this be when the request is made to declare bankruptcy or when the bankruptcy is actually declared by the courts. One argument even suggests that it could be set at the time of the debt being taken out.

In the decisive *Staubitz-Schreiber* case, the COMI was declared to be the time when the request for opening procedures was lodged. *Szydlo* argues here that if the COMI is declared when insolvency procedures actually open then the COMI is available to be manipulated in order for forum shopping to take place and this is why it would seem more appropriate at the time when the request is lodged which is generally the point in time that both legal practitioners and legal academics favour.

In addition to the above *Szydlo*'s next point looks at the people affected by insolvency and he cites four main stakeholder groups. These are managers; creditors; shareholders; and employees and each of these groups have different interests in an insolvency situation.

For example, managers prefer insolvency proceedings to take place in a jurisdiction which allows them to stay in charge during the process or limits their personal liability. In contrast, creditors will wish to choose a forum offering the quickest and most favourable distribution of assets whilst on the other hand, shareholders and employees would wish for the proceedings to take place where it is easier to financially reorganise a company thus allowing it to continue operating thereby preserving jobs and the ability to pay off debts.

In an article with a different slant, another writer, *Amy Coburn* looks specifically at why England benefits so much from forum shopping in insolvency cases when essentially if a company has a Centre of main interest in Europe then England will apply the criteria covered by Regulation 1346/2000.

The difference here seems to centre on the substantive law of England which was altered a decade ago to help people who had been bankrupt to enter into business again as soon as possible. One of the main parts of the law change was that bankrupts can be free of their debts in England just 12 months after the bankruptcy.

If we compare this to Germany for example where it can take six years for bankrupts to be discharged and worse still, the Republic of Ireland where it takes twelve years, it is easy to see why those facing bankruptcy would wish to move their Centre of Main Interest to England. This might explain why less than a hundred companies "went bust" in Ireland itself in 2010, despite Ireland being one of the worst hit countries in the fall-out from the world financial crisis of 2008. There is a suggestion here that many Companies sought bankruptcy in England.

Coburn also cites the *Wind Hellas* case to highlight how it is possible to move the centre of main interests. Indeed the company moved its COMI from Luxembourg to England only three months prior to filing for bankruptcy. However, the English courts only accepted the case on the basis that one of the cited aims under Regulation 1346/2000 is that the COMI should provide creditors with the knowledge of the whereabouts of the company. As debt

restructuring talks had taken place in England, the English court was satisfied that the creditors knew where the COMI was and so allowed the case.

However, in fairness to England, it should be noted that English courts don't accept cases flippantly. The English Insolvency service carried out an investigation in 2011 and as a result, 61 companies were wound up because they were known to have provided false information and were linked to two German businessmen who were offering to sell English companies to German firms that were having financial difficulties. These companies were incorporated purely for the purpose of moving a COMI to England to take advantage of the bankruptcy laws there.

Yet another commentator on EU Regulation 1346/2000 is *Christoph Von Wilken*. In his conference paper given to the European Association of Lawyers in 2011, he again concentrates on the concept of COMI and its uses (or misuses).

This time he considers the case of *Eurofood IFSC Ltd C-341/04* and highlights the decision of the ECJ which brought clarity to the fact that the COMI of a subsidiary company is the place where the subsidiary is located and not where the parent company is located and he argues that this decision has two effects.

Firstly it clarifies the point about subsidiaries however, in doing so it provides information about what to do if one wishes to move a COMI to another jurisdiction. *Von Wilken* argues that in effect, this weakens the legislation as it is easier to set up a subsidiary and move debt to the subsidiary than to move the headquarters of a whole company.

In a recent 2013 copy of *Company Law Newsletter*, the discussion centres on the proposed changes to European Union insolvency law mapped out in the European Commission document entitled *A new European approach to business failure and insolvency* (COM (2012) 742 final).

This document does propose some changes which may reduce incidences of forum shopping. The whole idea of the changes is based upon giving businesses a second chance and would propose proceedings whereby creditors would be able to make arrangements with debtors at the pre-insolvency stage with the hope being that companies may be able to restructure before an insolvency situation arises.

A further alteration would be to change the wording of the Centre of Main Interest to

“The place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by 3rd parties”

A third change would be making the courts of member states examine their right to jurisdiction before a case actually opens and to specify the reasons why it has allowed proceedings to go ahead. Any foreign creditors would then have the right to challenge that decision.

Summary

In summary then, there appears in this section to be two main problems, the first of these problems being the definition given to the “Centre of Main Interest”. The proposed changes to the COMI look as though they could reduce the incidence of forum shopping but they don’t answer the second problem i.e. that of harmonisation of substantive law among European Union members, which as seen, offers quite a wide difference in outcomes of insolvency cases.

Intellectual Property

Intellectual property is an area of growing importance, particularly when it comes to cross-border infringements. The availability of and access to patented or copyrighted material has grown phenomenally since the advent of the internet.

Whilst still concentrating in the area of European Law, an area which has very strong and extensive laws, we can still see that in spite of these laws there exists opportunities to forum shop.

Stefan Luginbuehl’s book (2012) reviewed by *Sir Robin Jacob* looks at uniform interpretation of European patent law and one of the proposals in his book is the development of a single European patent court which both he and *Jacob* support. NB it should be noted here that one of the perceived advantages of forum shopping is that where courts of certain countries or states are used for specific types of legal cases, those courts develop more efficient rules which saves time and leads to judges and lawyers becoming experts in a particular field.

An example of this would be Delaware in America which has dealt with a huge number of asbestos claims (as a result of forum shopping) and is considered by many to be highly proficient in dealing with such cases.

However, in a recent ruling, the ECJ has stated that it could not sanction a European Patent Court because if it is Europe-wide and not just EU-wide the questions of law raised in the new patent court may not conform to EU law. The ruling said that only EU members could join a European patent court and no-one else. This decision of course does nothing to help forum shopping in Intellectual Property law. The idea was to have a court in which (at least) procedurally the rules would be the same. It would also help to develop a more uniform system of substantive law too.

In 2011, *Geiger et al* wrote an extensive comment on the newly released report by the European commission dated 22-December 2010 to look at the effectiveness of current EU legislation.

Historically, back in the 1990’s, a report found a large increase in the amount of counterfeiting within the EU and concluded that this was a result of “significant disparities” in the way that different states enforced IP law. The result was the creation in 2004 of Directive 2004/48 on the enforcement of Intellectual property rights within the EU.

Since the introduction of the directive however, there are still differences in the infringement protection available.

Geiger et al point out that the directive allowed individual states to impose stricter laws than the directive if they so wished. Under article 13(1) it says that;

“The infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity may be made to pay damages to the victim of that infringement.”

In Germany and the UK, this article is enforced as written. However, in France and the Benelux countries, the infringer is made to pay damages irrespective of intention.

It is obvious to see why this would lead to forum shopping under these rules and to say that the European Commission has an objective of creating harmonisation in the laws of the EU; it seems strange to allow this difference.

Geiger et al. also support the idea setting up specialised jurisdictions purely to rule on Intellectual Property law with its ability to harmonise the law in this area. However, we now know that the European Commission will not allow a European-wide court, only an EU court.

Elmer & Lewis produced a paper in 2011 looking at which courts have the better win rates in IP cases around the world and uncover the findings in Finnegan’s Global IP project, set up to help IP lawyers choose best “first-win” courts in which to litigate for multi-national clients.

The paper considers patent courts around the world but this article will consider only the European courts. Indeed this again shows up problems of different laws being applied.

The results show that Germany is the most friendly patentee court in Europe with the Netherlands and France close behind. England is the least friendly patentee court. This means that where someone wishes to challenge a patent they would go to the court with the lowest first-win rate i.e. England whereas, someone wishing to sue for infringement would go to the patentee friendly courts i.e. Germany, Holland or France.

These differences of course could be expected except the European Union has Directive 2004/48 with its main aim being to harmonise laws in all member states. But on this particular issue, the problems are not only confined to the difference between countries.

Germany is a federal country with quite powerful individual states known as *Länder*. These *Länder* have quite a lot of devolved power. *Elmer & Lewis* point out that in Germany there are twelve patent courts of first instance but almost 40% of patent litigation in Germany goes through the court in Dusseldorf. Patentees in this court won 63% of cases there between 2006 and 2009.

It would seem from these figures that not only does Europe have a problem between sovereign member nations but also with individual states or regions inside those sovereign countries as well.

To conclude this particular section, one of the newest developments in IP rights is those conferred by “image rights”.

In modern times, many famous film stars or sports stars are now trying to protect their images because of the commercial value of them. *Catherine Walsh*, in her recent article looks at this quickly developing area of IP law with cross-border elements.

It is reported that David Beckham for example, earned \$37 million in 2011 purely from endorsement contracts and with figures like this at stake, it is understandable that stars wish to protect their images from those who try to “hang on the coat tails” of their success.

In the Court of Justice of the European Union (CJEU), in the recent case of *Olivier Martinez v MGN Ltd* it was held that personality rights (despite in this case being infringed via the internet) were to receive recognition.

In this case, Martinez, a famous actor and former boyfriend of Kylie Minogue, was the subject of an article produced by Mirror Group Newspapers in the UK.

The problem in this case was that the mirror group website was accessible in France and as such Martinez and his father brought an action in France against MGN for (among other things) the unauthorised use of his image.

MGN challenged the jurisdiction of the French courts on the basis that there was not a close enough connection between their website in England and any damage in France but unfortunately for them, the CJEU said that an infringement of personality rights which appears online can initiate litigation where the victim has his/her “centre of interests” irrespective of where in the EU the infringement occurred.

Bays, in his analysis of the Martinez case points to the general rule for determining jurisdiction in the EU. This is covered under Council Regulation 44/2001. The general principle here is that “proceedings should be brought in the court of the defendants domicile”. However, under article 5(3) of 44/2001, where a tort has occurred, the courts where the harmful event has occurred can also have jurisdiction.

Furthermore, *Judge Skouris* said of the Martinez case that under article 3 of the directive, where there are no binding harmonisation provisions, the substantive law of the member state in which the information service provider is established should apply.

We can see here that the choices available under EU law on this matter can create significant differences in the outcome of a case.

Walsh quotes *Smith* who pointed out that this ruling creates a major risk for forum shopping. At the end of the day, an injured party will raise their claim in a court that gives them better protection. It has already been seen above that in this case Germany, France or the Netherlands would prove better in matters relating to IP for the injured party.

Summary

To summarise the points raised on European IP law, it appears that there are still many differences on both substantive and procedural laws which provide various opportunities for forum shopping. Although the European Commission is looking at ways to improve the current situation, it appears that they will not completely remove the IP forum shopping opportunities available within the European Union until there is greater harmonisation of the laws of member states.

Forum Shopping amongst governments and the effects on EU law

The European Union tries to control jurisdiction within its own geographical borders and member states have a duty to comply with EU law as part of their membership agreement. However, there are a growing number of organisations which are truly global in their nature and as such have a large membership that goes way beyond the boundaries of the European Union.

Mathew Parish in an article in 2012 looked at the current use of international courts set in the context of the “European Legal Order”. He points out the increasing likelihood that with a growing number of such institutions there is more likelihood of a conflict of laws.

These courts which sit outside any particular domestic legal order can be called upon to decide matters of EU law. For example, in recent times the International Court of Justice (ICJ) as the court arm of the United Nations (UN), the European Court of Human Rights (ECHR) and the World Trade Organisation (WTO) via their settlement body have all been called upon to apply EU rules and this brings about its own problems for forum shopping.

The biggest problem in this situation is forum shopping by countries as opposed to individuals and this raises a particular question. How do countries manage to forum shop? The answer is quite different from the way in which companies or individuals would do it but it is nonetheless an attempt by one country or group of countries to gain a legal advantage over others in the same way that companies or individuals would do against other companies or individuals.

Rüland points to one reason for this which relates to power. He says that instead of forums for dealing with global problems, some of these large international institutions have become “arenas for power struggles between states aspiring to regional or global leadership”. This means that states or regional groups employ strategies to gain this power, one of these strategies being forum shopping.

He also argues that the more problems which arise on a global scale such as the 2008 global financial crisis or the rise of international terrorism, the more governments need to be part of either regional or global institutions. This creates a dichotomy. Whilst on the one hand countries find it harder to manage alone in an increasingly global world, on the other, they also want to be able to influence the legal systems of the organisations that they need to join.

Whilst *Rüland*'s work is as much a social paper as anything, it none the less gives an excellent insight into why countries engage in a battle for legal supremacy.

Another argument he puts forward is that there is a mistrust amongst the new world players (China, India, Russia etc.) with regards to the old world order of largely western nations.

Parts of the “old” global organisations are considered instruments of advantage to the western nations. These include the IMF and WTO to mention just two. In fact in the Asian countries it is expected that an AMF (Asian Monetary fund) will come into force in this decade as a counter organisation to the IMF.

Another author on this issue, *Kellow*, says that in terms of global government, individual nations have an opportunity either to block or advance international legal agreements and in this respect, the whole idea of forum shopping by individual nations is to gain an advantage for their own political or financial agendas.

Kellow goes on further to say that one doesn't hear much about forum shopping in international relations parlance but the term is “common currency among practising diplomats”.

He also explains how to use a particular forum in order to gain influence and so affect the policy-making within it. For example, the United States is by far the strongest and most powerful of the voices in the World Bank. In this case, persuading the US that a particular agreement should be made or a particular loan should be given virtually guarantees it will happen. However, in institutions like the WTO, the US is more like “just another member” and so any actor in this arena would need to persuade far more nations than America to be able to change policy or to develop legal agreements.

Kellow then points to yet another example of how countries can gain legal advantages. He cites a case in the Nordic Council (which has just 5 members) where Denmark (an EU member) was prohibited by the European Commission from moving an amendment at the Basel Convention. However, Norway (not an EU member) raised the amendment via the Nordic council thus allowing Denmark to influence the outcome of Basel.

Parish also raises questions of world legal order and looks at the European Union and the application of its laws by the “ever growing range of international tribunals” sitting outside the legal order of a nation state.

There are times when International courts have to interpret EU law even though they are not inside the EU system.

In recent times courts such as the ICJ or the WTO dispute Settlement Body have had to decide upon the applicability of EU law. However, neither of the above are responsible to a single individual state and so where there is a dispute, the court is not answerable. This means that if there is a discrepancy in the application of EU law, the ECJ has no possibility to correct that mistake and so cannot have the legal supremacy of which it insists upon having over its member states.

Parish mentions in particular the case of *AES v Hungary* in which the decision held that EU law was subordinate to international investment law.

In order to protect the EU from this type of forum shopping, in opinions 1/09 and 1/91, the EU stated that organisations who consider themselves to have supremacy of law cannot be signed up to by member states of the EU.

This of course shows where the major paradox lies but membership of different institutions means that where an EU member state is also a member of another international institution it can use fellow members who are not EU members to get resolutions passed contrary to EU legislation.

Summary

So as we can see from this section, just as individuals and companies can gain legal advantages by using the laws of different fora, so can countries.

Conclusion

If we consider all the above sections we can see that forum shopping in whatever form has a decided effect upon not only laws of countries within their national boundaries but among international groups of countries as well.

We can also see from all writers that forum shopping is rife in the current decade in spite of legislation to combat the phenomenon.

So why does this happen?

The answer would appear to be twofold.

It is clear that the laws when they are written do not necessarily answer the problems of forum shopping. For example, clarity of the law is of paramount importance as seen by vagueness in various EU Directives mentioned.

Furthermore, it is apparent that there is a variation in national laws themselves. An example of this is the rules on Insolvency, where it is possible to alter a centre of main interest to take advantage of rules in different countries. These countries of course are supposed to be part of a group of countries, namely the EU, which has as one of its main philosophies the integration and harmonisation of law.

We have also seen above that countries do not like forum shopping when they are on the receiving end of it but it would appear that they are quite happy to engage in it when it suits them.

But if the law makers either nationally or internationally are not prepared to consider making the necessary changes to their laws, then really they shouldn't complain. Without those changes forum shopping will certainly continue and we need look no further than the words of Lord Simon when he said

“Forum shopping is a dirty word; but....if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case will be most favourably presented: this should be a matter neither for surprise nor for indignation”.

John Craig Schofield

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An Analysis of Legal Provisions Regulating Child Labour in India

Dr. Hari Shankar Panda*

I. Introduction

Child labour has become a controversial issue throughout the world today. In almost all the countries it is seen that children are engaged in different type of works in different conditions. It is a fact that millions of children at their tender age work under hazardous and exploitative conditions which are very much harmful to their life. The 1991 Census of India puts the figure of child labour at 11.28 million. The ILO Report of 1996 puts the figure of child labour in India as 23.17 million out of which 12.67 million were employed full-time. They are engaged in the field of agriculture, industries, domestic service, prostitution, service establishments, family occupations etc. The 1981 Census of India divided child labour into nine industrial divisions: I. Cultivation, II. Agricultural labour, III. Livestock, Forestry, Fishery and Plantation, IV. Mining and quarrying, V. Manufacturing, processing, servicing and repairs, VI. Construction, VII. Trade and Commerce, VIII. Transport, storage and communication, and IX. Other services¹. Of all the sectors, agriculture is the main sector where majority of children are found engaged in India. The latest National Sample Survey Organisation (NSSO) study showed that the agricultural sector is the dominant employer of the child workers and most of the child labourers are either

* M.A., LL.M., LL.M., Ph.D. (Law), Research Scholar, P.G. Department of Law, Sambalpur University, India.

¹ Census of India, 1981 cited in Mangia, 1987, 72.

self-employed or are casual wage labourers.² Some of them are also found engaged in different organizations as bonded labour under the conditions of outright slavery. Bonded labour “refers to the phenomenon of children working in conditions of servitude in order to pay off a debt”³. Estimate places the number of bonded child labourers in India at close to one million⁴.

A numbers of legislations had been passed by the then British administration of India and subsequently independent Indian administration to protect the interest of children from being abused and exploited in the hand of self centered rich class people.

In this paper the present author thought it worthwhile to analyze the legal provisions regulating the child labour in India and how far the same provisions have been implemented properly and fructify the aspiration of law maker in this regard.

II. Legal interpretation of the word “Child” and “Child Labour”

It is a universally accepted notion that children up to certain age are unable to fend for themselves. In almost all the society throughout the world, age limit of a child regulates his/her activities, such as schooling, marriage, casting of franchise, infliction of punishment etc., even in respect of contributing labour to the society. But age limits relating to capacities, and responsibilities of a child differs from activities to activities and from countries to countries.⁵ According to United

² K. Sharma, “Child Labour in India”, *The Lawyers Collective*, November; 1999.

³ *Human Rights Watch* 1996, 2.

⁴ *International Labour Organisation*, 1992, 15.

⁵ *The State of the Worlds Children*, UNICEF, 1997.

Nations Convention of Rights of Childs “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”⁶. In India according to Census operation, the persons below the age of fourteen years are treated as child⁷. In its different programmes adopted for welfare of children the, Government of India has targeted the children below the age group of fourteen years for the purpose, basing on constitutional mandate⁸.

But it may be stated here that in India, the age at which a person ceases to be a child differs from legislation to legislation framed for the purposes concerned. For example, The Indian majority Act 1875. The main purpose behind framing this Act is to bring about uniformity in respect of implementation of law to persons of different religions⁹. Unless a particular personal law prescribes otherwise, every person, domiciled in India is deemed to have attained majority upon completion of eighteen years of age¹⁰. Child Marriage Restraint Act, 1924 states “child means a person who, if a male has not completed twenty-one years of age and, if a female has not completed eighteen years of age. A child below fourteen years of age is not allowed to work in any factory. An adolescent between fifteen and eighteen years can be employed in a factory only if he obtains a certificate of fitness from an

⁶ Article 1 of the U.N. Convention of the Rights of the Child 1989.

⁷ The Census of India.

⁸ Article 21(A) – The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may by law determine.

Article 45 – The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Article 51(K) – It lays down a duty that the parents or guardians should provide opportunities for education to his child/word between the age of six and fourteen years.

⁹ The Preamble of Indian Majority Act, 1875.

¹⁰ Indian Majority Act, 1875.

authorised medical doctor. A child between fourteen and eighteen years of age cannot be employed for more than four-and-a-half hours¹¹. 'Juvenile' or child means a person who has not completed eighteen years of age¹². For the purpose of special treatment under the Juvenile Justice Act, 1986, the age prescribed was sixteen years for boys and eighteen years for girls¹³. In case of child labour (Prohibition and Regulation) Act 1986, child means a person who has not completed his fourteen years of age.

There is no such universally accepted definition of the term "child labour" as are being used by international organizations, trade unions, NGOs and other concerned organizations. The term child labour is at times used as a synonym for 'employed child' or working child. If it is analyzed in this sense it signifies any work done by a child for the gainful purpose. The International Labour Organization has defined child labour or work that deprives children of their childhood, their potential and their dignity and that is harmful to physical and mental development. It refers to work that is mentally, physically or morally dangerous and harmful to children or work whose schedule interferes with their ability to attend regular school, or work that affects in any manner their ability to focus during school or experience healthy childhood¹⁴. Child labour is therefore all work that places children at risk¹⁵.

¹¹ Factories Act 1948.

¹² Juvenile Justice (Care and Protection of Children) Act 2000.

¹³ Juvenile Justice Act, 1986, Section 2(h).

¹⁴ Child Labour in India, *Wikipedia, The Free Encyclopedia*.

¹⁵ Report of the Director General of the International Labour Organisation, 1983.

UNICEF defines child labour differently. A child, suggests UNICEF, is involved in child labour activities if between 5 to 11 years of age he or she did at least one hour of economic activities or at least 28 hours of domestic work in a week, and in case of children between 12 to 14 years of age, he or she did at least 14 hours of economic activity or 42 hours of economic activity and domestic work per week. UNICEF in another report suggests, "Children's work needs to be seen as happening along a continuum with destructive or exploitative work at one end, beneficial work, promoting or enhancing children's development without interfering with their schooling, recreation and rest at the other. And between these two poles are vast areas of work that need not negatively affect a child's development"¹⁶.

According to some voluntary organizations and NGOs, a child who is not going to school is a child labour. When the business of wage earning or of participation in self or family's support conflicts directly or indirectly with the business of growth and education, the result is child labour¹⁷. India's Census- 2001 defines child labour as participation of a child less than 17 years of age in any economically productive activity with or without compensation, wages or profit. Such participation could be physical or mental or both. This work includes part-time help or unpaid work on the firm, family enterprise or in any other economic activity, such as cultivation and milk production for sale or domestic consumption¹⁸. Child labour includes children working in any sector, occupation, or process, including the

¹⁶ *Supra note 14.*

¹⁷ *Encyclopedia of Social Sciences.*

¹⁸ *Child Labour in India, Wikipedia, The Free Encyclopedia.*

formal and non-formal, organized or unorganized, within or outside the family¹⁹.

Child labour also includes children of following categories:

- (a) Child labour in bondage,
- (b) Child labour within and with families (including domestic child labour),
- (c) Girl child labour,
- (d) Child labour separated from families, and
- (e) Child labour which is itinerant.

Child labour can be broadly classified into the following categories:

- (i) child labour covered by legislation,
- (ii) child labour falling outside the legislative frameworks,
- (iii) agriculture and allied activities, and
- (iv) informal unorganized, semi-urban, and urban sector²⁰

A comprehensive definition of child labour is “any work done by the children in order to economically benefit their family or themselves directly or indirectly at the cost of their physical, mental or social development”²¹.

Thus the term child labour refers to the persons who are below fourteen years of age and who are working not only in industrial sector but also in different economic activities which are detrimental to their mental, physical, social and educational development.

III. Causes of Child Labour in India

¹⁹ Campaign Against Child Labour (CACL) – A network of over 5400 anti-child labour groups spread over twelve states in India.

²⁰ Public Hearing and Second National Convention of Child Labourers. Reference kit, CALC, March, 1997.

²¹ Analysis of Workforce in India, Office of the Registrar General, Census Commission, Government of India, New Delhi, Occasional Paper, No.8, 1988.

No single factor is responsible for creation of child labour in India. It is a combination of several factors, such as poverty, unemployment, underemployment, low wages, bad economic policies on the part of government, family customs etc. In the opinion of Helen Sekar, the causes that lead to child labour are : (1) Poverty, (2) Parental illiteracy and ignorance, (3) Tradition of making children learn the family skills, (4) Absence of universal compulsory primary education, (5) Non-availability and non-accessibility to schools, (6) Irrelevant and non-attractive school curriculum, (7) Social and cultural environment, (8) Informalisation of production, (9) Employers preference to children for their cheap labour and inability to organize against exploitation, (10) Family work, (11) Level of Technology, (12) Apathy of trade unions, (13) Ineffective enforcement of the legal provisions pertaining to child labour²².

In the opinion of present author, poverty is the primary factor for creation of child labour in India. Poverty has an obvious relationship with child labour, and studies have “revealed a positive correlation – in some instances a strong one - between child labour and such factors as poverty”²³. Child labour is a main source of additional income on the part of a poor family in India. A study conducted by the International Labour Organization’s Bureau of Statistics found that, “children’s work was considered essential to maintaining the economic level of households, either in the form of work for wages, of help in household enterprises, or of household chores in order to free adult household members for economic activity elsewhere”.

²² Helen Sekar, , “Ensuring Their Childhood”, V.V. Giri National Labour Institute, New Delhi, 2001.

²³ Mehera-Kerpelman, 1996, 8.

Even though poverty is treated as the major factor of child labour, it is not the only determinant one for creation of child labour. Lack of education also plays a pivotal role. A child who does not go to school is sent to the labour market to supplement the family income. Due to lack of schooling, the child remains at the lower strata in the labour market even in his adulthood, keeping his own as well as his family's income at very low. Consequently, his poverty compels next generation to participate in the labour force again at an early age. In this way, due to lack of proper education of children, vicious cycle of child labour continues affecting individual, family and the society, as a whole, interconnecting with each other.

In addition to above, the attitude of parents also contributes to child labour. Some parents feel that their children should work in order to develop their skills which will be useful to earn their livelihood instead of taking advantage of formal education. In many parts of India, girl childs are not allowed by their parents to go to school. Ultimately, they are forced to engage themselves as child labour. There is also lack of proper appreciation on the part of parents as to how continuance of children in education would benefit their employment prospects and improve their standard²⁴.

After analysing the factors responsible for creation of child labour in India it can be inferred that poverty is the main determinant of child labour in India at present followed by lack of proper education. Poor parents are unable to send their children to the school due to increasing cost of education. For example – a student

²⁴ M.K. Pandia (Ed.), *Child Labour in India*, 1979, p.54.

of class-XI of Central School has to pay fee of Rs.800.00 per month. Here one can imagine the cost of education. The concept of welfare state has gone now from India. So it is a high time for thinking about the problem of children and child labour in contemporary situation.

IV. Laws Regulating the Child Labour in India

Numbers of legislations have been passed by the government of India not only in colonial period but also in post-independent period to protect the interest of children. In contemporary situation child labour has become a main issue throughout the world. Therefore, the study of legal provisions regulating the child labour is necessary at present. A resume of the history of legislation relating to child labour and some salient features are presented below²⁵.

A. Legislation Passed During Pre-independence period

1. The Factories Act 1881.

- (i) Minimum age (seven years)
- (ii) Successive employment (employment in two factories on the same day) prohibited.
- (iii) Duration of employment (working hours not to exceed nine hours a day and at least four holidays to be given in a month).
- (iv) Factories employing one hundred or more persons were covered by this Act.

2. The Factories Act (Revised) 1881

²⁵ A.P. Verma, "Child Labour in India : An Overview", *Awards Digest : Journal of Labour Legislation*, National Labour Institute, Deep Printers, New Delhi, Vol.XX, Nos. 7-12, July-Dec., 1994,

- (i) Minimum age (increased to nine years).
- (ii) Hours of work (maximum seven hours per day with prohibition of works at night between 8 P.M. and 5 A.M.).

3. The Mines Act 1911

The Act prohibited employment of children under twelve years of age.

4. The Factories Act 1911

- (i) Work between 7 P.M. and 5.30 P.M. prohibited.
- (ii) Work in certain dangerous processes prohibited.
- (iii) Certificate of age and fitness required.

5. The Factor (Amendment) Act 1922.

To implement the ILO Convention (No.5) 1919, the amendment provided for changes such as:

- (i) Minimum age (fifteen years in general)
- (ii) Working hours (maximum six hours, and also an interval of half an hour if children are employed for more than five-and-half hour).
- (iii) Establishments employing twenty or more persons with mechanical processes were covered under this Act with power vested in the local government to exclude the applications of provisions to premises employing ten or more persons.
- (iv) Provision of employment of children below eighteen and women in certain processes.
- (v) Provision for medical certificate and also certificate of re-examination for continuing work.

6. The Indian Mines Act 1923

This Act rose the minimum age for employment from twelve to thirteen years.

7. The Factories (Amendment) Act 1926.

This Act imposed certain penalties on the parents and guardians for allowing their children to work in two separate factories on the same day.

8. The Indian Ports (Amendment) Act 1931

This Act prescribed twelve years as minimum age for handling goods in ports.

9. The Tea Districts (Emigration Labour) Act 1932

This Act provided that no child under sixteen years should be employed or allowed to migrate unless accompanied by a guardian.

10. The Children (Pledging of Labour) Act 1933

This Act prohibits parents or guardians from pledging children into bonded labour. The Act deems any such bonded labour contract as void when the labour is less than 15 years of age. This Act is still in force and stipulates penalties also.

11. The Factories (Amendment) Act 1934

- (i) Employments of children between twelve and fifteen years were generally prohibited in certain areas.

- (ii) Employment of children under twelve and fifteen years restricted to five hours a day in other areas.
- (iii) For employment of children between fifteen and seventeen years, certain restrictions were imposed.

12. Mines (Amendment) Act 1935

- (i) Employment of children less than fifteen years in mines was prohibited.
- (ii) Underground employment was permitted. Only on production of certificate of physical fitness granted by a qualified medical practitioner for persons between fifteen and seventeen years.
- (iii) Working time restricted to a maximum of ten hours a day and fifty-four hours a week for work above the ground and nine hours a day for work underground.

13. The Employment of Children Act 1938

- (i) Prohibited employment of children under fifteen years in occupations connected with transportations of goods, passengers and mails or in railways.
- (ii) Raised the minimum age of handling goods on docks from twelve to fourteen years.
- (iii) Provided for the requirement of a certificate of age.

B. Legislation Passed during Post-independence Period

1. The Factories Act 1948

The Act prohibits employment in factories for children below fourteen years.

2. Employment of Children (Amendment) Act 1949

This Act rose the minimum age to fourteen years for employment in establishments governed by the Act.

3. Employment of Children (Amendment) Act 1951

This Act prohibited the employment of children between fifteen and seventeen years at night in the railways and ports and also provided for requirement of maintaining a register for children less than seventeen years.

4. The Plantation Labour Act 1951

The Act provides that children below the age of twelve years are not permitted to work in plantations.

5. The Mines Act 1952

This Act prohibited the employment of children less then fifteen years in mines. The Act stipulates the conditions for underground work:

- (i) Requirement to have completed sixteen years of age.
- (ii) Requirement to obtain a certificate of physical fitness from a surgeon.

6. The Factories (Amendment) Act 1954

This Act prohibits employment of children under seventeen years between the hours of 10 P.M. to 7 A.M.

7. The Merchant Shipping Act 1958

This Act prohibits children under fifteen to be engaged to work in any capacity in any ship, except in certain specified cases.

8. The Motor Transport Workers Act 1961

This Act prohibits employment of children less than fifteen years in any motor transport undertaking.

9. The Apprentices Act 1961

This Act prohibits apprenticeship or training of child under fourteen years and requires a contract between guardians and the employer. The Act also regulated their working hours, and prohibited their working hours from 10 P.M. to 6 A.M. except in cases where the approval of the Apprenticeship Adviser has been obtained.

10. The Beedi and Cigar Workers (Conditions of Employment) Act 1966

This Act prohibits employment of children under the age of fourteen years in industrial premises where any manufacturing of Beedi and Cigar takes place. It also prohibits youth between fourteen to eighteen years to work during night time between 7 P.M. to 6 A.M. and also prohibits their working over time.

11. Employment of Children (Amendment) Act 1978

This Act prohibited employment of a child below fifteen years in occupations in railway premises such as cinder picking or clearing of ash pit or building operations, in catering establishments and in any other work which is carried on in close proximity to or between the railway lines.

12. The Child Labour (Prohibition and Regulation) Act 1986

The Child Labour (Prohibition and Regulation) Act 1986 (CLARA) is a product of the recommendations of various Committees on child labour²⁶. The recommendations of all the Committees were to frame a comprehensive legislation to prohibit child labour in India. Accordingly, the government of India framed Child Labour (Prohibition and Regulation) Act 1986.

The objectives of the Child Labour (Prohibition and Regulation) Act 1986 are:

- (i) Banning the employment of children, i.e. those who have not completed their fourteenth year in specified occupations and processes.
- (ii) Laying down procedures to decide modifications to the schedule of banned occupations or processes.
- (iii) Regulating the conditions of work of children in employment where they are not prohibited from working.
- (iv) Lays down penalties for employment of children in violation of the provisions of this Act, and other Acts which forbid the employment of children.
- (v) Brings uniformity in the definition of the “child” in related laws.

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

This Act was last amended in 2002 in conformity with the UN Convention on the Rights of the Child covers young persons below 18 years of age. Section 26 of

²⁶ The National Commission on Labour, 1969, The Committee on Child Labour 1979, The Gurupadswamy Committee on Child Labour 1976, and the Sanat Mehta Committee, 1984.

the Act deals with the penal provision for the person who violated the norms prescribed in the same²⁷.

14. The Right of Children to Free and Compulsory Education Act, 2009

This Act provides for free and compulsory education to all children aged 6 to 14 years. This legislation also envisages that 25 per cent of seats in every private school, should be allocated for children from disadvantaged groups including differently able children²⁸.

In spite of numerous legislations, framed by the government of India, since British period, the problem faced by the child labour are almost the same. Of course to some extent, the legal provisions have become effective in case of organized sector. But in case of unorganized sector it is seen that bonded child labourers are still exploited. Children at their tender age still working in different tea stall, hotel, motor garages etc.

The present author would like to submit here that for eradication of such evil framing of stringent law is not enough. Sincere effort of executive followed by public participation/cooperation the execution of law is essential.

V. Constitutional Provisions Regulating Child Labour in India²⁹

²⁷ <http://indiacode.nic.in>

²⁸ *Ibid.*

²⁹ J.N. Pandey, Constitutional Law of India, Central Law Agency, Allahabad, 2001.

1. Article 14 of the Constitution of India provides the general principle of right to equality and prohibits the state from denying to any person, “equality before the law or the equal protection of the laws”.
2. Article 15(3) prescribed that “nothing in Article 15 shall prevent the state from making any special provision for women and children.
3. Article 21(A) enunciates that the state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.
4. Article 23 provides for prohibition of traffic in human beings and forced labour.
5. Article 24 prohibits employment of any child (which includes a female child) below the age of fourteen years to work in any factory or mine or engage in any other hazardous employment.
6. Article 39 specifically requires the state to direct its policy towards securing the following principles:
 - (e) To protect health and strength of workers and tender age of children and to ensure that they are not forced by economic necessity to enter avocations unsuited to their age or strength.
 - (f) That children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

7. Article 45 provides that, “the state shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

8. Article 46, as a directive to the state in guiding its policies, provides that “the state shall promote with special care the educational and economic interests of the weaker sections of the people and shall protect them from social injustice and all forms of exploitation”.

VI. Policy and Programme Adopted by the Government of India for Eradication of Child Labour

After the enactment of the comprehensive Child Labour (Prohibition and Regulation) Act, 1986, the Government of India adopted the National Policy on Child Labour³⁰ in accordance with the Constitutional provisions and legal provisions made for the purpose. The basic objective behind framing such policy was to regulate the situation where the child labour are placed and also to formulate programme in the direction of complete elimination of child labour from the nation. The said policy encompasses action in the fields of education, health, nutrition, integrated child development and employment³¹.

The National Policy on Child Labour is set under the three following heads:

1. Legal Action Plan:

Under the head of legal action plan emphasis given on the strict implementation of the provisions of Child Labour (Prohibition and Regulation) Act

³⁰ National Policy on Child Labour 1987, Government of India.

³¹ Ashok Narayan, “Child Labour Policies and Programmes : The Indian Experience”, Government of India, Ministry of Labour, New Delhi, 1988.

1986 and other legislative measures adopted for protection and elimination of child labour from the country.

2. Focusing on general development programmes for benefiting child labour wherever possible.

The policy envisages the development programmes initiated in the areas of education, health, nutrition, integrated child development, opening of employment opportunities and acceleration of income for the poor class. The basic objective behind the implementation of this programme is to create an atmosphere where the children will be encouraged and motivated to attend the school properly instead of going to wage earning employment.

3. Area-wise Specific project

The objective behind launching of these specific project are to withdraw children employed in hazardous conditions particular in the areas where high concentration of child labour exists. The children are sent to school specifically meant for them for education.

Keeping in view the policies adopted for regulating child labour numbers of initiatives have been taken by the government in this direction. They are as follows:

1. The Central Advisory Board on Child Labour was constituted on 4th March, 1981 with a view to:

(a) Review the implementation of the existing legislation framed by the central government.

- (b) Suggest legislative measures as well as welfare measures for the welfare of the working children.
- (c) Review the progress of welfare measures.
- (d) Recommend the industries and areas where there must be a progressive elimination of child labour.

2. The National Child Labour Projects were stated in 1988. The major activities undertaken under the NCLP is to withdraw and rehabilitate children working in hazardous trades and industries in different states. The rehabilitation of child labourers included freeing them from their selfish employers and providing them with relevant education. Establishment of special schools to provide non-formal education, vocational training, supplementary nutrition etc. to children is also included in this project plan.

3. The National Authority for the elimination of Child Labour (NAECL) was constituted on 28th September, 1994, under the Chairmanship of the Minister of Labour, Government of India. The main purposes of Constitutions of NAECL are:

- (a) To lay down policies and programmes for the elimination of child labour working under hazardous conditions.
- (b) To monitor the progress of the implementation of different programmes adopted for eradication of child labour.
- (c) To co-ordinate the implementation of child labour related projects lunched by other ministries of Government of India.

4. Budgetary provision for child labour elimination programmes were made by the government of India in the Eighth Five Year Plan (1992-93 and 1996-97). A plan

provision of Rs.150 million was made for the purpose. Later on, it was substantially stepped up after the launching of programme in August 1994 for the rehabilitation of child labour working in hazardous occupations.

5. National Policy on Education 1986 adopted by the government of India also gives, priority to the universal elementary education. It also recommends that the children up to the age group of 14 years be provided free and compulsory education of sufficient quality before we enter the 21st century. Accordingly tuition fees in government schools were abolished up to the upper primary level education. The fees of schools run by local bodies as well as private aided institutions are almost made free. Compulsory education Acts have been enacted in 14 states and 4 Union territories.

6. Most significantly in 2001-02 the government launched the Sarva Shiksha Abhiyan or the education for all programme which is an effort to universalise elementary education. This programme aims to achieve the goal of universal elementary education of satisfactory quality by 2010.

7. Non government organizations also have played an important role in making child labour visible and in protecting them against exploitation. Under grant-in-aid scheme, the government of India financially assisted to the voluntary organisations to the extent of 75% of the project cost for taking up welfare projects for working children where the children are provided with education, supplementary nutrition, health care and vocational skill training.

8. India has been playing leading role in advocating for protection of children being an active member of International organisations by signing various International declarations and agreements prepared and declared by these organisations. India is also a party to ILO and as such has an obligation to adopt ILO Conventions on child labour. Following are the conventions related to minimum age for employment to children and young persons³².

- (a) Minimum Age (Industry) Convention (No.5) 1919.
- (b) Minimum Age (Sea) Convention (No.7) 1920.
- (c) Minimum Age (Agriculture) Convention (No.18) 1921.
- (d) Minimum Age (Trimmers and Stockers) Convention (No.15) 1921.
- (e) Minimum Age Employment (Non-industrial) Convention (No.33) 1932.
- (f) Minimum Age (Sea) Convention (Revised) (No.58) 1937.
- (g) Minimum Age (Industry) Convention (Revised) (No.57) 1937.
- (h) Minimum Age (Non-industrial Employment) Convention (Revised) (No.68) 1937.
- (i) Minimum Age (Underground works) Convention (No.123) 1965.
- (j) Minimum Age Convention (No.123) 1973.
- (k) The White Lead (Painting) Convention (No.123) 1921.
- (l) Radiation Protection Convention (No.123) 1968.

³² International Labour Office, Geneva, "Minimum Age for Admission to Employment Report 1B(1) & IV(i).

VII. Legal Analysis

Despite all the above mentioned legislative measures the phenomenon of child labour is on the rise in India. Child labour is commonly seen in different places engaged in different kind of works which are very much unsuitable to their health and moral development. As have been mentioned above, the reasons behind it are social and economical. But in the opinion of present author, major problem lies with the legislation regulating the issues of child labour in India. As such the main legislative deficiencies are as follows:

1. All the existing legislation lacks uniformity in respect of age of a child labour. It differs from act to act, state to state and industry to industry. The same thing is also observed in respect of working hour and rest periods.
2. All the legislation on child labour has been based on the assumption that child labour is harmful for social fabric and hence it should be eradicated forthwith. But as a matter of fact, in developing countries like India ,child labour is a major economic asset for a poor family.
3. There are some unorganised sectors which are not covered by child labour legislation.
4. Here in India poor execution of law take place due to inefficient law enforcing government agencies.
5. Majority of the people in India are illiterate and ignorant of legal provisions. Consequently, the law is also evaded at different places at different point of time.

6. Baring few, major legislation framed for the purpose of eradication of child labour in India lack international standard.

7. The peculiar socio-economic conditions prevalent in India become hurdles in the direction of eradication of child labour.

In the opinion of Meena Gupta³³, enforcement of child labour legislation faces a number of problems which fall into the following categories:

(i) Enforcement of Social Legislations

Social legislations are often difficult to enforce, as the law enforcers do not understand the spirit of the law. Neither the employers of child labour, nor the parents, nor the law enforcers perceive child labour as an undesirable thing.

(ii) Informalisation of Child Labour:

Due to informalisation of child labour viz. work involving child labour moving out of the factories and large establishments into small cottage and home-based units, from out of the organised sector to the unorganised sector, it has become difficult to enforce the Act. This requires a large increase in the labour enforcement machinery. Other labour laws are applicable only to the organized sector. Besides, no records are maintained of the child workers.

(iii) No Successful Conviction:

³³ Meena Gupta, "Special Problems of Enforcement of Child Labour Laws and Regulations", Award Digest: *Journal of Labour Legislation*, Vol.XX: Nos.7-12.

Where an inspection manages to find children working in an establishment, in violation of the law, the prosecution does not lead to successful conviction.

VIII. Conclusion and Suggestion

Despite the number of legislations, practice of child labour is not only going on but also increasing day by day. The exploitation of children at their tender age continues unabated in the hand of a few. Though socio-economic condition play a significant role in giving rise to the problem of child labour, yet it is generally viewed that illiteracy, ignorance of law, poverty, unemployment and peculiar social condition are the root causes of child labour. It prevails both in urban and rural areas throughout the country.

