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Through the Nigerian Prism – An Appraisal of Constitutional Democracy and Acts of Terrorism

Ayoade M. Adedayo*

Abstract

Terrorism, increasingly, is becoming part and parcel of the Nigerian experience. This is highly unfortunate in a country with considerable social, economic and religious tensions. Acts of terrorism seemingly threatens emerging democracy in the country. While the confrontation between acts of terrorism and democratic norms or traditions are not unique in the global experience, Nigeria as an emergent power in Africa is threatened as a nation, with dire consequences for the West African sub-region. Home grown terror groups such as Boko Haram have set up a confrontation with the Nigerian state that undermines the Constitution and democracy which emphasizes dialogue, debate and consensus. It is difficult for such rationality to co-exist with acts of terror perpetrated in the name of religion. Thus this paper seeks to describe and illuminate the Nigerian terrorism experience and challenges through the spectrum of constitutional democracy. It warns that this regional giant cannot win the fight against acts of terror through a response that is not in accordance with constitutional democracy.

I. INTRODUCTION

Terrorism, at the moment, is at the front burner of the Nigerian political agenda posing a risk to national integrity and a blow to development aspirations. Though other countries like Uganda, Kenya, and Tanzania have been unfortunate to experience terrorist acts since 1998, Nigeria had been relatively immune to such concerns until more recently.[1]

* LLB (E.Anglia) (B.L) LLM (Wales) LLM PhD (CEPMLP, Dundee)
Senior Lecturer Faculty of Law, University of Lagos, Akoka Lagos Nigeria. Phone: +234 805 843 5348. Email: ayoade17@unilag.edu.ng.

[1] In December 1998, US embassies in Dar es Salaam and Nairobi were bombed and there were bomb blasts in Kampala, East African Human Rights Report – Uganda, Uganda Report 2003, 1 E. African J. Hum. Rts. & Democracy 73 2003, p. 84; P. Kwesiga and S. Candia, 1st June 2012, "*Al-Shabaab Terrorist Sneaks into Uganda*", New Vision: http://www.newvision.co.ug/news/631574-al-shabab-terrorist-sneaks-into-uganda.html. Site accessed on 12.2.2014; see also C. Irvine, 25th September 2013, "*Kenya Shopping Mall Terror Attack: Up to 130 Feared Dead*" The Telegraph: http://www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10332852/kenya-shopping-mall-terror-attack-up-to-130-feared-dead.html. Site accessed on 12.2.2014.

However, the challenge of terrorist acts in relatively fragile democracies is an issue that should concern policy makers and the general public in Africa.[2]

The domestic terrorism challenge started from political struggles for the control of oil resources in the Niger Delta.[3] As the Nigerian Constitution and plethora of legislation awards absolute control over oil and gas resources to the Federal Government (FG) to the exclusion of marginalized host communities who suffer the pernicious impact of extant and past oil pollution.[4] However the problem seems to have taken a positive turn with an amnesty deal between the FG and Movement for the Emancipation of the Niger Delta (MEND).[5] Unfortunately, the terrorism gauntlet has been taken up by the Boko Haram sect, who seemly have less clear cut goals apart from the destruction of the secular Nigerian state and the declaration of a nation governed under Shariah law. [6]

Of course, terrorist acts are the antithesis of stable governments. The FG under the national constitution assumes duties and responsibilities such as providing good governance and security for citizens. It is, however, noted that constitutions are considerably only the preliminary steps in creating a legal order and by themselves can embody only as much meaning as the underlying culture permits.[7] Consequently, the realization of democratic ideals usually depends on more than the wordings of any constitutional document.

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2 Although the numbers of deaths emanating from terrorist acts are relatively minor compared to those occurring from traffic accidents, gun homicides, natural disasters and diseases, terrorism seems to create disproportionate public concern. This can be attributed to the fear and passion generated by terrorist acts in which relatively small scale harm can produce large scale impacts. Hence its adoption by groups that lack the capacity of States. See S.P. Marks, "Branding the 'War on Terrorism': Is there a "New Paradigm" of International Law?", *Michigan State Journal of International Law,* vol. 14 pp. 72-74; W. McCormack, *Understanding the Law of Terrorism*, Lexis Nexis, 2007 pp 3-7.