The phenomenon of child labour robs the child of his youthful life, restricts the prospects of education which can enable him to reach a higher level at a later stage of life, on the one hand and, ultimately, it harms the progress and prosperity of the nation as a whole. When put to work at a tender age, it reduces physical growth of children, lowers their efficiency, scale of intellectual growth and ultimately their ability and thereby nation's growth.

It is observed that India has framed a number of legislation and has become signatory to a number of international agreements to abolish child labour and to divert the childhood from the field of labour to the premises of schools and to ensure healthy environment for all-round development of children. As has been

stated above, the Constitution of India, the Supreme law of the land, mandates through its various articles to abolish child labour from the nation and to protect them from being exploited in the hand of few rich class. Hon'ble Supreme Court also has issued directives for protection of child labour in our country in a number of cases, such as People's Union for Democratic Rights v. Union of India³⁴. Labourers working on Salal Hydro Project v. State of Jammu and Kashmir and others³⁵, Rajangam, Secretary, District Bidi Workers Union v. State of Tamil Nadu and others³⁶, M.C. Mehta v. State of Tamil Nadu and others³⁷, M.C. Mehta v. State of Tamil Nadu and others³⁸.

In spite of all these efforts, the magnitude of the problem is almost the same. The child labour is still being exploited, free education in our country is still a mockery and drop outs from the schools are increasing day by day.

It is submitted here that to eradicate child labour, legislation alone is not enough. It calls for multi-dimensional approach. What is more important, at this stage, is creation of healthy social conditions and positive political environment for implementation and execution of different legislative and welfare measures targeted for the purpose. Both the targets can be achieved only when the people are made educated properly because education plays a pivotal role in socio-economic development of a country. Late President V.V. Giri had observed, "Education is the

³⁴ AIR 1982 SC 1480.

³⁵ 1983 Lah I.C. 542.

³⁶ (1992) 1 SCC 221.

³⁷ AIR 1991 SC 283.

³⁸ AIR 1997 SC 699.

principal tool of social development and unless all societies are provided with the right type of education, adequate in quantity and quality, it will not be possible to tackle satisfactorily the problems of ignorance, ill health and poverty which afflict the majority of human being in the world”³⁹. Education certainly helps the people to free themselves from the shackles of an anachronism and opens their minds to a different world and newer possibilities. Education develops basic skills and abilities and thereby boosts productivity. Emphasising the need of education for the people in underdeveloped areas of the world in particular, Margaret Mead says, “Education is needed in all these areas to cope with and repair the destruction already introduced and beyond this to make it possible for the people, if they choose to take their place in the community of nations, and to take advantages of the progress of science and technology improving their living”⁴⁰. Education is an act of developing oneself to a matured and complete personality. Rajiv Gandhi, the former Prime Minister of India once said that “Education must be a great equalizer in our society. It must be a tool to level the differences that our various social systems have created over the past thousand of years”. True education is a vehicle that delivers culture⁴¹. Education plays potential role for bringing about social transformation and for making democracy a success. As Halsey observed, “Education has become part of the economic foundation of modern society, a major avenue of social mobility a central agency of social distribution, and consequently an object of political debate

³⁹ V.V. Giri, *Yojana*, Vol. XIV, No.76, September, 1970.

⁴⁰ Margaret Mead, *Culture, Pattern and Technical Change*, Paris, UNESCO, 1953, p.269.

⁴¹ Manojit Gangopadhaya, “In Search of Education”, *The Times of India*, Patna Edn. 8th September, 1994.

and social policy as urgent and as important as poverty, sickness and unemployment⁴². Considering the need of education for rural development S. Roger has observed that, “Education for rural development, in the right quantity and of the right quality, should act as leaven in the rural environment, transforming it economically and socially in the required direction; productivity mobility, diversification and growth”⁴³. In order to survive in modern economic globalisation era education is also essential. Richard Gill opines, “An illiterate society is unlikely to be in the forefront neither of technological creativity nor for that matter to know how to use new technologies even if they exist for the taking”⁴⁴.

It is observed that primary education in India is compulsory only in statute books but in practice, large number of school dropout, who find their way into various low paid and odd jobs which are not conducive to good health, shows the failure of Indian state to enforce legally the primary education. A country like India, where social system has broken, law has a crucial role to play for social transformation. In such situation, formal law is helpful⁴⁵. K.D. Gangrade also opines that “the Major functions of the legal systems are as follows:

- (i) Maintenance of public order,
- (ii) Upholding rights and duties,
- (iii) Facilitating co-operation,

⁴² A.H. Halsey, “The Sociology of Education” in Neil J. Smelers (Ed.) *Sociology an Introduction*, Wiley Eastern, New Delhi, 1970, p.414.

⁴³ Savary Roger, *Education for Rural Development Between Tradition and Change, Prospect*, Vol.III, Summer 1973, p.203.

⁴⁴ T.R. Gill, *Economic Development: Past and Present*, Prentice Hall, New Delhi, 1965, p.18.

⁴⁵ A.N. Singh, *Child Labour in India*, Shipra Publications, Delhi, 1990, Chapter X, p.154.

- (iv) Confirming legitimacy,
- (v) Communicating moral standards⁴⁶.

Hence it is suggested here that the main focus should now be on the enforcement and implementation of compulsory education laws. Keeping in view the constitutional mandate enshrined under Article 21A, 51A and others as have been mentioned above. Corroborating view expressed by present author, Myron Weiner in his book *The Child and the State in India* states that “compulsory primary education is the policy instrument by which the state effectively removes children from the labour force. Fate thus stands as the ultimate guardian of children, protecting them against both parents and employer⁴⁷. Secondly the Acts rules and regulations framed for the purpose need to be reviewed and amended in conformity with the legislative measures adopted by the Government of India.

⁴⁶ K.D. Gangrade, “Child and the Law”, National Seminar on Child and Law, NIPCCD, New Delhi, 1982.

⁴⁷ S.R. Kasbekar, “Children of Lesser Gods”, *The Economic Times*, New Delhi, 29 July, 1993, p.12.

A Contemplation on National Transitional Council of Libya

Hamed Hashemi Saugheh & Rohaida Nordin

Abstract

National Transitional Council of Libya (NTC) emerged on the political scene in Libya after the eruption of intera-state war in that country and played a great role in state building and transition. Under international law there is a direct connection between the nature of the de facto authorities and their rights and responsibilities. In this article we are about to discern the nature of Libyan NTC.

Keywords: national liberation movement, de facto and de jure regimes, belligerents, effective control, Geneva Convention

National Transitional Council of Libya: Establishment and Dissolution

On 16th of February 2011, peaceful demonstration broke out following the arrest of an opposition lawyer in Benghazi. On 19th of February a range of other demonstrations started in eastern Libya and specific cities of Benghazi, Zayiwa, Ajdabiya and Derna.¹ The security forces repressed demonstrations violently and killed hundreds of them and within a week the demonstrations turned into an internal war.²

The rebels quickly increased their firepower and took control of east and most of the oil reserves of Libya.³ Local councils emerged in the rebel stronghold of cities and towns⁴ decided to establish a

¹ . African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Application No. 004/2011.

² . Anyway Sithole, "The African Union Peace and Security mechanism's crawl from design to reality: Was the Libyan crisis a depiction of severe limitations?" , African Journal on Conflict Resolution, volume12, number2012, ISSN 1562-6997, P114. "Death of a Dictator, Bloody Vengeance in Sirte", Human Rights Watch, October 2012, ISBN: 1-56432-952-6.P16,.

³ . ZOË HOWE , "Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya" , Texas International Law Journal, Volume 47, Issue 2, ISSN: 0163-7479 727, P12.

⁴ . such as Benghazi, Derna, Bayda and Tobruk.

broader group that “would represent anti-Gaddhafi rebellion”.⁵ On 27th of February 2011, rebels combined of opposition forces, exile groups and defectors organized themselves as National Transitional Council⁶ (NTC) under the leadership of Mostafa abdeljalil _who was a former justice minister that had defecated on 21th of February because of protesting over the use of guns against people by Gaddhafi security forces.⁷

According to the NTC’s website its official establishment was on the 5th of March.⁸ On this date the first meeting of NTC was held⁹ and it declared itself in a letter to General Assembly of UN as the “sole representative of all Libya”.¹⁰ On the 3th of August 2011, NTC released its roadmap transition to democracy through its

⁵ . Paul salem and amanda Kadlec , “Libya`s troubled transition” , Carnegie Endowment for International Peace, June 2012, *ISSN: 0094-3029*), P3.

⁶ . Emily O’Brien and Andrew Sinclair, “The Libyan War: A Diplomatic History, Center on International Cooperation”, New York University, August 2011, p5 . Jonte van Essen , “De Facto Regimes in International Law” , Utrecht Journal of International and European law, Volume 28/Issue 74, *ISSN: 0927-460X*, P2. “Libya a European War?”, European Union Center of North Carolina , EU Briefings, July 2011, P1,[http://euce.org/business_media/b2011_libya.php][date of access: 5.11.2012].

“The Battle for Libya Killings, Disappearances and Torture”, Amnesty International, September 2011, P17, [www.amnesty.org] . “Libya’s Transition: Uncertain Trajectories”, Atlantic Council, Rafik Hariri Center for The Middle east, June 2012, P2,[http://www.acus.org/files/ME/020112_Libya_Country_Profile.pdf][date of access 7.11.2012] . Professor Ali Abdullatif Ahmida , “The Libyan National Transitional Council: Social Bases, Membership and Political Trends” , AlJazeera Centre for Studies, October 2011, P4.

⁷ . Anyway Sithole, “The African Union Peace and Security mechanism’s crawl from design to reality: Was the Libyan crisis a depiction of severe limitations?” , , African Journal on Conflict Resolution, volume12, number2012, *ISSN 1562-6997*, P114. “The Battle for Libya Killings, Disappearances and Torture”, Amnesty International, September 2011, P17, [www.amnesty.org].

⁸ . Maria Cristina Paciello ,“Tunisia: Changes and Challenges of Political Transition” , , MEDPRO Technical Report No. 3/May 2011, *ISBN 978-94-6138-100-2*, P3, [www.medpro-foresight.eu].

⁹ . “Libya’s Transition: Uncertain Trajectories”, Atlantic Council, Rafik Hariri Center for The Middle east, June 2012, P2, [http://www.acus.org/files/ME/020112_Libya_Country_Profile.pdf][date of access 7.11.2012] and North Africa, Civil - Military Fusion Center, November 13, 2012, [<https://www.cimicweb.org>].

¹⁰ . Emily O’Brien and Andrew Sinclair, “The Libyan War: A Diplomatic History”, Center on International Cooperation, New York University, August 2011, p5.

“Interim Constitutional Declaration”.¹¹ On 16th September of 2011, the General Assembly of the UN, at its 66th session recognized NTC as representative of Libya.¹²

On 7th of July 2012, as a phase of transition from authoritarian to democratic rule, national elections held in Libya and self appointed NTC handed over power to General National Congress (GNC) and dissolved.¹³

Determining NTC’s Legal Status

After providing a brief history of Libyan NTC, it is time to discern what type of TG was it. The scholars and official documents used variant literature about the “nature” of Libyan NTC. Sometimes NTC is introduced as “Rebels”¹⁴, sometimes it was called “Authority”¹⁵ and some texts refer to it as “Interim Government”¹⁶ regarding the fact that NTC on its early days announced that it is not an “Interim Government”¹⁷ but after a

¹¹ . “Libya’s Transition: Uncertain Trajectories”, Atlantic Council, Rafik Hariri Center for The Middle East, June 2012, P2, [http://www.acus.org/files/ME/020112_Libya_Country_Profile.pdf][date of access 7.11.2012]

¹² . General Assembly of the United Nations, sixty-sixth session, A/66/PV.2 ZÖE HOWE and “Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya” , Texas International Law Journal, Volume 47, Issue 2, ISSN: 0163-7479 727, P423.

¹³ . Security Council, Resolution 1546 (2004), 8 June 2004., Kenneth Katzman and Jennifer Elsea, “Iraq: Transition to Sovereignty” , CRS Report for Congress, The Library of Congress, July 21, 2004 ,P10. Security Council, Report of the Secretary-General on the United Nations Support Mission in Libya, 30 August 2012.

¹⁴ . Talmon argues that its recognition was the same as the recognition of National Liberation Movements (NLM), Stefan Talmon, “Recognition of the Libyan National Transitional Council”, American Society of International Law (ASIL), Volume 15, Issue 16, June 16, 2011, ISSN: 0272-5037,P2.

¹⁵ . Alice Alunni and Karim Mezran “Post-Qadhafi Libya: the electoral dilemma” , Istituto per gli Studi di Politica Internazionale (ISPI), No. 114 – JUNE 2012, P1. “The Battle for Libya Killings, Disappearances and Torture”, Amnesty International, September 2011, P18, [www.amnesty.org] . Council of the European Union, Council conclusions on Libya, 3117th Foreign Affairs Council meeting .Luxembourg, 10 October 2011.

¹⁶ . “Death of a Dictator, Bloody Vengeance in Sirte”, HUMAN RIGHTS WATCH, October 2012, ISBN: 1-56432-952-6.P23.

¹⁷ . North Africa, Civil - Military Fusion Center, November 13, 2012, P5 ,[<https://www.cimicweb.org>].

while it declared itself as an interim government with full executive and legislative powers.¹⁸

Before we discerning what type of TG was NTC one has to ask what the nature of NTC was? Was it a group of rebels or a *de facto* government? Is it necessary for “Transitional Governments” to be “governments”? i.e. Is it possible for other authorities and entities such as rebel groups to lead the transition in a country?

NTC of Libya as a National Liberation Movement (NLM)?

On the question of the nature of NTC as a recognized National Liberation Movement (NLM) we need to refer to the definition and constitutive elements of NLMs and then compare it with NTC.

International Law Dictionary defines NLMs as organizations ruled by armed forces struggling “for independence of peoples under colonial, alien or racist domination, as reaffirmed by the numerous General Assembly (GA) resolutions pertaining to the right of self_determination of peoples. Sometimes NLMs are classified as insurgents or belligerents.”¹⁹

Libyan NTC was consisted of a group of lawyers and representatives of various factions from different parts of Libya.²⁰ In spite of that fact that Libyan NTC formed an army²¹ but it never claimed to be a military council. In the early stages of its formation NTC declared itself as the “sole legitimate

¹⁸ . “Libya’s Transition: Uncertain Trajectories”, Atlantic Council, Rafik Hariri Center for The Middle east, June 2012, P2, [http://www.acus.org/files/ME/020112_Libya_Country_Profile.pdf][date of access 7.11.2012].

¹⁹ . [Boleslaw A. Boczek](#), “International Law: A Dictionary” , Publication Date: July 2005 | ISBN-10: 0810850788,P86.

²⁰ . Maria Cristina Paciello, “Tunisia: Changes and Challenges of Political Transition”, MEDPRO Technical Report No. 3/May 2011, ISBN 978-94-6138-100-2, P3. [www.medpro-foresight.eu].

²¹ . “Understanding armed groups and the applicable law”, International Review of the Red Cross, Volume 93 Number 882, June 2011, P497.

representative of the Libyan people”²² and acted as a legislative body and formed an interim government.²³

NTC fought against the seated government under Gaddhafi that was *de jure* government of Libya more than 40 years and entitled itself as Libyan Arab Jumhuriyah. Thus, NTC was not fighting against any alien occupation or racist domination. The struggle of NTC was not for implementation of the right of self determination²⁴ but for the right to democracy.²⁵

Regarding the facts that Libyan NTC lacked fundamental elements of NLMs but the literature used by recognizing States was dubious. France recognized NTC as “the legitimate representative of the Libyan people”.²⁶ Talmon says the expression of “the legitimate representative of the respective people of.. ” is

²² . “The Battle for Libya Killings, Disappearances and Torture”, Amnesty International, September 2011, P17. [www.amnesty.org]

²³ . Karim Mezran & Alice Alunni, “Power Shifts in the Arab Spring”, Bologna Center Journal of International Affairs, Volume 15, Spring 2012, ISSN 1592-3444.

²⁴ . The right of self-determination is mentioned articles 1 and 55 of the Charter of the United Nations and resolutions of General Assembly such as Resolution 1514. Right of Self-determination is also mentioned in Article 1 of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly in 1966. Edre U. Olalia , “The Status of International Law of National Liberation Movements and Their Use of Armed Force”, International Association of People’s Lawyers, P8.

[<http://www.iadllaw.org>][date of access 24.10.2012]

²⁵ .Here again raises the question of if there is a right to democracy or not. Olalia refers to the”Right to Revolution” and defines it as “a right to change or overthrow a particular government”. Historically, this right comes from the perception of Abraham Lincoln who believed that authority shall come from the people of the United States and people have a right to overthrow a non-responsive government. Sometimes “Right to Revolution” is called “Right of National Self-determination”. Ibid,P4. Anyway, because right to revolution is not precisely referred to in any international document, one cannot claim the existence of this suspicious sub-division of right to self-determination and that NTC was fighting for this certain interpretation of “right to self-determination”. In classic international law “right of self-determination” is always tied with decolonization and getting rid of alien governments (in cases of internal right of self-determination).

²⁶ . Statements Made by the Ministry of Foreign and European Spokesperson, Mar. 10, 2011, [<http://www.ambafrance-us.org/spip.php?article989#5>]. Also Gambia, Turkey, Senegal, Qatar,Japan,spain and Germani recognized NTC with same literature.(Stefan Talmon, “Recognition of the Libyan National Transitional Council”, American Society of International Law (ASIL), Volume 15, Issue 16, June 16, 2011, ISSN: 0272-5037,P2.

the same as used for NLM of Palestine and reminiscent of the recognition of NLMs in 70s.²⁷

NTC of Libya as Rebels?

ILC categorizes the parties of a war as State and non-State actors.²⁸ A non-State actor is an armed group who takes up arms to control territory and overthrow the established government of a country. They are called in different expressions such as terrorists²⁹, guerillas, rebels, insurgents and belligerents. According to the fact that there is no unit literature used by different authors, under international law the title of a non-State actor has distinct legal consequences.³⁰

If one wants to become familiar with the terminology of armed groups acting within a country, it is inevitable to introduce the process of formation of them. The basis of a public revolution begins from “demonstrations”. When demonstrations turn into violence it is called “popular commotion”. If the demonstrations go on and turns into formal disobedience, it is called “sedition”. If sedition and violations spread from city to city and from province to province in a manner that endangers the sovereignty of government it is called “insurrection”. The next phase is the formation of factions. The nation will be divided into two opposite armed groups (pro-government and dissidents) and at last the republic turns into a civil war.³¹

²⁷ . Ibid.

²⁸ . Jean d’Aspremont , “Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents” , International and Comparative Law Quarterly, *ISSN*0020-5893 ,P18.

²⁹ .Usually governments accuse their opposition armed forces as terrorists because illegitimacy is the common character of terrorism and insurgency, Ibid, P13.

³⁰ . Hitoshi Nasu, “Status of Rebels in Non-International Armed Conflict”, The Australian National University, Louise Dowsald-Beck and Azizur Rahman Chowdhury, International Humanitarian Law – An Anthology, LexisNexis Butterworths, India, 2009, P3, [<http://ssrn.com/abstract=1663477>].

³¹ . Andrew Clapham, “The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement”, Geneva Academy of International Humanitarian Law and Human Rights, February 2010, PP16_18.[Electronic copy available at: <http://ssrn.com/abstract=1569636>]. This was exactly what happened in Libya; hundreds of armed groups organized in towns, cities and religious institutions and civil war of Libya in 2012 took place. Refer to “Death of a Dictator, Bloody Vengeance in Sirte”, Human Rights Watch, October 2012, ISBN: 1-56432-952-6.P18 And Statement of the chairperson of

International law and relations use the common expression of “rebel groups”³² for all sorts of opposition armed groups which fight against the established government of a country. ³³ The rebels are not organized sufficiently and don’t have the capacity to engage in regular and considerable operations. Rebels are called “insurgents” when there is unorganized civil disorder in the country but it is not still a full scale war.³⁴ Rebels have no status and protection under international law. Internationally recognized³⁵ rebels are called “belligerents” ³⁶ and this recognition attaches them limited international capacity.³⁷ The status of insurgents in content and scope is more limited than belligerents.³⁸

In order to determine whether libyan NTC was belligerents, we shall examine the constitutive elements of belligerents and then make a comparison with the Libyan NTC. An additional protocol to the Geneva Conventions 1997 defines belligerents as “... organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.³⁹

It is evident that from the above mentioned definition three necessary elements of belligerency are:

the African Union Commission, Dr. Jean Ping, at the meeting of the international contact group on Libya, Rome, Italy, 5 MAY 2011.

³² . for example refer to Malkom N. shaw, “International law”, Cambridge University Press, Sixth Edition,2008, P1317.

³³ . Edre U. Olalia, “The Status of International Law of National Liberation Movements and Their Use of Armed Force” , International Association of People’s Lawyers, P2,[<http://www.iadllaw.org>].

³⁴ .Ibid.

³⁵ .for debates on recognition of non-state actors and types of recognition please refer to next chapter.

³⁶ . Hitoshi Nasu, “Status of Rebels in Non-International Armed Conflict”, The Australian National University, Louise Dowsald-Beck and Azizur Rahman Chowdhury, International Humanitarian Law – An Anthology, LexisNexis Butterworths, India, 2009, P4.

³⁷ . Ibid,P3.

³⁸ . Edre U. Olalia, “The Status of International Law of National Liberation Movements and Their Use of Armed Force”, International Association of People’s Lawyers, P20,[<http://www.iadllaw.org>]

³⁹ . 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relative to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (hereinafter Additional Protocol II).

i. Existence of a Responsible Command⁴⁰

It is logic for any organized group to be under the rule of an authority. Even terrorists and hoodlums have commanders. Obviously, without the existence of a central authority it is impossible for an armed group to occupy and control parts of the national territory. So what is the difference between terrorists and belligerents? It is true that every group has a leader but the belligerent gain international personality and are bound by International Humanitarian Law (IHL). Responsibility comes to personality. There must be an authority to conduct hostilities in accordance with the rules of war and be responsible for the violations of IHL. The responsibility for violations of IHL such as war crimes rests upon individuals.

There is no doubt that Libyan rebels acted under NTC⁴¹ and NTC was recognized as the responsible authority and representative of the Libyan people. Moreover, the Libyan rebels, themselves, recognized NTC as their leader.⁴²

Evidence that Libyan NTC was the responsible authority of Libyan rebels is reflected in the declarations made by States. For example on 6th of April, Ahmet Davutoglu, Turkish foreign minister described Turkey's strategy "to encourage the TNC and the Gaddafi regime to agree to a cease-fire".⁴³ Germany recognized Libyan rebels and announced that was just an expression of approval of the NTC's actions.⁴⁴

⁴⁰ . For more info please refer to Hitoshi Nasu, "Status of Rebels in Non-International Armed Conflict", The Australian National University, 2009, P4, [<http://ssrn.com/abstract=1663477>]. Malcom Shaw instead of "responsible command" prefers to use "responsible authority" refer to Malkom N. shaw, "International law", Cambridge University Press, Sixth Edition, 2008, P1317.

⁴¹ . For example African Union during its meeting on 26 August 2011 made the recognition of NTC as "Government" conditional to creation of a TG but affirmed that NTC toppled Gaddhafi. Anyway Sithole, "The African Union Peace and Security mechanism's crawl from design to reality: Was the Libyan crisis a depiction of severe limitations?", African Journal on Conflict Resolution, volume12, number2012, ISSN 1562-6997, P123.

⁴² . Emily O'Brien and Andrew Sinclair, "The Libyan War: a Diplomatic History", Center on International Cooperation, New York University, August 2011, p5.

⁴³ . Ibid, p14.

⁴⁴ . Jonte van Essen, "De Facto Regimes in International Law", Utrecht Journal of International and European law, Volume 28/Issue 74, ISSN: 0927-460X, P42. , for more information on recognition of NTC as responsible authority please refer to ZOË HOWE, "Can the 1954 Hague

ii. Exercise Control over part of Territory

The territorial control must be effective that rebel group shall be able to implement military operation.⁴⁵ The importance of “effective control” is that the recognized rebel group must prove its ability of implementation of international law rules on a specific territory. International community considers “control” as a fundamental clause in recognition of rebel groups. In lack of effective control there is no guarantee that the rules of IHL and human rights are implemented correctly and nobody will be responsible for those violations. We shall bear in mind that responsibility comes with power. Effective control is a sign of the existence of a unique *de facto* power in a particular territory.

In the 66th session of General Assembly Bolivia’s delegate confessed the fact that NTC was controlling parts of Libya.⁴⁶ The Council of European Union at its meeting on 20th of June 2011 expressly referred to the effective control of NTC on vast parts of Libya.⁴⁷ Effective control of NTC on early days of eruption of war on eastern and Libyan oil reserves was reported by the media.⁴⁸

iii. Ability to Shoulder International Obligations

This element is interconnected with effective territorial control. As mentioned earlier, responsibility comes with power. A rebel group is responsible under IHL when it controls the territory and rules the militia groups and people. A rebel group without educated and knowledgeable elites who know the language of international community i.e. international law has no chance of recognition.

In this regards, NTC during the violence in Libya declared a statement in which emphasised the importance of principles of

Convention Apply to Non-state Actors?: A Study of Iraq and Libya”, Texas International Law Journal, Volume 47, Issue 2, ISSN: 0163-7479 727, PP422_423.

⁴⁵ . Hitoshi Nasu, “Status of Rebels in Non-International Armed Conflict”, The Australian National University, 2009, P3, [<http://ssrn.com/abstract=1663477>].

⁴⁶ . General Assembly, GA/11137, Sixty-sixth General Assembly Plenary 2nd Meeting.

⁴⁷ . Council conclusions on Libya, 3101st Foreign Affairs Council meeting Luxembourg, 20 June 2011, Council of the European Union, P2.

⁴⁸ . David D. Kirkpatrick & Mona El-Naggar, “Qaddafi’s Grip Falts as His Forces Take On Protestors”, N.Y. TIMES Feb. 21, 2011, [[Http://www.nytimes.com/2011/02/22/world/Africa](http://www.nytimes.com/2011/02/22/world/Africa)]. Cited in Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya, ZOEË HOWE, Texas International Law Journal, Volume 47, Issue 2, ISSN: 0163-7479 727, P421.

democratic rule, independence and sovereignty of other nations, international peace and security. It also declared its respect for IHL and IHRL declarations and denounced racism, discrimination and terrorism.⁴⁹

This declaration signalled that Libyan NTC members were aware of the responsibilities and obligations⁵⁰ of recognized belligerents and announced that NTC was bound by IHL rules specifically the Geneva Conventions provisions “relative to the treatment of prisoners of war”.⁵¹

We can also examine the nature of NTC by studying the advantages of its recognition. Generally, a recognized rebel group gets some privileges as follows:⁵² firstly, The struggle of the group against the seated government becomes legitimate and the rebel group will be accepted by the international community.

The African Union (AU) at its meeting at 26th August 2011 recognized Libyan NTC as a rebel group and rendered its recognition as a government to creation “of an all inclusive transitional government”.⁵³ The NTC was also recognized by the European Union (EU) subsequently as an authority which represented the “aspirations of the Libyan people”. The EU’s support for Libyan NTC was announced in a declaration.⁵⁴ NTC on its early days was recognized as “the legitimate representative

⁴⁹ . Understanding armed groups and the applicable law, *International Review of the Red Cross*, Volume 93 Number 882 June 2011, P468. On the legal effect of unilateral acts of states and government please refer to Hosein Miri, “The Authentication of Countries’ Unilateral Acts as a Source in International Law”, *Journal of Basic and Applied Scientific Research*, ISSN 2090-4304, P7.

⁵⁰ . The difference between obligation and responsibility is that obligations mandate the subjects of a legal system according to the related norms but when obligations are violated responsibility arises. In other words, there is no responsibility where there is no breach of law. but authors use these two expressions alternatively.

⁵¹ . Ibid.

⁵² . Stefan Talmon, “Recognition of the Libyan National Transitional Council”, *American Society of International Law (ASIL)*, Volume 15, Issue 16, June 16, 2011, *ISSN: 0272-5037*, P2.

⁵³ . Anyway Sithole, “The African Union Peace and Security mechanism’s crawl from design to reality: Was the Libyan crisis a depiction of severe limitations?”, *African Journal on Conflict Resolution*, volume12, number2012, *ISSN 1562-6997*, P123.

⁵⁴ . Council conclusions on Libya, 3101st Foreign Affairs Council meeting Luxembourg, 20 June 2011, Council of the European Union, P2. The statement of “recognition as the legitimate representative of people” or “representative of aspirations of people” is an evidence that the authority is recognizing the armed group as rebels but not a “Government”.

of the Libyan people” by a dozen of States such as France⁵⁵, Italy, Britain, Turkey, Jordan, and Qatar . ⁵⁶

Secondly, The group will be allowed to speak for the people in international organizations and opens “representative offices” in other States. Recognition of a rebel group confers them limited international personality but it does not give right to maintain diplomatic relations with foreign States.⁵⁷

1.In the case of the Libyan NTC the recognizing States sent “special representative”, “diplomatic envoys” or “special ambassadors” to Benghazi. These representatives had diplomatic functions but didn’t have formal diplomatic status.⁵⁸ For example, foreign minister of France on the 29th of March 2011 told reporters that “the French diplomat sent to the NTC was not an ambassador” because they hadn’t recognized NTC formally yet.⁵⁹ US, Britain and Germany⁶⁰ also sent envoys to Benghazi but did not offer recognition. The EU also opened diplomatic office in Benghazi but refrained offering formal recognition to the NTC.⁶¹

Thirdly, NTC recieved financial aid from different sources such as the Libyan Contact Group (consisted of Italy and France)⁶², EU⁶³ ,

⁵⁵ . Patrick Dumberry, "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", *The European Journal of International Law(EJIL)*, Vol. 17 , No.3, 2006, *ISSN* 0938-5428, P310.

⁵⁶ . ZOË HOWE, “Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya, *Texas International Law Journal*”, Volume 47, Issue 2, *ISSN: 0163-7479 727*, PP421-423.

⁵⁷ . Rudiger Wolfrum and Christiane E. Philipp, “The Status of the Taliban: Their Obligations and Rights Under International Law”, *Max Plank Yearbook of United Nations Law*, Volume 6, 2002, *ISSN: 1389-4633*, P580.

⁵⁸ . Stefan Talmon, “Recognition of the Libyan National Transitional Council”, *American Society of International Law (ASIL)*, Volume 15, Issue 16, June 16, 2011, *ISSN: 0272-5037*,PP4,5.

⁵⁹ . Ibid.

⁶⁰ . Jonte van Essen, “De Facto Regimes in International Law”, *Utrecht Journal of International and European law*, Volume 28/Issue 74, *ISSN: 0927-460X*, P42.

⁶¹ . Emily O’Brien and Andrew Sinclair, “The Libyan War: A Diplomatic History”, *Center on International Cooperation*, New York University, August 2011, p18.

⁶² . Ibid,P17.

the Security Council of UN⁶⁴, US and UK⁶⁵.

Finally, NTC also Gained legal capacity to conclude agreements with the representatives of other States.⁶⁶

This factor is a controversial issue. Nasu says recognized belligerents have the capacity to conclude agreements with foreign States but it does not confer them international personality.⁶⁷ On the other hand Wolfrum and Philipp believe that recognized rebels gain limited international personality but they don't have the capacity to conclude contracts with other nations.⁶⁸

If we accept the viewpoint of Nasu there raises a question; if recognized belligerent doesn't have any personality under international law, how they have the capacity to conclude agreements with other States? In every legal system a minimum legal capacity is required for a person to enter contracts.

Libyan NTC signed agreements and memorandum understanding with Italy⁶⁹, it established a new contract for exporting oil⁷⁰ and emphasized the continuity of contracts.⁷¹

⁶³ . EU support to the Libyan ,National General Congress: induction programme to the benefit of the 200 newly elected members started in Tripoli on 7 ,November 2012, European Union, A 498/12, [www.eeas.europa.eu].

⁶⁴ . Report of the Secretary-General on the United Nations Support Mission in Libya, Security Council, S/2012/129, 1 March 2012.

⁶⁵ . Herbert Smith, Libya Update, Japan dispute avoidance newsletter, number 110, November 2011.

⁶⁶ . Hitoshi Nasu, "Status of Rebels in Non-International Armed Conflict", The Australian National University, 2009, P19, [<http://ssrn.com/abstract=1663477>].

⁶⁷ . *ibid.*

⁶⁸ . Rudiger Wolfrum and Christiane E. Philipp, "The Status of the Taliban: Their Obligations and Rights Under International Law", Max Plank Yearbook of United Nations Law, Volume 6, 2002, *ISSN*: 1389-4633, P580.

⁶⁹ . Arturo Varvelli, "Italy and new Libya between continuity and change", ISPI, No. 219 - JUNE 2012, P4.

⁷⁰ . Julian Lindley-French, "Libya the Transition Clock", PRISM 3, no. 2, *ISSN*: 1448-4404, P6.

⁷¹ . "Libya: Challenges after Liberation", Libya Working Group Report: MENA Programme, Chatham House, November 2011, P12.[<http://www.chathamhouse.org>]. these contracts do not fall under the definition of "Treaties" because according to the Convention of Vienne on treaties, a treaty in order to be a source of international law and be recognized by ICJ shall be concluded

Generally, from the analysis we can conclude that Libyan NTC emerged as a rebel group on the political face of Libya and then was recognized as belligerents at the early stages of transition. Libyan NTC was an entity that entitled all the circumstances of recognized rebel groups under the classic international law. In order to avoid misunderstandings on the nature of NTC we wish to emphasise that the formation and recognition of Libyan NTC could be divided into two periods: i. Early stages; that NTC was recognized as belligerents and (ii) later stage; increase of its capacity and turning into a “government”.

NTC of Libya as a Government

Successful rebels which during hostilities became more organized, may represent the de facto government of the state.

De facto regimes (DFRs) according to M Schoiswohl are entities which exercise at least some effective authority over a territory within a State.⁷² Kelsen adds the subjective element of “the goal of being recognized by international community” as the official government of the State.⁷³ Essen highlights that a DFR is an entity which is not recognized as “the official government of the State” by the international community yet.⁷⁴ Curtis refers the objective element of DFRs and that is non-electoral basis of them. In his definition *de facto governments are unauthorized forces which are*

between states, in written form and ruled by international law. The contracts made by belligerents and even de facto authorities are not included in the definition. for the text of Vienna Convention on treaties please refer to : [www. <http://untreaty.un.org>]

⁷² . M Schoiswohl, ‘De Facto Regimes and Human Rights Obligations-The Twilight Zone of Public International Law?’ [2001] Austrian Review of International and European Law 50. Cited in Jonte van Essen, “De Facto Regimes in International Law”, Utrecht Journal of International and European Law, ISSN 0927_460X,P32.

⁷³ . H Kelsen, ‘Recognition in International Law: Theoretical Observations’ 1941,P 35 AJIL; H Lauterpacht, “Recognition in International Law”,reprinted from Yale Law Journal 1947; J Frowein, Das de facto-Regime im Volkerrecht(Carl Heymanns Verlag 1968).P7.

⁷⁴ . Jonte van Essen, “De Facto Regimes in International Law”, Utrecht Journal of International and European Law, ISSN 0927_460X, P33.

*constituted without the expressed consent of the governed people.*⁷⁵

One can conclude that DFRs are unauthorized organized forces which control some or all parts of the territory of a State with the goal of being recognized as the official government of that State, yet not recognized by the international community.

First element DFRs: Organized Armed Forces

A rebel group in order to be recognized as the *de facto* government of a State shall be organized⁷⁶ because every armed group such as clans, sub-clans, factions and other unlawful combatants are not organized forces under IHL.⁷⁷ Even if unlawful combatants occupy and control some parts of the land, they don't have a chance to be recognized as *de facto* government of the State unless they are organized.

It is evident that any social group, official or non-official, has some kind of organization and division of responsibilities among members. So exactly what is the meaning of "organized armed group" under IHL? Article 43 of the Protocol Additional I to the Geneva Conventions of 12 August 1949, refers to "organized armed group" as to be "under responsible command".⁷⁸ The ICRC⁷⁹ explains that "the existence of a responsible command implies some degree of organization"⁸⁰ ... it means that the organization is capable of carrying out concerted military operations and "imposing discipline in the name of a *de facto* authority".⁸¹ There is a point that this criterion cannot separate

⁷⁵ . Mr. Vincent J. Curtis , "The Three Block War:Its Causes and the Shape of the Peace", The Canadian Army Journal, Vol. 10.2, Summer 2007, ISSN 1713-773X, P54.

⁷⁶ . Ryan Kingsbury , "Applicability of the Geneva Convention (III) to the Global War on Terrorism: History and Perspectives", Undergraduate Research Journal, Volume 5, Number 1,ISSN 1538-9421 ,P12.

⁷⁷ . Carolus Grütters and Ashley Terlouw, Nijmegen Migration Law Working Papers Series 1998/01, Radboud University Nijmegen, ISSN 2212-7526,P37.

⁷⁸ .The text of the protocol is reachable at [<http://treaties.un.org/doc>].

⁷⁹ .International Committee of the Red Cross.

⁸⁰ . [ICRC Commentary on the 1977 Additional Protocols to the Geneva Convention of 1949, P 1352 cited in](#) Michael A. Newton and Casey Kuhlman, "Why Criminal Culpability Should Follow the Critical Path:Reframing the Theory of Effective Control", Netherlands Yearbook of International Law, Volume XL , 2009 ,doi:10.1017/S0167676809000014, P27.

⁸¹ . Stephen Pomper, "Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice", International Law Studies, Volume 88, 2012, ISBN 978-1-935352-05-1, P160.

insurgents from terrorists because terrorist groups are sometimes highly organized.

Article 4 of the Third Geneva Convention adds three criteria to the elements which distinguish organized groups of terrorists and other unlawful combatant. According to Article 4 an organized group shall:

- i. Be under the command of a person responsible for his subordinates
- ii. Carry arms openly
- iii. Have a fixed distinctive sign recognizable at a distance
- iv. To conduct their operations in accordance with the laws and customs of war⁸²

In the case of Libya the rebel forces become organized in early stages of the conflict⁸³. The former army officers who joined the revolution by 27th of February 2011⁸⁴ played a great role in organizing the insurgents.⁸⁵ Actually Libyan NTC itself is the symbol of organized armed forces and its formation provided a strong proof of the existence of ranking and discipline among Libyan insurgents.

Second element: Effective Control

An organized military group in order to be recognized as the *de facto* government shall control the territory effectively. An exercise of “effective control” is the primary criterion for a *de facto*

⁸² .you can reach the text of Geneva Conventions and its additional protocol on [<http://www.icrc.org/ihl.nsf/full/380>].

⁸³ . Country Reports on Human Rights Practices for 2011 ,United States Department of State, P1 and Kenneth Øhlenschläger Buhl, “Legalization of Civil Wars: The Legal Institutionalization of Non-international Armed Conflicts”, [Journal on Ethnopolitics and Minority Issues in Europe](#)(JEMIE),2009, Volume 8, ISSN 16175247, P36.

⁸⁴ . “Libya: A European War?” , European Union Center of Excellence, July 2011,P1.[www.unc.edu].

⁸⁵ . The ICRC commentary to the article 4 explains that the organization in an armed group may not necessarily be the same as hierarchical as regular armed forces. Refer to John Cerone, “Much Ado about Non-State Actors” , *Sandiego International Law Journal* , 2009, P335 , cited in Stephen Pomper, “Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice”, *International Law Studies*, Volume 88 , ISBN 978-1-935352-05-1, P160 .

government.⁸⁶ It is a fact that “recognition” is a political act and the recognizing authority itself assesses “effective control” but it does not mean there is no criterion for distinguishing it.

Effective control requires permanent military or physical presence of insurgents in the territory. Wolfrum and Philipp reiterate that the physical presence shall not be “of a temporary nature”.⁸⁷ In other words insurgents cannot claim their effective control over the areas which war is still going on.

The level of control is different from case to case. In international law there is no legal source that delineates certain amounts of control to be defined as “effective control”.⁸⁸ The highest degree of control is the one which is conjugated with popular support. Malcom Shaw says the mere control over the territory is not enough for effective control and the rebels shall administer the people and properties within the land.⁸⁹ Taft says effective control is not just having a permanent military presence in the territory but “popular support” is also a fundamental element.⁹⁰ Here arises a question; concerning the fact that *de facto* governments have no electoral mandate, how can one discern the existence of popular support?

In an intra-State war, two main armed groups are fighting each other⁹¹. It is evident that the abuse of civilians by one side will

⁸⁶ . Jonte van Essen, “De Facto Regimes in International Law”, Utrecht Journal of International and European Law, ISSN: 0927-460X, P47 and . M Peterson, “Recognition of Governments: Legal Doctrine and State Practice, 1815-1995” ,Palgrave Macmillian, 1997, P36.

⁸⁷ . Rudiger Wolfrum and christiane E. Philipp , “The Status of the Taliban: Their Obligations and Rights under International Law”, Max Plank Yearbook of United Nations Law, Volume 6, 2009, P562.

⁸⁸ . “Humanitarian debate: Law, policy, action Conflict in Afghanistan II”, International Review of the Red Cross, Volume 39,Number 881, March 2011,P73.

⁸⁹ . N. shaw, “International law”, Cambridge University Press, Sixth Edition,2008,P641.

⁹⁰ . Odette Lienau, Who Is the ‘Sovereign’in Sovereign Debt? Reinterpritting an Open Moment in the Early 20th Century, International Law and Justice Working Papers, History and Theory of International Law Series , 2007, ISSN: 1552-6275, P24 and Jonte van Essen , “De Facto Regimes in International Law” , Utrecht Journal of International and European law, Volume 28/Issue 74, ISSN: 0927-460X,P47.

⁹¹ .On the case of Libya the armed groups were devided into two parts: rebels and gddafi loyals. Refer to Emily O’Brien and Andrew Sinclair, “The Libyan War: A Diplomatic History”, Center on International Cooperation, February-August 2011, P14.

increase the legitimacy of the other side⁹² because people have a natural tendency to avoid pain and suffering.

In our opinion, the “popular support” is not an integral part of effective control. Of course the popular support of a rebel group increases the level of control but it is not a must. The sole permanent indisputable presence of insurgents in territory provides the bedrock of a de facto authority and it brings the rebels limited international personality and therefore international responsibility under IHL and IHRL.

If we regard the element of “popular support” as a fundamental ingredient of “effective control” we have inadvertently excluded the majority of rebels from responsibility and allowed them to do whatever they want to do with the people under their control. As a principle of law, penal code shall be interpreted strictly based on the rule of “legality of crimes and punishments”. The strict interpretation of penal code shall not cause a gap in law in such a way that criminals find an opportunity to exclude themselves from legal jurisdiction.

Military occupation of land accompanies control and power. With power comes responsibility. More power means more responsibilities. Occupation of land increases the power of rebel groups so their responsibility will also increase in parallel disregarding the existence of popular support. According to additional protocol of the Geneva Conventions 1977, IHL rule is applicable to intra-State wars but about the applicability of International Human Rights Law (IHRL) there are disputes. Occupation of land plus “exercising governmental functions”⁹³, turns the armed group into “Governor”. The relationship between government and people is covered by human rights.

⁹² . This is exactly what happened in Chechenya. The Russian troops oppressed local people and turned the population against their presence and resulted to increase of the legitimacy of the Chechen fighters. please refer to: Yury Scherbich, “What Law Applies to the Conflict in Chechenya: THE Legal Gap of Contemporary International Humanitarian Law of Non-International Armed Conflicts”, Free Law Journal, Special Issue,- Volume 1, Number 1 , AUGUST 2005 , ISSN 1712-9877, P63.

⁹³ . Such as handling security of civilians and managing police force, public financial management, health and education. Media reform and Responding to the Challenge of Stabilisation in post-conflict Libya.

Back to the libyan NTC, it never tried to exclude itself from responsibility and interestingly issued a statement and reiterated its obligations under IHL and IHRL rules⁹⁴. Libyan NTC by declaring such a statement paved the way towards acquiring recognition as a *de facto* government (at the first resort) and then *de jure* government of Libya.

Anyhow, in the the case of Libyan NTC, insurgents got limited control to the eastern parts of Libya at the early stages of the conflict.⁹⁵ Thus, NTC had the primary condition of being recognized as a local *de facto* government and it extended its control over all parts of the territory of Libya within eight months.⁹⁶ NTC was formed by opposition forces which organized themselves after public demonstrations in February of 2011. Moreover, the Gaddhafi forces abused the people of Libya so brutally that the League of Arab asked Security Council to create no fly zone areas in Libya.⁹⁷ In conclusion, the NTC was highly supported by Libyan people and had a high level of “effective control” in Libya.

Besides the above mentioned constitutive elements of *de facto* governments there are some emblems of the formation and existence of *de facto* governments. In Dix case, US-Venezuela Commission⁹⁸ highlighted that the success of a revolution provides certain proof of the formation of a *de facto* government and international responsibility is attributable to it. Another factor for

⁹⁴ . “Understanding armed groups and the applicable law”, International Review of the Red Cross, Volume 93, Number 882, June 2011, [ISSN 1560-7755](#) ,P214.

⁹⁵ . on 25 August 2011 Media reported that forces supporting the National Transitional Council (NTC) have taken control of most of the country. <http://www.un.org/apps/news/story.asp?NewsID=39383&Cr=libya&Cr1> [date of access 4 Nov 2012].

⁹⁶ . Stefan Talmon, “Recognition of the Libyan National Transitional Council”, American Society of International Law, June 2011, P7, and Council of the European Union, Council conclusions on Libya 3117th FOREIGN AFFAIRS, meeting Luxembourg, 10 October 2011.

⁹⁷ . Kieran Morris, “The Arab Spring: The Rise of Human Security and the Fall of Dictatorship”, Internet Journal of Criminology, ISSN 2045-6743 (Online), P19. [http://www.internetjournalofcriminology.com/Morris_The_Arab_Spring_IJC_July_2012.pdf].

⁹⁸ . Mr. Dix was an American national who involved business in Venezuela at the time of Venezuelan revolution in 1903. The revolutionaries stole Mr.Dix`s cattles and the tribunal decided compensation for his stolen cattle. Dix case, US–Venezuela Commission, Award of 1903, at9 UNRIAA 119, at 120, Patrick Dumberry, “New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement”, The European Journal of International Law Vol. 17 , 2006, doi: 10.1093/ejil/chl016, P609.

distinguishing *de facto* governments is exercising functions of governments such as legislating and maintaining courts and judicial system⁹⁹.

Further, the Libyan NTC exercised executive authority before the formation of its interim government¹⁰⁰ and reformed justice and security sector.

According to the provided facts there is no doubt that NTC entitled all constitutive and emblems of *de facto* governments as it was recognized by more than 40 countries as *de facto* government of Libya.¹⁰¹ International organizations such as NATO, European Union, and the Organization of the Islamic Cooperation, the League of Arab States, and Gulf Cooperation Council¹⁰² also recognized NTC as the sole representative of the Libyan people which is a proof of external support for NTC and recognition as *de facto* government.

De jure recognition usually succeeds *de facto* recognition.¹⁰³ The capacity of recognition of NTC increased by the League of Arab states members when on 27th of August 2011 NTC delegates filled the seats of Libya at the organization.¹⁰⁴ At 20th of September 2011¹⁰⁵, the General Assembly of the United Nations officially recognized NTC as the representative of Libya and voted to accept

⁹⁹ . Sydney Kentridge, “A Judge’s Duty in a Revolution , The case of Madzimbamuto v. Lardner-Burke”, Journal of the Commonwealth Magistrates’ and Judges’ Association , Vol 15 no. 2 December 2003,P37.

¹⁰⁰ . Country Reports on Human Rights Practices for 2011, United States Department of State.[www.state.gov]

¹⁰¹ . “The Battle for Libya; Killings, Disappearances and Torture”, Amnesty International, May 2011, P23 and Stefan Talmon, “Recognition of the Libyan National Transitional Council”, American Society of International Law (ASIL), Volume 15, Issue 16, June 16, 2011, ISSN: 0272-5037,P2 .

¹⁰² . [<http://www.un.org/apps/news/story.asp?NewsID=39383&Cr=libya&Cr1>][date of access 4.Nov.2012].

¹⁰³ . Shaw_460

¹⁰⁴ .[http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1277][date of access: 4.Nov.2012].

¹⁰⁵ . [<http://www.un.org/sg/statements/index.asp?nid=5529>][date of access: 4.Nov.2012].

the credentials of delegates¹⁰⁶ and since then NTC was recognized as a *de jure* government of Libya.¹⁰⁷

Conclusion

From the above analysis we can now conclude that NTC started as an organized rebel group, increased its control on parts of Libya, got capacity from belligerents and *de facto* government¹⁰⁸ to *de jure* government of Libya. On 7th of July 2012 elections held in Libya and the NTC handed over power to Libyan General National Congress (GNC).¹⁰⁹ Analogically, NTC is like a living creature; it born, lived and died.

The transition in Libya started from the early days of the revolution. NTC in transition acted as a *de facto* legislative authority and its interim government that was formed on 23th of November¹¹⁰ exercised executive authority. NTC drew a clear timetable for the rest of transition in Libya in its declaration of liberation.¹¹¹ In the declaration the point of transition was towards a “democratic Libya”¹¹² and the establishment of an interim government was the first step. Within 90 days of declaration an electoral commission was set up and the elections were held within 240 days, and a national congress established which gave

¹⁰⁶ . General Assembly GA/11137 Sixty-sixth General Assembly Plenary 2nd Meeting .[<http://www.unric.org/html/english/library/backgrounders/libya.pdf>].

¹⁰⁷ . Council of the European Union, Council conclusions on Libya 3117th FOREIGN AFFAIRS, meeting Luxembourg, 10 October 2011.

[http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/125028.pdf]

¹⁰⁸ . Stefan Talmon, “Recognition of the Libyan National Transitional Council”, American Society of International Law (ASIL), Volume 15, Issue 16, June 16, 2011, *ISSN: 0272-5037*,P3.

¹⁰⁹ . Report of the Secretary-General on the United Nations Support Mission in Libya to Security Council, 30 August 2012, S/2012/675. And Christopher S. Chivvis, Keith Crane, Peter Mandaville, Jeffrey Martini, “Libya’s Post-Qaddafi Transition The Nation-Building Challenge”, National Security Research Division,P10,[www.rand.org].

¹¹⁰ . Country Reports on Human Rights Practices for 2011 United States Department of State.[www.state.gov]

¹¹¹ . Kristina Kausch, “Constitutional Reform in Young Arab Democracies”, Policy Brief, Number 101 - October 2011, *ISSN: 1989-2667*,P3.

¹¹² . Council of the European Union, 3082nd Foreign Affairs , meeting Luxembourg, 12 April 2011, and Paul Salem and Amanda Kadlec, “Libya’s Troubled Transition, Carnegie Endowment for International Peace”, [www.Carnegie-Mec.org],P3.

democratic legitimacy to the government. The government drafted the new constitution and put it to popular referendum.¹¹³ NTC followed the transition roadmap at different levels. It formed the police forces, trained and rebuilt army¹¹⁴ to consolidate security and bring stability to the country, tried to recover Libyan assets frozen abroad, deal with transitional justice issues and revived oil production.¹¹⁵

Thus, NTC started its role as the leader of rebel groups, increased its capacity and turned into a “government”. The NTC leaders declined a clear plan for the future of Libya. They intended to create fundamental changes in the political and social system of Libya. NTC was formed around two weeks of popular eruption as one can suspect its formation even before the eruption of demonstrations. Movement of a rebel group to a de facto and the de jure government is a long journey with its perils. Not every rebel group has the chance to be recognized as the only representative of the people. Taliban controlled most parts of the territory of Afghanistan but certain mistakes such as hijacking Indian Airlines airplane¹¹⁶, playing a great role on 11th of September attacks and refusing to extradite Bin Laden to US changed its position from a rebel group to terrorists . On the other hand, NTC in its statement declared its respect for IHL and IHRL. There is no doubt that NTC formed a government which its interim government exercised executive power and itself acted as a legislative authority.¹¹⁷ NTC was successful in both phases of transition i.e. peacemaking and peacekeeping.

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¹¹⁴ . Libya Working Group Report: MENA Programme, “Libya: Challenges after Liberation”, November 2011 , P9.

¹¹⁵ . Paul salem and amanda Kadlec, “Libya’s Troubled ransiTion, Carnegie Endowment for International Peace”, [www.Carnegie-Mec.org],P5.

¹¹⁶ . Alka Jauhari, “India-Pakistan Relations: International Implications”, Asian Social Science, Vol. 9, No. 1, 2013, ISSN 1911-2017, P47.

¹¹⁷ . The resolution of Security Council reiterated the role of NTC in transition SC Resolution 2040. NTC also established judicial committees refer to Ali Abdullatif Ahmida, “The Libyan National Transitional Council: Social Bases, Membership and Political Trends”, Al Jazeera Centre for Studies, October 2011 , Al Jazeera Centre for Studies ,P5.

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A Critical Evaluation of the Effectiveness of the Mechanisms set out in the Industrial Disputes Act of Sri Lanka for the Prevention and Settlement of Industrial disputes.

Wasana Panditharatne

Abstract

Alongside the growing intensity of economic competition, what appear to be developing are industrial disputes at national levels. Particularly, developing countries like Sri Lanka are facing more complex issues range from wages, termination of employment, job insecurity, restructuring and downsizing.

Statutory mechanisms for settlement of industrial disputes which include the traditional methods like conciliation, arbitration and adjudication are being challenged to be effective in the new environment. Therefore, it is essential that more efficient mechanism exists in the interest of both economic growth and social justice.

Hypothesis of ‘The statutory mechanisms for the prevention and settlement of industrial disputes are not adequate to cope with the increasing level of industrial disputes in Sri Lanka.’ will be tested and the expected outcome will be to introduce a system which will be more effective, less time consuming and less expensive. It will focuses specifically on preventive techniques such as grievance redressal, mediation and social dialogue.

The principal methodology will be a literature survey. A comprehensive study will be carried out to identify the unsettled areas and complexities in the field of settlement of industrial disputes. Information will be gathered by conducting interviews among selected groups such as employers, employees and labour officials.

Introduction

The prompt and equitable settlement of industrial disputes is an important requirement to maintain sound industrial relations, and it is essential that appropriate dispute settlement mechanism exist to facilitate such settlement. The provision of an effective system of dispute settlement is particularly significant in the South Asian region. Many countries in the region are entering into an era of fast and challenging transition and globalization of their economies placing new demands on the social partners. The absence of effective dispute settlement procedures can result in widespread industrial conflicts. It is a recognized fact that, in many developed and developing countries today, the dispute settlement mechanism has become too legalistic, too expensive and too slow. The future of industrial dispute settlement with the existing traditional structures and the related labour law reforms are now being studied and debated in many countries. Serious consideration is being given to the prevention of disputes through various innovative techniques and approaches which enable parties to solve their problems amicably.

This paper focuses on the mechanisms established in Sri Lanka for the prevention and settlement of industrial disputes. It attempts to identify the distinctive features of these mechanisms set up to deal with industrial disputes, and bring out the main similarities and differences in the respective countries. Therefore an outline of the roles played by the statutory bodies in prevention and settlement of industrial disputes at both the enterprise and national levels are initially presented.

Thereafter, the discussion leads to a review of recent trends in settlement of industrial disputes, and an analysis of the institutional frameworks for dispute prevention and resolution. Finally, the mechanisms used in dispute resolution are assessed and some recommendations for future development are presented.

Objectives of the study are to analyse the statutory mechanisms for the prevention and settlement of industrial disputes in Sri Lanka in order to identify the lacuna in the field of settlement of industrial disputes and recommend innovative and workable solutions to increase the effectiveness of industrial dispute settlement process and its implementation.

A comprehensive study was carried out for the purpose of understanding the unsettled areas and complexities in the field of settlement of industrial disputes and its repercussions on the parties involved. In order to capture empirical reality on certain issues, information was gathered by conducting interviews among selected groups such as employers, employees and labour officials. For the purpose of analyzing existing laws, a literature survey was done on the books and articles published by academics and researchers.

Definition of Industrial Dispute

According to the Section 48 of the Industrial Disputes Act of Sri Lanka 'Industrial dispute' means any dispute or difference between an employer and a workman or between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment, or with the conditions of labour, or the termination of the services, or the reinstatement in service, of any person,

As it was held in *Colombo Apothecaries Co. Ltd. v. Wijesooriya*, 1

- (i) There must be a dispute or difference. This refers to the factum of a dispute or differences.
- (ii) The dispute or difference must be between an employer and a workman, or between employers and workmen, or between workmen and workmen. This refers to the parties to the dispute.
- (iii) The dispute or difference must be connected with the employment or non-employment or the terms of employment or with the conditions of labour or the termination of the services or the reinstatement in service of any person. This refers to the subject matter of the dispute.

The main difference between an industrial dispute and an individual dispute is that an industrial dispute deals with member of workmen whereas individual dispute only deals with a single workman, but ultimately an individual dispute may be transformed into an industrial dispute if certain preconditions are met.

History of Industrial Dispute Settlement in Sri Lanka

The history of dispute settlement mechanism in Sri Lanka goes back to the conciliation bodies up under the Industrial Dispute (Conciliation) Ordinance No. 3 of 1931 which was intended to bring about industrial peace by setting up machinery for settling disputes by conciliation where an industrial dispute was apprehended or existed, the statute enabled the Controller of Labour to take steps to enable parties to meet by themselves or their representatives under the presidency of a chairman mutually agreed upon or nominated by the controller.

In view of the labour unrest during the early years of the Second World War, the Government enacted the Essential Services (Avoidance of Strikes and Lock-outs) Order in 1942 with a view to ensuring that production and essential services were not hampered. All services essential to the war effort and the life of the community were declared 'essential services' and strikes and lockouts in such services were prohibited. Compulsory arbitration by special Tribunals or by District Judge was possible.

The conclusion of the Second World War led to the recession of the Regulation relating to Essential Services which was in any event unsuited to meet the growing industrial unrest arising out of the socio-economic and political changes that was a feature of the post-war era. These changes which the Trade Union Movement were in the fore front had an impact of labour law and legislation and due to the inadequacies of the Conciliation Ordinance of 1931 which remained the sole surviving state machinery for the regulation of industrial disputes to effectively meet the changing needs the Independent Government enacted the Industrial Disputes Act which was introduced in the form of a Bill in the House of Representatives on 20 June 1950.

The Industrial Disputes Act of Sri Lanka

The present Industrial Disputes Act No. 43 of 1950 (as amended) remains the singular most legislative enactment in the field of industrial relations by providing a legal framework through the instrumentalities of Collective Agreements, Labour Courts and the Commissioner of Labour for prevention investigation and settlement of industrial disputes. According to the preamble of the Act, it was enacted to provide for the prevention, investigation and settlement of industrial disputes. It also enables a workman whose services are terminated to make an application directly to the Labour Tribunal for relief. The Act exemplifies State intervention and control of industrial relations in Sri Lanka both directly through legislation and indirectly through Labour Courts. It provides a framework for peaceful resolution of industrial conflicts thus contributing to industrial peace. The Act has been subsequently amended several times for the purpose of introducing radical and significant alterations in the original Act such as establishing Labour Tribunals, new laws relating retrenchment of workmen, power to appeal against a order of Labour Tribunal to the Provincial High Court and gratuity jurisdiction of Labour Tribunal to workmen whose services have been terminated in an industry. Therefore with the present Industrial Disputes Act and with its subsequent amendments the concept of Industrial Jurisprudence has grown up in Sri Lanka, which is often distinct and contrary to common law.

Statutory Mechanism for the Settlement of Industrial Disputes in Sri Lanka

The Industrial Disputes Act No. 43 of 1950 (as amended) created a special system of statutory mechanism for the settlement of industrial disputes. The powers of this mechanism go well beyond

those of the common law courts. This statutory mechanism, unhampered by the common law of master and servant and the contract of employment, have built up a separate body of industrial law governing such important matters in the field of employment as termination and terms and conditions of employment. The Statutory mechanism that has been introduced by the present Industrial Disputes Act consists of five methods namely Conciliation, Arbitration, Industrial Court, Labour Tribunals and Collective Agreements.

Conciliation connotes the intervention of a third party who attempts to compose differences or to mediate between the disputing parties. It is the intervention of a third party which transform an otherwise bargaining process into one of conciliation. Conceptually mediation and conciliation are closely related, the only difference being that in the mediation, a third party takes an active part in submitting alternative proposals while conciliation results when the disputants get together to workout their own settlement.

The existing provisions relating to conciliation are found in the Industrial Disputes Act. According to Section 2 of the Act the Commissioner of Labour or his subordinates can intervene, whether on notice given or otherwise if they are satisfied that an industrial dispute exist or if they apprehend one, to make such enquiry into the dispute and take such other steps as may be necessary to resolve it whether by means referred to the Act or otherwise. The object being to promote a settlement of the disputes, these officers are entitled to resort to conciliation as a means to settlement. This type of conciliation is known as direct governmental conciliation and under this section a mode of settlement is direct.

In the process of Conciliation under the Industrial disputes Act, signing a memorandum of settlement under Section 12 (1) is very significant. It is a de-facto agreement setting out terms and conditions under which the industrial dispute is conciliated. The memorandum of settlement is legally binding on the parties to the dispute and become implied terms of contract of employment.

Where conciliation and mediation fails, the Commissioner of Labour may refer the dispute to voluntary arbitration; or recommend to the Minister of Labour that the dispute be referred for settlement by compulsory arbitration. However, it is not mandatory for the Minister to accept the Commissioner's recommendation and he may ignore it.

In terms of Section 3(1) d of the Industrial Disputes Act, voluntary arbitration takes place where the parties to an industrial dispute consent to the reference of such dispute by the Commissioner of Labour to an arbitrator chosen by the parties, or chosen by the Commissioner of Labour if the parties cannot agree on the nomination of an arbitrator; or where a collective agreement stipulates that the dispute be referred for voluntary arbitration.

In voluntary arbitration, the arbitrator is chosen by the parties concerned. Where the parties do not agree on a person, the arbitrator is nominated by the Commissioner. Where the parties are covered by a collective agreement, the Commissioner shall refer the dispute to an arbitrator drawn from the panel of arbitrators specified in such agreement.

The Act also provides for the reference of an industrial dispute to a body of arbitrators, in which event, such body shall consist of a person nominated by the employer, and another by the workman

or his trade union. The Chairman shall be jointly nominated by the parties or in the absence of such joint nomination by the Commissioner of Labour.

Awards made in voluntary arbitration are not legally binding on the parties except where the parties to the dispute are covered by a collective agreement.

Establishments not covered by such agreements rarely resort to voluntary arbitration for settlement of industrial disputes, since the awards are not binding and may be ignored by the parties to the dispute, when the award is not palatable to them.

Although voluntary arbitration would prove to be an effective method of dispute settlement, the requirement for the consent of both parties to the reference has become an impediment. The Commissioner of Labour however could play a proactive role and convince the parties the effectiveness of such a system.

According to Section 4 (1) compulsory arbitration can only arise on a reference made by the Minister of Labour who may, if he is of the opinion that an industrial dispute is a minor dispute, refer it by an order in writing for settlement by arbitration to an arbitrator appointed by him or to a Labour Tribunal even though the parties to such dispute or their representatives do not consent to such reference. The Act itself provides that the term 'arbitrator' includes a Labour Tribunal.

In terms of Section 16 every reference of an industrial dispute for arbitration made by the Commissioner in terms of Section 3 (1) (d) for voluntary arbitration or for compulsory arbitration by the Minister in terms of Section 4 (1), must be accompanied by a settlement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute between the parties. The award of an arbitrator is final and binding on the parties and the terms thereof become implied terms in the contract of employment.

Considerable delays encountered in concluding arbitration proceedings due to many reasons. Lack of proper infrastructure, confining arbitration mainly to Colombo, and the provisions to have several arbitrations in a single day, and the effect of Section 20 which provides for repudiation of arbitration awards are some of the factors that have to be reconsidered in making arbitration effective.

Section 4(2) of Industrial Disputes Act provides for the Minister by order to refer any industrial dispute to an Industrial Court for settlement. The Industrial Court is the highest tribunal under the Act. The Minister in constituting an Industrial Court may select one or three persons from the panel appointed by the President. The Industrial Court like the Arbitrator is under duty to make all such inquiries into the dispute and hear all such evidence, as it may be tendered by the parties to the dispute and thereafter to make such decision or make such award as may appear to the court to be 'just and equitable'. An Industrial Court exercises original jurisdiction in industrial disputes referred to it by the Minister for settlement by arbitration and can entertain appeals from a decision of the Commissioner of Labour, reconsider an award made by an Arbitrator or an Industrial Court. The procedure followed by an Industrial Court is substantially the same as in arbitration.

The award made by an Industrial Court cannot be repudiated by giving three months notice as in the case of an award made by an arbitrator. A party aggrieved by the award may however make an application after 12 months the award comes into operation, to the Minister to have the award set aside or for modification or addition of new terms and conditions to the award. The Minister on

receipt of such application may submit the application for consideration by an Industrial Court and the Court may confirm the award, set it aside and make a new award or vary or modify the awards as may appear necessary to it. Where the application is received from a party bound by the party within 12 months of the award, the application shall not be entertained by the Minister unless it is supported by a certificate from the Commissioner to the effect that a change in labour and economic conditions warrant the reconsideration of the findings in that award before a period of 12 months. For some reason or other industrial courts have not been functioning for the last 3 decades.

The functions of Labour Tribunals are to entertain applications from workmen for relief in respect of such matters as (1) the termination of services, (2) forfeiture of gratuity under Act, No. 12 of 1983 and (3) gratuity from establishments employing on the average less than 15 employees. Application for relief can be made by the workman or the trade union on his behalf within 3 months of the termination of his services in "Form D" signed by the workmen or by the President or Secretary of his trade union. The Union's status before the Tribunal is one of agent and the workman on whose behalf the application was made, could have himself substituted as the applicant at any time during the inquiry before the Labour Tribunal.

The Labour Tribunal has the power under the Act, to grant relief or redress notwithstanding anything contrary in any contract of service between the workman and the employer. Its power to grant relief is limited only by the duty to "make a just and equitable order". The power to make a just and equitable order does not entitle a tribunal to make an order arbitrarily. The Labour Tribunal must act judicially in evaluating evidence, hear both parties, consider all facts relative to the dispute and must make its order on the evidence before it, within six months of the date of such application. In cases involving moral turpitude, the Labour Tribunal need not look for proof beyond doubt as in the case of criminal courts and can act on a balance of probabilities. Confessions are admissible evidence before Labour Tribunals.

The order of the Labour Tribunal is final and binding on the parties subject to an appeal on a point of law to the Provincial High Court within 30 days of the order of the Tribunal. The law also permits an employer or workmen aggrieved by the order of the High Court, to appeal to the Supreme Court with leave from the High Court or the Supreme Court. An application can be made to the Court of Appeal for the issue an order in the nature of *certiorari*, *prohibition*, *procedendo* or *mandamus* against the President of a Labour Tribunal.

Industrial disputes Act of Sri Lanka 1950, has recognized Collective Agreements as a statutory mechanism for the settlement of industrial disputes. Section 5 (1) (a) and (b) of the Act defines collective agreement as an agreement between any employer or employers and any workmen or any trade union or trade unions consisting of workmen which relates to the terms and conditions of employment of any workmen, or to the privileges, rights or duties of any employer or employersor to the manner of settlement of any industrial dispute. Once a collective agreement is entered into, any party to that agreement may transmit it to the Commissioner of Labour for publication in the Gazette. Once it is published it becomes mandatory law and the parties to such agreements cannot contract outside the agreement.

Just and Equitable Principle

The dominant duty imposed on an Arbitrator in terms of Section 17 and on Industrial Court in terms of Section 24(1) and a Labour Tribunals in terms of Section 31 C (1) is to make an order or award 'just and equitable'. The phrase 'just and equitable' has not lent itself to precise definition and has been the subject of numerous interpretations by the Appellate courts.

The earliest interpretations of just and equitable order were in *Richard Pieris & Co. Ltd. v. Wijesiriwardhana*² where expressed the view that "justice and equity can themselves be measured not according to the urgings of a kind heart but only within the framework of law".

In the case of *United Engineering Workers v Devanagayam*³, the phrase in question was given a wide interpretation to the Tribunals as "unfettered discretion to do what they consider to be right & fair".

In *Walker Sons and Co. Ltd. v Fry*⁴ H.N.G Fernando J stated that the duty to make a just and equitable order did not allow the Labour Tribunals the 'freedom of a wild ass. Rajaratnam J observed in *Ceylon Tea Plantations Co.Ltd. v Ceylon Estate Staffs' Union* ⁵ "....A just and equitable order must be fair by all the parties. It never means the safeguarding of the interest of the workman alone".

G.P.S de Silva CJ in *Hatton National Bank v Perera*⁶ stated ".....The Tribunal is required to make just and equitable order. The order must therefore be just and equitable for both parties....."

S.R. de Siva in his 'The Legal Framework of Industrial Relations'⁷ has extracted from the case law the following Principles and considerations that weigh in determining whether an order is just and equitable. Firstly, the Labour tribunals are under a duty to act judicially, and stated the Privy Council decision in *Devanayagam*⁸ case was an authority only for the principle that Labour Tribunals do not exercise judicial power, and must not be thought to mean that Labour Tribunals do not and are not required to act judicially."

Secondly though Labour Tribunals exercise wide power, it is not unlimited and its discretion must be exercised reasonably giving due weightage to the interest of employee, employer and the Public.⁹

Thirdly, the power of a Labour Tribunal are limited by the Statute that created them, the subject matter of the dispute, the relief asked for and the law of the land as prescribed by statute and the decisions of superior courts¹⁰. Fourthly, Labour Tribunals are not bound by the contract of employment or the common law of master & servant.

Fifthly Labour Tribunals are required to consider and decide every material question involved in the dispute and cannot ignore the facts on ground of justice and equity¹¹. Sixthly, Labour Tribunals are under a duty to give reasons for the orders they make. This requirement was spelled out by the Supreme Court in *Abevsundera v Same*¹².

Finally, Industrial Tribunals must observe the principles of Natural Justice¹³.

Industrial Relations and the Dispute Settlement

The relation between management and employees or between their respective representatives is defined as Industrial Relations. The objective of industrial relations is to minimize the chances of industrial disputes that could result in the disruption in production. There could be many cause for the rise of industrial disputes, however, figures on incidences of industrial disputes in many

countries indicate that some of the main causes of industrial disputes include wages and allowances; personnel and retrenchment; in-discipline and violence; bonus; and leave and hour of work.

Most countries have long-standing dispute settlement procedures such as conciliation, arbitration and industrial or labour courts at the national level. They operate only when a dispute arises. Dispute prevention through communication, consultation and negotiation procedures and mechanisms which operate largely at the enterprise level is an equally important in this regard. They are not particularly common in many Asian enterprises. Their importance has increased in the current decade when changes in the organizational structure and management have created the potential for workplace conflict.

According to S.R. De Silva "Employers are now compelled to view industrial relations and human resource management from a strategic perspective; in other words, not only from the traditional viewpoint of negotiating terms and conditions of employment and performing a personnel and welfare function. Industrial relations and human resource management are directly relevant to competitiveness, and how they are managed will impact on its productivity and quality of goods and services, labour costs, quality of the workforce, motivation, prevention of disputes and aligning employee aspirations with enterprise objectives"¹⁴.

Alternative modes of 'dispute governance' could encompass the wider use of dispute-prevention methods, including new forms of mediation, and greater use of 'in-house' enterprise partnership mechanisms involving joint problem-solving. There undoubtedly appears to be a growing demand for developing more informal modes of dispute governance, particularly where parties do not want to be caught up in the formal dispute-resolution machinery.

According to the information gathered from the sample group of employers, there is a growing perception among employers that the existing dispute-resolution system is, to some extent, still burdened by the historical adversarial legacy, and is becoming too legalistic, and that more could be done to promote alternative, more informal modes of dispute resolution and dispute avoidance. The existing system is not equipped to deal with the new challenges in the field of industrial relations

International Labour Standards on Dispute Settlement

The principles and standards embodied in the ILO Conventions have persuasive value in settling industrial disputes in the countries which ratified them. . There is a growing trend with regard to many spheres of law to consider the principles and standards embodied in the international instruments particularly when lacuna exists in the domestic law. The International Labour Organization has set various standards and methods for settlement of labour disputes. These methods which involve settlement by intervention of third parties fall in to three categories.

They are Conciliation and Mediation, Arbitration (Voluntary/Compulsory and Judicial Adjudication

The main ILO instrument dealing with dispute prevention and settlement is the Voluntary Conciliation and Arbitration Recommendation, No.92 (1951). It recommends that voluntary conciliation should be made available to assist in the prevention and settlement of industrial disputes between employers and workers. It further recommends that such procedures should

include equal representation of employers and workers, should be free and expeditious and that provision should be made to allow the parties to enter into conciliation voluntarily or upon the initiative of the conciliation authority. It also recommends that parties should refrain from strikes or lockouts while conciliation or arbitration procedures are in progress, without limiting the right to strike.

Dispute resolution is further addressed under the Collective Bargaining Convention No. 154 (1981) which provides that bodies and procedures for the settlement of labour disputes should be designed to contribute to the promotion of collective bargaining

While Convention No. 154 focuses on collective bargaining, it does not rule out the use of conciliation and/or arbitration as part of the bargaining process where such processes are voluntary. One objective of dispute resolution is in fact to promote the mutual resolution of differences between workers and employers and, consequently, to promote collective bargaining and the practice of bipartite negotiation.

With respect to the public sector, the Labour Relations (Public Service) Convention No. 151 (1978) provides that the settlement of disputes over the terms and conditions of employment is to be sought through independent and impartial machinery, such as mediation, conciliation and arbitration, established in such a manner as to ensure the confidence of the parties involved.

Also, the Examination of Grievances Recommendation No. 130 (1967) addresses dispute resolution at the enterprise level, including rights disputes over alleged violations of collective agreements. It sets out a number of recommendations on the development and implementation of workplace dispute mechanisms, emphasizing the importance of preventative measures such as sound personnel policy and the co-operation between the social partners on decisions that affect the workers. It further recommends that where efforts to resolve the dispute have failed, there should be a possibility for final settlement either through the procedures set out by collective agreement, through conciliation or arbitration by the competent public authorities, through recourse to a labour court or other judicial authority, or through any other procedure which may be appropriate under national conditions.

Other ILO instruments make reference to the role of the labour administration in resolving disputes. For example, the Labour Administration Recommendation No. 158 (1978) provides that the “competent bodies within the system of labour administration should be in a position to provide, in agreement with the employers' and workers' organisations concerned, conciliation and mediation facilities, appropriate to national conditions, in case of collective disputes .

Conclusion and Recommendations

Along with the growing intensity of economic competition and financial turmoil, it is observed that labour disputes at national and enterprise levels have been increased. Many countries, particularly developing countries like Sri Lanka and India are facing additional problems leading to more complex issues. These issues range from wages, termination of employment, job insecurity arising from de-regulation, restructuring, downsizing and mergers. Such issues have become common in both unionized and non-unionized sectors of the economy.

Legal institutions for dispute settlement and the traditional methods like conciliation, arbitration and adjudication are being challenged to be effective in the new environment. Therefore, a system of effective prevention and settlement of labour disputes remains a pillar of sound labour relation practices. It is essential that efficient and accessible mechanism exists in the interest of both economic development and social justice.

After reviewing articles and research papers written by various academics and after interviewing selected groups of employees, employers and labour officials, following recommendations and suggestions can be made to improve the existing system of industrial dispute settlement in Sri Lanka.

The Industrial Disputes Act of Sri Lanka is in existence for nearly five decades and had been the main instrument for resolution of industrial disputes in the country. Observations extracted from researches show that it has failed in its objectives of bringing speedy settlement of industrial disputes.

A legal framework which promotes cordiality and peace in the workplace, protects the legitimate interests of employees and the industry, promotes industrial harmony and improves the quality of lives of the employees, is an urgent requirement.

Enhancement of effectiveness of conciliation can be considered as a prime importance for maintenance of industrial peace. Therefore immediate steps should be taken such as promotion of mutual confidence between the employers and the workmen to bring them together and encourage them to conciliate within a legal framework and recognized norms of the enterprise.

In order to give complete effect to the conciliation process it is necessary that trained Conciliators be available in the Department of Labour. Conciliators should be selected on the basis of aptitude testing. They should have adequate knowledge of labour law and industrial relations. A training school for this purpose is a long-felt need. Conciliators should be protected from outside influence as far as possible. One method of ensuring this is to make conciliators answerable only to the Commissioner of Labour. Commissioner should be free of interference from the Minister in relation to the administration of labour legislation. It is suggested that a special Conciliation Board should be set up as recommended in the Harry Jayawardane Committee¹⁵.

As conciliation is considered as a fundamental aspect of dispute settlement and it requires a set up different from the one which is available. It is observed that the present form of conciliation through the Labour Department is weighed down with various difficulties and is not conducive to create a proper atmosphere for amicable settlement. The role of labour officers is not to impose a settlement but to provide a healthy environment in which the parties to the disputes can discuss matters among themselves. 'A culture of conciliation' needs to be nurtured¹⁶.

After considering the views of the selected groups of employers and employees it can be suggested that referral for arbitration should be done by the Commissioner of Labour instead of the Minister. So that undue influence to the parties could be avoided or minimized.

Although voluntary arbitration would prove to be an effective method of dispute settlement, the requirement for the consent of both parties to the reference has become an impediment. The Commissioner of Labour however could play a proactive role and convince the parties the effectiveness of such a system.

Delays encountered in concluding arbitration proceedings due to many reasons. Lack of proper infrastructure, confining arbitration mainly to Colombo, and the provisions to have several arbitrations in a single day are some of the factors that have to be reconsidered in making arbitration effective. Competent, experienced and trained persons should be appointed as arbitrators to build up confidence of the parties involved.

The Labour tribunal is one of the mechanisms provided under Industrial Disputes Act for speedy settlement of industrial disputes. Yet the Tribunal lacks power to compel the attendance of witnesses and due to that, may not be able to carry out all necessary inquiries in order to make just and equitable orders. This seriously hampers its function and causes disadvantage both to employers as well as the workmen. Therefore an amendment to the Act should be made so as to empower Labour Tribunals to compel the attendance of witnesses.

Bringing in formality to the Labour Tribunal procedures has caused unnecessary delays. Some of the labour officers interviewed were of the view that majority of cases are heard by way of formal detailed trial as the procedure followed in the District Court. If the procedure is more streamlined and simplified the delays could be avoided.

The problems related to substitution of parties in the event of death of an applicant also have given rise to controversy. Proving documents before the Labour Tribunals and complexity in the mode of placing evidence are areas that have to be looked into in addressing the causes for delays.

Apart from the procedural matters there are areas of substantive law, which need serious consideration. One of the areas in substantive law that has to be taken into consideration is the appellate procedure. Non-stipulation of a time limit for the appeal to the Supreme Court has created many problems and should be given serious consideration.

The Industrial Disputes Act may also be amended to create a Special Enforcement Labour Tribunal for the enforcement of all labour tribunal orders as it is said there are delays in the Magistrate's Courts in this matter.

A special Labour Appellate Court may be created to hear appeals on decisions on all labour cases from the lower courts. Harry Jayawardane Committee also has expressed the view that the subject matter of labour relations should be dealt with by a procedural mechanism set up with exclusive powers in this field. This includes prerogative writs and the setting up of a labour appellate court.

The Industrial Disputes Act may be amended to incorporate a section on 'unfair labour practices' on the part of employers as well as on the part of workmen.

The law must be fair by both parties. If collective bargaining is to be developed into an effective tool promoting stability and harmony in industrial relations, it is essential that it be considered as a two way process with rights and obligations attached to both, the employers and trade unions/workers, alike. Harry Jayawardane Committee in Chapter XII of their Report has also recommended that certain matters should be declared as unfair labour practices in Ceylon.

A grievance procedure should be incorporated to the Industrial Disputes Act and make it mandatory for all establishments to follow the procedure. Since grievances at the enterprise level is the main

cause that leads to disruption of work, a system of grievance procedure for speedy settlement of disputes at the source will help to promote industrial harmony in the workplace.

As recommended by Shauna Olney¹⁷, Senior Social Dialogue Specialist, no single dispute resolution model will be appropriate to all situations and countries; however, guided by principles arising out of International Labour Standards, and drawing on the valuable experience of ILO specialists and projects, a series of scales for dispute resolution systems can be identified. A system must firstly be legitimate, and thus credible. Respect for freedom of association is a necessary prerequisite for legitimate and sustainable dispute resolution. Credibility also rests on the system being fair, independent, and transparent. Another key requirement is accessibility: the system should be geographically, financially and procedurally accessible.

Provide adequate resources to the existing system; create a supportive legal environment and introducing clear procedures are some of the benchmarks that can be set. Availability of tripartite involvement in the establishments, consistency of awards, respect for voluntary agreements and adequate enforcement mechanisms for mandatory awards are also a must. Disputes should be dealt with as close to the source as possible, and there should be a special focus on prevention of industrial disputes.

Before considering the framework for dispute settlement and each of its elements in more practical detail, it is important not to lose sight of the fact that labour policies and workplace strategies designed to prevent industrial disputes before they erupt are an equally significant aspect of good labour relations. Sound workplace policies and procedures can at the same time serve as a foundation for successful business while fostering good workplace relations. Open lines of communication between workers and management, workers participation in decision making can each contribute not only to better cooperation and understanding between workers and employers. They provide for the prompt and equitable settlement of collective labour disputes at the initial stage.

It is observed that during the last few decades the economic environment and industrial relations have undergone profound changes in many ways. It is also noted that the dispute settlement mechanisms had become too legalistic, too expensive and too slow. The traditional dispute settlement mechanism is unable to cope with additional pressure applied and hence it is an urgent requirement to explore new methods for the prevention and settlement of industrial disputes.

End Notes

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2. (1961) 62 NLR 223
3. (1987) 69 NLR 289
4. (1966) 68 NLR 73
5. SC 211/72, SCM15/5/74 (unrep.)
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REFORMING THE DISPUTE SETTLEMENT SYSTEM UNDER THE WTO

Sheela Rai

Assistant Professor, Amity Law School

Amity University Rajasthan (India)

INTRODUCTION

The time when international law was considered as vanishing point of jurisprudence is long past. Increasing globalization is ensuring development of international community which is necessitating development of certain international norms and rules which may hold together the fabric of international or what some may call the global society. International institutions such as the United Nations and the Bretton woods institutions have aided a lot to bring the international society together and help resolve dispute between countries in as amicable manner as possible. One of the most important international organizations is the World trade organization (WTO). International trade has become one of the most potent forces to bring the countries together in cooperative, conciliatory and adjustable mood. General Agreement on Trade and Tariffs (GATT) which began its journey with protocol of provisional application through consistent effort and progress saw to it that the third foot of the Bretton Woods stool(an international trade organisation) finally gets acceptance and the World Trade Organisation was born.

The success and influence of the world trade organization has motivated some writers to discuss about the organization and its organs in terms of constitutionalization.¹ The dispute settlement system of the WTO is largely accredited for pushing towards the constitutionalization of the system established by the WTO.² Some writers have contested these assertions³ but what is interesting is that such impression is being created in the mind of some and that it signifies the importance the WTO dispute settlement system has gained in the international trade regime. It has to be remembered however, that dispute settlement system had started acquiring importance since the GATT era itself because of its better efficacy even though at that time many panel reports remained unadopted because of the practice of positive consensus. It was because of the better efficacy of the GATT dispute

settlement system that the United States of America(USA) and its pharmaceutical lobby was adamant that intellectual property rights should be on the Uruguay Round agenda even though it did not have anything to do with trade. The WTO dispute settlement understanding brought about further reforms. It has number of salient feature which shows improvement not only over the existing dispute settlement system under the GATT but also an improvement in the existing international system of dispute resolution or adjudication.

The WTO dispute settlement system provides the dispute settlement body with a kind of compulsory jurisdiction equal to that of a national court. Any member whose right has been infringed can approach the dispute settlement body and start the dispute resolution process. While the jurisdiction of the dispute settlement body is due to a treaty like any other international treaty conferring jurisdiction on particular tribunals, but since it is a multilateral treaty with number of countries party to it, it becomes more effective. For the first time in the international legal system there is an appellate process with a standing appellate body. Thus it creates a hierarchy of courts like any national judicial system. Various forms of alternative dispute resolution process have been brought under one umbrella along with the regular adjudication process. The emphasis is on amicable resolution of disputes. Therefore complaining party has to first approach for consultation. It is only when consultations do not yield any result can the complaining parties approach the adjudicatory process. This process can be made more effective for developing countries if the amendments in the proposed draft are accepted finally.⁴ Apart from consultation process, good offices, arbitration and conciliation can also be resorted to even when the adjudication process has started.

The dispute settlement process under the WTO no doubt an improvement and development over the existing international dispute resolution process has come under severe criticism and is under negotiations in the Doha Round for further reforms and amendments. Various proposals have been submitted to further refine and redesign what is called by some as the ‘Jewel’ of the WTO.⁵ Largely the debate and work is pertaining to the following areas:

1. Procedural reforms
2. Balancing the weak position of developing countries
3. Maintenance of Structural Balance within the WTO
4. Democratization of the dispute resolution process.

The paper deals with last two issues which have largely invited debate among the political groups as well as among the academicians. The first issue relates to the increasing power of

the appellate body which has led writers to debate about whether there is constitutionalization of the World Trade Organisation and induced some to comment that appellate body has become activist. The issue of democratization has to be examined from two angles; one participation in the dispute settlement process of entities other than members and whose advice is not solicited. In other words issue relating to amicus curiae briefs. The other issue relating to democratization is democratic control of members over the dispute resolution process.