3 For an excellent background analysis to oil and gas conflicts in the Niger Delta see E.T., Bristol-Alagbariya, *Participation in Petroleum Development: Towards Sustainable Community Development in the Niger Delta*, CEPMLP, University of Dundee, 2000, pp 3-12.

4 Section 44(3) of the Constitution of the Federal Republic of Nigeria ('CFRN') 1999 states that "the entire property in and control of all minerals, mineral oils and natural gas in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation". Also s 1(1) of the Petroleum Act 1969 similarly ensures that the entire ownership and control of all petroleum in, under or upon any land is vested in the State. Y. Omorogbe, *Oil and Gas Law in Nigeria: Simplified Series*, Malthouse Press Ltd, Lagos, 2001, p. 34. Note that the "State" in this context refers to the Federal Government of Nigeria and not the federating units or states.

5 MEND is one of the largest militant groups in the Niger Delta region of Nigeria. It aims to fight against widespread oil pollution in the Niger Delta; and seeks greater involvement of indigenous people in the control and management of the petroleum sector. From 2006 to date, MEND has bombed public buildings, sabotaged petroleum infrastructure, kidnappings and guerrilla warfare. However, there have been relatively few attacks since an amnesty program in 2009. The program started by then President Umaru Yar'Adua offered cash and a pardon to militants so long as they surrendered their arms, Xan Rice, 6th August 2009, "*Nigeria Begins Amnesty for Niger Delta Militants*", The Guardian: http://www.guardian.co.uk/world/2009/aug/06/niger-delta-militants-amnesty-launched. Site accessed on 12.2.2014.

6 Jama'atu Ahlis Sunna Lidda'awati Wal-Jihad (People Committed to the Propagation of the Prophet's Teachings and Jihad) is better known by its Hausa name Boko Haram (Western education is forbidden) is a radical islamist group founded in 2002 with the aim of establishing an Islamic state in Nigeria. It is believed to have links with international terrorist groups such as Al Qaeda in the Islamic Magreb (AQIM) and al-Shabab. See J. Campbell et al, 26th December 2012, "*Boko Haram and Nigeria's Pervasive Violence*", Council on Foreign Relations: http://www.cfr.org/Nigeria/boko-haram-nigerias-pervasive-violence/p29706. Site accessed on 18.2.2014.

7 A.M. Emon, "The Limits of Constitutionalism in the Muslim World: History and Identity in Islamic Law" in S. Choudry, *Constitutional Design for Divided Societies: Integration or Accommodation*?, Oxford University Press, 2008, p 260.

Democracy, by its very nature, emphasizes the logic and rationality of dialogue, debate, choice and consensus over public policies in the pursuit of the fulfillment of the needs of the citizenry and the primary functions of meeting the public interest.[8] This implies *inter alia* that individual rights and fundamental freedoms as well as common interest and public security ought to be safeguarded against terrorist acts. However, there is the concern that in protecting citizens, the state may wish to override personal freedoms and liberties in exchange for public safety and stability.[9] This paper will argue that this is a false choice that ultimately endangers constitutional democracy to the detriment of citizens.[10]

The paper adopts a doctrinal research methodology to critically assess the Nigerian legislative and policy response to the terrorism challenge. The objective is to examine constitutional democracy against acts of terrorism as described in Nigerian counter terrorism law. Therefore, the paper is arranged as follows. Part II reviews constitutional democracy in Nigeria. Part III investigates international regime on terrorism as well as institutional and legal responses by the Nigerian state. Part IV assesses the definition of acts of terrorism under the Terrorism (Prevention) Act (TPA) 2011;[11] and Part V locates the fight against acts of terrorism within democratic governance.

II. CONSTITUTIONAL DEMOCRACY IN NIGERIA

Constitutional democracy or liberal democracy developed in Europe as a reaction to oppression caused by the fusion of state and church in the eighteenth century.[12] The theory posits that no man can rule without the consent of others.[13] It is, therefore, premised on a representative structure that recognizes the fact that the *every-man* rule model is impracticable in a modern state.[14] As a common form of representative democracy, constitutional democracy denotes the practice of principles such as universal suffrage, free and fair election, protection of individual rights and freedoms, separation of powers,

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8 O. Oyewo, Constitutionalism and The Oversight Functions of The Legislature in Nigeria, Draft paper presented at African Network of Constitutional Law Conference on Fostering Constitutionalism in Africa Nairobi April 2007, p. 20.

9 The 'war on terror' does not simply endanger democratic values but threatens to vitiate democracy itself, reducing politics to security and democracy to formality. J. Hocking, "Protecting Democracy by Preserving Justice: Even for the Feared and the Hated", *UNSW Law Journal,* 2004, vol. 27, p. 338. See also E. Azinge, Roundtable on Aviation Terrorism: Imperatives for Best Practices Communiqué NIALS (Nigerian Institute of Advanced Legal Studies) Lagos, 19 January 2010. Note however that there does not have to be contradiction between security and human rights protection. See I. Cotler, Attorney General Canada, Principles of Anti-Terrorism Act Review , Speech given before Special Committee of the Senate on the Anti-Terrorism Act on 21 February 2005 in University of New Brunswick Law Journal 2005, Vol. 54 p. 54.

10 For the argument that terrorism is a separate and unusually pernicious criminal act worthy of a robust response, See C. Harding, "International Terrorism: The British Response", *Singapore Journal of Legal Studies,* 2002, p. 17; and V.V. Ramraj, "Terrorism, Security and Rights: A New Dialogue", *Singapore Journal of Legal Studies*, 2002, p. 5.

11 The Terrorism (Prevention) Act (TPA) 2011 is the principal counter terrorism legislation in Nigeria. It has been recently amended, due to unfolding challenges not envisaged in the enactment, by the Terrorism (Prevention) (Amendment) Act 2013.

12 R.A, Wokocha, "Democratic Governance, the Rule of Law and Sustainable Democracy in Nigeria", *Port Harcourt Law Journal,* 1999, Vol. 1, p. 116.

13 Ibid.

14 Ibid.

independent judiciary etc.[15] Other features include multi-party politics and the protection of human rights.[16]

Furthermore, constitutional democracy requires government under law in which coalition and majority rule is balanced by minority and individual rights, and in which most rights are balanced by responsibilities.[17] It entails a system in which government should be as limited as possible.[18] This is due to the origins of constitutional democracy founded on the need to *inter alia* maintain law and order, ensure security of life, property and contract.[19] For this writer, a very significant feature which also doubles as a goal for constitutional democracies is the balancing act between security and rights. This means that the state must be strong enough to protect its citizens as well as refrain from arbitrary use of power. Freedoms are ensured through institutional limits and control on governmental action, hence the challenge is to provide a vigorous institutional response to violence whilst controlling that response.[20]

In most democratic systems, all laws usually flow from the constitution and any law inconsistent with the constitution is void to the extent of such inconsistency.[21] Consequently, governmental authority must be legitimately exercised in accordance with written law and enforced in line with established procedure. The state is therefore inherently bound to respect as well as promote the rights of its citizens.

That is why democracies grant rights and may establish limits on specific freedoms.[22] These usually exist in the form of legal limitations such as laws against defamation and slander in defense of public policy, safety and health as the case may be.[23] There may also be limits on attempts to undermine human rights and on the promotion of terrorism. J.S. Mill in his liberty principle stated that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others, on the utilitarian ground that adoption of the principle would promote the general good'.[24] The common justification for these limits is that they are

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[15] A. Nafiu et al., "*Challenges of Constitutional Democracy and Good Governance*", The Tribune: http://www.tribune.com.ng/index.php/tribune-law/7385-challenges-of-constitutional-democracy-and-good-governance. Site accessed on 12.2.2014.