I

MAINTENANCE OF STRUCTURAL BALANCE WITHIN THE WTO

The WTO dispute settlement system especially the appellate body has come under criticism from many quarters as being activist. It has been argued that the appellate body has overstepped its powers and has become activist. Non-functioning of the diplomatic branch that is the general council and the committees has often been blamed for the activist role of the appellate body.⁶ The appellate body in such case has to necessarily step in to fill the void because it has to resolve the dispute between the parties.

The criticism of an activist adjudicative body can be compared with similar problems at domestic level in many common law countries like the USA and India. In both countries judiciary was intended to be independent but least powerful branch of the government. However, it is possibly inherent in a multicultural society having a constitutional democratic political system based on rule of law that judicial power becomes powerful. The legal document in this case becomes a type of social contract which holds not only the polity but also the society together. But then ensues a tussle between the democratic branch of the state represented in the legislature and executive and the oligarchic branch of the state which is the judiciary. The democratic branch insists that it represents will of the people or the popular will. Oligarchic branch on the other hand insists that it represents the rational will or real will of the people. Judiciary through the mechanism of judicial review upholds the sanctity of the constitution and asserts its power to examine a legislative and executive act against the touchstone of this basic law of the land. Executive and legislature on the other hand cry for judicial restraint on political questions and try to limit the interference of judiciary by asserting separation of powers.

WTO is a negotiated text, in a way a bargained commercial contract between sovereign states. This contract limits or regulates the sovereign power of each country to regulate its own economy including the trading pattern and behavior of its citizens. If we talk in terms of the social contract philosopher John Lock governments of these states who represent the interest of the people within their jurisdiction have ceded limited powers to this international organization and have retained the rest with them. None of them would like to make it something near to a *Leviathan* and hence there are different organs within the WTO in the form of councils and committees wherein the members can regularly discuss their economic measures and endeavour to resolve their problems through mutual adjustments in an amicable manner. However, to protect the vulnerable and weak a rule based system is also necessary and the adjudicative bodies of the WTO ensures that the delicate balance of rights and obligations of the members is not upset by any arm twisting measure exercised by the powerful. On the other hand too much emphasis on the legalistic approach may also create a type of aristocratic or oligarchic club within the WTO which may gain through the appellate body what it may not through the negotiations. A proper working of the system would require a balance between the diplomatic or political branch on the one hand adjudicative branch on the other.

Arguments on these lines were raised in two cases, both involving India. The argument was in fact first put forward by India and then it was used against India where India was a complaining party. In the first case *India-Quantitative Restrictions*,⁷ India raised the issue of separation of powers and institutional balance. Complaint was filed against India on the ground that it should phase out its quantitative restrictions which it had applied under article XVIII(B) of the General Agreement on Trade and Tariffs (GATT 1994) because it had reached a comfortable balance of payment situation. India asserted that under the WTO there is a balance of payment committee which is empowered to examine the issue of legitimacy and necessity of a member's requirement for quantitative restrictions on the ground of balance of payment problem. India argued that panel should not take jurisdiction in the case because there is an institutional balance within the WTO and such matters are best resolved through diplomatic means in the relevant committees by discussions and adjustments rather than adjudication. However, India's objection was dismissed on the basis of footnote 1 of the understanding on balance of payments which allows any matter related to balance of payment to be resolved through adjudication by the dispute settlement body. The matter again arose in *Turkey-Textile*⁸ case, in which complaint was made by India. In this case Turkey tried to

argue at the panel stage that the matter raised by India should not be examined by the panel as it was pending before the committee on Regional Trade Agreements. However, Turkey did not press upon the issue and did not raise it in the appellate body possibly due to the previous decision in the *India-Quantitative Restrictions* case.

The matter of institutional balance raised by India, however, still remains open. If the balance of payment committee or committee on the regional trade agreements give a decision, can the matter still be argued and discussed before the panel and the appellate body? Or vice-versa if the panel or the appellate body give a finding can it not be discussed by the committees after that? What if they arrive at a different conclusion?⁹

The issue of political or democratic power versus judicial power becomes more important in the WTO as it is an international treaty of sovereign countries. How far will the sovereign countries accept an activist appellate body? The draft proposed by the Chair has 'Parameters Concerning the Interpretive Approach to Use in WTO Dispute Settlement'. In substance it states the following which are relevant for our discussion:

1. Any interpretive approach taken by the adjudicative bodies should not result in supplementing or reducing the rights and obligations of members under the covered agreements.
2. If any provision is left ambiguous the adjudicative bodies should adopt prescribed rules of treaty interpretation to find out whether the provision has been left ambiguous. They should not try to clear the ambiguity.
3. One agreement or provision should not be used to interpret other provisions as the wordings of each provision reflect the will of negotiators.
4. Two types of gap fillings are identified: (a) to read in the text a right or obligation which is not present in the agreement by extrapolating from a different provision; (b) to resolve an ambiguity in the agreement which supplements or diminishes the rights and obligations of members. It is made clear that neither type of gap filling is allowed.
5. It is also provided that prior reports of the adjudicative bodies of the WTO are not covered agreements therefore it is not appropriate to refer to prior reports as if they represent agreed text.

The draft points out that at times the panel had overstepped its jurisdiction and gone beyond the agreed text due to which the appellate body had overturned the panel findings. Let us examine the above claims with some concrete examples:

1. In the *Shrimp-Turtle* case¹⁰ the panel accepting the contention of the complaining countries which were developing countries stated that article 13 of the dispute settlement understanding authorizes the panel to ‘seek’ information from appropriate sources. Therefore it would not consider unsolicited briefs. But the appellate body held that the panel had adopted a very literal interpretation and there is nothing which restricts the power of the panel to consider unsolicited briefs. Was the panel paying more deference to the words of the covered agreement or the appellate body?
2. In the *Tuna-Dolphin* case the issue of territorial application of the general exception clause under article XX was raised. It had to be remembered that GATT was drafted in 1947 when environmental issues were not a big concern and many countries especially the developing countries would never have agreed to wide interpretation of article XX which is being given now. This fact was respected in *Tuna –Dolphin I*¹¹ but disregarded in *Tuna-Dolphin II*¹² on the basis of clause (e) which is a special instance. The appellate body in the Shrimp Turtle case went beyond the issues raised and made a declaration about what it was not deciding and stated clearly that it was not stating that a member cannot take measures which are effective beyond its territorial boundaries. ‘It surely can!’ Since the appellate body could not make this statement as a decision because the issue was not raised, it stated it the other way round by clarifying what it was not deciding. It is too much to say that the appellate body was not laying down a law. It was in fact going beyond its jurisdiction. Since unadopted panel report of the Tuna Dolphin case could anytime be discarded as having only persuasive value, appellate body made sure that its declaration would lay down a precedent to be followed in future.
3. In the case of *Argentina-Footwear*¹³ and *Korea-Dairy Products*¹⁴ the issue was whether safeguards agreement has modified obligations under article XIX(1)(a) of GATT 1994 because the ‘unforeseen development’ clause was not repeated in article 2.1 of the safeguards agreement which otherwise contained all other conditions of article XIX(1)(a). Based on the appellate body report of *Brazil-Dessicated Coconut*¹⁵ and the logical arguments, panel rightly decided that if language of later agreement differed from earlier agreement, latter would to that extent be considered amended by the former. However, appellate Body in this case stated that WTO agreement is a single undertaking and full application would be given to all parts of the WTO treaty. However, it could not logically say that it is an additional condition therefore it said

that it is only a circumstance which should be shown to exist, a statement which creates more ambiguity than it clears.

Purpose of the above examples have not been to prove that panels are usually right and appellate body wrong though the above examples seem to give that impression. Purpose of the above examples is to point to the futility of the effort of laying down the parameters. If a dispute appears before a panel and the appellate body how are they expected to resolve the dispute? If we take an analogy from writings on domestic jurisprudence then H.L.A.Hart would argue that judges have discretion with regard to penumbral meaning of the word. Dworkin on the other hand argues that judges have discretion only in the weak sense because they interpret the laws and regulations according to the principles of a legal system. Can we assert the argument of 'principle' in international trading system? The obvious answer would be 'NO' because WTO is an international contract between sovereign countries and like any commercial contract each party wants to maximize its interest and benefits from the system. The adjudicative body is faced with the task of maintaining political balance between conflicting interests so that the system survives and prevent its collapse. That way the adjudicative body of the WTO performs as much a political role as a legal one with a difference that its decisions become a type of law which is abided by in the future. No matter what is given in the parameters, the decisions of the appellate body do have a precedential value. The hierarchy of courts and provision for a standing appellate body has created a judicial structure in the WTO much akin to the one at national level and decisions of higher court necessarily bind the lower courts. To say that prior reports are not authoritative interpretation of the WTO agreements is futile because existence of any system based on reasoning and rationality depends on consistency and predictability of the system. While in the precedent system usually a court in present times is not considered to be bound by its own decisions, yet deviation from prior decisions are not done arbitrarily and often. It is inherent characteristic of the judicial system that it is based on reasoning and reasoning cannot keep changing depending on who the parties to the dispute are.

The fact is that check and balance on the adjudicative body cannot be done by laying down parameters which have not been followed so far and would not be done so in future. It cannot be more than eyewash. For check and balance to be operative other organs of the WTO have to be activated and India's argument of institutional balance within the WTO needs to be reflected upon seriously. At the national level if decisions of judicial body have to be made ineffective then the parliament or the legislature can pass an amendment to the impugned

law. Amending WTO agreements is not an easy task and it cannot be done regularly. Hence the WTO agreement has provided article IX which provides that the general council and the ministerial conference has the power to adopt authoritative interpretation of the WTO agreements. If reasoning of the appellate body which in the process of deciding a dispute would necessarily interpret the WTO agreements has to be overturned, then only way out is recourse to article IX of the WTO agreement. However, experience has shown that this recourse is not effective due to the practice of taking decision by consensus.

II

DEMOCRATIZATION OF THE WORLD TRADE ORGANISATION

The second issue deals with democratization of the dispute settlement process. The issue is approached from two angles. One is involvement in and access to dispute settlement process of entities other than state. This means not democratization of the dispute settlement process as such but limitation on the legitimacy of the state by providing legitimacy and locus standi to entities other than the state. The second angle is about greater control of the dispute settlement body over the findings of the panel and the appellate body. The first one relates to amicus curiae briefs.

Issue of amicus curiae briefs: Issue of amicus curiae briefs have been debated since the shrimp turtle case. In the *Shrimp- Turtle* case the complaining parties on the basis of Article 13 of the dispute settlement understanding argued that the panel should not accept unsolicited advice and opinions. Since the issue related to environment and sustainable development, developing countries were apprehensive that pressure of NGOs would induce the panel and appellate body to bow before what they would term as public opinion. The panel accepted the argument of complaining parties who were largely developing countries and stated that since it did not 'seek' any opinion it would not consider unsolicited opinions. However, the appellate body overruled the panel and said that panel had taken a very literal and narrow interpretation of the word 'seek' used in article 13 of the DSU. According to the appellate body it was the discretion of the panel to accept and take into consideration a particular submission or not, but the power of the panel need not be restricted to consideration of specifically solicited opinions only. Developing countries tried to get the ruling overturned by

adoption of authoritative interpretation of article 13 by the general council but it did not yield any result.

In the Doha Round developing countries seem to be prevailing on the insistence that unsolicited opinions should not be accepted by the panel or the appellate body. In the last draft the chair to the dispute settlement process has incorporated such a clause.

[In exercising the right to seek information and technical advice, the panel shall not accept or consider information or technical advice provided by any individual or body from whom the panel has not sought it.]¹⁶

The reason why developing countries want such a ban is that it creates pressure on the adjudicative body in the garb of public opinion. Most of the NGOs established either in developed countries or developing countries are funded by agencies located in developed countries. Hence it is one sided view which prevails in the name of interest of general public.

However, the view is getting support from academicians and persons of influence. As usual the view has been put forward under the garb of innocuous and benevolent idea of ‘cosmopolitanism’ based on Kant’s essay on perpetual peace.¹⁷ In his third definitive article of perpetual peace, Kant states, ‘The rights of men, as citizens of the world shall be limited to the conditions of universal hospitality’. Kant in this directive talks about rights of human beings as citizens of the world not in the way that is being suggested by some writers. He hopes that a person going in the jurisdiction of any other state would be treated with hospitality. In his second directive Kant states that ‘the law of nations shall be founded on a federation of free states.’ In this Kant hopes that states would constitute a federation to avoid war and savagery in the same way individuals constitute civil society and state to substitute reasoned liberty to barbarianism and savagery.

Nations, as states, may be judged like individuals who, living in the natural state of society—that is to say, uncontrolled by external law—injure one another through their very proximity. ?- .Every state, for the sake of its own security, may—and ought to—demand that its neighbour should submit itself to conditions, similar to those of the civil society where the right of every individual is guaranteed. This would give rise to a federation of nations which, however, would not have to be a State of nations.

The attachment of savages to their lawless liberty, the fact that they would rather be at hopeless variance with one another than submit themselves to a legal authority constituted by themselves, that they therefore prefer their senseless freedom to a reason-governed liberty, is regarded by us with profound contempt as barbarism and uncivilisation and the brutal degradation of humanity.

Hence a well ordered civil society and well governed state is a sine quo non for a federation of states aspiring to be free from exploitation and war. States are hoped to live side by side in mutual coexistence as do individuals in a civil society and resolve their disputes through peaceful and lawful manner rather than through war. Exhorting individuals and groups to represent against the state and that too in commercial matters, may further lead to exploitation which Kant has condemned in the beginning of his essay. In the beginning of his essay Kant condemns exploitation of countries such Hindustan, China and Africa for commercial interests by colonial powers.

But the notion of cosmopolitanism is being utilized for that purpose only. It started with a speech of Pascal Lamy stressing upon the need for cosmopolitanism.¹⁸ The idea was taken up by some academicians who argued that it is high time that we abandon the idea of WTO only as an international agreement between states. The WTO institutions should also pay heed to and open the doors for intervention by individuals and NGOs.¹⁹ According to this view it would be in consonance with the idea of cosmopolitanism where every individual is citizen of the world and therefore has rights against and obligation towards international institutions. Writers have criticized the idea of WTO dealing only with states in the matter of international trade.

Prof. Charnovitz who has argued for amicus curiae briefs and greater role of NGOs and civil society organizations within the WTO has taken support from the idea of cosmopolitanism. However, one has to remember that independence of judiciary is the most important aspect of the adjudicative process. Independence of judiciary means not only that judges should be free from bias and influence of any other branch of the institution, it also means that judges should not be pressurized by public opinion to the detriment of the rights of the parties. Hence in many jurisdictions matters which are sub-judice are not allowed to be discussed and debated in the public and in any other forum to ensure that judges give full consideration to the arguments of the parties and give a judgment on the basis of reason and rationality rather than being swayed away by the pressure of public opinion. Adjudicative bodies are not

political bodies. They are considered to be the last recourse of the weak and vulnerable. Therefore as far as possible they should be kept free and immune from public pressure so long adjudication is not complete. Amicus curiae briefs become a means of pressurizing the adjudicative bodies. In the WTO states or members are supposed to represent the interest of the people they govern. In a commercial treaty like the WTO these interests are delicately balanced and using civil society organization to disrupt the balance would not be healthy for federation of states dreamt by Kant. Idea of federation of states or *vasudhaiv kutumbkam* dreamt by the seers of India can be realized only when right and interest of all are respected and divisions are not created by using one group for the exploitation of other or both.

Democratic Control over the Dispute Resolution Process: During the GATT era some of the panel reports remained unadopted due to the process of positive consensus. In the Uruguay round the process of decision making in the dispute settlement body was changed from positive consensus into negative consensus, therefore adoption of panel report would have become automatic. To have a chance of reconsideration appellate body was created. The appellate body can disagree with the findings of the panel and to the extent appellate body's findings differ from panel's findings, report of the panel to that extent stands modified. However, panel and appellate body technically give only recommendation which become decision of the dispute settlement body only when the dispute settlement body decides to adopt the report. Since the adoption process is through negative consensus therefore adoption of the reports is almost automatic. Under the Uruguay round dispute settlement agreement the report has to be either accepted as a whole or rejected as a whole. There is no process in dispute settlement understanding whereby reports can be either modified or only partly adopted by the dispute settlement body. This is sought to be amended in the Doha Round. The draft agreement provides;

[The DSB may by consensus decide not to adopt a finding in the report *[[or the basic rationale behind a finding]]*.]

This amendment is being brought to bring about greater control of members over the dispute settlement process or in other words it is an effort to democratize the dispute settlement process. Given the fact that WTO is a commercial agreement between members and emphasis of the dispute settlement body is resolution of dispute rather than adjudication, the proposed amendment seems to be welcome but it needs to be examined vis-à-vis the following:

1. How does it correspond with other objectives like transparency partly on which basis admission of amicus curiae briefs are being advocated? The parts of the panel or the appellate body report which are not adopted would be expunged. It is clear there would be bargaining in the adoption process. However, does not the public have the right to know what are the parts which have not been adopted and why? While on the one hand involvement of public opinion in the adjudicatory process is being advocated on the other hand common public is excluded from knowing what has transpired in the dispute settlement body and whether the published reports are the same which had been decided by the panel and the appellate body or different.
2. Group retaliation is also being proposed in the proposed drafts on the demand of developing countries to make the enforcement process more effective. We need to wait and see how far the power of modification of panel and appellate body findings affect group retaliation.
3. Reports of panel and the appellate body are very technical in nature as they have necessarily to be based on interpretation. In the proceedings before the panel and the appellate body parties are represented by experts and lawyers. However, the dispute settlement body comprises of generalists because the general council reconvenes itself as dispute settlement body. Members of the dispute settlement body would necessarily have to take the help of legal experts if different findings of the panel and appellate body are to be discussed for adoption. One wonders how it would affect the interests of developing countries and whether it would not further escalate the cost of dispute settlement process.

CONCLUSION

Amicable and civilized resolution of disputes is the basic purpose of a civilized society. It is this characteristics of human being which distinguishes them from animals and what in Sanskrit is called the *matsya nyay* whereby the stronger fish has the right to eat the weaker ones. Human society cannot for long survive on domination of the few. There have been and there is bound to be change and upheaval in such situations. However, it cannot be denied that man is also a social animal and necessarily has traits of its predecessors one of which is the desire to dominate. This desire unchecked when combines with never to be satiated greed of rational man it leads to unthinkable exploitation of unfortunate fellow human beings. Human institutions born out of another natural propensity of human beings that is desire for co-existence, cooperation, peace and society help in countering animal instinct of man made

worse by ambitions born of mental capacity to think ahead. These human institutions may fail in their purpose if care is not taken to ensure that they are not captured and tamed for narrow interests. And this can be ensured only by having mechanisms within the institution which prevent any one or single part of it becoming more powerful and important than required. Because in that case that part is usually captured by a minority who disable it to serve the purpose for which it was made and utilize it only for narrow interests. This adversely affects the credibility and legitimacy of the whole institution. The theory of separation of powers and checks and balances is relevant not only in national systems of governance but is relevant for international institutions also. Montesquieu felt that if legislative, administrative and judicial powers are combined it would end individual liberty and would lead to despotism. The principle holds true about international institutions as well.

Reform of the dispute settlement body has to be made keeping this in mind. Limitations on the powers of the adjudicative branch has to be put not so much from inside as from outside by making other organs and branches of the WTO more active. It is nothing more than a lip service to say that precedent system does not follow in the WTO and appellate body or panel should not treat prior report as laying down a law. Any judicial body worth the name cannot be arbitrary and unreasonable to the extent that it changes its reasoning every time much less a judicial body in an international agreement. Laying down limitations on the power of interpretation would also not help much because interpretation is a necessary part of adjudication especially in appellate cases because appeal is made only on legal issues and not on facts. Therefore what is needed is not laying down principles for the exercise of powers by the oligarchic branch that is the judiciary as it was done in the case of rulers of ancient time. The requirement is to make general council, and other councils and committees more active and functional. This would automatically curtail the influence of the adjudicative branch. It is much more desirable that objectionable part of the findings of the adjudicative bodies are discussed in other councils and committees rather than in the dispute settlement body and decisions taken therein are followed later. This would prevent any danger of bargaining taking place in the adjudication process. While there are different modes of dispute settlement all brought under one umbrella of the WTO, adjudication and bargaining somehow do not go hand in hand. If disputes are to be resolved through bargaining process then it is more desirable that alternative dispute resolution process be resorted to. Hence one has to wait with skepticism the actual result of allowing the dispute settlement body to delete parts of the report. One safeguard is that the decision would be by consensus.

The dispute settlement system of the WTO no doubt has functioned very well. It is also true that like any other adjudicative body the WTO adjudicative bodies also have to perform the political task of balancing the conflicting interests. Therefore at times there are political decisions packed and parceled under the cover of legal reasoning. This may lead to dissatisfaction in future if the instances increase. Active democratic bodies within an institution keep a natural check and limitations on the exercise of powers of the oligarchic branch of the institution. This mutual check and balance within the institution ensures that the institution works for the greatest common good and peaceful and amicable coexistence is made possible much to the credit of the organ entrusted with the job of amicable resolution of dispute, an organ in whose impartiality and objectivity larger group of the institution has faith.

¹ See Deborah Z. Cass, *The Constitutionalization of the World Trade Organisation* 2005,(Oxford University Press) for an exhaustive discussion of the issue.

² HL Schloemann and S Ohlhoff, "Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence(1999) 93 American Journal of International Law 424. PM Nicholas, GATT Doctrine (1996) 36 Virginia Journal of International law 379, R Howse, *The Legitimacy of the World Trade Organisation* in J Coicaud and V Heiskanen (Eds) *The Legitimacy of International Organisations* (Tokyo: New York United Nations Press, 2001) 358.

³ See Deborah Z. Cass, *The Constitutionalization of the World Trade Organisation* 2005,(Oxford University Press)

⁴ Article 10 bis of the proposed draft provides

[In a dispute between a developing country Member and a developed country Member, the developing country Member shall be provided every opportunity to present requests to the developed country Member on any matter relating to the holding of the consultations or the settlement of the dispute, taking into account the particular problems and interests of the developing country Member][Where the party complained against is a developing country Member, the complaining party shall accord sympathetic consideration to any request from that Member to give special attention to any particular problems and interests it has identified, in relation to the holding of the consultations or to the settlement of the dispute]. Should the developed country Member reject any parts of such requests, it shall provide the reasons in writing, together with an explanation of how it has given special attention to the particular problems and interests of the developing country Member.]

⁵ Consolidated Draft Legal Text (Proposed as a basis for further work) Report by the Chairman, Ambassador Ronald Saborío Soto, to the Trade Negotiations Committee. TN/DS/25 , 21 April 2011

⁶ See generally, Lorand Bartels, *The Separation of Powers in the WTO: How to Avoid Judicial Activism* International and Comparative Law Quarterly 2004, (53) 861-895; Claus-Dieter Ehlermann, *Tensions Between the Dispute Settlement Process and the Diplomatic and Treaty Making Activities of the WTO* World Trade Review 2002, 1(3), 301-308; John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited*, Journal of International Economic Law, 2001, 4: 67-78; Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, (American Enterprise Institute,

Washington DC 2001); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints* American Journal of International Law', [Vol.98:247-275 2004]; John Greenwald, *WTO: Dispute Settlement: An Exercise in Trade Law Legislation* Journal of International and Economic Law 2003, 6(1): 113-124.

⁷ India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products WT/DS90/AB/R

⁸ Turkey-Restrictions on Imports of Textile and Clothing Products WT/DS34/R.

⁹ Petros C. Mavroidis, *Judicial Supremacy, Judicial Restraint, and the issue of Consistency of Preferential Trade agreements with the WTO: The apple in the Picture* In Daniel L.M. Kennedy & James D. Southwick (eds.) *The Political Economy of International Trade Law* (Cambridge University Press, 2002).

¹⁰ United States-Import Prohibition on Certain Shrimp and Shrimp Products, WT/DS58/AB/R

¹¹ (DS21/R - 39S/155

¹² DS29/R

¹³ Argentina-Definitive Safeguard Measures on Imports of Preserved Peaches WT/DS238/AB/R

¹⁴ Korea-Definitive Safeguard Measures on Imports of Certain Dairy Products WT/DS98/AB/R.

¹⁵ Brazil-Measures Affecting Dried Coconut WT/DS22/AB/R

¹⁶ Article 13 para 3 of the proposed draft.

¹⁷ Immanuel Kant, *Perpetual Peace, Philosophical Essay*, 1795. Translated by 31. Campbell Smith, **M.A.** (London: George Allen & Unwin Ltd.)

¹⁸ Pascal Lamy, *Harnessing Globalisation: Do We Need Cosmopolitics?* Speech at London School of Economics (Feb. 1, 2000) (transcript available at http://europa.eu.int/comm/trade/speeches_articles/spla86_en.htm).

¹⁹ Steve Charnovitz, *WTO Cosmopolitics*, available at http://scholarship.law.gwu.edu/faculty_publications/450/

Diversified challenges in implementing death penalty for drug trafficking offences in Malaysia

Ekmil Krishnawati Erlen Joni

Abstract

Drug related offences attract various punishments around the globe depending on distinct policies adopted by the respective States in combating drug menace. Many States have abolished death penalty for drug trafficking. Law and policymakers in Malaysia are currently contemplating the removal of this “inhumane” punishment. Whilst this move is not merely to appease exponents for human rights who detest death penalty, it is an indication of a change of policy in imposing capital punishment as a deterrent measure for drug trafficking. Imposing death penalty as a punishment does not appear to fulfill the legislature’s intent in deterring drug trafficking if the death sentence itself is difficult to achieve. Analysis of preliminary empirical evidence in this study revealed that securing a conviction under section 39B of the Malaysian Dangerous Drugs Act 1952 is a laborious process. This paper highlights the diversified challenges faced by the legal fraternity in Malaysia in implementing death penalty for drug trafficking. In view of the diversified challenges, the deterrent effect of death penalty alone may not be adequate to curtail drug trafficking. Nevertheless, the removal of death penalty needs to be adequately replaced with an effective retribution or punishment.

Keywords – drug trafficking, death penalty, drug

Introduction

Drug trafficking is viewed as the most hideous drug related offence in Malaysia as it involves spreading prohibited drugs to the public for monetary gains. While offences of drug possession or illegal usage of drugs may be punishable with imprisonment, drug trafficking in Malaysia attracts mandatory death sentence as provided under section 39B of the Dangerous Drugs Act 1952 (Revised 1980) (hereinafter referred to as “s.39B DDA”). The rationale for imposing such severe sentence is to reduce and possibly to eradicate drug offences.¹ Mandatory death penalty was supposed to deter

existing and would-be drug traffickers from committing the same offence.² Imposing such severe sentence was necessary for the protection of public interests³ as the end result of drug trafficking is drug abuse leading to the deterioration of the nation.

In passing a sentence for drug related offences, judges need to be mindful of the features in sentencing, namely, retribution, deterrence and protection of the public interests.⁴ Public interest and deterrence were given primary consideration in the case *Tan Bok Yang v Public Prosecutor*⁵ where Sharma J, in pronouncing the sentence, said:

“...It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.”

The court in the case of *PP v Lok Kok Wai*⁶ in convicting and sentencing the accused for drug trafficking, stressed on the protection of the public in addition to punishing the accused for a grave offence disapproved by the public. Similarly, in *Public Prosecutor v Jamaluddin bin Mokhtar*⁷, the court viewed that public interest would be protected by meting out severe punishment not only to punish the offender but also to deter others.

Nevertheless, although public interests needs to be protected, the severity of the punishment imposed for drug trafficking in Malaysia may not necessarily result in the actual deterrence of the crime. In the following, analysis is made on the effectiveness of Malaysia’s mandatory death sentence in deterring drug trafficking offences and the impediments in securing a conviction in drug trafficking cases.

The “success” of mandatory death penalty in reducing drug trafficking cases

The Court of Appeal in *Tia Ah Leng v Public Prosecutor*⁸ took judicial notice of the fact that drug addiction amongst youths is still rampant and that death penalty had not been a very successful deterrence. The Court of Appeal reiterated the views of previous judges, policymakers and

legislatures that the main culprits were drug traffickers and peddlers who profited from the lucrative business of selling and trafficking drugs.

Statistics obtained from the Royal Malaysian Police Department showed that the number of drug trafficking cases in Malaysia continued to increase⁹. The number of persons arrested in relation to drug trafficking had increased from 744 in 1990 to 3,845 in 2011. This corresponds with the increase in the cases charged under s.39B DDA. A total of 38,180 persons were arrested under s.39B from 1990 to 2011 for a total of 24,321 cases. There is less number of cases in which the accused were charged as compared with the number of accused persons arrested. This could be attributed to the fact that more than one accused persons were jointly charged in the same case as well as a good number of persons arrested were not charged due to insufficient evidence. The escalating figures of persons arrested and cases charged under s.39B DDA appear to suggest that the mandatory death penalty has not achieved the legislature and policymaker's intent in deterring drug trafficking.

Furthermore, from 1990 to 2011, only 772 accused were convicted and only 93 accused persons were actually hanged to death. A total of 50 accused persons had their charges amended from s.39B DDA to one of a lesser degree which were not punishable by death. Across the board, 772 convictions out of 24,321 cases from 1990 to 2011 represented a mere 3%, an extremely insignificant number to have a deterrence effect on existing and potential drug traffickers. Although financial gains could be the main incentive for drug traffickers, the possibility of escaping the mandatory death penalty could entice them to take the risk in breaking the law. There is no guarantee that a person charged under s.39B DDA would be convicted and face death penalty. Securing the conviction is not an easy task as there are various obstacles which may prevent the courts from sentencing the accused person to death.

Diversified challenges: Procedural and evidential obstacles in implementing mandatory death penalty for drug trafficking

An offence punished by mandatory death penalty requires the judges to be exceedingly cautious and must be satisfied beyond reasonable doubt that the accused is guilty of the offence. Death penalty is irreversible and any errors made in making a finding of the accused's guilt could never be sufficiently compensated after a person's life has been taken away. As Mahadev Shankar, J (as he then was) said in *Public Prosecutor v Kang Ho Soh*¹⁰: "But before we take a man's life we must be absolutely sure as the law will allow that we have got the right man for the right reasons".

To obtain a conviction under s.39B DDA, the prosecution must prove a prima facie case as stated under s.180(1) of the Criminal Procedure Code. In proving a prima facie case, the prosecution needs to prove the ingredients under s.39B DDA: that the accused had exclusive possession of the drugs and for that, it must be shown that the accused had custody and control of the drugs; that the accused had knowledge of the drugs in his/her possession, and that the weight of the specific drugs must meet the requirements under the DDA to establish trafficking in addition to actions amounting to trafficking. There are, however, impediments in proving knowledge, possession, weight of the drugs and/or the act of trafficking. Such impediments may lead to some defects in the prosecution's case resulting in the acquittal of the accused.

In addition to proving the ingredients under s.39B, the prosecution must ensure that there are no procedural and evidential impediments which would jeopardize the conviction. Procedural and evidential requirements in a criminal case impose obligations on the prosecution to prove that there is no break in the chain of evidence; that the identity of the drugs were not compromised and relevant witnesses must be traced and called to give evidence¹¹. Evidentially, material discrepancies and contradictions in the witnesses' evidence may also be fatal in the prosecution's case.¹² A chemist's evidence which is successfully challenged by the defence and inaccuracies in the chemist's report further adds risks to the prosecution's case. Administrative impediments can be seen in the investigations carried out by the investigating officers, the interpretation of the law by the courts

and other actions in the carrying out of justice. In the following, analysis of section 39B cases demonstrate various procedural, evidential and administrative impediments which impede the aims of legislature and policymakers in Malaysia in imposing mandatory death penalty for drug trafficking.

Proving the ingredients of s.39B DDA: possession, knowledge, custody and control

The mere possession of drugs is an offence under s.36 DDA. However, for an offence to fall under s.39B DDA, the prosecution must prove that the drug was a dangerous drug within the meaning of s.2 DDA, that the weight of the dangerous drug meets the requirement of the DDA and that the accused was trafficking in the dangerous drugs. The prosecution must also prove that the accused had possession of the drugs coupled with the knowledge that the drugs are in his/her possession. A person is presumed to have possession and knowledge of the drugs when he/she is found to have custody and control over the drugs or anything containing the drugs. This statutory presumption is laid down in s.37(d) DDA which states that:

“any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug”

Trafficking can be proven by relying on the statutory presumption under s.37(da) DDA if the weight of the drugs seized had fulfilled the requirements under the DDA. Each type of drugs has a specific weight requirement which would attract the presumption of trafficking if the drug was found to be in one’s possession. For example, a person having 200g or more cannabis in his possession is deemed to be trafficking cannabis.

In the absence of direct evidence of trafficking, the prosecution must first establish the ingredient of possession before he could rely on the presumption of trafficking under s.37(da) DDA. Possession

and knowledge of the drugs are inter-related ingredients which need to be proven. In order to prove possession, the prosecution must adduce evidence to demonstrate that the accused had knowledge of the item that was in his/her possession. There is not specific definition of “possession” under the DDA. Thus, the task lies in the courts to determine what amounts to possession. In the case of *Saad Ibrahim v Public Prosecutor*,¹³ Yong J held that:

“Mere possession is one thing and possession with mens rea is another. Possession which incriminates must have certain characteristics; the possessor must be aware of his possession, must know the nature of the thing possessed and must have the power of disposal over it. Without these characteristics possession raises no presumption of mens rea. Without mens rea possession cannot be criminal except in certain cases created by statute, which is not applicable in this case”.

The tasks of the prosecution in proving his case were summed up by Visu Sinnadurai, J in the case of *Public Prosecutor v Muhamad Nasir bin Shaharuddin & Anor*¹⁴ as follows:

“Possession is not defined in the DDA. However, it is now firmly established that to constitute possession, it is necessary to establish that: (a) the person had knowledge of the drugs; and (b) that the person had some form of control or custody of the drugs. To prove either of these two requirements, the prosecution may either adduce direct evidence or it may rely on the relevant presumptions under s 37 of the DDA”.

On the face of it, the DDA appears to facilitate the prosecution’s case by allowing a person to be convicted on the basis of presumptions and as such, convictions ought not to be difficult to attain. Based on reported cases, however, conviction under section 39B is not assured regardless of the presumptions under the DDA. Although the prosecution may rely on statutory presumptions, it must be borne in mind that the presumptions are rebuttable. The accused may rebut the presumptions by adducing evidence and/or by challenging the evidence of prosecution’s witnesses. Thus, whilst the prosecution has a choice to prove the possession, knowledge and trafficking either by relying on the statutory presumptions or by producing positive evidence, it is essential for the prosecution to build his case with cogent evidence to prove possession, knowledge and trafficking.

Failure of the prosecution to prove that the accused had possession, that the accused had some form of control and custody as well as knowledge in addition to the weight of the drugs exceeding the stipulated limit would result in the accused being acquitted. For instance, in *Public Prosecutor v Abd Razak bin Termizi @ Fudzil*¹⁵ the accused was acquitted because the prosecution failed to prove that the accused had physical possession and knowledge of the drugs. The drugs were found in a packet at the foot of the driver's seat and the evidence was insufficient to prove that the accused had control or care of the drugs. The prosecution had not proven that the accused had physical possession of the drugs and there was uncertainty as to which part of the floor of the driver's seat were the drugs placed.

An accused found with physical possession of the drugs (such as having drugs strapped to his body) may have an arduous task to disprove possession or knowledge. In circumstances where physical possession cannot be proven, it is vital that the prosecution proves that the accused had exclusive possession of the place where the drugs were found. In three celebrated cases, *P.P v. Abdullah Zawawi bin Yusof, Choo Yoke Choy v PP* and *PP v Muhammad Nasir B. Shaharuddin*,¹⁶ the courts emphasized that the exclusivity of custody and control of the drugs by the accused must be established by the prosecution. The prosecution, therefore, needs to adduce evidence of exclusive possession of the place where the drugs were found which excludes accessibility by others.

Access by others to the place where the drugs were found (e.g. access to a room, a house or a car) would raise a doubt as the accused may not have been the trafficker. In view of the doubt raised due to the prosecution's failure to prove exclusive possession, the accused would inevitably be acquitted. In *Public Prosecutor v Tukiman bin Demin*,¹⁷ the drugs were found in a room to which several persons had access. In acquitting the accused, the court held that knowledge of the existence of the drugs alone was not enough to establish control. Similarly, in *Thong Jin v PP*¹⁸, there

was evidence that third parties had access to the premises. As the exclusivity of use of the premises had not been proved, the accused was acquitted.

It can be challenging to prove exclusive possession when drugs are found in vehicles. In the case of *PP v Ibrahim Mahmud*,¹⁹ failure on the part of the prosecution to call witnesses to prove exclusive possession of the vehicles, resulted in the accused's acquittal. This was gravely unfortunate for the prosecution as the case involved a huge amount of heroin.

The term "exclusive possession" is not defined in the DDA. Nevertheless, the courts have elucidated "exclusive possession" as follows:

"Thus, to sum up, the common usage, plain, natural and ordinary meaning of "exclusive" is "excluding or to exclude all others; not shared or divided". In the context of drug possession, "exclusive possession" can be construed to mean that the place where the drugs are found must be exclusive to the accused. However, possession of the drugs need not be exclusive. Possession may be joint, that is, two or more persons may jointly have possession of the contraband, exercising custody and control over it. In that case, each of these persons is considered to be in possession of that contraband"²⁰ (per Zawawi Salleh, JC in *Public Prosecutor v Tukiman bin Demin, supra*).

It is also strenuous for the prosecution to prove knowledge. The prosecution not only has to prove that the accused had knowledge of the drugs in his/her possession but recent judicial interpretations of knowledge have placed a heavier burden on the prosecution to prove that the accused should know the nature of the drugs in his possession (Abdullah, 2006). The courts in *PP v Abd Latif bin Sakimin, Public Prosecutor v Poh Ah Kwang, Public Prosecutor v Rosman bin Ismail*²¹ held that, the accused must have actual or full knowledge of the nature of drugs in order to establish possession. Although some judges may not agree with this narrow interpretation of knowledge, they are bound by judicial precedent to follow the decisions of higher courts. In the case of *Public Prosecutor v Rosman bin Ismail*,²² the judge agreed that the law imposed a higher burden on prosecution to prove a prima facie case but was unable to depart from the decision. The honourable judge said:

“I feel the prosecution has been given a near impossible task of establishing knowledge on the part of an accused person that he knew what drug he was carrying. I have no choice but to follow the decisions of the higher courts. The sooner the law is amended to redress the problem the better it is”.

In sum, despite the presumptions under the DDA, the prosecution is still imposed with a heavy burden to prove the essential ingredients of section 39B. The presumptions do not necessarily lessen the evidential burden of the prosecution to prove the accused’s guilt. Although in theory, more convictions should be secured with the aid of the presumptions, the reality is that the prosecution cannot merely rely on the presumptions to obtain a conviction.

Impediments in proving trafficking and the shortcomings of statutory presumptions

Under section 2 DDA, there are eighteen different conducts that can be regarded as “trafficking” which includes, inter alia, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act. Regardless of the wide scope of trafficking, there are some difficulties on the part of prosecution to prove trafficking.

It is trite law that before the prosecution must prove the element of possession before he can invoke the presumption of trafficking under section 2 DDA. The easiest way for the prosecution to prove the element of trafficking is to invoke the presumption of trafficking provided in section 37 (da) of the DDA. It has been held in several cases that the mere act of carrying the drugs, keeping, concealing is not sufficient to constitute the offence of trafficking²³. Lord Diplock laid down the principle of trafficking in the case of *Ong Ah Chuan v PP [1981] 1 MLJ 64* as follows:

“To ‘traffic’ in controlled drug it involves something more than passive possession; it involves doing or offering to do an overt act of one or other of the kinds specified in the definition of ‘traffic’ and imports the existence of at least two parties, namely, a supplier and the person to whom the goods are to be supplied”.

From the above, it is necessary to prove that the accused had transferred, or at least intended to transfer possession of drug to another party as decided in the case *PP v Nik Ahmad Aman Nik Mansor*²⁴. The obstacle to secure a conviction is where the conducts stated in section 2 DDA would not constitute trafficking if there is no further evidence on the part of the accused to trade or deal with the drugs. This was highlighted by Augustine Paul J (as he then was) in *PP v Mohd Farid Mohd Sukis*²⁵:

“This is where the difficulty arises. Proof of the purpose from which a person is keeping, concealing, or carrying dangerous drugs is often difficult to establish.”

Thus, in many situations, the prosecution relied on inference to prove that the accused had transferred or intended to transfer the drugs to another party. For example, by referring to the weight of drugs involved or by relying on the presumption of trafficking as stated in section 37 (da) of the Act.

The example could be seen in the case *Ong Ah Chuan* (supra) where Lord Diplock explained that in relation to the verb ‘transport’, the inference that arises from the quantity of drugs involved, is that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter’s own consumption.

“... in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible explanation by him, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act”.

The above principle was adopted by the Federal Court in *Public Prosecutor v Abdul Manaf bin Muhammad Hassan*²⁶ where the court held that possession of 334 grammes more than the statutory minimum of 200 grammes provided in S37(da) DDA gave rise to the inference that it was not for personal consumption, but rather the accused was trafficking in dangerous drugs.

However, in the case of *PP v Hasbi b M Kusin & Anor*,²⁷ the court was reluctant to accept the inference of trafficking. In this case, the two accused were charged with trafficking in 876g of cannabis. The prosecution sought to establish the ingredients of the charge by relying on section 2 DDA which includes in its definition of 'trafficking', the act of 'transporting' dangerous drugs. The quantity of cannabis was far in excess of an amount that would be utilized for personal consumption, was in itself sufficient to warrant an inference of 'trafficking. The court, however, amended the charge for an offence under s 6 DDA and the first accused in this case was sentenced to 14 years imprisonment and 10 strokes of the whipping. The reason being lack of evidence on 'transport'; that the evidence had not shown that the cannabis was 'conveyed' from one place to another.

Agent provocateurs are often used to prove trafficking. In *Public Prosecutor v Sidek Abdullah*²⁸ the agent provocateur (PW12) was on a pretext of being a drug trafficker and there were several negotiations of the sale transaction between PW12 and the accused. Finally, the accused agreed to supply 50 kg of cannabis at the prize of RM75,000. Both of them agreed to conclude the transaction at Ulu Bernam Road. The accused was arrested when he stopped his car very close to Shell petrol station situated at Ulu Bernam Road by the strike team of Narcotic Department. The court held that the prosecution had failed to establish a prima facie case against the accused as there was "no evidence of a sale transaction ever took place between the accused and PW12".

In contrast, in the case of *Teuku Nawardin Bin Shamsuar v Public Prosecutor*,²⁹ the accused was convicted and sentenced to death on a charge of trafficking. In this case, the accused was riding a motorcycle and stopped in front of the factory. He was apprehended and the police found a package of 491 grams cannabis wrapped in tin foil plastic and cello tape tucked in front of his waist underneath his trousers and covered by his jacket. On the issue of trafficking, the judge referred to Lord Diplock in *Ong Ah Chuan v PP (supra)* and decided that as the amount of drugs recovered from

the accused in the present case is about 10 times more than the statutory minimum of 50 grams under Section 39A(2) of the Act, and there being no challenge made by the defence that the cannabis in question was for his personal consumption, the prosecution had successfully proven a prima facie case of drug trafficking.

Thus, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into. The prosecution carries the legal burden to prove that the accused intended to transfer the drugs to another person in order to succeed to establish trafficking as mentioned by section 2 of the Act.

Defects in investigation: a break in the chain of evidence and the failure to call relevant witnesses

In establishing his case, the prosecution needs to prove that there is no break in the chain of evidence. It is crucial that the movements of the drugs are accounted for from the time the drugs were discovered until they were handed over to the chemist for analysis and until they were returned by the chemist. The drugs would have to be exhibited as evidence in court and it is fundamental that the prosecution eliminate any doubts as to the handling of the drugs. It must be proven that the drugs sent to the chemist were the same drugs as the drugs seized; that the drugs exhibited in court were also the same drugs seized from the accused. To prove the movements of the drugs or any other exhibits in relation to the case, relevant witnesses must be called to testify. Among the relevant witnesses are the arresting officer(s), the investigating officer or any other persons who were authorized with the safekeeping of the drugs before and after sending the drugs to the chemist for analysis. Inability of the prosecution to account for the handling of the drugs may raise a doubt and may result in acquittal of the accused, particularly when it affects the identity of the drugs.

In *Shamsuddin bin Hassan & Anor v PP*³⁰ the prosecution witnesses failed to explain why there was more than 5 hours gap before the drugs were handed over to the investigating officer. This created a break in the chain of evidence and reasonable doubt was raised. The prosecution also has to ensure that the chemist accounted for the handling of the drugs to prevent any possibility of tampering of evidence. In the case of *PP v Mansor bin Md Rashid & 2 Ors*,³¹ no explanation was given on how long the government chemist handled the drugs and the steps taken to ensure the safe custody of the exhibit. This gave rise to a break in the chain of evidence.

The prosecution's dilemma is enhanced when the officers responsible for the arrest of the accused and seizure of the drugs had made more than one arrests or seizures on the same day but could not positively account for the movement of the drugs or clearly identify the drugs. In the case of *Public Prosecutor v Lee Boon Seng*³² there were flaws in the prosecution's case in handling evidence, where there were two sets of arrests relating to drug trafficking on the same day the accused was arrested. All the drugs were kept in the same cabinet. Since no other precautions were taken to avoid the possibility of a mix-up of exhibits and there was no distinguishing marking on the exhibits, the court found that there was a break in the chain of exhibit.

Relevant witnesses must be called to justify the movement of the exhibits to eliminate doubts or discrepancies of exhibit which may cause a break in the chain of evidence. In *Abdullah bin Yaacob v PP*,³³ failure of the prosecution to call the police officer who kept all the exhibits for a long period from 1985 to 1989 was held to be a serious failure causing break in the chain of evidence leading to doubts. Attempts must be made by the prosecution to trace the witnesses, particularly when the witnesses are traceable through government agencies.

A break in the chain of evidence raises reasonable doubt to the prosecution's case and thus, the onus is on the prosecution to ensure that there is no break in the chain of evidence to prove a prima

facie case against the accused. The prosecution's failure to do so would be an advantage for the accused and the accused may escape the gallows on evidential and procedural grounds.

The prosecution is under a duty to call all material witnesses to prove the case against the accused. A material witness is one who is "essential to the unfolding of the narratives on which the prosecution case is based" as per Lord Roche in *Seneviratne v R* [1936] 3 All ER 36. A person is a material witness if he/she could shed some light to prove the accused's exclusive possession, knowledge, custody and control or the accused's whereabouts leading towards proving the accused's action in possession or trafficking. Failure of the prosecution to call a relevant witness may result in adverse inference being made by invoking s.114(g) of the Evidence Act and ultimately, may result in the acquittal of the accused.

In the case of *PP v Saare Hama & Anor*³⁴ the judge acquitted the accused as the prosecution failed to call the owner of the car in which the drugs were found. The owner of the car was also wanted by the Thai narcotic enforcement officers to assist them in the investigation of other dangerous drugs offences. Although details of the owner's residential address was available, no effort had been made to trace him. The onus was on the prosecution to rule out the probability that the owner himself had placed the drugs in the compartment of the car. The prosecution, however, had failed to rule out such probability and the accused must be given the benefit of the doubt. Likewise, in *Public Prosecutor v Karim bin Ab Jaabar*,³⁵ cannabis weighing 10,384g were found in the front passenger seat and the booth. The court invoked section 114 (g) of Evidence Act 1950 as the prosecution failed to call the registered owner of the car. In acquitting the accused, the court ticked off the prosecution for the lackadaisical approach taken to secure the attendance of the witness in the court.

A witness who could disprove the prosecution's evidence on possession of the drugs by the accused and who could support the accused's statement on the drugs is a material witness. In *PP v Mohd Faris B. Mohd Sukis & Anor*,³⁶ the prosecution's failure to call such witness was fatal and created

doubt in the prosecution's case. Similarly, in *PP v Ibrahim Mahmud*,³⁷ the prosecution's failure to call two witnesses to testify in the trial against the accused constituted suppression of evidence as their evidence had the potential of showing that the accused did or did not have exclusive possession or in fact, that these witnesses had exclusive possession. As the probabilities raised doubt, the accused was acquitted.

Therefore, the prosecution's failure to call a material witness will create a gap in the prosecution's case resulting in acquittal of the accused. Irrespective of large amount of drugs discovered, the accused may walk free if the prosecution's case contains flaws due to failure to secure the evidence of a material witness or at the very least some justification of the witness' absence. The failure of the prosecution to call a relevant witness, however, is closely associated with the investigations carried out by the police investigating officer. Investigation which was not thoroughly conducted would increase the possibility of not securing the presence of potential relevant witnesses.

Challenges against the chemist's report

It is elementary that a chemist report is required to prove that the drug is dangerous drugs under section 2 of the DDA. The chemist report, the qualification of the chemist, the tests conducted by the chemist and the amount of sample taken for analysis have been frequently challenged by the defence in raising a doubt in the prosecution's case. From the reported cases, there appears to be divergent interpretations on the amount of drugs which required to be analyzed by the chemist in order for the test to be conclusive that the exhibits were, in fact, dangerous drugs. The judge in *Loo Kia Meng v PP*³⁸ interpreted section 37(j) DDA to mean that the chemist is required to give the actual amount or weight of the samples. For the purpose of the analysis, a minimum 10% from the receptacle in which the drug was found needed to be tested. Failure of the chemist to state the accurate amount of drugs taken for analysis or to test sufficient sample of the drugs would raise a

doubt on the actual content of the drugs. In a subsequent case, *Gunalan a/l Ramachandran & 2 Ors v PP*,³⁹ the court decided that as long as the chemist's evidence is credible, it has to be accepted at the face value. The chemist could decide what amounts are sufficient for analysis purpose.

The chemist report and evidence is vital in determining whether the substance seized were dangerous drugs. Thus, failure to satisfy the court that the chemist had undertaken the necessary tests and had tested on sufficient samples so as to prove that the substance was dangerous drugs would put the prosecution's case at risk.

In addition to chemist's analysis of the drugs, finger print evidence is also essential to prove the accused's possession of the drugs. However, this fundamental procedure is sometimes overlooked – there were cases where the investigating officer failed to dust the packages for finger prints, failed to take hand swaps or nail clippings from the accused, failed to test the accused's clothings for traces of drugs. These omissions may be fatal to the prosecution's case, particularly when physical possession could not be proven. For instance, in *PP v Fom It Cheong*,⁴⁰ no finger print dusting was done on the exhibits. The prosecution had failed to prove knowledge and possession on the part of the accused. Similarly, in *Public Prosecutor v Rajandiran a/l Kadirveil*,⁴¹ neither the bag nor the packets containing the drugs were dusted for fingerprints to show if the accused had handled them. Thus, the prosecution had failed to prove knowledge or possession. Finger print test, however, would not be necessary if the drugs were found on the accused's body such as that in the case of *PP v Chuah Kok Wah*.⁴² Therefore, while some tests may be merely procedural, chemist's evidence on the tests conducted on the drugs is extremely important and other tests need also be undertaken to substantiate the prosecution's case. It is unfortunate, however, that these tests were not done comprehensively and meticulously resulting in gaps and doubts in the prosecution's case.

Conclusion

Drug trafficking is a serious crime but there is no conclusive evidence that the provision of mandatory death penalty under the DDA is an effective deterrence. Analysis of the cases above indicates that despite the aid of presumptions under the DDA, the prosecution is faced with numerous impediments in securing a conviction. The prosecution alone cannot ensure that the deterrence objective of the legislature and policymakers are achieved. The prosecution's case is very much affected by those who carried out the investigations leading to the arrest of the accused, the chemist's analysis of the drugs as well as any other material witnesses to the case. Indeed, the prosecution's burden is a heavy one and it should be, considering that a human's life is at stake. Legislature and policymakers perhaps need to consider removing the mandatory death penalty and allow the judges to exercise their discretion on several punishments.

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¹ Ho, Mooi Ching. 2007. *Sentencing Practice in Malaysia*. Petaling Jaya, Selangor: Sweet & Maxwell Asia. pp. 18-39.

² Clarkson, CMV & Keating, Heather M . 2007. *Clarkson and Keating Criminal Law: Text and Material*. London: Sweet & Maxwell. pp. 20-52.

³ Public Prosecutor v Loo Chang Hock [1988] 1 MLJ 316 at 318, per Zakaria Yatim J (as he then was)

⁴ Khaira, Hardial Singh. 2005. "Sentencing of Drugs Offenders (A comparative Study of the Australian and Malaysia Approach", *Malayan Law Journal* , vol. 3, pp.lxxvii.

⁵ [1972] 1 MLJ 214

⁶ [1988] 3 MLJ 124

⁷ [2006] 5 MLJ 446

⁸ [2004] 4 MLJ 249

⁹ Statistic from Narcotic Department Investigation Crime, Royal Police Department of Malaysia as on April 2012

¹⁰ [1991] 3CLJ 557 at pp.571.

¹¹ Abdullah, Hisham. 2006. *The Law on Drugs Possession and Trafficking in Malaysia*. Kuala Lumpur: Marsden Law Book Sdn Bhd. pp. 89- 113, 139 -137.

¹² Abdullah, Hisham. 2009. *Criminal Trial Advocacy for the Defence*. Johor Baru: Hisham Bin Abdullah @Teh Poh Teik. pp. 136-139, 234-238.

¹³ [1968] 1 MLJ 158 at pp. 159

¹⁴ [1994] 2 MLJ 576 pp. 592

¹⁵ [2011] 4 MLJ 76

¹⁶ [1993] 3 MLJ 1; [1992] MLJ 632; [1994] 2 MLJ 576

¹⁷ [2008] 4 MLJ 79

¹⁸ [2002] 3 CLJ 553

¹⁹ [2001] 3 CLJ 284

²⁰ per Zawawi Salleh, JC in *Public Prosecutor v Tukiman bin Demin* [2008] 4 MLJ 79

²¹ [2005] 6 MLJ 351; [2003] 3 AMR 664; [2003] 5 CLJ 139

²² [2003] 5 CLJ 139

²³ *Koh Chai Cheng v PP* [1981] 1 MLJ 64; *PP v Hairul Din Zainal Abidin* [2001] 6 CLJ 480

²⁴ [2002] 6 CLJ 369

²⁵ [2002] 8 CLJ 814

²⁶ [2006] 3 MLJ 205

²⁷ [2008] 7 MLJ 331

²⁸ [2005] MLJU 503

²⁹ [2010] MLJU 249

³⁰ [1991] 3 MLJ 314

³¹ [1993] 4 CLJ 266

³² [1995] 4 MLJ 277

³³ [1991] 2MLJ 237

³⁴ [2001] 4 CLJ 475

³⁵ [2002] 2 MLJ 888

³⁶ [2002] 3 MLJ 401

³⁷ [2001] 3 CLJ 284

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³⁹ [2004] 4 CLJ 551

⁴⁰ [1991] 3 CLJ 524

⁴¹ [2002] 7 MLJ 77

⁴² [1994] 2CLJ 423

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CHILD SEXUAL ABUSE PREVENTION AND ELIMINATION IN PAKISTAN

BY MUHAMMAD IMRAN ALI

ABSTRACT

Most of the child protection laws are out-of-date in Pakistan. The Pakistan Penal Code 1860 does not contain punishments for child sexual abuse offences, it also does not differentiate offences that relates to children and adults. These facts need comprehensive laws dealing with child sexual abuse offences. This lacuna in the criminal law of Pakistan has given rise to the research question "[whether the criminal justice system in Pakistan needs improvements to response child sexual abuse?](#)"

This article focus on the issues:-

- What is child sexual abuse?
- The developments in the laws relating to child sexual abuse and the role of superior Judiciary in different countries.
- The laws existing in Pakistan and the role of superior judiciary in dealing with the issue of child sexual abuse.
- The amendments required in the criminal law to response child sexual abuse in Pakistan.
- Recommendations for preventing and addressing issues of child sexual abuse.

What we need are the comprehensive amendments in the criminal justice system of Pakistan to combat child sexual abuse.

Keywords: child sexual abuse, laws, Pakistan, prevention.

1. INTRODUCTION

Sexual abuse of any form has never been tolerated by any religion. Islam forbids homosexual acts and declares these acts as punishable. The Holy Quran teaches that the most sinful act is the act of homosexuality, this is the Message of God conveyed to human beings through the Holy Quran¹. The people of Lot were destroyed and severely punished by God for committing homosexual acts. There is very strict punishment for illegal sexual intercourse in Islam.

Christianity forbids sexual abuse in the same way and every child is a unique individual created by God. According to Bible², God is concerned for children and anybody who causes sexual abuse to a child will be punished heavily.

Sexual contact of any kind between a grown up and a minor including fondling and kissing is strictly forbidden in Jewish law³. Jewish law is very strict on this subject, forbids intentional illicit thoughts and those activities which may result in sexual stimulation. Jewish law forbids intentional self-stimulation and illicit sexual thoughts. It even forbids a number of gentle activities that may bring about sexual stimulation.

Children are the supreme national asset and the future of a nation depends upon its children.

No one can ignore child's importance in a society because the growth and development of a nation depends upon the well-being of its children.

The term child abuse may include physical abuse, sexual abuse, emotional abuse and neglect. Child sexual abuse is improper sexual behaviour with a child. It includes touching or fondling the genitals of a child or inducing a child to fondle an adult genitals, child molestation (with or without penetration), sodomy, rape and pornography.

Child sexual abuse is a major problem in almost all societies and child molestation is increasing day by day. Child sexual abuse exists in Pakistan and the incidence is higher than generally perceived.

The purpose of the study is to substantiate that child sexual abuse exists in Pakistan and the laws available in Pakistan are not enough to combat child sexual abuse. This study comparatively analysis the developments made in the laws relating to child sexual abuse and the role of superior judiciary in USA, UK, India and Pakistan. This research study uses the primary sources such as pieces of legislation and the relevant constitutional provisions as well as the case-law of various countries including Pakistan. The secondary sources include literature on customary law such as books and world-wide web.

The purpose of this research study is to present the information base that will help government to formulate the necessary legislation, to develop improvements in the criminal justice system of Pakistan to deal with this problem

The overarching responsibility is that of the state and it is the state that has to create a protective environment and presents a safety net for children who fall into vulnerable and exploitative situations.

2. DEFINITION OF CHILD SEXUAL ABUSE

There is no precise and comprehensive definition of child sexual abuse, however, sexual abuse to a child refers to violent sexual acts which will physically and mentally harm a child. Child sexual abuse is a burning problem in almost all countries and especially in Pakistan. Child sexual abuse is an attempt or sexual assault by a grown up man or by a child of older or same age towards the child to commit sexual act with him without his consent.

Kemp⁴ in 1978 defines child sexual abuse as,

"The involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent or that violates activities that they do not fully comprehend and to which they are unable to give informed consent, or that violate the social taboos of family roles"

Salter⁵ in 1988 defines sexual abuse as,

"Sexual activity between a child or adolescent with an adult or another child five years or older than the child."

There are two categories of child sexual exploitation or abuse. The first is non-contact which includes exhibitionism, voyeurism, sexual comments, pornography, making pornographic films of a child and

exploitation. Second category is Contact which includes kissing a child or touching a child with sexual intents, fondling, masturbation, oral sex, intercourse.

Most common types of child sexual abuse in Pakistan are abduction for sexual abuse, molestation, rape, sodomy or incest and murder after sexual abuse.

The United Nations Convention on the Rights of the Child 1989⁶ which is also known as CRC is a treaty to safeguard the human, social, cultural, civil, economic, health and safety rights of the children. The Convention defined a child as a human being under the age of eighteen years, unless a different age of majority is recognised by the law of a country. This convention has a binding effect on all the nations who ratified this convention. This Convention consists of 54 articles and two Optional Protocols. This convention recognises the right of a child to survive in society, to have equal opportunities to develop him, fully protected against any harms likely to occur to him, protection against any form of sexual abuse and the right to fully participate in his family, social and cultural life as the basic human rights of the children.

The basic principle of the Convention is that every child has equal rights without any discrimination. The rights describe by the Convention are belong to the human dignity and harmonic development of every child. The basic purpose of the Convention is to protect children's rights. Article 34 declares that the States are responsible to protect children from all forms of sexual abuse and are responsible to take all necessary measures on all levels to eradicate this evil.

3. LEGAL DEVELOPMENTS IN DIFFERENT COUNTRIES

3.1. UNITED STATES OF AMERICA

In the United States hearsay evidence is admissible in evidence in child sexual abuse cases with few exceptions. Hearsay evidence is very important in child sexual abuse cases. Generally trials take a long time for their conclusion and a child have the fear of forgetting the evidence which he is going to record in the trial court. Moreover during the trial, the child also disturbed mentally. The Courts must understand this condition of the child and must give value to the hearsay evidence to bring the culprit to justice.

The case titled as *Ohio v. Robert*⁷, established the foundation for allowing hearsay evidence, statement of the actual witness who was not available was so trustworthy and reliable that the Court considers it justifiable, that another person permitted to repeat it in the Court. The reliability of a statement depends upon the Court to decide whether it is true.

In *White v. Illinois*,⁸ the Supreme Court has to settle question of admission of hearsay evidence in the presence of the Confrontation Clause of the Sixth Amendment⁹. In this case Randall White charged with offence of assaulting sexually a four-year-old girl, during theft in a residential building. The occurrence witnessed by the babysitter by hearing the screams of the victim child.

White was found guilty by the Court and appealed in the High Court arguing that the hearsay testimony of the babysitter was not valid in presence of the Confrontation Clause¹⁰. The High Court unanimously decides that the Confrontation Clause has no link with admissibility of hearsay evidence. The US Supreme Court comes to the conclusion that in this case the hearsay evidence

corroborated with the medical evidence and considering the principle of “Res gestae, upheld hearsay evidence as valid.

In *Coy Versus Iowa*¹¹, the US Supreme Court held that the use of screen between the child and the accused during the cross-examination was not a violation of the Confrontation Clause. The argument that the use of screen prejudicial and was an infringement of the due process also rejected by the US Supreme Court.

In *Maryland Versus Craig*¹², The Supreme Court declares that it is in the best interest of justice that there should an evidentiary hearing before the commencement of the trial, where it will examine that what affects made on the child giving testimony in the presence of the accused.

In *Idaho vs. Wright*¹³, the US Supreme Court considered to examine the question what are the exceptions in the hearsay evidence which are admissible in the presence of the Confrontation Clause. The US Supreme Court set forth a test which comprised of two parts to determine whether hearsay evidence admitted in child sexual abuse cases. Firstly, hearsay evidence has to fall into an exception of the hearsay rule to be admitted in evidence. Secondly, the statement will be inadmissible in evidence if the statement does not fall under a hearsay exception that is not firmly based. The statement will meet the standards of admissibility of the Confrontation Clause, if it is trustworthy.

*New Jersey Versus Michaels*¹⁴, Kelly Michaels convicted of sexually abusing children while they were in a day care Centre and imprisoned for 5 years. He filed an appeal. The victim children in this case interviewed and asked highly leading, suggestive, and coercive questions. The Supreme Court held that the interviews of the victims like interrogations were not proper, and there will be substantial likelihood that the evidence derived from the victims was unreliable, instead of this practice a pretrial hearing initiated in which the state was bound to prove beyond any shadow of doubt by a clear and convincing evidence that the testimony of the victims was reliable enough to warrant admission of trial.

Coy v. Iowa and *Maryland v. Craig* set the principles for the arrangements of closed circuit television or screen between the victim and the offender to testify the child without any fear and face to face contact with the accused in child sexual abuse cases.

In the cases *Idaho v. Wright* and *White v. Illinois*, hearsay exceptions admitted. The judgment delivered in the *White* case has a wider applicability and threatens the Confrontation Clause rights claimed by all accused.

The United States Supreme Court responds to the developments in the child sexual abuse cases by acknowledging the difficulties faced by the prosecution. The US Supreme Court considered the facts that the court rooms atmosphere is not suitable to the child sexual abuse victims damaged by physical as well as psychological effects, and therefore, introducing developments in all levels to make the courtrooms more friendly.

The Child Abuse Prevention and Treatment Act¹⁵ is a development in child sexual abuse laws in the United States. CAPTA enacted on January 31, 1974 and amended several times, lastly amended on 20-12-2010 by the CAPTA Reauthorization Act of 2010. CAPTA authorizes the United States Federal

Government to play an active role in research, technical assistance and data collection activities. The Offices of Child Abuse and Neglect were established under this Act.

3.2. UNITED KINGDOM

The Sexual Offences Act, 2003¹⁶ is a great development in laws relating to child sexual abuse laws in the United Kingdom.

The government believed that the existing laws relating to sexual offences have been out dated, therefore, this act introduced to reform the laws, specially laws in child sexual abuse cases.

This new Act makes consent the key feature between the sex contacting parties. A clear definition of consent added. The accused has to prove that the sexual act has done with consent of his partner. It widened the definition of rape by including penetration in vagina, anus or mouth with or without consent. It also introduces a new offence of assault by penetration of an object in vagina or annus such as bottle or any other thing. It also includes in sexual assault the intentional sexual touching without consent. This Act declares the age of a child at 18 years and provides protection for all sexual offenses to a child under the age of 16 years. It introduces new criminal offences including familial sexual abuse, offences committed by adult relatives and offences giving protection to persons with mental disorder. This Act also re-designs offence of abuse of a trust position towards a child and introduces effective measures to protect children from sex offenders. This Act introduces for the first time, offence of voyeurism.

The Sexual Offences (Scotland) Act, 2009¹⁷ provides a comprehensive framework of laws for sexual offences in Scotland. This Act repeals the old laws relating to rape, sodomy and a several other offences relating to sexual abuse and particularly introduces new statutory laws relating to sexual abuse which take place without consent. This Act defines consent as free agreement.

The Social Work (Scotland) Act 1968 introduced the system of children's hearing, which is now included in the Children's Hearings Scotland Act, 2011. Its aim is to combine justice and welfare for children.

In *Re P.B. (a minor)*¹⁸, it was held by the Court that evidence of the doctor about the statement given by a child during the interview cannot be struck out on the ground that it was against the hearsay rule but the court may admit it on its discretion.

In the proceedings relating to wardship cases, the most important purpose before a court is the welfare of a child. It is the duty of the court that the rules of procedure and the rules of evidence will not apply in such a manner to prejudice the welfare of the minor. If the evidence available is the only one which could prove the alleged sexual offence with which the accused charged.

3.3. INDIA

In India children are also victims of sexual abuse like other countries, they are sexually abused by family members, relatives, servants, teachers and friends.

The laws relating to sexual offences are found in the Constitution of India¹⁹ and in the Indian Penal Code 1860²⁰. But the real developments in the laws relating to child sexual abuse made by the superior judiciary of India through their judgments on this subject.

Sakshi vs. Union of India and Ors,²¹ is a landmark judgment in the judicial history of India relating to the child sexual abuse cases, the Supreme Court holds that the laws in Indian Penal Code are not sufficient enough to cover all sexual offences against women, or child sexual abuse. Previously, the Delhi High Court holds that the penetration by father to his eight years old daughter was neither a rape nor an unnatural offence, and declared it as hurt or an outrage of modesty. Appeal filed in the Supreme Court of India. Sakshi (an NGO) filed the petition in the year 1997 and contended in its petition the scope of sections 375 and 376 of the Indian Penal Code 1860 is very limited and it will extend to include other forms of sexual offences which intends to degrade or humiliate a woman or child

Considering the sensitivity of child sexual abuse and rape cases, the Supreme Court established that the victim and witnesses will prevent from face to face contact with the accused during trial by using a screen or similar arrangements.

The Court established that the defence side should put their questions in cross-examination to the child in writing through the trial judge and the trial judge should explain those questions to the child victim clearly and in a simple language. The Court holds that in camera proceedings are mandatory in cases even penile penetration have not been occurred.

Sheba Abidi versus State of Delhi²², the Delhi High Court keeping in view the principles established in the Judgment passed by the August Supreme Court of India in the case of Sakshi, established further parameters in cases of child sexual abuse.

The Court established that the court is responsible to assure that the child was not psychologically traumatized, and the court should allow the child to give evidence outside the court, if the child was uncomfortable in the court atmosphere and feel reluctant to go inside the courtroom. Further the child entitles to get support of any person including the family member or parent to accompany him during the trial proceedings. The Court established that the child victim can testify outside the Court.

In the case State of Punjab vs. Gurmit Singh²³, the Supreme Court has made the observations that the trials relating to the child sexual offences will be held in camera and held that in camera trials are mandatory in cases relating to child sexual abuse. The Court also held that women judges should conduct the hearing of these types of cases and the court is responsible to consider all these factors and the process of cross-examination will not a means of harassment to the victim.

As a result of these judgments, The Protection of Children from Sexual Offences Act, 2012²⁴ was passed by the Indian legislature. This Act introduces child friendly procedure for recording the statement of a child, at the place of his choice and by a woman police officer of a higher rank and the police officer will not in uniform while recording his statement. The child can require the help of a translator or an expert. In case of disability, the child can take assistance of a special educator for communication. No aggressive questions allowed to put to the child during his cross-examination. The child statement must record within 30 days. Trials should conduct in-camera.

Special courts will establish for trial of offences under this Act. Under this Act, onus of proof shifts on the accused considering the child's innocence. The period of one year fixed for conclusion of a trial. The media cannot disclose the child's identity without the prior permission of the Special Court.

4. CHILD SEXUAL ABUSE IN PAKISTAN

Child sexual abuse exists in Pakistan. It becomes a very serious problem in our society. A minor girl or boy abused or raped every second day in Pakistan. There is no official agency which prepares a data of this crime. Child molestation would certainly be a child abuse but all acts of child abuse would not necessarily be child molestation. Sexual molestation of a child is of various types. It could be fondling of the genital organs of the child, or it could be showing him nude photographs to arouse his sexual emotions or it could be in form of physical nudity with the object of sexually provoking or using a child. The child sexual abuse acts or the child sexual molestation have not been categorically defined as offences in the Pakistan Penal Code or in any other law of the State.

Child sexual abuse becomes a common and serious problem in Pakistan. The most recognised forms are molestation, sodomy, rape, sexual abuse without penetration and abduction for sexual abuse which sometimes resulted in murder of the child.

Commercial sexual exploitation of children is another serious problem in Pakistan. Boys targeted more than girls. Both boys and girls used in the prostitution business. Boys are available for prostitution at bus stops and hotels. However, girls supplied in private homes and hotels. Prostitution is illegal in Pakistan, but existed under the cover of dancing business. In prostitution business, virginity of a girl at an early age has sold on a very high price in Pakistan, called *nathutra* or first night.

Sexual abuse is improper sexual behaviour with a child. It includes touching or fondling the genitals of a child or inducing a child to fondle an adult genitals, child molestation (with or without penetration), sodomy, rape and pornography.

There are no specific laws about child sexual abuse in Pakistan like The Child Abuse Prevention and Treatment Act in USA, The Sexual Offences Act, 2003 in UK and The Protection of Children from Sexual Offences Act, 2012 in India. Most of the existing laws have not been specifically made offences relating to child sexual abuse or sexual molestation in our criminal law.

Equal protection of law envisaged in Article 25 of the Constitution of Pakistan 1973²⁵ means that no person or class of persons would be denied same protection of law enjoyed by persons or other class of persons in like circumstances in respect of their life, liberty, property or pursuit of happiness. Persons similarly situated or in similar circumstances treated in same manner.

The concept embodied in Article 25 of the Constitution of Pakistan 1973 is similar to Article 7 of the Universal Declaration of Human Rights²⁶. No discrimination allowed in case of children. Further, Article 37(e)²⁷ of the Constitution of Pakistan, 1973 stipulates that the state shall make provisions for ensuring equitable and humanitarian conditions of work for children and women ensuring that they are not employed in vocations which are not suited to their age or sex.

Section 82 of the Pakistan Penal Code, 1860²⁸ provides that a child under the age of seven years is not guilty of a crime. Section 375 PPC²⁹ provides the definition for rape and section 376 PPC³⁰ provides punishment for rape. Section 377 PPC³¹ deals with unnatural offences, e.g., sodomy. Section 3 of The Police Order 2002³² provides that it is the duty of police officials to aid individuals who are in danger of physical harm particularly women and children.

State versus Abdul Malik³³ is a landmark judgment which establishes the basis for development of laws relating to child sexual abuse in Pakistan. The High Court holds that the rape of a minor would ordinarily result in feeling of fear and insecurity in society, therefore, the offence would be covered by Anti-Terrorism Act, 1997. Secondly no law in Pakistan has defined child molestation. Most of the foregoing acts have not been specifically made child molestation an offence in our criminal law. The rape of a child is a serious form of child molestation and the punishment for zina-bil-jabr provided in Section 7 (Offence of Zina) Enforcement of Hudood Ordinance, 1979³⁴. The act of child molestation being a heinous offence tried by a special Court constituted to try terrorist offences. The Court further holds that penal laws should amend to make the child sexual abuse offences punishable. The High Court Further Holds that section 6 clause (c) Anti-Terrorism Act, 1997,³⁵ appears to have drafted in haste and child molestation in its various meanings have not been defined nor any punishment prescribed for other types of child molestation. The High Court directs the Government to examine desirability of some affirmative action in the light of this judgment.

In another case titled as Akhter Ali Versus The State, it was held that the rape of a minor child is a serious offence and a feature of horror.

5. EFFECTS OF CHILD SEXUAL ABUSE

The offence of child sexual abuse is the worst social crime in our society. It not only affects the child victim but also his family and the society. Child sexual abuse killed the victim's childhood. It is a worst sin as described by almost every religion. The sexual abuse of children affects us all. Sexual abuse of a child not only physically hurts the child but also demolished them mentally. Child sexual abuse destroys the child's innocence. They will never trust another adult due to the mishap they suffered in their life. Children cannot be used for sexual intercourse as they are not physically or mentally grown up. Sexual intercourse between a grown up man and five years old child cannot possible. This unrealistic behaviour shows the mental sickness of the offender who sexually abused a child to satisfy his lust. This is the behaviour of a monster and not a civilized person.

The sexual abuse of a child has very bad effects on the victim. It mentally destroyed a child and the child become sexually aggressive. The child lost trust on his family and relatives in case of familial sexual abuse. The child victim psychological suffers more serious and dangerous consequences as compare to physical effects. They will affect by anxiety, aggressiveness, guilty feeling and depression.

The sexual abuse of a child involves serious impacts on victim's body, honour, privacy, safety and right to independence. The victim's life totally ruined and he becomes unable to live a normal life. The child always feels used and dirty, thus mentally disturbed in his whole life.

The child sexual abuse victim needs counseling, but unfortunately very few organizations in Pakistan which provide counselling services to child abuse victims. Child sexual abuse victim's confidence shackles and he needs confidence building therapies.

6. PREVENTION AND ELIMINATION OF CHILD SEXUAL ABUSE IN PAKISTAN

In the year 2010, a total number of 2595 cases reported of child sexual abuse in Pakistan³⁶. Unfortunately, there is no official agency in Pakistan for maintaining the data of child sexual abuse cases. The newspapers only highlighted the brutal nature of child sexual abuse cases such as rape or sodomy resulted in murder of child. No child is safe in our society. We live in a state of fear. Every

child is facing this fact alone. In our criminal justice system, the accused will release in one or two years due to the obsolete procedural laws which are not responding to this brutal act as it deserves. This crime costs us all. It is necessary to keep this offence under control by process and enforcement of law.

Preventive measures against child sexual abuse must improve and increase in number. The most important is the development in the criminal justice system regarding the child sexual abuse offences. The state cannot punish citizens without specific laws warning them that particular conduct will be dealt with by way of punishment in a particular manner. The criminal law is the strongest arm of all the normative systems of the society by which it punishes, controls, curbs and prevents crime in the society. The evil has lived with the mankind from its beginning and the society has to make continuous efforts to keep it at bay and the criminal law keeps undergoing change to meet the new challenges. The basic purpose of the criminal justice is to save the society from evil, to free it of crime. The criminal law will interpret, apply and be enforced in a manner to achieve these objectives.

Judges are particularly accountable to their conscience and more than this to Almighty Allah. A crime free society can only be set up if every citizen irrespective of his colour, creed, religion and status is to provide justice and in this respect court can play a vital major role.

The child not only faced sexual abuse but also faced the abuse of criminal justice system. We need a comprehensive criminal justice system to eliminate child sexual abuse from our society, and this object should only be achieved by awarding punishment to deter people from committing this crime. Child molestation should include as an offence in the Anti-Terrorism Act, 1997.

Campaigns will be launched to aware society about the child sexual abuse and exploitation. Media and NGO's should play their effective role in these campaigns.

CONCLUSION

Islam pays great emphasis on family and child, it is the duty of parliament to enact the necessary laws to safeguard the rights of the children. Security of persons is an essential function of state and this purpose can only be achieved through the medium of criminal law. Protection of society is the aim of law which must be accomplished by imposing proper sentence. Law should adopt the remedial machinery in operating the sentencing system. It will be a denial of justice, when an accused was allowed to evade the major penalty while facing such cruel acts. The court is responsible to award a proper sentence considering the nature of the offence and the way in which the offence was committed. The social effect of the crime, when it relates to offences against children requires exemplary punishment. Child molestation affects the child's dignity. The physical scar may heal up, but the scar on her soul will always remain. The victim lost her valuable and priceless dignity.

This study on child sexual abuse expects to place the subject of child sexual abuse on the national agenda. Need to discuss the issue of child sexual abuse in different forums. The central government, provincial governments, civil society, families and children themselves need to understand the rights perspective and together create the enabling environment wherein a child is protected from abuse and exploitation. The momentum needs to be sustained and should be carried forward in the form of a movement that will take all stakeholders along the road to sustainable development and create a protective environment for the children of Pakistan.

In a democracy, the State includes in three constitutional organs the Legislature, the Executive and the Judiciary, which must play their effective and active role to combat child sexual abuse. It is the fundamental duty of a state to protect children from sexual exploitation. Parliament legislate laws and these laws effective only with the strict enforcement by the executive authorities. It is, therefore, essential to develop model legislation covering all elements of child sexual abuse.

RECOMMENDATIONS FOR ADDRESSING ISSUES OF CHILD SEXUAL ABUSE

Based on the findings of the study, the following recommendations for addressing the issue of child sexual abuse are proposed.

RECOMMENDATION RELATING TO LEGISLATURE

A comprehensive law should be enacted which will cover all offences relating to child sexual abuse like the child sexual offences laws in USA, UK and India. Child molestation should include as an offence in the Anti-Terrorism Act, 1997, triable by the special court established under the Anti-Terrorism Act, 1997. The punishment awarded for child molestation will enhance to death penalty or imprisonment for life. Parliament will amend the Criminal Procedure Code, 1898 and the Qanun-e-Shahadat order, 1984 to fill gaps in the procedural law. The age of child will declare 18 years instead of 7 years.

RECOMMENDATIONS TO THE TRIAL PROCESS

Child friendly procedure should introduce for recording the statement of a child in the court room. The child can require the help of a translator or an expert. In case of disability, the child can take the assistance of a special educator for communication. Statement of the child will record in his own words. No aggressive questions allow to put to the child during his cross examination. Alternative moods of recording evidence will introduce by amending the relevant laws such as video trial, the use of screen, pre-recorded interviews of the victim child. Child evidence will record within 30 days. Trials should conduct in-camera. The maximum period of one year should fix for conclusion of a trial.

RECOMMENDATIONS RELATING TO POLICY

The Juvenile Justice System Ordinance, 2000 needs to implement at every level in Pakistan. The standard operating procedures should use effectively. The sexually abused children should rehabilitate by counseling at the police station and in their houses. Training workshop should conduct to train the judiciary, prosecution, defence lawyers and the law enforcement agencies. Child sexual abuse should include in the law syllabus. Free legal aid cell should be established in every bar association to aid sexual abuse victims.

RECOMMENDATIONS RELATING TO LAW ENFORCEMENT AGENCIES

An Anti-Child Sexual Offences Unit should establish in every police sub-division. A monitoring cell should establish at the District Police Office for monitoring and collecting data. Forensic Laboratory should fully equip with latest equipment. The investigation should conduct by a sub-inspector, who will be responsible for recording the statement of the child victim and registration of the First Information Report (FIR). The duty police officer shall register the first information report (FIR) in the same words as narrated by the victim child. The investigation officers should supportive and co-operative to the child and the family. The police shall make arrangements for the medical examination and transportation to the hospital of the child victim. The police officer should make proper arrangements for the child's visit

to the court room. The investigation officer shall co-ordinate with the child victim and his family during the pendency of the trial. Make use of proper investigative techniques. A psychologist should be arranged for the child victim. This role should be assumed by the public prosecutor.

SUGGESTIONS FOR FURTHER RESEARCH

Findings of the current study confirm a lacuna in the laws relating to child sexual abuse in Pakistan. Further research need to enact laws for the elimination of child sexual abuse in Pakistan.

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⁹Sixth amendment of the US Constitution Rights of Accused in Criminal Prosecutions, Confrontation Clause page 1517-1524 source <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-9-7.pdf>

¹⁰ibid

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¹⁴New Jersey vs. Michaels 642 A.2d 1372, N.J. 1994 source <http://tillers.net/advanced/michaels.htm>

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²¹Sakshi vs. Union of India and Ors AIR 2004 SC 3566

²²Sheba Abidi versus State of Delhi and another 113 (2004) DLT 125

²³State of Punjab vs. Gurmit Singh and Others 1996 (2) SCC 384

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²⁸Pakistan Penal Code, 1860 by M. Mehmood 2nd Ed. 2007 Section 82 page 232

²⁹Pakistan Penal Code, 1860 by M. Mehmood 2nd Ed. 2007 Section 375 page 1361

³⁰Pakistan Penal Code, 1860 by M. Mehmood 2nd Ed. 2007 Section 376 page 1371

³¹Pakistan Penal Code, 1860 by M. Mehmood 2nd Ed. 2007 Section 377 page 1380

³²[The Police Order 2002 Chapter II Section 3 Responsibilities and Duties of the Police page 5](#)

³³State versus Abdul Malik PLD 2000 Lahore 449

³⁴Omission of sections 6 and 7, Ordinance VII of 1979:In the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979), sections 6 and 7 shall be omitted. By section 13 of the Protection of Women (Criminal Laws Amendment) Act, 2006

³⁵The Anti-Terrorism Act, 1997 Act No. XXVII OF 1997 Section 6 page 3

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SEPARATION OF POWERS: A FAIRYTALE OF UTOPIA

Danushka Sewwandi Medawatte¹

Lecturer (Probationary)

Department of Public and International Law,

Faculty of Law,

University of Colombo

ABSTRACT

The ancient philosophers, who perceived the necessity to establish the stability of the society and to have a form of government where checks and balances exist, created the heavenly concept of separation of powers in order to grant separate authority to the Executive, Legislature and the Judiciary. Jurisdiction of the courts, the powers of parliament, the authority of the executive are, as generally understood, dependent on the separation of powers. However, this separation and the checks and balances that rest on it, have been set off balance by the encroachment of judicial territory by the Executive and the Legislature. This is a reality that holds true all over the world.

This research paper, which has been extensively carried out through literature reviews, analyses the way in which the deterioration of the concept of separation of powers has resulted in the other arms of the government in encroaching to the territory that is ideally bestowed upon the judiciary. Separation of powers as it subsists in Sri Lanka and other countries is analysed with contemporary examples to establish that the jurisdiction of courts has been greatly imbalanced due to the encroachments and that true separation of power no longer exists.

Keywords: Jurisdiction, Power, Separation

INTRODUCTION

Lord Atkin in *Toronto Corporation v York Corporation*², a case which was decided in 1938, referred to the three organs of the Government, namely the Executive, Legislature and the Judiciary as the 'three pillars in the temple of justice' that 'are not to be undermined'. What was meant by this statement was that the three pillars should have equal but independent powers to keep each other in check. The three pillars should be able to shoulder equal responsibility of the government as any imbalance could jeopardize the independence of the judiciary which could have a negative impact on the rule of law, democracy and the basic principles of civility in a democratic society³.

The modern doctrine of Separation of Powers propounded by Montesquieu and Locke, liberty cannot exist where there is a monopoly or an imbalance of power as there would be no checks and balances. It has been mentioned innumerable times that *power corrupts and absolute power corrupts absolutely* which is the reason why separation of powers became absolute essentiality in terms of constitutional law and practice as the lack of separation of powers would have an inverse impact on 'due course of justice'⁴. The good intentions of the constitutional drafters have been, however, thrown aside in practice especially where there were attempts to exercise checks and balances in order to curb the powers of either the executive arm of the government or of the legislature. The defence that has been taken up by the aforementioned two limbs of government has been the fact that an *unelected judiciary* would not have the right to overpower the decisions that have been taken by the officials elected by the people to compose the executive or the legislature.

The concept of the Separation of Powers has been criticized many a time as a theoretical concept that does not portray the political underpinnings and the reality that exists in the division of power between the three main limbs of government: namely, the Executive, Legislature and the Judiciary. The author is well aware of the fact that this concept has been appreciated, criticized and analyzed earlier. However, in light of the current constitutional theatrics that take place all over the world, it has become essential to view this in light of the current events that specifically prove that out of the three limbs of the government, the least powerful is the judiciary.

Constitutions of many countries have incorporated the principle of separation of powers in the provisions. However, a closer study of these constitutional provisions also prove that some of the constitution makers have carefully drafted the constitution in such a way as to enable the interpreters to usurp the powers that have been given to a particular limb. The French Jurist Montesquieu, who is much talked of in relation to separation of powers, would never have imagined how difficult and impossible it would be for the future generation to exercise checks and balances on one another in an era where, equal distribution of power has stooped to the level of an unapproachable notion which could only be seen in an idealistic Utopia. Unfortunately this Utopian status seems to be light years away from the constitutional practice all over the world.

The author is of the view that a paper of this length would not do justice to the topic of interest unless it analyses the constitutions of other jurisdictions thus exposing the reader to the reality regarding the non existence of separation of powers in the real constitutional world. The author has examined the constitutions of Sri Lanka, India, France, Brazil, South Africa and America in the course of this paper in an attempt to prove the stance of the author that true separation of powers no longer exists.