[16] See T. Olagunju, A. Jinadu and S. Oyovbaire, *Transition to Democracy in Nigeria (1895-1993)*, Safari Books Export and Spectrum Books Limited, 1993, pp. 10-11.

[17] *Supra* note 9.

[18] In this regard, the concept of constitutional democracy is interwoven with constitutionalism or limited government which projects the idea of including certain rules and regulations geared towards preventing abuses or exercise of arbitrary power by government. See K.M. Mowoe, *Constitutional Law is Nigeria,* Malthouse Press Limited, Lagos, 2008, p. 9.

[19] U. Ukiwo, Civil Society and Democratization in Nigeria, (paper presented at a Democracy Education Forum Organized by IHRHL in Port Harcourt, 29 June 1998) at 8.

[20] See W. McCormack, Op. cit. note 2. p. 1. This has been a challenge that has occupied western democracies for at least the past four hundred years. See generally, P. Chalk, "The Response to Terrorism as a Threat to Liberal Democracy", *Australian Journal of Politics and History,* 1998, Vol. 44.

[21] See I.O. Smith, *The Constitution of the Federal Republic of Nigeria: Annotated,* Ecowatch Publishing Nigeria Limited, Lagos, 1999, pp. 3-4. See also section 1(3) of the CFRN 1999.

[22] K.M. Mowoe, Constitutional Law in Nigeria, *supra* note 18 at 523.

[23] See for example section 45 of the CFRN 1999.

[24] J.S. Mill, On Liberty in J.H. Ely, "Democracy and the Right to be Different", *New York University law Review,* Vol 56, 1981, at 401.

necessary to guarantee the existence of democracy, or the existence of the freedoms themselves.[25]

One of the most important functions of government is to provide security within its borders, whilst maintaining the delicate balance between communal rights and individual freedoms. Therefore, a democratic government, as a matter of necessity should have checks and limitations for the protection of citizens and in particular minorities, through the guarantee of fundamental rights. This is why democratic nations that vigorously promote civil liberties seemingly claim a higher moral ground than other regimes. However, acts of terrorism within such states raise serious dilemma as to the price of freedom. In other words, whether to maintain civil liberties and thus risk being perceived as ineffective in countering violence; or alternatively to restrict civil liberties and thus risk delegitimizing its constitutional democratic mantle.[26]

Democracy in Nigeria rests on the Constitution of the Federal Republic of Nigeria (CFRN) 1999, which proclaims that sovereignty is based on the people of Nigeria.[27] This is due to the presumption that citizens relinquish some of their rights while retaining other important ones, and that in turn, the state provides public security and order. The principles of Nigeria's democracy are secured in the 1999 Constitution which provides for duly elected Executive and Legislative arms of government at general elections conducted by the Independent National Electoral Commission (INEC).[28] The country shares similar features with other constitutional democracies such as representative government, recognition of fundamental rights and periodic elections. Being a heterogeneous state, it is considered that representation of all sections of the society is not just ideal but a necessity, in addition to adherence to the rule of law.[29]

Furthermore, chapter IV of CFRN 1999 acknowledges individual human rights and the respect, protection and enforcement of such rights in the event of infringement. This is significant because it is believed that legal protections and liberties define democracy.[30] In *Federal Republic of Nigeria & Anor. V. Ifegwu*,[31] the Supreme Court per Tobi JSC held that:

> Fundamental rights inhere in man because they are part of man. If a hierarchical order of our laws is drawn, fundamental rights will not only take a pride of place but the first place.

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[25] K.M. Mowoe, Constitutional Law in Nigeria, *supra* note 18 at 524. For example, allowing free speech for those advocating mass murder undermines the right to life and security.