Time has now dawned on the man kind to move away from the theoretical concept of separation of powers and find a mechanism through which the powers and jurisdiction of the judiciary can be truly protected from being usurped by the other arms of the government. In the current context, all that happens is to blame the non implementation of the separation of powers without attempting to see beyond that concept which has been unsuccessful in carrying out the expected task of checks and balances. Recommendations to that effect have been presented in this paper to re-implement the lost checks and balances in order to recreate true democracy and a constitutional setting in which the three limbs of the government will function without the fear of having their powers usurped and exercise their power with caution without usurping the powers of the others according to their whims and fancies.

THEORY OF THE SEPARATION OF POWERS

The broader framework of the separation of powers has come into being through the historical use of the concept. This is sometimes referred to as the *historical gloss* argument. Some critics argue that, in the current context, this historical acquiescence of the concept is not given the recognition that it deserves⁵. While the author of this paper agrees with the above notion, it is submitted that the time has come to look at that theory with a practical perspective whereby other methods to implement the separation can be effected without only concentrating on the history of separation of powers. In order to be able to gain a complete understanding of a particular concept, it is necessary that one understands the historical evolution of the concept. Nonetheless, what needs to be identified in the current state of affairs is the lack of implementation of the concept.

It is justifiable to state that the concept of the separation of powers in itself does not possess any lacuna that begs rectification. What should be rectified is the application of it in all constitutional frameworks which can no longer be limited to a concept and has to evolve and rise up to the standard of a law which the three organs would be obliged to abide by.

Separation of powers is founded on the idea that the limbs of the government or the powers which are used in ruling the community should be subject to checks and balances. This is a principle which has been upheld by many respected historians, philosophers and academics. According to Calabresi,

Berghausen and Albertson 'Aristotle, Polybius, Cicero, St. Thomas Aquinas, and Machiavelli all argued that Mixed Regimes of the One, the Few, and the Many were the best forms of regimes in practice because they led to a system of checks and balances'⁶. In the modern context, the concept of separation of powers will be required in protecting the rights of the people as well⁷.

Most of the critics are of the view that separation of powers cannot be achieved merely due to the difficulty that one faces in attempting to formulate exact definitions for executive power, legislative power and judicial power⁸. It is worth noticing that the formulation of a clear demarcation of the powers itself would not necessarily enable the implementation of the separation of powers. Definitions of power can always be misinterpreted and adapted for the advantage of the one that has more power thereby standing in the way of true constitutionalism. Abraham Lincoln has stated⁹ once that one must be given power in order to test the character as there is a high tendency to abuse power. According to the theoretical principle of separation of powers, the only way to prevent such abuse or usurpation is through the concept of separation of powers although it is evident that the concept has utterly and miserably failed in promoting constitutionalism in practice.

Montesquieu, though was the first to formulate the concept of separation of powers as we know it today, has not used the exact term 'separation of powers' in his book *L'Esprit des Lois* as his main subject area was political and individual liberty. He was of the view that such political liberty can only be attained when one man is not vested with all forms of power. He further argues that each power should act as a check and a balance on the other powers. It was primarily John Locke that identified the three separate arms of the government as executive, legislature and the judiciary. Montesquieu divided the three powers into that of 'enacting laws', 'executing the public resolution' and 'trying the causes of individuals'¹⁰. Even ancient philosophers such as Aristotle have advocated the theory of separation of powers. The theory of Montesquieu especially highlights the significance of independence of the judiciary¹¹. It is also stated that 'judicial independence is essential if Judges are to perform their judicial functions without fear or favour'¹². This is the principle on which the author of this paper bases the argument that separation of powers is a long dead concept in the current context. But by no means is this an attempt to state that the judges can do as they please because that would, in the words of Justice K. Ramaswamy, '*betray the confidence of the litigant public in the efficacy of the judicial process*'.¹³

CONSTITUTIONAL PROVISIONS OF VARIOUS COUNTRIES THAT RELATE TO SEPARATION OF POWERS

Sri Lanka

Concerns regarding the concept of judicial independence are not new to Sri Lanka as this subject was also discussed in 1963 in relation to the Soulbury Constitution which was then applicable. Although the independence of the judiciary was not constitutionally recognized back then, Lord Pearce, in *Bribery Commissioner v Ranasinghe*¹⁴ stated that *'the importance of securing the independence of the judges and of maintaining the dividing line between the Judiciary and the Executive was appreciated by those who framed the Constitution'*¹⁵.

The current Constitution of Sri Lanka, however, has incorporated the concept of separation of powers at least in a theoretical form. Article 4 of the 1978 Constitution of Sri Lanka which fleshes out Article 3 clearly lays down the three separate powers of the government and in the marginal note it is referred to as the exercise of sovereignty. Article 4 (a) states that: 'legislative power of the People shall be exercised by parliament consisting of elected representatives of the People and by the People at a referendum'. This is a clear articulation of how the legislative power of people shall be exercised and it unmistakably gives the power of law making to the legislature. Article 4 (b) states that the 'executive power of the People including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People'. It is evident that by virtue of this provision, the President of the Republic is appointed as the agent of the people to carry out the executive power. The problem arises only with regard to the power that has been given to the Judiciary. The recent upheaval of the removal of the former Chief Justice – Dr. Shirani Bandaranayake brought this issue to the limelight. According to Article 4 (c) 'the judicial power of the people shall be exercised by¹⁶ Parliament through¹⁷ courts, tribunals and institutions created and established, or recognized by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law'. The underlined preposition of the aforementioned Article and the exception mentioned therein functions as limitations cast on the judiciary right at the outset of separation of powers. Of course it is understood that there has to be limitation, checks and balances on all three organs of power. However, it is noteworthy that such limitation has not been mentioned with regard to the powers of the Executive and the Legislature. The fact that the judicial power of the people is exercised by Parliament through courts gives the sense that the judicial power of the people is also to be exercised under the Legislature. It could also be possible to argue that the court has been given a subordinate place as it appears to function according to the directions of the Parliament. This proves that the concept of separation of powers has been brutally misconceived in the Constitution itself.

Under the subheading of 'Independence of the Judiciary' it is stated that the 'Chief Justice, the President of the Court of Appeal and every other judge of the Supreme Court and the Court of Appeal shall be appointed by the President of the Republic by warrant under his hand'¹⁸ and that such judges shall 'hold office during good behaviour'¹⁹. Nowhere in the Constitution is it defined what 'good behaviour' means. Therefore, one could argue that this becomes a blanket provision on the conduct of the judges and judicial officers and there could also be the threat of such blanket provision even extending to the personal sphere of a judge thereby exceeding the limits of checks

and balances that the concept of separation of powers expect. The fact that the independence of the judiciary is expected to be present when the Judges are appointed by the Executive is also noteworthy. A feeling of subordination or obligation that one limb of government bears to another is serious hindrance that could fatally damage the expected independence. The lack of a definition of what 'good behaviour' is, leaves too much to be interpreted and the author is of the view that the proponents of theory of separation of powers as a pillar which upholds and balances the structure of constitutionalism and rule of law ought to be worried of the imbalance that is thereby created.

Public officials such as the Secretary General of Parliament²⁰, Commissioner of Elections²¹, Auditor General²², and Parliamentary Commissioner for Administration²³ hold office during good behaviour which has not been defined. However, there is no such blanket provision that is applicable to the Executive. Article 38 (2) (a) lays down the circumstances in which the President of the Republic can be removed and impeached. According to the aforementioned Article the President may be impeached for '*misconduct or corruption involving the abuse of the powers of his office*'²⁴. This is a somewhat proper definition as opposed to the definition that is given to the phrase '*good behaviour*'. It is ironical to think that the judges and such other officials would be independent in their work due to the uncertainty that is cast upon the provisions that govern them. This can be proven in light of the issues that arose in Sri Lanka regarding the much celebrated impeachment of the 43rd Chief Justice as well.

INDIA

Article 50 of the Indian Constitution²⁵ specifically states that '*the state shall take steps to separate the judiciary from the executive in the public services of the State*'²⁶. This is an interesting provision when compared to most of the constitutional provisions of the other states as this is a clear attempt to create a demarcation between the executive and the judicial organs of the Government which is a definitive step towards the achievement of democracy in the strict sense of the word. In light of the above provision, it could be argued that there is a common understanding that the judicial powers could be curbed or usurped by the executive (as opposed to by the legislature) which is why there is a specific need to take steps to preventing that end. A direct provision to the effect of barring executive interference in to the sphere of the judiciary could be one reason why India has been fortunate to witness activist judges. This issue was taken up in the celebrated Indian case named *K. Veeraswamy v Union of India and Others*²⁷ which was in relation to the impeachment motion of a judge. It was contended in the appeal of this case that '*if the President is regarded as the authority, he cannot act independently as he exercises his powers by and with the advice of his Council of Ministers and the Executive may misuse the power by interfering with the judiciary*'²⁸. Most notably it has been stated by Justice Krishna Iyer²⁹ that the '*independence of the judiciary is not genuflexion; nor is it opposition to every proposition of Government. It is neither judiciary made to opposition measure nor Government pleasure*' which is important in this regard as it helps establish the stance that the independence of the judiciary is neither meant to rule in favour of the government nor in

favour of the opposition. What it is meant to do is rule in favour of the party in whose favour the law lies.

Although the concept of separation of powers is mostly important in the sphere of judicial independence, the theory of separation of powers is important in restricting the powers that are given to the executive as well. Article 162 of the Indian Constitution provides this guarantee. At first glance this provision may seem to be generous towards the executive by stating that '*the executive power of a State shall extend to matters with respect to which the Legislature of the State has power to make laws*'. One may construe this part of the provision to mean that the Executive can interfere with regard to any matter over which the Legislature has powers. However, this seemingly overarching power has been curbed by the proviso which immediately follows this provision. It says that '*in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof*'. This provision conveys the notion that the executive powers are also subject to the parliamentary rules and will be limited by the provisions of the Constitutions. This provides the guarantee that even the Executive is unable to act *ultra vires* the Constitution. Article 56³⁰ expressly provides that the President shall be impeached if he violates the Constitution.

One may argue that a further separation has been explicitly mentioned in the Indian Constitution in Article 59 proclaim that the President shall not be a Member of either House. Such an undertaking points at the separation of powers that have been attempted to be achieved within the existing federal structure of India that has also paved way for much judicial activism. However, the opposite argument can be brought when one looks at Article 124 of the Constitution which allows the President of the Republic to appoint all Supreme Court Judges under warrant of his hand. The real impact of such provisions can be seen in the analysis which follows.

FRANCE

According to Title³¹ VIII of the French Constitution³² of which the heading is '*On Judicial Authority*', the President has been appointed as the '*guarantor of the independence of the judicial authority*'³³ and the same Article states that the '*judges shall be irremovable from office*'. The fact that the President has been appointed as the guarantor of the judicial independence and at the same time been rendered unable to remove any of the judicial officers from office protects the distinction that should exist between these two organs of the Government. Jurisdiction of the courts is thereby protected from the Constitution itself by taking measures to preserve the independence of the judiciary from undue influences. It is submitted that the appointment of the President as the guarantor of Judicial Authority holds much value in this regard as the President can be held accountable for violation of a Constitutional provision if the judicial independence has been tampered with by the President. However, one may argue that the effect of this provision has been

somewhat dampened by Article 65 which allows the President to preside over the High Council of the Judiciary.

As guardian of the freedom of the individual, the judiciary shall exercise their authority as per the statutes enacted by the Parliament. The judiciary shall be guided and checked and balanced by the statutes of the Parliament. The President shall sit in the High Council of the Judiciary but will not be able to remove judicial officers. The Executive shall have powers according to statutes and thereby be checked and balanced by those powers which are regulated by the Statutes of the Parliament. The Legislature will be checked and balanced by the judicial independence that can be exercised in the form of judicial review of legislation³⁴. As was mentioned earlier, the Judiciary will carry out the task of checking the compatibility of legislations which are enacted by Parliament in order to maintain constitutionality of the legislations. It is clear that a good separation of powers has been constitutionally recognized and that could probably be due to the Montesquiean impact on the formulation of the concept of separation of power.

BRAZIL

The framers of a Constitution should be extremely cautious of potential amendments that may be brought to the Constitution. That may help the framers to entrench some of the main fundamental rights, provisions on sovereignty and most importantly the provisions which incorporate the principle of separation of powers. This has been statutorily provided for in the Brazilian Constitution³⁵. Paragraph 4 of Article 60 (Subsection II) of the Brazilian Constitution³⁶ specifically states that *'no proposal of amendment shall be considered which is aimed at abolishing' inter alia*³⁷ *'the separation of the government powers'*. Article 2 of the said Constitution refers to the three powers of the government as *'the powers of the Union'* and firmly demands that those powers be *'independent and harmonious among themselves'*. It is submitted that the placing of the separation of powers at the beginning of the Constitution itself displays the level to which such separation is appreciated in the context of Brazil.

While the Constitution requires the three organs of the Government to work together harmoniously, it also calls for the independence of the three organs. As per Article 49 of the Brazilian Constitution, *'it is exclusive the competence of the National Congress...to stop the normative acts of the Executive Power which exceed their regimental authority or the limits of legislative delegation'*³⁸. In the point of view of the author, this provision functions at two levels. Firstly, it controls the executive power by stating that it would be *ultra vires* if it exceeds the *'regimental authority'* and secondly, it also surmounts the powers of the Executive to the extent that has been determined by the *'legislative delegations'*. However, the effect of the provision is the check that is exercised on the Executive by the Legislature. Part X of Article 49 enhances the impact created by Part V by stating that the National Congress can *'supervise and control directly or through either of its Houses, the acts of the Executive power, including those of the indirect administration.'* This too performs as a mechanism that can be used to check the extent of Executive power. The parliamentary competence has not

been compromised in the face of the other two organs as part XI of Article 49 protects parliamentary competence³⁹.

Articles 65 and 66 of the Brazilian Constitution provides for review of legislation. The power given to the President by virtue of Article 66 of the Constitution to veto any legislation that in his view is unconstitutional is subject to some checks as well. The president has not been given the absolute power to veto any piece of legislation without stating the reasons⁴⁰. Even if reasons have been stated for such veto, it is not absolutely and mandatorily binding on the legislation as the veto can be rejected '*by the absolute majority of the Deputies and the Senators, by secret voting*'⁴¹. The checks and balances of the legislative process have been brought to height in this Article as it attempts to strike a balance regarding the constitutionality of a proposed Bill from every possible angle. Paragraph 5 of the said Article makes it mandatory for the sending of the Bill to the President of the Republic for promulgation when the veto is not upheld. The procedure that has to be followed in the case of silence of the President or the Deputies and Senators has been set in position in the Constitution to avoid any confusion that may arise in this regard⁴². Hence, it could justifiably be stated that the Constitutional formulation of the theory of separation of powers has been sufficiently integrated in to the Brazilian Constitution.

SOUTH AFRICA

As was mentioned elsewhere in this paper, rule of law and constitutionalism are the prime aspects of separation of powers. Even if the separation of powers per se has not been literally mentioned, if the rule of law is incorporated in any Constitution as a founding provision, it could be interpreted as separation of powers as there would be no separation of powers in the absence of the rule of law. Article 1 states that South Africa is founded upon *inter alia*⁴³ supremacy of the Constitution and the rule of law. The supremacy of the Constitution is further guaranteed by Article 2 which states that it is the supreme law of the Republic and that '*law of conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled*'.

A separate chapter is dedicated to the Courts and Administration of Justice⁴⁴. Article 165 (1) of Chapter 8 is on judicial authority and states that it is vested in the courts. Article 165 (2) is a direct rendition of the separation of powers. According to that provision, '*the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice*'. This will encourage the judges to follow the Constitution and apply the relevant laws without being subject to undue pressure either by the Legislature or the Executive. Principally, this imposes a responsibility on the judges to not be subject to fear, intimidation or any form of strain exercised by the Government. The said provision could also be construed to mean that the judges are under a constitutional obligation to exercise the duties of their office independently and that the other two organs of the government are expected to abdicate from exercising any pressure to prejudice the judges. Hence, the South African Constitution too can be marked as one Constitution that has attempted to constitutionally provide for proper separation of powers.

AMERICA

Each of the three organs of the Government has been allocated different, separate and independent powers from one another through different provisions of the American Constitution. Article II Section 1⁴⁵, Article II Section 1⁴⁶ and Article III Section 1 respectively refer to the Legislative, Executive and Judicial powers. The judicial powers have been defined as follows: '*the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish*'. Similar to the Sri Lankan Constitution, the independence of the judiciary has been subject to the provision that the judges shall hold office during good behavior. However, with regard to the other two governmental powers, such good behavior has not been mentioned along with the vesting of such powers in the relevant offices. Although the concept of separation of powers has been seemingly vested in the three organs in an equal manner, the use of the phrase '*good behaviour*', as was shown in the analysis of the Sri Lankan Constitution, grants much power to the other two organs to determine what good behaviour means⁴⁷.

Section 2 of the Constitution lays down provisions in relation to the jurisdiction of the courts. However, Section 2 (2) states that the courts shall have jurisdiction '*both as to law and fact, with such Exceptions and under such Regulations as the Congress shall make*'. The fact that the Congress has been given the power to make regulations and the fact that it may create a situation in which the separation of powers is not exercised properly could be brought up in relation to this provision. This could be even more disturbing in light of the fact that judicial review of legislation has not been provided for by the Constitution of the United States of America. It is submitted that such a situation could pave way for the encroachment of the judicial territory by the Legislature and the Executive. As was pointed out in the Indian case *C. Ravichandran Iyer v Justice A.M. Bhattacharjee & Others*⁴⁸ for a democracy to function democratically in the strict sense of the word and for rule of law and fundamental rights to be protected, it is absolutely necessary to have judicial review and it should be considered as a basic feature of the Constitution⁴⁹. In a federal state, it is absolutely essential that the courts have sufficient powers to review the legislations that are brought especially by the central legislature as the absence of review could enable the central legislature to enact legislations in a manner which is detrimental to the federal units.

ENCROACHMENT OF JUDICIAL TERRITORY

For purposes of clarity, the previous section only introduces the reader to direct provisions of various constitutions that are applicable to the concept of Separation of powers. The analysis of those provisions in relation to the true encroachment and usurpation of judicial power of those countries and the examples of such occurrences are analysed in this part of the paper to prove the author's stance that true separation of power no longer exists and the lack of true checks and balances have tilted the balance of the jurisdiction of the courts. The constitutional disasters that

have taken place all over the world prove that some countries have limited separation of powers to an inactive provision in a Constitution and have rendered the concept useless.

As was shown above, there are several Constitutions which allow the President of the country to be directly or indirectly involved in the process of the appointment of judges⁵⁰. This can become a hindrance to the independence of the judiciary as the judges might feel uncomfortable in exercising their independence in situations where the unbiased judgment could be a judgement against the executive or executive actions. If the appointment of the judges are to be done by the Executive and if such appointment is to last until such judge displays '*good behaviour*' which has not been constitutionally or statutorily defined, there could be undue influence on the independence of the judiciary which will affect the whole system of justice inversely. It would be unlikely that a judge would feel comfortable in fulfilling the role assigned to him if he is not independent⁵¹.

It is very rarely that an allegation against the judiciary is made stating that it has encroached upon the territory of the legislature unless when it is declared that the judiciary has overstepped its power through interpretation and by attributing meanings to particular statutes which are not in accordance with the parliamentary intention. In India, an allegation was made against the judiciary when the review jurisdiction of the Indian Judiciary was invoked in relation to the 9th Schedule of the Indian Constitution. It was contended that judicial activism was used in order to step outside the powers that have been legally bestowed upon the judiciary⁵².

The celebrated judgment of *Queen v Liyanage and Others*⁵³ also highlights the importance of the judicial independence. In this case it was pointed out that the appointments of judges which are made by executive officials could amount to an encroachment on the judicial territory. The case stated that "the nomination of the judges by the Minister was a violation of the Constitution and *ultra vires* the Constitution. It was an open attempt to interfere with one of the entrenched institutions in the Constitution viz an Independent Judiciary

Apart from the judicial appointments which are done by the Executives, another factor which endangers the independence of the judiciary is the manner in which the judiciary should rely on the Executive to have the judicial orders implemented. One may argue that this performs as a check and balance between the three organs of the Government and that it is healthy. This argument can be accepted on the ground that separation of powers does not refer to the existence of the three organs in an alienated manner but that it refers to the harmonious, yet independent existence which paves way for checks and balances.

When the concept of independence of the judiciary is taken in to consideration, several types of independences can be drawn out from it. '*The independence of judiciary is not limited only to the*

*independence from the executive pressure or influence; it is a wider concept which takes within its sweep independence from any other pressure and prejudices.*⁵⁴ Therefore, other forms of independences should also be considered. Firstly, the independence that the judiciary should ideally enjoy as an institution is important. This can be termed as *institutional independence*⁵⁵. In relation to separation of powers and the independence of the judiciary, some writers⁵⁶ refer to the concept of *decisional independence*. This can be highlighted as the second aspect of independence of the judiciary. Thirdly, *occupational independence* too could be given importance in this regard.

In this circumstance, the phrase institutional independence is used to refer to the broader concept of judicial independence and the independence of courts. The courts of a country should be structured in such a manner so as not to be subject to unwarranted influence from other bodies of the government. One may say that this refers to the institution of the judiciary as a separate organ which has to be constitutionally instituted. The previous part of this paper has mentioned few countries which do not award institutional independence to the judiciary. This however, is a matter which requires separate and lengthier discussion in another paper and for the purposes of this paper it suffices to state that countries such as Sri Lanka and France⁵⁷.

Decisional independence refers to the traditional sense in which writers refer to the independence that is used by the judges in interpreting cases and applying the principles of law to the cases that they are deciding. Nevertheless, as was correctly stated *obiter* in *Queen v Liyanage*⁵⁸ '*the independence of the judiciary does not require that judges should have the freedom to decide which case they may hear but it requires that they should have the freedom to decide any case which they may hear in any manner that they think the law requires and justice demands*'.

In terms of this paper, what is referred to as occupational independence⁵⁹ is the individual freedom that a judge may exercise when deciding the cases. The author distinguishes this from decisional independence on the ground that decisional independence is only applicable to the law and interpretation of the judge in decision making whereas occupational independence would deal with the personal and private independence of the judge which too could have a huge bearing on the type of decision that he is making⁶⁰. Some states have had instances in which the judges were attacked and the court premises were attacked thus violating the principles of occupational independence which has a huge bearing on decisional independence as well. Independence that a judge gains in his personal life is therefore, significant in that it will have a positive impact on the person who is being judged⁶¹. Nevertheless, it is also accepted that the '*independence of the Judges in their individual capacity of the Judiciary as an institution is, however, not absolute*⁶²'.

As per the analysis of the Constitutions that was done in this paper, it is understandable that Constitutions only provided for institutional independence by virtue of Constitutional provisions. It is noteworthy that this is the most important aspect of judicial independence and that decisional and occupational independences would rest on institutional independence. Constitutional provisions

that deal with decisional and occupational independence is much difficult than finding a sock in a room sized Texas. However, it is understood that true judicial independence could only be present in a country which provides for all three aspects of judicial independence. If one attempts to ignore the important role played by occupational independence, he or she should be reminded that the independence that a judge feels as a private individual is necessary and is a co-partner in the larger network of judicial independence.

Stepping aside from the conceptual framework of the independence of the judiciary is warranted in this situation because day to day incidents such as commonplace transfers too have commenced to play a considerably significant role in relation to the curbing of the independence of the judiciary. After the impeachment of the 43rd Chief Justice in Sri Lanka, so many other judges too have been transferred from the usual courts. The author lacks knowledge and information to comment on the consent of the transferred judges to their transfers. However, what one should note in this situation is that certain cases such as *K. Veeraswamy v Union of India and Others*⁶³ have also pointed out that the transferring of a judge without the consent of such judge too could amount to a violation of the independence of the judiciary.

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² [1938] 1 AC 415

³ Law Commission of India – 195th Report on the Judges (Inquiry) Bill 2005

⁴ *vide Dr. D.C. Saxena v Hon'ble The Chief Justice of India* in which Justice K. Ramaswamy stated that 'independence of the judiciary for due course of administration of justice must be protected and remain unimpaired'

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⁷ *R v Quinn; ex parte Consolidated Foods Corporation* [1977] 138 CLR 1 at p.11 cited in Sydney Law Review *supra* endnote no: xli

⁸ Cooray L.J.M, 2005, *Constitutional Government in Sri Lanka 1796 – 1977*, 2nd Edition, A Stamford Lake Publication, Pannipitiya at p. 223.

⁹ 'Nearly all men can stand adversity, but if you want to test a man's character, give him power'.

¹⁰ Manning J.F, 1939, 'Separation of Powers as Ordinary Interpretation', *Harvard Law Review*, Volume 124 at p. 1994

¹¹ Cooray J.A.L, 1973, *Constitutional and Administrative Law of Sri Lanka*, Hansa, Colombo at p. 108

¹² *id.*

¹³ *C. Ravichandran Iyer v Justice A.M. Bhattacharjee & Others* (Supreme Court of India) [1995] SCC (5) 457

¹⁴ Privy Council Appeal no 20 of 1963

¹⁵ At p. 75

¹⁶ The emphasis is by the author.

¹⁷ The emphasis is by the author.

¹⁸ Article 107 (1) of the 1978 Constitution of Sri Lanka

¹⁹ Article 107 (2)

²⁰ Article 65 (1)

²¹ Article 103 (1)

²² Article 153 (1)

²³ Article 156 (2)

²⁴ Article 38 (2) (a) (iv)

²⁵ The Constitution of the Sovereign Socialist Secular Democratic Republic of India - 1949

²⁶ The heading of the Article is 'separation of judiciary from executive'

²⁷ [1991] 3 SCR 189

²⁸ *id.* Similarly in the Sri Lankan case of *Queen v Liyanage infra* it was stated that 'The nomination of the judges by the Minister was a violation of the Constitution and ultra vires the Constitution. It was an open attempt to interfere with one of the entrenched institutions in the Constitution viz an Independent Judiciary' at p. 317

²⁹ As cited in *K. Veeraswamy v Union of India and Others supra*.

³⁰ *vide* Article 56 of the Indian Constitution which states that the President of India can be impeached for the violation of Constitutional provisions as per the procedure for the impeachment of the President that is laid down in Article 61.

³¹ The Chapters of the French Constitution are referred to as Title.

³² French Constitution of October 4th 1952

³³ Article 64

³⁴ Article 74 states that 'the Conseil d'État shall exercise specific judicial review of certain categories of decisions taken by the Deliberative Assembly in matters which are within the powers vested in it by statute'.

³⁵ Constitution of the Federative Republic of Brazil – Constitutional text of October 5th, 1988 with the alterations introduced by Constitutional Amendments No 1/1992 through 64/2010 and by Revision Constitutional Amendments No 1/1994 through 6/1994

³⁶ This section is on Amendments to the Constitution

³⁷ The addition is by the author

³⁸ Part V of Article 49

³⁹ 'to ensure the preservation of legislative competence in the face of the normative incumbency of the other powers'

⁴⁰ Paragraph 1 Article 66 ‘*the President of the Republic shall...within forty eight hours, inform the President of the Senate of the reasons of his veto*’.

⁴¹ Paragraph 6 – Article 66

⁴² Please see the other paragraphs of Article 66

⁴³ Human dignity, equality, advancement of human rights and freedoms, non racialism and non sexism, universal adult suffrage, regular elections etc are the other founding provisions of the Republic of South Africa.

⁴⁴ Chapter 8

⁴⁵ ‘*All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives*’

⁴⁶ ‘*The Executive power shall be vested in a President of the United States of America.*’

⁴⁷ The term good behaviour has not been defined in the Constitution of the United States of America.

⁴⁸ *Supra*. “In a democracy governed by rule of law under a written constitution, judiciary is sentinel on the *qui vive* to protect the fundamental rights and to poise even scales of justice between the citizens and the State or the States *inter se*. Rule of law and judicial review are basic features of the Constitution. As its integral constitutional structure independence of the judiciary is an essential attribute of rule of law”.

⁴⁹ In addition to the aforementioned case, it was stated in *K. Veeraswamy v Union of India and Others* that ‘*The concept of independence of judiciary is a noble concept which inspires the Constitutional scheme and constitute the foundation on which rests the edifice of our democratic polity*’

⁵⁰ See for instance the Constitutions of Sri Lanka and India for direct involvement of the President in the process of the appointment of the judges. France is an example of a country where the Constitution itself has embodied the indirect involvement of the President in the judge-appointing process by virtue of Article 65.

⁵¹ *Supra C. Ravichandran Iyer v Justice A.M. Bhattacharjee & Others*: ‘*Every endeavour should be made to preserve independent judiciary as a citadel of public justice and public security to fulfil the constitutional role assigned to the judges*’

⁵² Chaudhuri, T., Relations of Judiciary and Executive in India, Electronic copy available at

<http://ssrn.com/abstract=1672222>.

⁵³ [1965] 68 NLR 265

⁵⁴ *Supra C. Ravichandran Iyer v Justice A.M. Bhattacharjee & Others*

⁵⁵ This too has been referred to by previous writers. For example see, Gerangelos. P.A, 2008, ‘The Separation of Powers and Legislative Interference in Pending Cases’, *Sydney Law Review*, Volume 30, Issue 61 at p. 64

⁵⁶ *id.*

⁵⁷ See the analysis of the previous section.

⁵⁸ *supra* at p. 329. Further, in the Indian case named *Union of India v Sankalchand Himatlal Sheth* at p. 31 it was stated that ‘*Impartiality, independence, fairness and reasonableness in decision making are the hall marks of the judiciary. If ‘impartiality’ is the soul of the judiciary, ‘independence’ is the life blood of the judiciary. Without independence, impartiality cannot thrive. Independence is not the freedom for judges to do what they like. It is the independence of judicial thought*’

⁵⁹ *vide* Keong C.S., 2010, ‘Securing and Maintaining the Independence of the Court in Judicial Proceedings’, *Singapore Academy of Law Journal*, Volume 22 p. 229 at p. 231

⁶⁰ However, a different view has been submitted in respect of the individual independence of judges by the Law Commission of India 195th Report which stated that ‘*Individual independence means that the Judge is free to decide a case according to law and he cannot be interefered with by anybody without process*’ without reference to the private independence of the judge.

⁶¹ *Supra C. Ravichandran Iyer v Justice A.M. Bhattacharjee & Others*: ‘*The judge must act independently, if he is to perform the functions as expected of him and he must feel secure that such action of him will not lead to his own downfall. The independence is not assured for the judge, but to the judged. Independence to the judge therefore, would be both essential and proper*’

⁶² *supra* Law Commission of India 195th Report

⁶³ *supra*.

Regulating Nanotechnology: Timely Stitch for Saving Future

Md. Ershadul Karim
PhD Candidate in Law
University of Malaya
Malaysia

Abstract

Nanotechnology, the science of using technology at the atomic scale, is the next industrial revolution after internet and is 'the techno *buzzword de jour*'. Its virtually limitless prospects lure the government, research firms and business ventures around the world to invest huge amount for its commercial application and already hundreds of products containing nanomaterials are available in the market. The United Nations also encouraged the application of nanotechnology in ten priority areas for the benefit of 5 billion people of developing countries within its Millennium Development Goal. Conversely, to many people, it is the next asbestos as it has some serious consequence on environment and health and already seven workers in China got lungs infection and two were died. This is a matter of serious concern that there is no effective regulation both in national or international level to handle the possible environment and human health threats. European countries introduced some voluntary reporting systems which were not successful. In this backdrop, the paper, with an appeal in favour of continuous research and development of nanotechnology, aims to focus on some of the regulatory challenges for the regulators around the world with some suggestions to keep the nanotechnology dream alive avoiding nightmares.

Keywords – Nanotechnology, regulation, research and development

Introduction:

Nanotechnology is the next industrial revolution after the internet and is 'the techno *'buzzword de jour'* (Cameron, 2007). The word 'nanotechnology' has turned to be a darling child and everyone has been coining this term with different adjectives e.g. *generic technology* (diversified applications as ICT), *general purpose technology* or *enabling technology* (adding new functions to existing products), and *transformative technology*, which can be compared with steam engine in 18th century and electricity in 20th century in terms of effect.¹ It has virtually limitless potential and will shake up every single sector in near future. Realizing the limitless potential of nanotechnology, country around the world have been investing huge amount of money to be the world leader in nanotechnology.

Besides, though nanotechnology is still in an early phase of development, and is sometimes compared in the literature to information technology in the 1960's and biotechnology in the 1980's, it is no more *terra incognita* i.e. an issue of science fiction or concern of scientists and engineers only rather it has turned to be an inter-disciplinary study. What were in science fictions, many of them are now part of reality.

When group of scientists have been inventing different categories of products ranging from medical devices to sports instruments, transport parts to skin care and cosmetic products using nanoparticles, there are also concerns about unanticipated harms and risks due to which it is also termed as next asbestos. Some of the study already warns that unless this issue of harm and risk cannot be properly managed a catastrophic event may occur which will have the whole venture before question mark.

Science and invention always run faster than law and policy. This is agreed that significant progress in nanotechnology research is already evident, albeit the world community is yet to reach to a consensus about regulating nanotechnology as there is always a risk that too much regulation may hinder the development of the research and application of nanotechnology. However, regulators around the world simply cannot sit idle and wait for any disaster in

terms of human health and environment and are in serious dilemma to make a balance between risk and benefits of nanotechnology.

History of Nanotechnology

Nanoparticles exist on the planet for centuries i.e. smoke particles and viruses and there are many examples of structures in the nature that exist with nanometer dimensions i.e. DNA, proteins, cells, etc. (García et al., 2013) Ideas or techniques of using nano level particles is not a new thing. Use of nanoparticles like silver in its pure form was used in ancient Greece; nanoparticles in ceramics were used in ancient Rome.² There are also some researches where scholars have found out some religious roots of nanotechnology (Toumey, 2009); (Hongladarom, 2009).

The history of modern nanotechnology started with the ground breaking lecture of the founding genius and Noble laureate Richard Feynman titled ‘There’s Plenty of Room at the Bottom’³ at the meeting of the American Physical Society at the California Institute of Technology (CalTech) on December 29, 1959 where he shared the principle of possibility of manoeuvring things atom by atom though he admitted that he did not try that yet. In 1974, the Japanese Professor Norio Taniguchi of Tokyo Science University first coined the term ‘nanotechnology’. Noble laureate Richard Smalley and Eric Drexler played pioneer role to make the idea very popular in the world.

Prospect and perils

Statistics on Investment and Products

This socio-economic promise of nanotechnology has contributed to very rapid growth in public research and development (R & D) investments in this field. In fact, hardly any other technology field has benefited from as much public R & D investment globally in such a short time as nanotechnology, and private sector investment is also picking (Palmberg et al.,

2009). Simultaneously, private companies also have been investing a lot with the intention of making huge amount of money in future.

Leading market research organization Cientifica reported in 2011 that the different governments around the world are currently spending USD 10 billion per year with a growth rate of 20% over the next three years. By the end of 2011 the total government funding in this field shall reach to USD 65 billion and to USD 100 billion and with the investment of private and corporate funding the figure will reach to USD 250 billion by 2014.⁴ In USA, after launching the world's first national nanotechnology program, the government invested total USD 15.6 billion in between 2001-2012⁵ and the President requested to allocate USD 1.766 billion (USD 70 million more which is 4.1% higher than the previous year) for the year 2013 for the National Nanotechnology Initiative (NNI).⁶

Based on a broad industry survey and analysis in the Americas, Europe, Asia and Australia, the National Science Foundation of the United Nations estimated that the nanotechnology job market in the United States will require over 2 million nanotechnology-savvy workers by 2014, and about three times as many jobs in supporting activities. Another 5 to 7 million jobs will be created worldwide in this field (Mongillo, 2009). Of them only 20% are expected to be scientists, and the remaining 80% shall be from highly skilled engineers, technicians, business leaders and economists.

The UN Task Force on Science, Technology and Innovation (part of the process designed to assist UN agencies in achieving the United Nations Millennium Development Goals) addresses the potential of nanotechnology for sustainable development considering the benefits of 5 billion people of the developing countries and it was also discussed how nanotechnology can contribute the developing countries in achieving these goals (Singer et al., 2005). UNESCO traced top ten applications of nanotechnology within the UN Millennium Development Goals (MDGs)- (a) Energy storage, productions and conversion,

(b) Agricultural productivity enhancement, (c) Water treatment and remediation, (d) Disease diagnosis and screening, (e) Drug delivery systems, (f) Food processing and storage, (g) Air pollution and remediation, (h) Construction, (i) Health monitoring, (j) Vector and pest detection and control.

Apart from the leading economies, smaller and developing economies are not staying behind. Countries like Thailand and the Philippines, for example, are both devoting a portion of their small science and technology budgets to nanoscience and nanotechnology (Hassan, 2005). (Mahajan, 2006) shared some concern of the US government officials where they expressed that perhaps this is the first time in recent memory, the United States does not have a clear advantage though which is “crucial” for the future economic health of the country; nanotechnology is not dominated by USA and outpaced by Japan, EU, Russia, Korea, China.

Definition of Different Terms:

a. Nano:

The word ‘Nano’ derives from the Greek word "Nanos" meaning "dwarf", means one-billionth. A nanometer is one billionth of a meter. The simple but wholly accurate description of Nanotechnology or, more specifically, that subset of nanotechnology is that "molecular manufacturing" is that it involves manipulating matter on an atom-by-atom or molecule-by-molecule basis to attain desired configurations (Fiedler and Reynolds, 1993). To share some examples, a sheet of paper is about 100,000 nanometers thick and there are 25,400,000 nanometers in one inch, a strand of human hair is roughly 75,000 nm across.

At the nanoscale, the characteristics of matter can be significantly changed, particularly under 10–20 nm, because of properties such as the dominance of quantum effects, confinement effects, molecular recognition, and an increase in relative surface area. Downsized material

structures of the same chemical elements change their mechanical, optical, magnetic and electronic properties, as well as chemical reactivity leading to surprising and unpredicted, or unpredictable, effects. In essence, nanodevices exist in a unique realm, where the properties of matter are governed by a complex combination of classic physics and quantum mechanics. At the nanometer scale manufacturing capabilities (including by self assembly, templating, stamping, and fragmentation) are broad and can lead to numerous efficient outcomes.

There are two reasons which cause nanoscale matter to behave differently from materials at other scales. *First*, nanomaterials have a relatively larger surface area when compared to the same mass of material produced in a larger form. This can make materials more chemically reactive (in some cases materials that are inert in their larger form are reactive when produced in their nanoscale form), and affect their strength or electrical properties. *Second*, quantum effects can begin to dominate the behaviour of matter at the nanoscale - particularly at the lower end - affecting the optical, electrical and magnetic behaviour of materials. Materials can be produced that are nanoscale in one dimension (for example, very thin surface coatings), in two dimensions (for example, nanowires and nanotubes) or in all three dimensions (for example, nanoparticles).⁷

One can reach to the nanoscale either from the *top down*, where structures are smaller and even smaller so that it can be reached to a nanometric scale, or from the *bottom up*, whereby nanoscale elements are collected and assembled to make some tiny structures.

b. Nano Technology

Nobel Laureate Richard Smalley defined nanotechnology as the art and science of building stuff that does stuff at the nanometer scale. This is a matter of great concern that the world community is still in search of a regulatory definition of nanotechnology, due to which different organization, person or countries define 'nanotechnology' from different

perspective. A close analysis of all these definition will reveal that most of these definitions are derived from the definition suggested by the United State's National Nanotechnology Initiative (NNI).⁸ However, pertinent to mention here that National Nanotechnology Initiative (NNI) has some reservation on attiring something 'nanotechnology' and will do so only if it involves all of the following:

- a. Research and technology development at the atomic, molecular, or macro-molecular levels, in the length scale of approximately 1 to 100-nanoeter range.
- b. Creating and using structures, devices, and systems that have novel properties and functions because of their small and/or intermediate size.
- c. Ability to control or manipulate on the atomic scale (Mongillo, 2009).

European Union in its report on *Considerations on a Definition of Nanomaterial for Regulatory Purposes* considered and shared all the definitions given by different international Organisations like Organisation for Economic Co-operation and Development (OECD), EU Scientific Committee on Emerging and Newly Identified Health Risks, European Union Cosmetic Products Regulation, etc. and definitions which are available in municipal legislation of different countries including Australia, Canada, Denmark, the United Kingdom, USA and defined nanomaterials as materials with internal structures and/or external dimensions within the size range measured in nanometers (nm) where 100 nm is frequently used as a delimiting size between the nanoscale and the micro and macroscopic scales. Some international Oraganisations like United Nations (World Health Organisation, Food and Agriculture Organisation, International Standard Organistaion (ISO), International Labour Organisation (ILO), European Union (EU), Organisation of Economic Cooperation and Development (OECD) are in the process of developing nanotechnology framework.

From regulatory point of view, definition is immensely important as unless one thing cannot be defined properly, legal sanctions and attributes cannot be attached to it. The issue of definition deserves further attention because of the unanticipated environmental and health hazards which may occur from nanomaterials. The European Parliament also emphasized to introduce a comprehensive science-based definition of nanomaterials.⁹ Definition is further crucial to assess the label of liability of different people engaged in nanotechnology research and business.

c. Nano Particle/Nanomaterial

Nanoparticle is considered as miracle fibre.¹⁰ There are three types of nanoparticles: ‘engineered’ nanoparticles (such as buckyballs and gold nanoshells), ‘incidental’ nanoparticles (such as those found in welding fumes, cooking and diesel exhaust), and ‘naturally occurring’ nanoparticles (salt spray from the ocean, or forest-fire combustion). Only ‘engineered’ nanoparticles constitute an entirely new class of particles and, to date, buckyballs are the only engineered nanoparticles that have been seriously studied, whereas ‘incidental’ nanoparticles (often referred to as ‘ultrafine particulate matter’) such as auto exhaust have clearly been more extensively studied. The handful of studies on the toxicity of fullerenes so far suggest that they are indeed hazardous – but also that they can be engineered to be less so, in particular by conjugating other chemicals to the surface of buckyballs, thus changing their chemical properties.¹¹

To nanoparticles are of three types (i) unintentionally produced particles (e.g., diesel engines and welding processes) or originate from natural sources (volcanoes and forest fire); (ii) particles produced in bulk in traditional industries such as the chemical industry or the

polymer industry (e.g., carbon black and titanium dioxide); (iii) particles that are deliberately engineered to have specific properties and characteristics only existing in the nano-range and utilized for a specific function (e.g., carbon nanotubes, fullerenes and quantum dots).

Nanoparticle can take different shapes- cylindrical, discoidal, spherical, tabular, ellisodial, equant or irregular.