[26] Ibid.

[27] Section 14 of the CFRN 1999. The 1999 Constitution is the 8th Nigerian Constitution since its formation with the amalgamation of Northern and Southern Protectorates of Nigeria in 1914. It is also the 4th Constitution since Independence from Great Britain in 1960.

[28] See sections 1(2), 14, 47-50, 130-135 of the CFRN 1999.

[29] Inter-Parliamentary Union, Article 22 of the Universal Declaration on Democracy, states that 'institutions and processes of democracy must accommodate the participation of all people in homogeneous as well as heterogeneous societies in order to safeguard diversity, pluralism and the right to be different in a climate of tolerance': http://www.uni-bonn.de/~uholtz/ZEF/welterklaerung_zur_demokratie.pdf. Site accessed on 18.2.2014.

[30] J. Hocking, *Supra* note 9 at p. 336.

[31] (2003) 5 SC 252, p. 304.

Unfortunately, the predatory years of military rule and the dictatorship loom over extant democratic institutions and human rights culture. According to a published report, the major hurdle to deepening democracy in Nigeria, is authoritarian rule by an institutionalized oligarchy.[32] That said, since the inception of democratic government in 1999, the courts have played a critical role in developing constitutional practice and the guarantee of fundamental rights.[33] The Fundamental Rights Enforcement Procedure Rules (FREP) 2009, in particular, provides for speedy adjudication of fundamental rights matters.[34] This of course, deepens democratic access for the benefit of the citizenry.

Deciphering national posture towards the parallels of fundamental rights, on one hand and public order and national security on the other hand, may serve as a clear indicator of Nigeria's perspective in its *new* fight against terrorism. Under the 1999 Constitution, restriction on and derogation from fundamental rights are featured. According to section 45 of the CFRN 1999, reasonably justifiable limitations can be legitimately placed on some fundamental rights in the interest of public safety, public order, public morality and public health or for the purpose of protecting the rights and freedom of other persons

The case of *Inspector General of Police v. ANPP*[35] offers some insight in matters of public order, security and safety. In that case, the court in its judgment voided the provisions of Public Order Act[36] in line with democratic ideals. Adekeye JCA opined that it was wrong to continue to rely on colonial repression techniques which prevent people from exercising and enjoying their rights under the guise of the Public Order Act. The court held that:

> The Public Order Act- relating to the issuance of police permit cannot be used as a camouflage to stifle the citizens' fundamental rights in the course of maintaining law and order.

On the other hand, the court in the prior case of *Asari-Dokubo v. Inspector General of Police,* [37] unequivocally upheld the need to safeguard national security against the interest of the individual. The court was of the view that:

> Section 35 of the 1999 Constitution contains provisions to protect the personal liberty of the individual. However, a charge of treasonable felony is a very serious offence especially where national security is threatened or there is the real likelihood of its being threatened. The human rights or the individual rights must be suspended until the national security can be protected or well taken care of…[38]

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32 See USAID Report, Democracy and Governance Assessment of Nigeria 2006: http://pdf.usaid.gov/pdf_docs/PNADI079.pdf. Site accessed on 23.02.2014.

33 T. Mamman and P.C. Okorie, Nurturing Constitutionalism through the Courts: Constitutional Adjudication and Democracy in Nigeria, *Nigerian Law School*, p. 1.

34 See paragraph 3 of the FREP Rules 2009 for the overriding objectives of the courts.

35 (2008) WRN 65. It is viewed as a milestone in Nigeria's bid to enthrone constitutional democracy and guarantee citizens' right to congregate as the Court of Appeal, Abuja Division, struck down the Public Order Act.

36 Cap P42 Laws of the Federation of Nigeria (LFN) 2004.

37 (2006) 11 NWLR Pt 991 p. 324.

38 Ibid. p. 336.

It is thus a matter of conjecture where the court will lean in respect of ensuring fundamental human rights or upholding national security concerns. The court in *Inspector General of Police v. ANPP* rightly identifies colonial hangover as a problem in entrenching democratic culture or norms.[39] Undoubtedly, colonial governments were strongly bent on the protection of public order and security, through a rule based on force and subjugation of native people.[40] It is, however, submitted that Nigerian jurisprudence increasingly favours the protection of human rights. The two cases merely illustrate the importance of the judiciary in balancing security and democratic considerations under the 1999 Constitution.

A. Terrorism in Nigeria: Contextual Background

Despite the antecedents of MEND, Nigerians until 2009 were seemingly not convinced that it was possible for domestic or international terrorism to be an intractable problem for the nation. On 26 July 2009, violence broke out in Bornu perpetrated by an Islamic sect known as the Boko Haram, which resulted in many casualties (about 800 people were killed).[41] The group was alleged to have burnt schools, government establishments and churches. The Nigerian government moved in promptly with the military and police force to make arrests and contain the situation.[42] In the process, the head of Boko Haram was killed and this raised serious issues of human rights abuse and extra-judicial killing by law enforcement agencies.[43]

Since then, Nigeria has witnessed a lot of terrorist incidents which has strained the ethnic, religious and regional fabric of the nation. Notable acts of terrorism have included international and domestic elements. In relation to the former, on 25 December (Christmas day) 2009 Nigerian citizen, Umar Farouk Abdulmutallab, boarded a plane from Lagos, Nigeria en route Detroit USA. After a change over in Amsterdam to Delta Airlines, he attempted to blow up the plane. The unfortunate incident led to Nigeria's listing by the US as a 'Country of Interest' with respect to terrorism and tightened air security worldwide.[44] On the domestic front, suicide bombers infiltrated the Nigerian Police Headquarters on 16 June 2011, resulting in a bomb blast which may have accidentally detonated in the

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[39] Supra note 36.

[40] A.A. Idowu, A.A. Adedeji and S.O. Oyelade, Public Order, State Security and Democracy In Nigeria, Paper presented at the *Nigerian Association of Law Teachers 39th Annual Conference (Proceeding) at Faculty of Law, University of Maiduguri, Maiduguri*, 13th – 15th October 2003 at 122.

[41] The violence later spread to Yobe, Kano and Borno. The group founded by Mohammed Yussuf opposes secularism, western education and institutions.

[42] See news reports available at: http://english.aljazeera.net/news/africa/2009/07/2009730174233896352.html. Site accessed on 12.02.2014. Also, in August 2011, eighteen people were killed when the UN building in Abuja was attacked by a Boko Haram suicide bomber. UN Secretary General, Ban Ki Moon described the attack as 'an assault on those who devote their lives to helping others', Mark Tran, 26th August, 2014, "*Nigeria attack: Islamist militants claim responsibility for UN building blast*", The Guardian: http://www.theguardian.com/world/2011/aug/26/nigeria-attack-islamists-claim-responsibility. Site accessed on 18.02.2014.

[43] Ibid.

[44] See George Agba and Philip Nyam, 4th January 2010, "*Nigeria: Govt Protests U.S. List of Terrorist Nations*",All Africa: http://allafrica.com/stories/201001050013.html. Site accessed on 18.02.2014.

car park killing two people (suspected bomber and a civil defence employee).[45] This is believed to be the first suicide bombing in Nigeria.[46]

The brutality of Boko Haram attacks has placed the FG and security forces under strong criticism for alleged ineffectiveness and even incompetence. Increasingly, communities do not have confidence in the ability of the Nigerian state to address the Boko Haram problem. There is also suspicion of collaboration between rogue members of the security forces and Boko Haram.[47] Even worse, security forces arm youths in communities affected by terrorist attacks. Involving poorly trained and armed communities in direct confrontation with terror groups might arguably be regarded as an abdication of responsibility and such behavior clearly leaves room for significant problems when casualties occur.[48]