Health and environmental concerns of nanotechnology:

Technology, be it ‘low’ technologies like slash-and-burn agriculture, or “high” technologies like nuclear weapons do cause some environmental harm, but new technologies are often cleaner and safer than their older counterparts and offer ways of remedying environmental harms which were previously thought of as impossible. (Reynolds, 2001)

The social implication of nanotechnology was first prognosticated by Eric Drexler in his 1986 book on *Engine of Creation: The Coming Era of Nanotechnology*. Drexler was seriously concerned about the abuse of nanotechnology. Nanotechnological devices for military use also raise the issue that they do the work of chemical and biological weapons, but—at least arguably—do not fall within treaties regulating chemical and biological weapons (Reynolds, 2001). Challenges are there about nanobotes leading to ‘gray goo’ situation and use of nuclear weapon by the military weapons. Some of these will have no significant impact on the nonhuman environment, but nanotechnology-based agents for crop destruction, forest-cover removal, and area-denial applications are likely to pose familiar environmental problems in a new fashion. (Reynolds, 2001) shared that the civilian nanotechnology will be less harmful than the military nanotechnology and the ‘open source’ software is less harmful than the ‘closed source’ software.

Though there are limited number of research regarding the health and environmental implications of nanotechnology, every single research so far done around the world have

placed a warning on the health and environmental issues associated with nano materials. European Parliament realized that significant new risks are associated with nanomaterials 'due to their minute size, such as increased reactivity and mobility, possibly leading to increased toxicity in combination with unrestricted access to the human body, and possibly involving quite different mechanisms of interference with the physiology of human and environmental species'.¹² The Parliament further realized to evaluate the community legislation regarding waste, workers, chemicals, etc.

In October, 2009, the Scientists of Institute for Health and Consumer Protection (IHCP) of the Joint Research Centre (JRC) of the European Commission performed basic risk assessments for four types of nanomaterials: fullerenes, carbon nanotubes, nano-silver and metal-oxides and in its 426 pages report concluded that health risks are likely to arise from chronic occupational inhalation of nanoparticles and the consumer may be affected by the spray applications of the nanomaterials.¹³

Toxic wastes in contaminated aquifers may be neutralized by specially designed nanorobots that selectively capture undesirable molecules and then either sequester them for removal or (where the danger is chemical, not nuclear) break them down into harmless substances. While nanodevices cannot, for example, render radioactive materials nonradioactive, they could capture molecules of radioactive waste and concentrate them into a form that would be easily removed. (Reynolds, 2001)

Application and use of Nanomaterials should carefully be used so that additional problems which were occurred previously, are not occurred like destructive action on the atmospheric ozone layer by extensive application of chlorinated and fluorinated hydrocarbons or asbestos fiber-based materials. (Andreev et al., 2009)

In order to assess the health effect of nanotechnology, this is important to consider how human may be exposed to engineered nanoparticles. Workers are obviously exposed to nanomaterials. Few companies like Japanese Mitsubishi opened the first fullerene plant in May, 2003. In USA, the material safety data sheets (MSDS) contains the list the naomaterials with bulk materials and workers handling such substances do not take any safety precautions beyond those adopted for bulk solids of identical composition. Therefore, workers are in contact with nanoparticles. Furthermore, consumers come in contact with nanomaterials through personal care products i.e. cosmetics, sunscreen, etc. Back to 2011, the physician-led American organization Nanodermatology Society in its first position statement claimed that the use of sunscreen containing nanomaterials were safe to use.

Consumers are in great dilemmas. Even in some recent studies, it has been claimed that nano-sized cosmetic or sunscreen ingredients pose no potential risk to human health (Nohynek et al., 2008). In Australian researches these were found that sunscreen use reduce melanoma risk by 50% and one kind of skin cancer i.e. squamous cell carcinoma by 39% (Green et al., 2011). Again, on the other hand, nanoparticles are used in sunscreen which are of specific concern that it can penetrate through the skin and may cause another problem.

Nanoparticles can enter the human body through the lungs, the intestinal tract, and skin (Khaled Radad, 2012), and are likely to be a health issue, although the extent of effects on health are inconclusive. Nanoparticles can be modified to cross the brain blood barrier for medical applications, but this suggests other synthetic nanoparticles may unintentionally cross this barrier. According to (Albrecht et al., 2006), people working within emerging nano-industries are some of the first coming into contact with the new materials, therefore, this is a challenge to ensure the safety of these people.

Given the limited number of research findings, though the challenge is tough, is not impossible. Previous studies have shown that inhaled mineral dusts such as quartz and

asbestos fibers can lead to lung damage and cancer. (Carter, 2008, Kai, 2012) (M. Ellenbecker, 2011) (Song et al., 2009). Some of the news are already reported. In 2009, Reuter reported that seven young Chinese women suffered permanent lung damage and two of them died after working for months without proper protection in a paint factory using nanoparticles. These cases arouse concern that long term exposure to nanoparticles without protective measures may be related to serious damage to human lungs¹⁴ (Gilbert, 2009). Interestingly, though the Chinese government denied the fact, the doctors who treated these workers ruled in favour. The team of the doctors who dealt with these patients concluded that long-term exposure to some nanoparticles without protective measures may lead to serious damage to lungs and it is impossible to remove nanoparticles that have penetrated the cell(Song et al., 2009).

A research group at the National Institute of Health Sciences in Japan reported in the Journal of Toxicological Sciences in February that carbon nanotubes injected into mice led to actual tumors. Their mice had a mutation that made them more sensitive to asbestos, predisposing them to form tumors. The study found that the carbon nanotubes caused scarring as well as tumors in 88% of the mice, compared with 79% of the mice treated with asbestos. (Carter, 2008)

Chiu-Wing Lam of NASA's Johnson Space Center conducted a study and found that carbon nanotubes, when directly injected into the lungs of mice, could damage lung tissue (Mongillo, 2009). Malaysia has done significant development in terms of carbon nanotubes and therefore, this issue should be considered seriously.

Both UNESCO (2006) and Royal Society of UK (2004) were concerned about a different type of risk and challenge regarding the enjoyment of benefits and risks of nanotechnology as the can predict that the products with nanotechnology application will be produced in one area and may be used in another place and finally may be disposed of in another place. Thus

it may not harm the people who will consume or use the benefits of nanotechnology application instead will people in a state of danger where the production will be made and the waste will be disposed.

It is a matter of fact that the way companies and the governments are interested in commercial application of nanotechnology, are not equally interested on research on health and environmental concerns arising out of nanotechnology, if any. It has been revealed that China is investing only 3% for safety studies and USA is spending 6% of the federal nanotechnology funding, in 2006, out of \$ 1.5 billion of USD, 2.5% were allocated for the health and safety risks of nanoscale materials.¹⁵

However, the year 2013 started with a good news in this regard. In a very recent research it has been revealed that the concern of carbon nanotube as asbestos can be completely alleviated if their effective length is decreased as a result of chemical functionalization, such as with tri (ethylene glycol) (TEG). But not all chemical treatments alleviate the toxicity risks associated with the material. Only those reactions that are able to render carbon nanotubes short and stably suspended in biological fluids without aggregation are able to result in safe, risk-free material(Ali-Boucetta et al., 2013).

Regulating Nanotechnology:

Legislations and regulation have great role to play in the development of nanotechnology. Earlier, based on the available exciting data and research findings, the Commission of the European Communities, in its communication to the European Parliament, the Council and the European Economic and Social Committee Regulatory Aspects of Nanomaterials, after evaluating community legislation relating to chemical, worker protection, product and environment concluded that the current regulatory set up in principle covered the potential health, safety and environmental risks in relation to nanomaterials.¹⁶

However, the situation has been changing. Nanotechnology should not be treated as a blank cheque to the scientists. (Scheufele et al., 2007) shared a Switzerland study where it was found that the scientists similarly perceived lower risks associated with nanotechnology as they perceived with nuclear energy, food biotechnology etc. This is an irony of fate that after few years of utilization and commercialization of nuclear energy and food biotechnology the world community has witnessed some serious disasters around the world.

Calls for tighter regulation of nanotechnology have occurred alongside a growing debate related to the human health and safety risks of nanotechnology (Rollins, 2009). Being a nanotechnology researcher, since it would be tough to assess engineered nanoparticles, (Colvin, 2003) was against formulation of any risk assessment tool or guideline in the absence of clear data. However, (Hoet et al., 2004) were against this contention and suggested for risk assessment of every particle based on size, shape, surface area, chemical composition and biopersistence since these are crucial and may create substantially different health effects. They further imposed a duty on the part of the producers of nanomaterials to provide relevant toxicity test result for any new materials as per the international guidelines of risk assessment and in this regard the regulatory authorities and the legislators should support fundamental research to construct scientifically valid, lo-cost, fast-throughput toxicity test.

While discussing on the benefits of engineered nanoparticles in medicine in terms of drug delivery, cancer therapy, neuroprotection, tissue engineering, tissue imaging (Khaled Radad, 2012) also considered the potential hazards of engineered nanoparticles and took strong stand in favour of regulatory health risk assessment of engineered nanoparticles mandatory. For doing so, they suggested to consider the exposure assessment by collecting data and knowledge about potential exposure of engineered nanoparticles and hazard identification

through assessing the physicochemical characteristics of these nanoparticles, in vitro assays, in vivo assays and human epidemiological studies.

There is significant debate about who is responsible for the regulation of nanotechnology. Some regulatory agencies currently cover some nanotechnology products and processes (to varying degrees) – by “bolting on” nanotechnology to existing regulations – there are clear gaps in these regimes (Bowman and Hodge, 2006). (Davies, 2008) has proposed a regulatory road map describing steps to deal with these shortcomings.

Renowned NGO ETC-group is against distinct regulatory set up and in favour of a similar approach like the EU Chemical Regulation, REACH which will make liable the producers for the risk and safety of their products, for regulating nanoparticles. (Aasgeir Helland, 2006)

This is already accepted and realized that the nanotechnology should be regulated though there are some differences of opinion as to the nature of regulation e.g. to what extent research, application and commercialization of nanotechnology should be regulated, how nanotechnology should be regulated etc.

(Bowman and Hodge, 2006) identified six regulatory frontiers for nanotechnology i.e. product safety, privacy and civil liberties, occupational health and safety (OH&S), intellectual property (IP), international law and environmental law and extensively considered three of them i.e. occupational health and safety, product safety and environmental law within the regulatory frameworks in Australia, Japan, the United Kingdom and the United States and conclude that there was no nano specific regulation and legislation in these countries though all these countries have legislation on Occupational Health and Safety, Industrial Chemicals, Therapeutic Goods & Medical Products, Cosmetics, Food, Pesticides & Veterinary Medicines / Agricultural Chemicals Environment and these countries deal with nano scale chemicals with the existing legal framework of the country. In this given

situation, they went on examining whether the existing regulatory framework will be sufficient to handle the possible threats and challenges posed by nanotechnology application and conclude that the existing regulatory provisions will frame the immediate structure of regulations. (Bowman and Hodge, 2006) revealed that one of the most important factors in having no specific legislation on nanotechnology in these countries is because nano scale chemicals are not treated as 'new chemical' and can be considered under the existing legal framework. They further found that of the four countries they studied the laws of UK are the most advanced to handle nanotechnology challenges and they proposed for short term to medium regulatory set up instead of making any comprehensive legal or regulatory set up. However, the UK newspaper, the Independent reported on January, 26, 2013 that the leading scientist of UK are in favour of regulating nanoparticles.¹⁷ The findings of this article will be good to consider in details as the article assessed the existing regulatory framework of civil law countries where codified laws play crucial role and common law countries where the judges by way of precedent play crucial role. Therefore, this will be a great opportunity to test the findings of the article in the context of Malaysia.

When (Bowman and Hodge, 2006) were claiming in the abovementioned way and (Paradise, 2012) also repeated that USA's FDA Regulations are not sufficient to deal with nanotechnology, a report by the U.S. Food and Drug Administration (FDA), for example, essentially recommended that existing regulatory structures were already comprehensive for nanotechnology drugs and biological products subject to premarket authorization.¹⁸

UK Health and Safety Executive (HSE) issued an information sheet on Risk management of carbon nanotubes in March 2009, where it has been stated that the occupational use of nanomaterials is regulated under the Control of Substances Hazardous to Health Regulations (COSHH) 2002 (as amended). The information sheet further stated that the principles of risk assessment as mentioned in the Control of Substances Hazardous to Health Regulations

(COSHH) 2002 shall be applicable and companies should take precautionary approaches.¹⁹

This information sheet will be very useful to check the existing practice with regard to carbon nanotube in Malaysia.

In recent times, the scholars around the world are divided into main platforms on whether new legislation on Nanotechnology is required or amendment in the existing sectoral laws like environmental law, occupational health law, food and agriculture law will be suffice. Scholars who are in favour of regulating nanotechnology through existing regulation concludes that no comprehensive legislation is required, it will be enough to regulate moderately some sector of nanotechnology like invisibility, micro-locomotion and self-replication applications (Pinson, 2004). They find momentum in favour of their argument as some of the regulatory actions are already taken under the existing regulations. For example, in 2008 the Environmental Protection Agency (EPA) fined the US Company Aten Technology US\$ 208,000 for failing to register nanosilver as a pesticide. Reynolds has continued to engage in the debate over nano-regulation, articulating the advantages and disadvantages of several theoretical models for regulating nanotechnology and advocated for self-regulation and co-regulation (Reynolds, 2003). However, this may not be true as in a wakeup call Fiedler and Reynolds suggested that some of the problems posed by nanotechnology may be sui generis, which may be addressable only through the creation of entirely new rules (Fiedler and Reynolds, 1993) since the existing regulatory framework will not be adequate to human and environment safety.²⁰ Therefore, one of the best approaches to settle down the debate may be a cooperative government industry initiative in which there can be open dialogue and input from many different technological and administrative bodies with some expertise in managing technology (Wejnert, 2004).

The 'Nano Risk Framework' jointly launched by the Environmental Defense Fund and DuPont in 2007 is a useful tool for the industries dealing with nanotechnologies to follow.

This framework is information-driven and in the absence of information it will not assume the presence of any risk instead it will suggest to use ‘reasonable worst case assumption’. The framework suggests for six different steps to assess the safety of nanoparticles i.e. (1) development of a general description of nanomaterials and their intended used, (2) development of three sets of profile i.e. properties profile (to identify physical and chemical properties), hazard profile (to check potential safety, health and environmental hazard) and exposure profile (to identify the scope of human and environmental exposure of nanomaterials), (3) evaluation of risks in all these three properties profile, hazard profile and exposure profile, (4) assessment of risk and adoption of course of action through engineering controls, protective equipment, risk communication and product or process modifications, (5) decide in an appropriate review team, document the decision with rationale and information and act, and finally (6) review the action in changing circumstances with the availability of new information, technology change, etc.²¹

The next issue of consideration is that if nanotechnology is to be regulated should it be done through binding laws or through some policy documents or issues should be left for self regulations. Though self regulation should be an ideal stand in dealing with emerging technology like nanotechnology in UK this approach was not successful. There are already some The Department for Environment, Food and Rural Affairs (DEFRA) of the United Kingdom introduced a Voluntary Reporting Scheme (VRS) for engineered nanoscale materials at any stage of a product’s life-cycle in between September 2006 to September 2008 to develop appropriate controls in respect of any risks to the environment and human health from free engineered nanoscale materials from anyone involved in their manufacture or use and anyone involved in nanoscience research or managing wastes consisting of engineered nanoscale materials. It is a matter of fact that even after repeated assurance about the end result of the Voluntary Reporting Scheme, DEFRA received only twelve completed

submissions and one more after conducting the telephone survey done as a consequence of very low submissions (Fiedler and Welpe, 2010).

Some of the countries, on the other hand, have enacted laws relating to nanotechnology, e.g. the U.S 21st Century Nanotechnology Research and Development Act, 2003 etc. Being concerned with the potential health and safety risks of products containing nanotechnology materials, in October, 2011, the US Senator for Arkansas introduced a bill to amend the Federal Food, Drug, and Cosmetic Act to establish a nanotechnology regulatory science program titled the Nanotechnology Regulatory Science Act, 2011. Under the proposed bill, it is proposed to appropriate US\$ 15 million, 16 million and 17 million for the fiscal year 2013, 2014 and 2015 respectively. The Bill is now pending before the Committee on Health, Education, Labor and Pensions of the Senate.²² Other countries like Ireland, Germany are in the process of enacting laws regulating nanotechnology, whereas countries like Australia and New Zealand identified that the existing regulatory framework is not adequate. Though the Australian Cancer Council did not find any evidence in favour of any unacceptable safety risks in sunscreens containing nanoparticles, the Australian Education Union resolved to use sunscreen without nanoparticles only.²³ In 2012, in USA, the NGO, Friends of the Earth sued the FDA for failing to regulate nanoparticles.

In February 2012, the final decree of the French Ministry for Ecology, Sustainable Development, Transportation and Housing introduced the first mandatory reporting scheme for nanomaterials in Europe. The decree, which shall be in operation from January 2013, was adopted to have a better understanding of nanomaterials and their use, to enable better traceability, to have a better knowledge of the market and volume of nanomaterials involved and to collect available information on toxicology and ecotoxicology of nanomaterials. Under the decree, the importers, producers, distributors of nanomaterials, as well as “professional users” and research laboratories located in France that manufacture, import, distribute

nanomaterials in quantities of $\geq 100\text{g}$ must submit an annual declaration on 1st May of every year containing the quantity and use information to the Minister of the Environment. The decree entails the French National Agency for Food Safety, Environment and Labour (ANSES) for management of data thus collected.²⁴ Whereas, in another European country i.e. in Germany, the Federal Environment Agency advised the consumers against using products containing nanomaterials.²⁵

Though Japan is one of the most advanced countries in the field of nanotechnology and robotics in the world, the word ‘nanotechnology’ was first used by Japanese Norio Taniguchi in 1974 and Sumio Iijima discovered carbon nanotube (CNT) legal issues associated with it is not discussed enough (Kai, 2012). The main reason is that the people cannot concretely understand and foresee the dangers and results which nanotechnology can bring about to human body or human life.

(Cassandra D. Engeman, 2012) in a very recent article shared the result of an international survey on nanomaterials companies in 14 countries where though the participant companies were also concerned about the high level of risks and uncertainties with regard to the engineered nanomaterials, were not careful enough to take counter measures. Lack of regulatory oversight and lack of information about the particular risk were the main reasons behind such practices.

Finally, (Hansen and Baun, 2012) with an austere tone questioned the initiative taken by the European Commission in December, 2011. The European Commission asked the Scientific Committee on Engineering and Newly Identified Health Risks (SCENIHR) to provide scientific opinion on safety, health and environmental effects of nanosilver and its role in antimicrobial resistance. (Hansen and Baun, 2012) opined that all these issues have already been discussed in 18 review articles, which covered the same ground, identified some common data gaps and research needs and thus the Commission should avoid the ‘paralysis

by analysis' situation and should not wait for regulating nanomaterials as already twenty years elapsed from the publication of first article on effects of nanotechnology with concerns. Some of the governments are still asking for further information, may be because nanomaterials are used by all big companies like pharmaceuticals, medical equipment, oil, arms etc. All these companies are big donors to run the state machineries and that may prevent the government to take strict steps in favour of regulation. If the Commission does so, it will definitely be a ground breaking event as in terms of commercialization Europe has already overtaken East Asian countries and holding second position after USA.

Legal and Regulatory Interventions and Policy Implications:

After all these discussion on in favour of and against regulating nanotechnology for the benefits of mankind, this is obvious that it is high time that the international community should reach to a consensus on the definition of nanoscale which will enable the regulators of the countries around the world to regulate the products which are developed using nanotechnology. The precise definition of the nanoscale will allow the countries to assess whether the existing laws relating to chemical, product liability, occupational health, environment are sufficient or not. On the basis of such assessment, the countries will be able to go for further reform in the existing regulatory framework.

The governments, regulators and companies around the world should take initiative to make people aware of nanotechnology enabled products and should allow them to choice. Since this is a new technology to many countries in the world the regulators of the developed countries where most of the companies are registered and functioning. The regulators there should be more cautious before exporting such products in another country.

The United Nations and other international organization should also come forward to assess the perception or opinion of the people who will be the ultimate stakeholders of this

technology. Back to 1996, the United Nations Office of the Outer Space conducted a survey on the legal issues relating to aerospace objects. Similar initiative relating to nanotechnology shall highly be welcomed. If such initiative will be taken under the supervision of the United Nations all the countries will feel obliged to share information and it is presumed that the countries irrespective of size, economy will be properly represented.

This is again a matter of great concern that though the companies are interested to spent huge amount of money in developing commercial products using nanotechnology, they are reluctant to spent money for the research on human health and environmental concerns of nanotechnology. It has been revealed that China is investing only 3% for safety studies and USA is spending 6% of the federal nanotechnology funding, in 2006, out of \$ 1.5 billion of USD, 2.5% were allocated for the health and safety risks of nanoscale materials (Rico et al., 2011). Therefore, the companies and government should increase the amount in conducting more research pertaining to health and environmental concerns relating to nanotechnology. At least the companies should realize that the people should be convinced about the safety of the nano-enabled products otherwise all the hard work, investment will go in vain.

Finally, before being assured about any kind of danger the companies and the research organization working on nanotechnology should observe the 'precautionary principle' always as the guiding rule to avoid any kind of injuries.

Conclusion:

There should not have any doubt or debate that the magic technology, nanotechnology and research should be continuous within the approved regulatory framework as it has huge potential which should be used for the betterment of mankind. Simultaneously, the scientist should not be offered a blank cheque to do researches according to their own will with this technology and therefore their activities must be regulated. It may give a comfort feeling that

so far no accident or damage has been evident, but this is equally true that the effect of the technology is dormant and not visible and therefore a precautionary approach shall be the best approach.

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PROF. KINGA FLAGA-GIERUSZYŃSKA

ALEKSANDRA KLICH, MA

**POLISH ELECTRONIC WRIT OF PAYMENT PROCEEDINGS AS A MODERN MODEL OF PAYMENT
DISPUTE RESOLUTION**

ABSTRACT

Polish electronic writ proceedings reflect the Europe-wide trend to move financial settlements away from the courtroom and into the tele-information system. In this work the essence of such proceedings will be presented, their subjective and objective scope, and the distinctions that determine the high efficiency of this method of payment dispute resolution. The electronic form of proceedings was introduced comprehensively, i.e. the computer system not only receives a lawsuit to be examined and issues a decision, but this form is also largely used at the stage of enforcement proceedings, which speeds up the execution of the decision issued in this mode.

At the same time the authors wish to point out the difficulties posed by the spread of the procedure, in particular, issues of access to internet services and the costs of obtaining the so-called secure electronic signature which allows the identification of the parties of the electronic proceedings.

The authors believe that the experiences of Poland as a country that for the past two decades has experienced a profound democratic and economic transformation, by joining the modern and democratic European countries can be a valuable message to the countries that are currently in the process of formation of modern structures of justice in civil matters. This applies in particular to the implementation of high-tech remote communication solutions and

information technology tools in the practice of civil disputes as a way to reduce costs and streamline the civil proceedings.

INTRODUCTION

The introduction and establishment of market economy after a quarter of a century of centrally steered one, marked by the stigma of socialism, and also Poland's joining the structures of the European Union resulted in an avalanche development of different forms of business activity - in particular the activity of micro-, small and medium-sized enterprises. Such a quickly progressing development of trade and services resulted at the same time in an equally rapid growth in the number of disputes between the various participants in economic and legal relations. Among these a significant percentage comprises simple cases, payment suits based on an unequivocal factual state (generated by the so-called mass reasons - claims arising from telecommunications services and the supply of other media). Polish legal system dedicates such disputes to writ of payment proceedings, which allows for issuing an order for payment against the defendant without his participation. This procedure, however, does not affect the defendant's right to trial because the order for payment is designed as an alternative: the defendant may, within two weeks from the date of the service of the order, settle the claim in whole, and also in this period he is allowed to submit a statement of opposition. The consequence of submitting a statement of position in a proper manner is the loss of validity of the payment order, which in turn results in running further proceedings from the beginning, now on general principles, i.e., with the participation of the defendant. The functioning of the writ of payment proceedings in the traditional form, based on the written form rule in the first phase, and then on the basis of the oral form rule with elements of the written form in the phase involving the defendant, has never raised serious doubts of

interpretation in the Polish doctrine of civil procedural law from the perspective of compliance with the constitutional right to trial.

However, recent years, marked by the rapid development of techniques and technologies of an electronic nature and the development of information and communication systems have made it possible to introduce additional features whose principal aim is to accelerate the examination of pecuniary claims in writ of payment proceedings. This idea was intended to be served by the introduction of, as one of types of writ of payment proceedings, procedures fully anchored in the tele-information system. The aim of the originators of this solution, created in 2009, was to carry out all procedural steps in this system, starting from the initiation of the proceedings, to issuing an order for payment, to the enforcement action - if necessary, the use of state coercion to satisfy the claimant's claims.

From the onset this solution gave rise to a number of problems. Firstly, in Poland, the electronic form of legal, and thus procedural, actions is still not prevalent, e.g. among consumers, in principle, one can say that it is a domain of entrepreneurs operating in the IT services market, who use this form in their relations with other entities of the industry. Secondly, the form of claimant's, i.e. the entity filing the lawsuit in such proceedings, identification has become debatable due to the high cost of generating a secure electronic signature, which under Polish law can be used as an electronic equivalent of a traditional signature. These costs would naturally be a factor limiting the number of operators who use the secure electronic signature in legal relations (again, in principle, it is only possible to indicate here entrepreneurs, especially those in the information technology industry and entities cooperating with them). The authors of the electronic writ of payment proceedings were thus faced with the problem of determining the system of unambiguous identification of the claimant's identity at the time of filing the lawsuit in such proceedings. Various indirect solutions have been proposed, including the use of the PESEL number (personalized number

generated for Polish citizens and residents in the area of Poland under the Universal Electronic System for Civil Registration). The latter solution, however, was burdened with a high degree of risk because of the relatively easy availability of this number in different types of poorly secured databases. This risk would be primarily associated with the court's obligation to respond to any unpaid, though PESEL number-labelled, lawsuit in the form of an order for payment of the relevant balance. As a result, the state justice system would bear the costs of different types of irresponsible behaviour on the part of people who would use someone else's PESEL number. The ultimate solution in this regard was the adoption of a compromise design of a regular electronic signature, obtaining which is much easier and less costly than the safer, certificated form. The third problem the designers had to face was the technical condition of the infrastructure of state courts, which are only in the process of computerization and implementation of various electronic features, facilitating the conduct of the procedure and its documentation. This question was solved by centralizing the examination of lawsuits in electronic writ of payment proceedings in one court of law in the country. The purpose of this approach was to focus spending on the ICT database and minimize the initial costs of establishing adequate technical support for the introduction of said proceedings.

These signalled problems, along with others side problems, which, due to the limited scope of the study Authors will not discuss, naturally imposed legal solutions introduced by the legislator, as well as, what follows - technical structures which have become *de facto* a compromise between a notable need for computerization of public services, including jurisdiction services - a need imposed by legal relations standards based on EU legislation, and the capabilities of the state budget, attitude of the judiciary circles and organizational capacities resulting from the existing infrastructure of the judiciary.

Devising such a compromise for obvious reasons resulted in the resignation from costly solutions which in the long run could, after all, bring positive results for the real promptness and efficiency of considering cases in the writ of payment proceedings, and thus it would demonstrate to persons seeking legal protection in such proceedings that it is an effective instrument of obtaining a writ of execution, implemented through state coercion. These compromises, concerning for instance the concentration of the competency to issue orders for payment in one place substantially affected the functioning of electronic writ proceedings in practice. Hence the two years of the functioning of these proceedings showed the areas in which they should be revised in order to achieve higher efficiency of their use. Authors' main aim will be to examine the current state of law applicable in the discussed proceedings with a critical approach to those regulations which in practice raise questions of interpretation, or constitute the proceedings' weak points for praxeological or axiological reasons. Against the background of this criticism, Authors will try, drawing on their own thoughts and views of the doctrine and also the to date modest legacy of the jurisdiction, to indicate conclusions *de lege ferenda* which will allow the formation of electronic writ of payment proceedings in such a way so that they become an important means of pursuing pecuniary claims.

It seems that an analysis of this type will constitute an interesting basis for the doctrine's representatives coming from countries that are also at the stage of forming or modifying electronic forms of civil proceedings, especially for those who are only contemplating the intention of introducing this kind of proceedings. The indication of problems existing in this area, and most of all outlining ways to remove or significantly reduce them, can make an important contribution to the discussion on the role of information technology tools in the performance of activities related to the administration of justice in modern democratic rules of law, both in terms of present solutions as well as building prospects for the development of

means ultimately reducing the costs of the settlement of civil cases owing to the opportunity of using ICT systems or means of remote communication.

MATERIAL AND METHODS

This paper conducts an examination and an in-depth analysis of the provisions of art. 505²⁹ and the following Act of 17 November 1964 – Code of Civil Procedure¹ ([hereinafter referred to](#) as CCP), which refer to both the admissibility and the scope of application of writ of payment proceedings in general, as well as, key to these considerations, the electronic form. These provisions, which are at the same time an expression of the legislator's intention signalled at the outset for speeding up the settlement of pecuniary claims, have been verified by practice. In terms of practical aspects of the operation of these proceedings, the following had the decisive importance: views of the doctrine developed upon observing ways of application of the law in an electronic procedure, as well as statistical data relating to the extent of the workload of Polish district courts, including the e-court, and also the length of electronic proceedings. The research material gathered in this scope was analysed using the following research methods applicable in social sciences:

1. the analytical method, whose task was to determine the current state of law and the practice of operation of electronic proceedings, both in static terms, referring to legal structures of the organizational and financial character, as well as dynamic ones, relating to the conduct and results of solutions of procedural character;
2. the historical method – Authors assumed that it is impossible to accurately assess and determine the outlook for the development of electronic writ of payment proceedings without determining in the right scope the hitherto existing development trends in regular writ of payment proceedings, hence the need to refer to, to a limited extent, solutions for the latter that have been in operation for a longer time now, which are relevantly applicable in

electronic proceedings. To an ancillary extent, the following will be applied: the formal-dogmatic method (referring to the examination of the contents of legal provisions, out of which legal standards co-forming ordinary writ of payment proceedings and their electronic form may be interpreted) and the sociological method (of key importance to the determination of the significance of the proceedings for the judiciary and for the experience of applying electronic writ of payment proceedings in practice).

The combination of these methods allowed for a comprehensive analysis of the problem in question, both from the perspective of the functioning of courts as entities implementing the law, as well as from the point of view of persons using legal protection in the form of electronic writ of payment proceedings, as well as entities against whom these claims have been brought up. As a result, it was possible to draw basic conclusions on the future of electronic writ of payment proceedings, in particular as regards the proposal for their improvement and removing the provisions that cause practical difficulties.

RESULTS AND DISCUSSION

The character of electronic writ of payment proceedings

The creators of the idea of Polish electronic writ of payment proceedings, drew experience from similar legal and technological solutions proven in Germany, Austria and the UK. As emphasised in literature, these borrowings were not limited to technical issues alone, but also to a large extent determined the constitutive features of these proceedings. According to some authors an approach that proved accurate was the one which did not to a large extent use technologically sophisticated solutions adopted in Germanic systems, but a more pragmatic English model. From the *Money Claim Online* procedure, among others, the following were borrowed: the functional e-court interface modelled after a classic internet service, and also

widely available means of identification of the parties of the proceedings. As pointed out by J. Pawliczak, the creators of electronic writ-of-payment proceedings did not only adapt foreign applications to Polish conditions, but they also developed them to some extent. As a result, in the first year of their operation, these proceedings proved to be much more popular than their well-known English equivalent.²

The introduction from 1 January 2010 to the Polish legal order electronic writ-of-payment proceedings aimed at speeding up the examination of selected civil cases while reducing procedural costs. Improving proceedings in pecuniary claims was to take place by using modern technological means and available capabilities of tele-information systems. This does not mean that the electronic writ-of-payment proceedings is an entirely new design. To a large extent it relates to the already functioning (for several years) in the area of the Polish civil law construction of writ-of-payment proceedings as a special form of pursuing well-grounded pecuniary claims. However, electronic proceedings rooted in these solutions, due to their modern nature contained within the tele-information system, comprise a number of solutions, hitherto unknown to the Polish legal system.

Electronic writ-of-payment proceedings are proceedings of an optional character. It is proven by the fact that the claimant, using the electronic form of filing a lawsuit, implicitly expresses the will for his claim to be considered in this manner. Otherwise, the claimant files the lawsuit in the form of a traditional pleading and such a formula is adopted in further writ of payment proceedings. Similarly, the defendant, already at the stage of proceedings called for by his opposition, has the opportunity to choose the form of procedural actions. It seems that this optionality is highly justified, most of all with regard to the still differing propagation of the electronic form in the Polish legal relations. As mentioned above, it results to a great extent from the weak usage outside of the ICT industry of the electronic signature, both in its simple and qualified form (the so called secure electronic signature). Therefore the

discussion preceding the introduction of electronic proceedings indicated a view – as one of the leading ones – that introducing it as compulsory to examine any type of claims in the electronic form engaging this type of identification of the defendant, would constitute *de facto* a limitation of access to justice within the scope of these claims. There would have arisen two barriers in this case - a financial one – resulting from the necessity of bearing costs of obtaining an electronic signature and internet connections (which, for instance among the elderly are not common), and also a substantive one – resulting from the fact that not all entities pursuing claims would have been able to use electronic tools comfortably.

Another constitutive feature of these proceedings is their accelerated course. There is a group of claims in the Polish civil procedure whose essential feature is the division into two stages. In these proceedings (order, writ and electronic writ) the first stage does not have a contradictory character, therefore a payment order – having a similar status to a sentence – is issued without the participation, or even the awareness, of the defendant, but only on grounds of proven, alternatively highly substantiated, statements of the claimant. Contradictoriness of these proceedings only starts when the defendant, after the order for payment along with the lawsuit have been served on him, negates the content of the judgement by filing a relevant legal remedy. Such an internal construction of, also, electronic proceedings, accelerates greatly actions taken between filing a lawsuit and issuing the statement in the form of order for payment. Emphasising the accelerated character of actions performed in these proceedings, some representatives of the doctrine also describe electronic proceedings as accelerated proceedings.³ In practice, significant efficiency of e-court proceedings is emphasised, where within one and a half years almost 1.2m claims were examined out of 1.4m lawsuits filed. The Ministry of Justice stresses that one e-court special official (referendary) may consider up to 20 thousand cases a year.⁴

It is worth noting though that this particular feature of electronic proceedings is relative in nature with regard to the simplicity of challenging the order for payment issued in a tele-information system. As a result of submitting by the defendant a statement of opposition to the order of payment of any content, the proceedings start afresh – on general rules. In consequence, in the event of defendant's opposition, the proceeding loses its accelerated value and practice shows that the time in which the case file travels from the e-court to the competent court of general jurisdiction is so lengthy that pursuing pecuniary claims in this mode may stretch to the same extent as in reference to cases considered disregarding the accelerated mode. What is more, when the case is referred from the e-court to the court operating on general principles, faced with the necessity of completing procedural documentation by the parties in a traditional way, especially in the event of the court deeming itself incompetent (art. 505³⁶§ 2 CCP), the timespan of proceedings may be significantly extended compared to a regular writ of payment mode.⁵

In addition, attention needs to be paid to one feature of electronic proceedings which was only revealed in practice. This attribute could be described as universality. It was expressed mainly in the dramatic increase in the volume of cases examined by the state court in reference to pecuniary claims. This increase does not apply to writ of payment proceedings in general, but their electronic form. Analysis of reasons for this surprising state of affairs necessitates the recognition that it consisted of two factors: low costs of the initiation of these proceedings (at the level of 25% of the total costs) and the ease of obtaining an order for payment which in the absence of the defendant's activity (not always aware of the legal situation - despite appropriate instructions served on him) remains in legal relations and may become a writ of execution allowing for the execution of the claim under state coercion. As a result, the court suddenly began to receive electronic lawsuits for pecuniary claims that were time-barred or otherwise questionable in their pursuit in general terms. In 2010 - the first

year of the proceedings' operation – almost 6% of all cases recorded in the e-court were referred to district courts.⁶ Due to the narrowed subjective scope of electronic proceedings, it is a significant result.

There actually emerged a practice of creating a *quasi*-economic activity, involving the buying up of these high-risk claims at minimal rates and pursuing them in the electronic proceedings mode. Statistics in this area are not, of course, conducted but practitioners participating in these proceedings indicate that the percentage of cases in which the defendant does not respond effectively (does not submit a statement of opposition based on, for instance, defense of limitation) is so high that such activities are very economically profitable. In this context, one cannot always treat the universality attribute of the use of electronic proceedings as unequivocally positive. In this case, the positive aspect of universality, in Authors' opinion, may be spoken of in regard to situations in which a wider access to justice for persons at risk of legal exclusion came about, whereas in the case of electronic proceedings, unfortunately, its negative aspect comes to the fore in the practice of their implementation. It involves the use of a low level of legal awareness of some social groups (e.g., consumers of para-banking services) who do not fully understand the importance of an order for payment, and mandatory instructions given by the court on the service of the order for payment and lawsuit are not able to level this problem due to their linguistically hermetic character.

Court's jurisdiction in electronic writ-of-payment proceedings

Focusing on subjects of electronic writ of payment proceedings, one cannot not refer to an absolutely unique design of the territorial jurisdiction feature of the court in question. The rule applied to the territorial jurisdiction in the Polish procedural law is basing the court's jurisdiction on the territorial division of the state. This seems obvious because of the obligation on the part of the public authority to create such an organizational structure of the

judiciary, which would guarantee legal protection to persons seeking real access to justice, also in the sense of a reasonable distance from his registered seat. Hence, only in specific cases the solution assigning a given category of civil cases to one civil court in the territory of the whole country is applied.

The same is true in the case of material jurisdiction where a general rule was introduced, saying that the court having material jurisdiction is the district court, except in special cases set out in the act for which the competent court in the first instance is the district court (for example, cases related to copyright, related rights, the rights of the press, etc.).

In the case of electronic writ of payment proceedings, to be precise – up until the moment of challenging of the order for payment in these proceedings by the defendant's opposition, rules on court's jurisdiction were introduced, which significantly differ from those set out by general principles. Firstly, the basic rule that the district court holds material jurisdiction if the balance in dispute does not exceed the amount of 75,000 PLN was broken, because in the electronic proceedings material jurisdiction of the district court is not dependent on the amount indicated as the value of the claim. Thus, the legislature assigned exclusive material jurisdiction to the district court and therefore a situation where a pecuniary claim is based on rights or legal relations which should be subject to consideration of the district court (the said copyright, industrial property rights, etc.), the claimant cannot in the lawsuit apply for the case to be considered under electronic writ of payment proceedings.⁷

As signalled, the distinctive features relating to a court's jurisdiction do not only apply to material jurisdiction, already discussed, but also to – the territorial jurisdiction of the court. Under the current law, the Minister of Justice was legally authorized to vest in one District Court the considerations of cases in the electronic writ of payment proceedings belonging to other district courts, as reflected in the Regulation of 15 December 2009⁸, under which the so-called e-court was established, which is the Civil Division of the District Court

in Lublin, and the court of appeal against the decisions of the e-court issued in the electronic writ of payment proceedings is the Department of Civil Appeals of the District Court in Lublin. E-court is, therefore, a special faculty of one of the district courts that is competent to consider cases in electronic writ of payment proceedings. In addition, to further speed up the proceedings it was made possible for procedural actions to be performed by court officials (referendaries), both in the scope of issuing orders for payment and decisions in these electronic proceedings. The court special official (referendary) is an entity within the structures of the justice system that can perform court's acts in cases strictly defined by law. As part of these activities, he has the power of the chief judge and the court, unless the law provides otherwise.

The existence of a single e-court to serve the whole country does not have a particular importance for the functioning of electronic writ of payment proceedings. According to some Authors this is nothing but an argument in favour of the simplicity of maintenance of the technical infrastructure of the tele-information system that is located in one place.⁹ Such a solution is justified in this case by the fact that although the e-court is located in the far east part of the country, it does not bear importance for access to the proceedings, as physical access to electronic proceedings that allows filing a lawsuit is possible through the use of the Ministry of Justice website and another specialized one from any computer with Internet access, regardless of the current whereabouts of the claimant.

In reference to the electronic writ of payment proceeding restrictive regulations have been introduced regarding the admissibility of the so called contractual jurisdiction (*prorogatio fori*), i.e. opportunity to shape territorial jurisdiction in a different way as a result of concluding an appropriate agreement by the parties (prorogation agreement). In this case, due to the exclusive character of the territorial jurisdiction of the district court in Lublin, the admissibility of the use of a prorogation agreement has been excluded in the proceedings

before the e-court. Even if the parties, in reference to the given subject matter of the dispute, conclude such an agreement, the claimant – when using the optional formula of filing a lawsuit in electronic writ of payment proceedings – should do so with respect to the exclusive jurisdiction of the Lublin court. In such a case, (even though the lawsuit will unambiguously state that the parties are bound by the contractual choice of the competent court) there will be no ground for referring the issue to be considered by a court whose jurisdiction was contractually recognized. Thus, according to the doctrine's representatives, the claimant, bringing a case to the e-court, *implicite* agrees to resign from the contractual jurisdiction.¹⁰ It seems that in this case the question of the prorogation agreement concluded by the parties shall return at the stage of proceedings called for by the defendant's filing of a statement of opposition to the electronic order for payment, which should proceed under general rules, therefore also including solutions concerning contractual jurisdiction.

To conclude the considerations on the jurisdiction of the e-court one should also pay attention to three cases in which it ceases to be the competent court, in consequence of which the case is referred to the court of general jurisdiction. Such a situation occurs if there are no grounds for issuing an order for payment, in the event of having to waive the order for payment (this case refers to formal aspects accompanying the issuing of the order for payment, for example, the discovery that the person against whom the order to pay was issued does not have the capacity to be a party in civil proceedings) and in the repeatedly quoted case of effective opposition filed by the defendant. Technical transfer of the case by the e-court is conducted through the tele-information system, which indicates the court having territorial jurisdiction based on the defendant's place of residence or registered seat. An essential issue is also the fact that the court to which the case was referred to be considered, carries out the procedure for making good the formal deficiencies of the lawsuit

again, in a manner appropriate to the proper mode for further proceedings, which will be discussed further.¹¹

One of the consequences of such a formation of electronic proceedings, also in the scope of territorial and material jurisdiction of the court, was to relieve other district courts of their workload. It seems that the aim has been achieved, as the e-court registered only in the first year of its operation nearly 700 thousand cases, therefore a similar number of cases did not target the remaining courts. Meanwhile in 2010, all district courts, including the e-court, received in total 1.96m order for payment and writ of payment cases. In 2009 the number of such cases was 1.3m, therefore their total increased by over 50%.¹² However, according to the then Minister for Justice, Mr Krzysztof Kwiatkowski, about 30% of the one million cases which were brought before the e-court within the first eight months of 2011 would never have been finalised in court, had the electronic proceedings not been conducted.¹³

Thus, the procedure did not so much relieve other courts of their workload, but encouraged entities, who had for different reasons so far not done so, to file lawsuits. According to data from the Ministry of Justice of the Helsinki Foundation for Human Rights, in 2010, in relation to the commence of operation of an e-court, 246 of the 320 district courts noticed the reduction of the number of cases filed in the writ of payment and order for payment proceedings. In 66 courts it was a drop of 10%, in 87 courts from 11% to 20%, in 59 between 21% and 30%, and in only 34 courts above 30%. At the same time in as many as 74 district courts there was an increase in the number of such cases filed. The data confirm the assumption that the decrease in the number of writ of payment cases registered in regular courts was not as significant as it had been suspected.¹⁴ It must be clearly recognized that this situation is due to the indicated universality (mass occurrence) of electronic proceedings, increasing the volume of payment cases in general, with the clear and significant participation of an e-court.