III. INTERNATIONAL LEGAL REGIME ON TERRORISM

The international legal framework governing terrorism consists of a series of instruments at transnational level that contain a series of legally binding standards on nation states aimed at the prevention and control of international terrorism. [49] These instruments concentrate on particular variants of terrorism such as aviation protection, terrorism finance and protection of nuclear materials. Such developments have taken place usually under the auspices of the United Nations to ensure international cooperation and avoid resort to unilateral action.[50]

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45 16th June 2011, "*Two Killed In Abuja Police Headquarters' Bomb Blast*", Thisday Live: http://www.thisdaylive.com/articles/multiple-explosions-rock-police-headquarters-in-abuja/93339/. Site accessed on 14.02.2014.

46 Other attacks that have strained Nigeria's ethnic and religious co-existence include: the Christmas Day Massacre on 25 December 2011 in which over 30 people were reportedly killed in churches located at Madalla and Jos (Northern Nigeria); church bombings and reprisal attacks in which about 50 people were killed in Kaduna (Northern Nigeria); and attacks on Yobe College of Agriculture resulting in around 70 deaths. Martin Plaut, 25th December 2011, "*Nigeria Churches hit by blast during Christmas*", BBC News: http://bbc.co.uk/news/world-africa-16328940. Site accessed on 20.02.2014; 18th June 2012, "*Nigeria's Boko Haram bombed Kaduna churches*", BBC News: http://www.bbc.co.uk/news/world-africa-18496285. Site accessed on 22.02.2014; and 22nd February 2014, "*Gunmen Massacre 78 Students in Yobe*", Vanguard Newspapers: http://www.vanguardngr.com/2013/09/gunmen-massacre-78-students-yobe/. Site accessed on 22.02.2014.

47 Kabiru Sokoto, the prime suspect in the Madalla Christmas attacks escaped from police custody the day after his initial arrest. Though he was later re-arrested following a public outcry. See 10th February 2012, "*Xmas Day Bombing: Kabiru Sokoto Re-arrested*", The Nation: http://www.thenationonlineng.net/2011/index.php/news/36389-xmas-day-bombing-kabiru-sokoto-re-arrested.html. Site accessed on 22.02.2014.

48 9th September 2013, "Gunmen Kill 13 Civilian JTF Members in Borno", Daily Times: http://www.dailytimes.com.ng/article/gunmen-kill-13-civilian-jtf-members-borno. Site accessed on 22.02.2014; see also, O. Audu, 14th September 2013, "*Tension in Maiduguri as Police Kill Civilian-JTF*" Premium Times: http://premiumtimesng.com/news/144699-tension-maiduguri-police-shot-dead-civilian-jtf.html. Site accessed on 22.02.2014.

49 The application of international law in Nigeria is governed by section 12 (1) CFRN 1999. The section states that no treaty between Nigeria and any other country "shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly." Thus the domestication of international law in Nigeria requires an "implementing statute" to transform the treaty into municipal law. This may be through its substantive provisions; by reference to the treaty in question; or re-enactment of the treaty's provisions. A. Oyebode, Of Norms, Values and Attitudes: The Cogency of International Law, University of Lagos, Inaugural Lecture Series 2011, pp. 40-41. Under Article 26 of the Vienna Convention on the Law of Treaties 1969, Nigeria is obliged to perform her international obligations on the basis of the *pacta sunt servanda* principle. See also U. Ezeh, Tackling Terrorism – A Human Rights Perspective on the Terrorism (Prevention) Act 2011, Faculty of Law, University of Lagos, LL.B thesis July 2012, p. 31.

50 See S. Ali-Balogun, The United Nations and Counter Terrorism: A Critical Assessment, Faculty of Law, University of Lagos, Masters in International Law and Diplomacy (MILD) thesis November 2012, p. 35.