Parties in the electronic writ of payment proceedings

In writ of payment proceedings, including the electronic ones, subjective aspects are regulated according to the general Polish civil procedure. The capacity to be a party in civil proceedings is held by all natural persons, legal persons and also organisations with no legal personality, but whom the legislator expressly granted the capacity to sue and be sued.

Whereas the capacity to perform actions in civil proceedings is held by any entity that is not a natural person but who has the capacity to be a party in civil proceedings, and among natural persons – of age and non-incapacitated. In other cases, natural persons depending on the age or the degree of incapacitation must in some (or all - persons under 13 years of age and persons completely incapacitated) cases be assisted by a legal representative who performs effective proceedings actions on their behalf and for their benefit, and can also give the power of attorney on behalf of the represented.

With regard to the latter form of representation in electronic proceedings, the legislator introduced a different way of documenting the authorization of a procedural attorney, mainly due to the electronic form of documents filed in these proceedings. According to general rules of Polish civil procedure, the attorney representing a party before the court is obliged to demonstrate his powers on the first action in the civil proceedings, therefore - if the party files a lawsuit or a pleading - a document confirming the authorization of representation should be attached to the pleadings. This rule does not apply, however, to electronic writ of payment proceedings, as attorney ad litem in this case is required only to indicate the basis of their authorization.¹⁵ There is no need, therefore, to attach a power of attorney document created electronically or a scan of its traditional form.

This latter issue was regulated in this way, mainly due to the fact that the legislator excluded from the proceedings before the e-court an obligation to bring to court any

traditional documents, including a document showing authorization of a given entity to represent the parties in that particular separate proceeding. According to P. Telengi, it is sufficient for the representative to rely on the power of attorney, at the same time indicating the date of the authorisation, the scope and circumstances regulated by the legislator in art. 87 et seq. of the CCP, indicating the subjective scope of the power of attorney. This solution is controversial in as much as it may contribute to the increased number of cases of abuse of the power of attorney *ad litem* (for example, where a scope of representation was set out). According to the author the legislator applied a very liberal solution relating to the improper representation of parties, and the latter is a key procedural premise whose non-occurrence may also be the basis for filing a complaint for the re-opening of civil proceedings.¹⁶ It is worth adding that the requirement to produce a document of the power of attorney *ad litem*, will, however, arise before a court of general jurisdiction, when there are reasons justifying the transfer of the case brought before the e-court for an examination in ordinary court proceedings.

The subject matter of electronic proceedings

Writ of payment proceedings apply only to one category of civil cases - pecuniary claims, which naturally *a priori* limits the subject scope of proceedings, also in the electronic form. Although article 498 § 1 of the CCP provides that an order for payment in writ of payment proceedings shall be issued if the claimant is pursuing a pecuniary claim, and in other cases, where a specific provision provides so, but in practice the Polish legislator has not made use of the latter solutions for the needs of other categories of cases.

The concept of a pecuniary claim relates to a situation when the claimant pursues a set financial balance. Consideration of the case in the form of writ of payment proceedings is not excluded either should there be a cumulation of claims in one lawsuit, if all claims are

pecuniary (art. 191 CCP). It is then possible to issue an order for payment including only a part of these claims. One needs to acknowledge as justified a view presented in literature that it is inadmissible to issue an order for a part of any of the claims pursued in the statement.¹⁷

Regardless of the justification of the presented position in this scope one may not omit the fact that art. 502 § 1 of the CCP, defining the content of the order for payment, speaks of imposing an obligation upon the defendant to settle the claim in full.

On the basis of art. 201 § 1 of the CCP it should be assumed that the chief judge by default examines whether the case falls under consideration in separate proceedings and in the cases provided for in the Act he schedules a closed session in order to issue an order for payment in writ of payment proceedings. The chief judge's ruling on the examination of the case in writ of payment proceedings is not binding on the court that examines the case.¹⁸ If there are no grounds for issuing an order for payment the chief judge schedules a hearing, unless the case can be considered in a closed session. In this case, the case is considered without regard for the provisions on writ of payment proceedings.

With regard to the availability (universality) of electronic writ of payment proceedings critical importance is born by legislator's regulations on the costs of these proceedings. In accordance with Article 19 Paragraph 19 § 2 point 2 of the Act of 28 July 2005 on court fees in civil cases only the fourth part of the fee (i.e. a quarter of the 5% of the principal amount of money claimed - without interest, benefits and other side payments) is collected from the lawsuit in electronic writ of payment proceedings.¹⁹ Certain legal remedies bear no charges at all (grievances and complaints against the court official). Due to the low cost of pursuing such claims in these proceedings the institution of exemption from court fees by a judicial decision does not apply in this case. Consequently, the claimant, who wants to apply for this exemption may not use the electronic mode of proceedings.

For the outlining of admissibility of issuing an order for payment in electronic writ of payment proceedings, key are provisions of art 499 of the CCP. The order for payment may not be issued, if, according to the content of the suit:

- 1) the claim is clearly unfounded;
- 2) the quoted circumstances raise doubt;
- 3) the settling of the claim is dependent on executory consideration;
- 4) the defendant's place of residence is unknown or if the service of the order on him is not possible be be conducted in the country.

Article 499 § 1 of the CCP does not refer to the content of the documents submitted but to the contents of the lawsuit, and uses there the expression "if the claim is clearly unfounded." It is therefore not required for the claim to be fully proven by the submitted documents. The claim is clearly unfounded if it is already clear from the content of the lawsuit that the claimant is not entitled to claim a specified benefit from the defendant on the basis of the quoted real circumstances.²⁰

These provisions are designed to eliminate from the course of proceedings of these cases, pecuniary claims which at the outset can raise doubt as to their validity, as well as those where there may occur difficulties with service of the order of payment on the defendant. This seems a reasonable solution given accelerated nature of the proceedings highlighted by Authors, one which excludes dealing with legal problems of a higher degree of complexity (eg, the defendant's mutual claims). The subsequent difficulties with service of the order of payment would surely compromise the fundamental value of these prompt proceedings, delaying the actual time of realization of its objectives.

As mentioned above, in the absence of grounds for issuing an order for payment the court refers the case to the court of general jurisdiction. The decision to refer the case is serviced on the claimant only. Also, if after the order of payment has been issued it turns out that it

cannot be serviced due to the reason specified in art. 499 paragraph 4 of the CCP, the court by default wives the order for payment and refers the case to the court of general jurisdiction unless the claimant within the time limit given removes the obstacles to the service of the order for payment. The decision to refer the case is serviced on the claimant only. Also, if after the order of payment has been issued it turns out that the defendant at the time of filing the lawsuit had no capacity to be a party in civil proceedings, no capacity to perform actions in civil proceedings or no entity authorised to act as his attorney, and these deficiencies were not made good in the time limit given in accordance with the provisions of the code, the court by default waives the order for payment and issues a relevant decision.

The proceedings and settlements in the tele-information system

The actions of the court, the court official and the chief judge are recorded in the tele-information system only and the electronic data produced as a result of these is provided with a secure electronic signature within the meaning of art. 3, point 2 of the law of 18 September 2001 on electronic signature (art. 505³⁰ CCP).²¹

Claimant's pleadings not submitted electronically do not have legal consequences which the law binds with the filing of the pleading. The submission date of a pleading filed electronically is the date of entering the pleading into the tele-information system.

Defendant's pleadings may also be filed electronically. Therefore, the defendant has to decide on the form he wishes to proceed in in the further course of the proceedings - traditional or electronic. The court instructs the defendant on the first service on the consequences of filing a pleading in an electronic mode. Should the defendant proceed in the electronic form, subsequent pleadings will also have to be done electronically. The Minister of Justice in consultation with the minister responsible for information technology determines by regulation the manner of pleadings submitted electronically, with a view to ensuring the

effectiveness of filing pleadings and the protection of the rights of persons filing those pleadings.

It is worth noting that the legislator, in order to facilitate handling of a large number of cases, following this time Germanic solutions, introduced a solution of a particular user profile. It allows claimants who file lawsuits on a massive scale to prepare the lawsuits in their own IT systems, and then connect to the e-court's tele-information system to authenticate and file the lawsuit. It is indicated that the scheme of package statements provided with this in view allows for filing up to several thousand lawsuits per day.²²

In the lawsuit the claimant should indicate evidence to prove his statements. The evidence is not attached to the statement. (art. 505³² § 1 CCP). The lawsuit should also include:

- 1) the PESEL number of a claimant who is a natural person if the claimant is obliged to have one,
the NIP (tax identification number) number of the claimant who is not a natural person, if the claimant is obliged to have one, and his number in the National Court Register and in the absence of it, his identification number in other competent registries or records.

J. Widlo, referring to numerous items of contemporary Polish subject literature, indicates a fundamental problem concerning legal consequences of the occurrence of formal deficiencies in the lawsuit in electronic proceedings. In this scope, there are three basic concepts. Firstly, any formal deficiencies of the lawsuit are supposed to lead to its return *a limine*. Secondly, there is a concept for the option for summoning a person to complete the formal deficiencies of the lawsuit; in such a case, the basis for the summoning to complete the lawsuit's deficiencies is art. 130 CCP; the decision to return the lawsuit as a result of failing to complete the deficiencies or completing them defectively for reasons other than the lack of payment would be subject to an appeal. Thirdly, a compromise solution is adopted that allows for the correction of formal deficiencies of an e-lawsuit by a summons to complete them

under pain of finding no grounds to issue an order for payment; this kind of solution should be regarded as non-appealable and not closing the way for further proceedings. Successful completion of these deficiencies would generate the possibility of issuing an order for payment in electronic writ of payment proceedings. Practice relating to the postulate of the promptness of proceedings and opportunities for completing formal deficiencies of an electronic lawsuit orders to treat the third solution favourably, however, not ruling out the possibility of the application of the second one.²³

In accordance with Article 502 of the CCP the defendant is required in the order for payment to satisfy the claim in full, including fees, within two weeks from the service of the order or to file an statement of opposition. The court on issuing the order for payment relies solely on the claimant's statements, who does not attach proofs to support them, but merely describes them. It can therefore be concluded that the court does not examine the case but rather checks whether the claim is probable. This type of procedure is not yet a fiction of justice, but is far from adversarial civil proceedings. This is evidenced by the fact that in electronic proceedings, the court issues orders for payment in more than 95% of cases.²⁴ The order for payment is serviced on the defendant along with the lawsuit and instructions on how to file a statement of opposition, and the consequences of refraining from doing so.

The opposition to an order for payment filed by a defendant is not required to state a justification or proofs, however in the opposition the defendant should include the charges that should be reported to the pain of their loss before engaging in the dispute on the merits of the case. In the remaining scope the provision of Art. 503 § 1 sentence 2 on evidence preclusion does not apply (art. 505³⁵ of CCP). The court rejects the opposition filed after the deadline or otherwise unacceptable or if the defendant did not complete the deficiencies within the time period given. The order for payment against which, in whole or in part,

effective opposition has not been filed bears the consequences of a final and legally valid judgement.

On effective filing of the statement of opposition, the order for payment is repealed in whole and the court refers the case to the court of general jurisdiction, which has already been mentioned. The court to which the case has been transferred is not bound by the decision of case referral in the event of reporting in the defendant's opposition claims referring to the court's contractual jurisdiction based on a prorogation agreement.

After the referral of the case to ordinary proceedings due to inadmissibility of an order for payment or in the event of failure to service it, the chief judge calls on the claimant to remove formal deficiencies of the lawsuit and complete it in a manner appropriate to the proceedings in which the case will be considered - within two weeks from the date of the servicing of the summons. If the lawsuit's formal deficiencies are not removed the court discontinues the proceedings. Copy of the decision to discontinue the proceedings is served on the defendant, but only if he was served with a copy of the lawsuit. If the claimant completes the lawsuit as required by a normal procedure, the chief judge calls on the defendant to complete the appeal in a manner appropriate to the proceedings in which the case will be considered - within two weeks from the date of service of the summons.

CONCLUSIONS

In light of the foregoing, the following trends of change should be noted that will strengthen the accelerated nature of electronic proceedings, while at the same time it will eliminate the shortcomings these proceedings face in practice.

Firstly, the simplifying of organizational and administrative issues relating to, among others, the obligation to create special profiles by attorneys ad litem working in electronic

proceedings, to the mode of case transfers from the e-court to the state court, which is currently too time-consuming, etc. should be conducted.

Secondly, doubts on the removal of formal deficiencies of lawsuits filed in electronic writ of payment proceedings needs to be eliminated, as mentioned above.

Thirdly, steps needs to be taken to reduce the volume share of cases of dubious character, in particular - overdue claims against consumers (recognizing this problem, the legislator wants to introduce a restriction under which only claims whose maturity period is less than five years may be pursued in electronic proceedings).

Fourthly, it is worth introducing a requirement of submitting proofs in the opposition against the order for payment in electronic writ of payment proceedings, as in the current state of the law the defendant can effortlessly lead to the order for payment becoming invalid, and this should occur when the defendant actually does have arguments undermining the legitimacy of the ruling (for example, the defense of limitation). The current solution is not conducive to efficiency of the electronic form of writ of payment proceedings, because it compromises its basic feature - the efficiency of settlement.

Fifthly, it is worth considering the option for filing opposition to a part of the order for payment, as it does happen that a liability is indeed there, but according to the defendant – of a smaller amount. In this case, the far-reaching effect is the loss of validity of the order for payment in full, as a part of the claims is fully justified.

Regardless of these difficulties, a positive evaluation needs to be given to the Polish solution to electronic proceedings, which is a manifestation of a general European trend to include electronic means and IT tools in the process of applying the law to speed up and improve proceedings. Regulations of this kind relate in particular to pecuniary claims - claims which are easiest to undergo standardization, while at the same time they function in the scope of mass transactions and certainly are one of the major burdens of the state judiciary. As a

result, electronic writ of payment proceedings constitute the opening of a new stage in the development of a modern model of consideration and settlement of pecuniary claims in civil cases.

¹ Journal of Laws 1964, no 43, pos. 296 as amended.

² Pawliczak, Jakub. 2011. *Electronic writ of payment proceedings – assumed aims and the operating practice*, The Helsinki Foundation for Human Rights, http://www.hfhr.pl/wp-content/uploads/2011/09/J_pawliczak_elektroniczne-postepowanie-upominawcze-zalozone-cele-a-praktyka-funkcjonowania.pdf, p. 4.

³ Cieslak, Sławomir. 2010. Electronic Writ of Payment Proceedings, *Legal Monitor*, no. 7, p. 361.

⁴ Kryszkiewicz., Malgorzata. 2008. E-court will examine more cases, *Legal Gazette Journal*, 26.08.2008r

⁵ Franczak, Katarzyna. 2011. Electronic writ of payment proceedings – virtues and downsides for the parties in pre proceedings, *Trade Law Review*, no. 7, p. 49.

⁶ Ministry of Justice. 2011. *Statistical description of general courts in 2010*, Warsaw, <http://bip.ms.gov.pl/pl/dzialalnosc/statystyki/statystyki-2010>.

⁷ E. g. Widlo, Jacek. 2010. *Electronic Writ of Payment Proceedings*, Warsaw, p. 18.

⁸ Journal of Laws no 220, pos. 1728.

⁹ Goździaszek, Lukasz. 2009. IT breakthrough in civil proceedings? Considerations on electronic writ of payment proceedings, *Palestra*. No 9-10, s.

¹⁰ Widlo, Jacek. *op. cit.*, p. 19.

¹¹ Franczak, Katarzyna. *op. cit.* p. 49.

¹² Pawliczak, Jakub. *op. cit.*, p. 6.

¹³ Kryszkiewicz, Malgorzata. *op. cit.*, p. 9.

¹⁴ Pawliczak, Jakub. *op. cit.*, p.6.

¹⁵ Zielinski, Andrzej. 2012. Commentary to art. 68 CCP, [in:] Zielinski, Andrzej. [eds] *Code of Civil Procedure. Commentary*, Warsaw, pp. 151-152.

¹⁶ Journal of Laws no 225, pos. 1635 as amended.

¹⁷ Jedrzejewska, Maria. 2007 [in:] Erecinski, Tadeusz. [ed.], *Code of civil procedure. Commentary. Part one. Recognition proceedings. Part two. Securing proceedings, Vol. 2, ,* Warszawa, p. 588.

¹⁸ High Court Resolution of 19.04.2007., III CZP 11/07, OSNC 2008, no 2, pos. 23.

¹⁹ Journal of Laws of 2010, no 90, pos. 594 as amended.

²⁰ Manowska, Malgorzata. 1997. Documentation in the writ of payment and order proceedings, ”*Corporation Law*”, no 5, p. 38.

²¹ Journal of Laws 2001, no 130, pos. 1450.

²² Tylec, Grzegorz, Telusiewicz, Piotr. 2010. Electronic writ of payment proceedings – first three months. Comments on operation practice, ”*Legal Monitor*”, no 14, p. 813.

²³ Widlo, Jacek. *op. cit.*, pp. 76-77.

²⁴ Pawliczak, Jakub. *op. cit.*, p. 14.

PROTECTION OF HUMAN RIGHTS: AN INTERNATIONAL RESPONSIBILITY

Sharath, Raj

Research Associate

Department of Studies in Law,

University of Mysore, Manasagangothri, Mysore-06, Karnataka, India.

INTRODUCTION

Human rights are almost a form of religion in today's world. They are the great ethical yardstick that is used to measure a government's treatment of its people. A broad consensus has emerged in the twentieth century on rhetoric that frames judgment of nations against an international moral code prescribing certain benefits and treatment for all humans simply because they are human. Human rights are a product of a philosophical debate that has raged for over two thousand years. The earliest direct precursor to human rights might be found in the notions of 'natural right' developed by classical Greek Philosophers, such as Aristotle, but this concept was more fully developed by Thomas Aquinas in his *Summa Theologica*. For several centuries Aquinas' conception was held, what was naturally right could be ascertained by humans by 'right reason' thinking properly. Now the law of nature is so unalterable, that it cannot be changed even by God himself. For although the power of God is infinite, yet there are some things, to which it does not extend. Thus two and two must make four, nor is it possible otherwise; nor, again, can what is really evil not be evil.

The assumption is that responsibility to protect human rights is an international responsibility. Protecting human rights is not just a matter of each state protecting the rights of its own citizens, even though this is one of its primary functions and arguably a condition of its legitimacy. Making human rights protection purely an internal responsibility of states is not going to be effective in many cases. So the wider responsibility falls on that rather elusive entity 'the world community'. The human rights at stake are to be understood in a fairly narrow sense, as basic rights such as right to life, bodily integrity, basic nutrition and health, and so forth. When we invoke the international responsibility to protect, we are thinking about those all too familiar instances in which human beings are being placed in life threatening situations, in which

they are being starved, or terrorized, or evicted from their homes, or are dying from disease in other words are caught up in what we have learnt to call humanitarian disasters.

International responsibility should be invoked in cases in which human rights are being violated on a large scale, not about individual violations occur on a daily basis in most states. It is only when the scale of rights violations crosses a certain threshold that the idea of an international responsibility to protect human rights comes into play. International community voluntarily comes to the rescue of the people at the time of natural disasters such as earthquakes, floods, droughts etc. that leave people without food, shelter and other necessities of life.

The question arises when large scale violations of human rights are taking place, who has the responsibility to intervene? It is one thing to say that when large scale violations of human rights are taking place, there is a diffused responsibility on the part of humanity as a whole to protect the victims.

In 1994, the international community did nothing to stop the genocide Rwanda. What, if anything, should have been done to stop the carnage? In Kosovo in 1999, the international community reacted differently. Through the actions of North Atlantic Treaty Organization, it intervened to prevent ethnic cleansing and further conflict. But the protection of human rights came at a price as not just enemy soldiers, but civilians too were killed during the bomb raids. Was this price worth paying or should others means have been sought to solve the conflict?

International Human Rights Law has three distinctive functions. First, it assures some subsidiary rules are applicable in situations where International Humanitarian Law does not apply. Secondly, it allows a proper application of some concepts within the Law of Armed Conflict. Thirdly, International Human Rights Law and International Humanitarian Law may partially merge together to produce a single set of rules applicable in armed conflict, or even in all situations of conflict as a sort of minimum standard. In any case, if there is not a specifically applicable rule of International Humanitarian Law, it is possible that, International Human Rights Law may still provide some useful guidance.

THE PHILOSOPHY OF HUMAN RIGHTS LAW

The first thing that is noticed when reading human rights treaties is that they are arranged in a series of assertions, each assertion setting forth a right that all individuals have by virtue of

the fact that they are human. Thus the law concentrates on the value of the persons themselves, who have the right to expect the benefit of certain freedoms and forms of protection.

There are number of theories that have been used as a basis for human rights law, including those streaming from religion i.e. the law of God which binds all humans, the law of nature which is permanent and which should be respected, positivists' utilitarianism and socialist movements. However, most people would point to theories by influential writers, such as John Locke, Thomas Paine or Jean Jacques Rosseau, as having prompted the major developments in human rights in revolutionary constitutions of the eighteenth and nineteenth centuries. These theorists of the natural law school pondered on the relationship between the government and the individual in order to define the basis for a just society. They founded their theories on analysis of the nature of human beings and their relationships with each other and came to conclusion as to the best means of assuring mutual respect and protection. The most commonly cited "classical" natural lawyer is Locke, whose premise is that the state of nature is one of peace, goodwill, mutual assistance and preservation. In his opinion the protection of private rights assures the protection of the common good because people have the right to protect themselves and the obligation to respect the same right of others. However, as the state of nature lacks organization, he saw government as a "social contract" according to which the people confer power on the understanding that the government will retain its justification only if it protects those natural rights. He generally referred to them as "life, liberty and estate". Positivist human rights theoristsⁱ on the other hand, do not feel bound by any overriding natural law but rather base their advocacy for human rights protection on reason which shows that cooperation and mutual respect are the most advantageous behavior for both individual and society.

A particularly important development which influenced later human rights law was the creation of the International Labour Organisation in 1919 which made major efforts, through the development of treaties and the installation of supervisory mechanisms, to improve economic and social including health conditions for workers.ⁱⁱ

As the development of human rights progressed from theories of social organization to law, it is not surprising that lawyers began to analyze the nature of these rights from the legal point of view. Thus there is a plethora of articles arguing over whether human rights are really legal rights if the beneficiary cannot insist on their implementation in court.ⁱⁱⁱ The focus of this

argument is on the nature of economic and social rights, which many legal theorists argue cannot therefore be described as legal rights.

However the first major international instrument defining “human rights”, namely the 1948 Universal Declaration of Human Rights, contain not only civil and political but also economic and social rights. In drafting it a conscious effort was made to take into account the different philosophies as to the appropriate content of human rights. It was only when the attempt was made to transform this document into international treaty law that the legal difficulties outlined above made themselves felt. The International Covenant on Civil and Political Rights 1966, requires each state party to “respect and to ensure to all individuals the rights recognized in the present covenant”.^{iv} On the other hand, the International Covenant on Economic, Social and Cultural Rights 1966 requires each state party to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant”.^v The main difference is the civil and political rights are perceived as not requiring any particular level of economic development, as for the most part they consist in individual freedoms. Yet it would not be accurate to say that respect for the Civil and Political Covenant does not involve the creation of certain state structures. In particular, the right to fair trial calls for certain infrastructures and professional training, and the same is true as regards the political rights listed in Article 25. However, it is a fact that the implementation of most of the economic rights does necessitate some resources and thought as to the best economic arrangement in order to achieve the best standard of living possible. The genuine difficulty thus created in giving a proper interpretation to the Economic Social and Cultural Covenant in the particular circumstances of each state has a direct effect on the nature of the individual’s economic rights.^{vi}

DEFINING HUMAN RIGHTS

Louis Henkin, a Professor and Western Scholar, defined Human Rights as “Claims asserted and recognized as of rights against society as represented by governments and its officials.”^{vii}

In another definition, a Soviet International Legal Scholar, Vladimir Kudrygutse, stated that human rights are “an opportunity guaranteed by the state to its citizens to enjoy the social benefits and values existing in the given society.”^{viii}

The concept of human rights, it has been argued, falls within the framework of constitutional law and international law. For this purpose it has been identified to “defined by institutionalized means the rights of human beings against abuses of power committed by the organs of the state and at the same time to promote the establishment of human living conditions and the multi-dimensional development of human personality.

HUMAN RIGHTS AND THE RIGHT TO DIGNITY

The term ‘dignity’ has been derived from the Latin word ‘dignitas’ which denotes a quality of being worthy or honorable. It suggests a high rank or a position of distinction in the community.^{ix} Dignity means ‘honour and authority, reputation’.^x The human dignity consists in man’s ability to experience self awareness and to think rationally. Rationality is not only the distinctive defining characteristic of human species but also the mark of his highest and most noble achievements. When one loses the ability to exercise his rational function, he has lost his humanness i.e. his essential dignity.^{xi} Dignity is a social thing. It involves one’s ability to participate in a social arrangement of some sort and to hold some kind of rank therein. It is society which confers dignity on the individual and it is the society that can take it away. In its ordinary and most prevalent forms, social dignity refers to one’s reputation or good name, holding one’s head up in the community. The dignity involves an attitude of concern on the part of others for each individual. As far as there are people who are concerned for you, you have dignity.

It may be, as Cassio said in Shakespeare’s Othello, reputation is something priceless and much more valuable than any other possession and “who steals purse, steals trash”. It may also be that our culture and heritage are also priceless and are our most proud achievements. But since millions do live without any recognizable reputation or without any awareness about their cultural heritage these cannot be parts of life.

PRINCIPLES OF STATE SOVEREIGNTY AND NONINTERVENTION

The most fundamental principle of international law is state sovereignty, which is often misconstrued as national sovereignty. In international law the state is clearly sovereign and has the ultimate legal right to say what should be done within its jurisdiction.

No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign. The concept of public interest has changed with the structural change in the society. No legal or political system today can place the state above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the state without any remedy. From sincerity, efficiency and dignity of the state as a juristic person, propounded in the nineteenth century as a sound sociological basis for state immunity, the circle has gone round and the emphasis now is more on liberty, equality and the rule of law. The modern social thinking of progressive societies and the judicial approach is to do away with archaic state protection and place the state or the government at par with any other juristic legal entity. Any water tight compartmentalization of the functions the state as 'sovereign and non-sovereign or 'governmental or non-governmental' is not sound. It is contrary to modern jurisprudential thinking. The need of the state to have extraordinary power cannot be doubted. But with the conceptual change of statutory power being a statutory duty for the sake of society and the people, the claim of a common man or ordinary citizen cannot be thrown but merely because it was done by an officer of the state even though it was against the law and negligently done. Needs of the state, duty of its officials and the rights of the citizens are required to be reconciled so that the rule of law in a welfare state is not shaken. Even in America where this doctrine of sovereignty found its place gradually gave way to the movement from 'state irresponsibility to state responsibility'. The demarcating line between sovereign and non sovereign powers for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the state cannot claim any immunity.^{xiii}

“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” This is the wording of Article 2(4) of the United Nations Charter which is at the centre of the debate with respect to the legality of

humanitarian interventions. Does this provision allow for an intervention by the use of force for humanitarian reasons? This can be answered affirmatively.

The doctrine of humanitarian intervention is not exclusive to modern society but the debate started as early as the 16th century among legal scholars such as Grotius. Although Grotius generally advocated the principle of non intervention, he acknowledged that where a tyrant practiced atrocities towards his subjects, military intervention by a foreign sovereign on their behalf may be legitimate.

Article 55 of the Charter states that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms”. In accordance with Article 56 all Members of the United Nations pledge themselves to take joint and separate action to achieve the object of protecting human rights. By this it can be clearly justified that whenever there is a gross violation of human rights the other nation or group of nations can go for the rescue of the people whose life and liberty is at great risk by its own government. In 1970, the International Court of Justice concluded that the obligations of a state towards the international community include the protections of “the principles and rules concerning basic rights of the human person”. The Court continued by affirming that the protection of these rights concerns the international community of states: “all states can be held to have a legal interest in their protection; they are obligations erga omnes ”.^{xiii} Today, the most fundamental norms of international humanitarian law and human rights law are considered part of customary international law and thereby legally binding upon all states.^{xiv}

UNITED NATIONS MANDATED HUMANITARIAN INTERVENTIONS

There is the possibility for the Security Council in a special situation to determine the existence of any threat to peace, breach of peace, or act of aggression according to Article 39 United Nations Charter. Today, it is worldwide accepted that massive human rights violations may be seen as a threat to international peace and security. According to Chapter VII of the United Nations Charter the Security Council can decide what measures shall be taken to maintain or restore international peace and security. This may include the use of military means, which is

by definition, humanitarian intervention in the field of actions under Article 42 of United Nations Charter. The United Nations may act in this field by “own” troops or mandate a national or multinational intervener.^{xv} The provision of Article 2 (4) United Nations Charter prohibits any “threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations”. The main aspect of the interpretation in favour of Humanitarian Intervention is that the threat or use of force for a “good” reason like the prevention of massive Human Rights violations is not directed against the territorial integrity and the political independence of a state and not inconsistent with the purposes of the UN.^{xvi} Thus, the Humanitarian Intervention is not covered by general prohibition of the use of force. So far as fundamental rights and human rights are concerned, the law has marched ahead like a Pegasus, but the government attitude continues to be conservative and it tries to defend its action or the tortuous action of its officers by raising the plea of immunity for sovereign acts or acts of the state.

ARMED CONFLICT AND VIOLATION OF HUMAN RIGHTS

All military or police operations, whatever their names or the forces engaged, take place within a legal framework shaped by international law primarily law of armed conflict and human rights law and national legislation. The law of armed conflict and human rights law are complementary. Both are intended to protect the lives, integrity and dignity of individuals, albeit in different ways. Both also directly address issues related to the use of force. The law of armed conflict has been codified and developed to regulate humanitarian issues in time of armed conflict; it aims to protect persons not or no longer taking part in hostilities and to define the rights and obligations of all parties to a conflict in the conduct of hostilities. Human rights law protects individuals at all times, in peace and war like, it benefits everyone and its principal goal is to protect individuals from arbitrary behavior by states. For these protections to be effective, international provisions must be reflected in national legislation.

Most human rights instruments allow governments to derogate, under strict conditions, from certain rights when confronted with a serious public threat. However there is a hardcore of basic rights from which government cannot derogate under any circumstances. Among these basic rights is the right to life. No derogation are permitted under the law of armed conflict, as

this branch of law designed from the outset to apply in extreme situations. It strikes a balance between military necessities and humanitarian objectives.

The right to life is the supreme human right, since without effective guarantees for it, all other human rights would be devoid of meaning. The right of everyone to life, liberty and security of person is proclaimed in Article 3 of the Universal Declaration of Human Rights. These rights are reiterated in Article 6.1 and 9.1 of the International Covenant on Civil and Political Rights as well as in regional instruments such as Article 4 and 6 of African Charter on Human and Peoples' Rights, Article 4.1 and Article 7.1 of the American Convention on Human Rights and Article 2 and 5.1 of the European Convention on Human Rights.

Article 6.1 of the International Covenant on Civil and Political Rights states that : “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

Article 9.1 of the International Covenant on Civil and Political Rights states that: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

ENFORCEMENT OF HUMAN RIGHTS

Three areas of international law converge to provide the framework for the enforcement of human rights by means of criminal prosecution. International humanitarian law, at least as the term is employed by the United Nations Security Council, mandates the prosecution of genocide, war crimes and crimes against humanity. International criminal law provides much of the technical support for such prosecution, including procedural mechanisms such as extradition and a jurisdictional framework. Finally, international human rights law establishes the overarching context, fixing obligations for both individuals and states that have consequences in the area of criminal law. The major human rights conventions require that states implement the protection of human rights by ensuring prompt and effective repression of violations by means of criminal investigation and prosecution. Some specialized human rights instruments, dealing with such matters as genocide, torture and apartheid, impose quite precise duties upon states in this area.

The prerequisites for the recognition and protection of human rights emphasize a bottom up process, whereby human rights are articulated and safeguarded at the domestic level. International standards and procedures serve as a corrective to domestic human rights protection but can never replace it. Sanctions follow the opposite logic, being imposed against a state by its peers, they aim at enforcing a change in the behavior of the targeted state from the outside. Sanctions thus result in the externalization of responsibility, situating both the specification of conditions for lifting sanctions and assessment of compliance with them within the province of other states. Contrary to the insistence of international human rights law on domestic human rights protection, sanctions rely on foreign and or international substantive and procedural standards, weakening the accountability of governments to their own population.^{xvii}

When human rights violations assume massive dimensions, the General Assembly and other organs of the UN can initiate discussion and action. The security council may even impose mandatory sanctions as it did in the case of South Africa in 1977 for resorting to massive violence and killing of people including children opposing racial discrimination. Similarly economic sanctions were imposed against former Yugoslavia in 1992-1995 and Haiti in 1993. The UN Security Council passed resolutions for promoting the right of self determination in East Timor in 1999-2000.^{xviii}

INTERNATIONAL RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS AND FREEDOMS.

International responsibility for violations of human rights and freedoms is an important element. The twentieth century has made especially relevant the question of the responsibility of states and of individuals for violating international humanitarian law, international human rights law and specifically the laws and customs of war.

An important landmark in the development of the concept of responsibility in international humanitarian law in Article 227 of the Treaty of Versailles 1919, on the basis of which the allied powers publicly accused emperor Wilhelm II of Germany of the gross contempt for international morality and sanctity of a treaty. It was decided to set up an international tribunal to try Wilhelm II. However, the Netherlands refused to extradite him and the Leipzig

trials of the other German war criminals were of a limited nature. That was the time when the concept of criminal responsibility of natural persons for violations of the laws and customs of war was only taking place.^{xix}

One of the purpose of the United Nations is “to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.^{xx} Each United Nations member state pledges “to take joint and separate action in cooperation with the organization for the achievement of universal respect for and observance of human rights”.^{xxi}

The work of the United Nations in the field of human rights has evolved in several different phases. The first phase, which began immediately after creation of the United Nations in 1945, was primarily concerned with standard setting, this work has continued to the present, as evidenced by the recent adoption of conventions on children’s and migrants’ rights and the drafting of formal declarations on the rights of minorities and indigenous people.

The second phase consisted in public discussion of alleged violations of human rights in specific countries. While early General Assembly resolutions criticized the human rights situation in a few specific countries.^{xxii} Following adoption of Resolution 1235 by the Economic and Social Council in 1967, which authorized the ECOSOC’s subsidiary bodies to discuss the violation of human rights in any country and the overthrow of President Allende in Chile in 1973 human rights debates in the United Nations became increasingly frequent and direct.

The third stage consisted of creating mechanisms to implement accepted norms more effectively. These include creation of a procedure under which individual communications concerning a consistent pattern of gross violations of human rights could be considered^{xxiii} and the appointment of rapporteurs and working groups to investigate human rights violations in specific countries or to report on particular types of human rights violations.

All prohibition against “a consistent pattern of gross violations of human rights” is drawn directly from the Economic and Social Council Resolution 1503, which uses this language as the standard for determining whether the United Nations will consider allegations of human rights. This language also has been used by the United States congress in placing restrictions on the provisions of military and economic assistance to countries that violate human rights.

Criticism of the United Nations' role in the human rights law making is similar to those directed to its law making activities in general. Responding in part to such criticism, the General Assembly adopted in 1986 a resolution on "setting international standards in the field of human rights".^{xxiv} The resolution offers guidelines for the development of additional international human rights instruments, which should:

1. Be consistent with the existing body of international human rights law;
2. Be of fundamental character and derive from the inherent dignity and worth of the human person;
3. Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
4. Provide, where appropriate, realistic and effective implementation machinery, including reporting systems and
5. Attract broad international support.^{xxv}

Without minimizing the contribution to human rights made by regional organizations and many states, international human rights law is largely a creation of the United Nations. Without ignoring the substantial problems of implementation, it is a creation that ranks as one of the United Nations' great accomplishments.

COMPETENT TRIBUNALS

In accordance with the legal criminal principle of territoriality, the Convention on Genocide establishes that the competence to judge and punish the offence of genocide is assigned to the state on whose territory said offence took place or eventually to the International Criminal Court^{xxvi} and the convention against Apartheid establishes the same. Meanwhile, the convention on the non applicability of statutory limitation to war crimes and crimes against humanity establishes the obligation of states to extradite in case they don't have a jurisdiction which can bring to trial authors of war crimes or crimes against humanity.

In consequence, in the above mentioned three treaties the national jurisdiction in its strict sense is established as the competent jurisdiction, in accordance with the judicial criminal principles of territoriality and nationality. Nevertheless, other treaties go beyond this dimension and evoke universal jurisdiction.

United Nations Convention against Torture which states that the state has the competence to develop a jurisdiction for such offences and recognize the competence of any state which does not concede extradition to judge the alleged criminal present in its territory, even if the crime was committed outside its territory or if the criminal or the victim are not national citizens of the state in question. Article 5 even concludes that “The convention does not exclude any criminal jurisdiction exercised in accordance with internal law”.^{xxvii} Meaning that it is possible that a state establishes a jurisdiction to judge the alleged criminal and in consequence requests extradition from another state in spite of the fact that the crime was not committed in its territory or that the criminal is not a national citizen.

The Security Council created ad hoc tribunals for the former Yugoslavia and for Rwanda that the project became a reality and an International Conference was called together in Rome which debated and approved the creation of the International Criminal Court. With regard to criminal jurisdiction there are antecedents and within the context of the fight against impunity one should stress the positive aspect of the creation and working of the International Military Courts of Nuremberg and the Far East, without prejudice to the fact that legally the latter were controversial because they posed problems of legitimacy and legality.^{xxviii}

In the nineties and in the absence of the international Criminal Court, the Security Council decided “on behalf of the international community” to set up International Criminal Tribunals ad hoc for the former Yugoslavia in 1993 and for the Rwanda in 1994,^{xxix} so as to not leave unpunished the acts committed during armed conflicts within the territory of said states.

Later on, in 2002, the Special Court for Sierra Leone was set up with a mixed character i.e. national and international since it was created on the basis of an agreement between government of Sierra Leone and the United Nations,^{xxx} so that both international humanitarian law and internal law apply.^{xxxi}

In order to judge authors of international crimes, they need to possess the nationality of a state party of the statute or to have committed the crime within its territory, without affecting the fact that the security council, acting in accordance with chapter VII of the United Nations charter can submit a situation to the prosecutor regardless of the nationality and of the place where the crimes were committed.^{xxxii}

CONCLUSION

No document including the Universal Declaration of Human Rights can solve the problems of humanity simply by its existence on paper. Far from it, Universal Declaration represents only the vision and hope of those who proclaimed it. To give life to the document, each generation must work actively and diligently to uphold its principles. To bring the universal Declaration to life, each of us must work to uphold human rights and oppose human wrongs. Human rights demand human responsibilities. The worst atrocities are committed by governments, often against their own people. The Universal Declaration of Human Rights was a response in part to the genocidal abuses which occurred during the World War II, but genocide has not gone away at present. It is our responsibility to build an international community that is strong enough to prevent the commission of genocide from occurring ever again. The irony of our times is that on the one hand we have a human rights jurisprudence which has reached its peak of glory and on the other hand we see human rights violations all around and this keeps happening in newer and newer forms such as ethnic conflicts, displacement from homeland etc. to name a few. Though human rights are today better known and better respected and though violations thereof are denounced even beyond the frontiers of the countries where these occurs, the performance in the implementation of the human rights code has, nevertheless, not been encouraging in many parts of the world, where it has acquired only a theoretical legitimacy. The human rights movement needs to be activated and made more intensive. Today, as never before, this movement needs all round support of the free world, of the institutions of the free world, of lawyers and judges and of enlightened citizens and human rights activists. There is paramount need to arouse the human rights conscience of the world. This must also get ingrained in the administration of justice around the world, in particular when dealing with fundamental rights of human beings.

Endnotes:

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ⁱⁱ T.Meron.1984.“Human Rights in International Law”,Oxford University Press, London,Volume 11, pp. 273.

- iii M.Cranston.1973. *What Are Human Rights?*pp.44
- iv Article 2 of International Covenant on Civil and Political Rights, 1966
- v Id
- vi P.Alston, and K. Tomasevski.1984. *The Right to Food*, SIM, Utrecht.
- vii Justice Palok Basu.2002. “*Law Relating to Protection of Human Rights*”,first edition, Modern Law Publications pp. 5.
- viii Id
- ix Joyce M. Hawkins,*Oxford Mini Dictionary*, pp.118, referred in AIR 2000 Journal Section 199,pp. 200.
- x Ramanatha Aiyar.1997 *Law Lexicon*, pp. 55
- xi Govind Misra.2000. “*The Concept of Human Dignity and the Constitution of India*”, referred in AIR 2000 Journal Section 199, pp. 200.
- xii *State of Andhra Pradesh V. Challa Ramakrishna Reddy*, AIR 2000, SC 2083,pp. 2090
- xiii *Barcelona Traction case*. 1970.ICJ Reports paragraph 33-34.
- xiv 1999.*Danish Institute of International Affairs, Humanitarian Intervention. Legal and Political Aspects*, Copenhagen , pp. 51.
- xv Articles 45, 46 and 47 UN Charter. Although there is no “UN-army” existing at the moment there might be one in the future (may be on regional level in accordance to Chapter VIII of the UN Charter).
- xvi Albert C. Pierce.1996 *Just War Principles and Economic Sanctions, Ethnicity and International Affairs*, pp.99-113.
- xvii Jansuz Symonides. 2003 *Human Rights: International Protection, Monitoring, Enforcement*, UNESCO Publishing , pp.313.
- xviii NK Jayakumar. 2005.” *International Law and Human Rights*”, LexisNexis 2005, pp.356.
- xix Igor Blishchenk. 1989. “*International Humanitarian Law*,” Progress Publishers, ,pp. 186.
- xx UN Charter, art. 1(3).
- xxi Id arts. 56,55(c).
- xxii General Assembly Resolution 44(I) Dec 8, 1946.
- xxiii Economic and Social Council Resolution 1503(XLVIII),May 27,1970.
- xxiv General Assembly Resolution 41/120,December 4, 1986.
- xxv Id paragraph 4.
- xxvi Until 1998, the references to the International Criminal Court have been vain.Actually these references have full sense from adoption of Rome Statute of International Criminal Court, in July 18, 1998 and been in force in July 1, 2002.

^{xxvii} An example was the criminal process against General Pinochet in Spain, according to article 5.3.

^{xxviii} Hiroshima and Nagasaki, like winners' actions, were immunes, like the bombardment against the civil population in the German town of Dresde.

^{xxix} www.un.org/ictt.org visited at 12 April 30, 2013 at 8 pm.

^{xxx} The Agreement was signed in January 16, 2002. In the same date was signature the Tribunal Statute.

^{xxxi} Castro-Granja, O, "*El Tribunal Especial de Sierra Leona*", Primavera, pp. 60-68.

^{xxxii} Nizkor and team, 2002 *A collection of Statutes for international Criminal Courts* , Sierra Leona .