Nigeria is signatory to a number of international and regional instruments against terrorism.[51] It should be noted that some of these instruments were ratified before the extant challenges with terrorism. For instance, the Convention on Offences and Certain Other Acts committed on Board Aircraft (1963) ratified on 7 April 1970; and Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988) ratified on 25 March 2003.[52]

Despite the plethora of UN instruments, it is instructive that the UN does not have an internationally agreed definition of terrorism. It is this lacuna that has prevented the adoption of a comprehensive convention on international terrorism despite widespread concern among UN member states.[53] That said, the United Nations Ad-hoc Committee on International Terrorism began negotiations on a comprehensive international terrorism convention with the following draft definition in 2008.[54]

> Article 2 of the draft comprehensive convention states that:[55]
>
> 1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
>
> a. Death or serious bodily injury to any person; or
>
> b. Serious damage to public and private property including a place of public use, a State or government facility, a public transportation system or infrastructure facility or the environment; or
>
> c. Damage to property, places, facilities or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,
>
> when the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act.

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51 Note that Nigeria has not ratified or acceded to all UN instruments against terrorism. There is therefore a lacuna in the international treaty network against terrorism from the Nigerian perspective. See United Nations Office on Drugs and Crime Working Document, *A Review of the Legal Regime against Terrorism in West and Central Africa: Angola, Benin etc* United Nations, New York,, 2009, pp. 2-3, 138 (available at www.unodc.org).

52 More recently, Nigeria has ratified the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) ratified on 24 February 2004; Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) ratified on 10 May 2002; and International Convention for the Suppression of the Financing of Terrorism (1999) ratified on 16 June 2003. Note that none of these Conventions have been domesticated under Nigerian law. See: A Paper presented by the Federal Ministry of Justice at the Bayo Ojo Centre for Aviation and Transportation Law, Roundtable on Terrorism in the Aviation Industry: Imperatives for Best Practices in Nigeria held at Nigerian Institute of Advanced Legal Studies (NIALS) University of Lagos Campus, 19 January 2010.

53 The main reason for the failure to agree on a terrorism definition stems from the insistence of the Organisation of the Islamic Conference (OIC) that any acceptable definition of terrorism should exclude armed struggle for liberation and self determination, particularly in situations of foreign occupation. See UN 101, EYE on the UN, Human Right Voices: http://www.humanrightsvoices.org/EYEontheUN/un_101/facts/?p=61. Site accessed 24.09.2014.

54 UN Report of the Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, General Assembly Official Records, Fifty-seventh Session, Supplement No. 37 (A/57/37); See also A.P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations" in M. Ranstorp and P. Wilkinson, *Terrorism and Human Rights*, Routledge, London, 2008, at 16.

55 Ibid.

This definition, if the convention is ultimately endorsed, will provide a solid working definition of acts of terrorism especially those that have a significant international dimension. However, there is no lacuna under Nigerian law as acts of terrorism are defined under domestic law. At the regional level, Nigeria is party to the OAU Convention on the Prevention and Combating of Terrorism (AU Convention) made in Algiers in July 1999.[56] Also Nigeria adopted the Plan of Action for the Prevention and Combating of Terrorism in September 2002 in Algiers, Algeria. The Plan of Action requires member states to establish a forum to facilitate timely exchange and sharing of ideas and intelligence for combating terrorism within the continent.[57]

On the sub-regional level, the Economic Community of West African States (ECOWAS) does not have any specific instruments on acts of terrorism. However, ECOWAS set up the Inter-Governmental Action Group Against Money Laundering in West Africa (GIABA) to underpin the commitment of member states to implement Anti-Money Laundering and Combating Financing of Terrorism (AML/CFT) regimes in the sub region. Note also the relevance of the ECOWAS Regional Convention on Judicial Mutual Legal Assistance on Criminal Matters (1992) and ECOWAS Regional Convention on Extradition (1994).

A. Institutional and Legal Response to Terrorism

The executive arm of the Nigerian Government is imbued with vast powers to ensure the defence of Nigerian territory e.g. war powers are exercisable by the President with or without notice and sanction of the National Assembly.[58] The President or such other authorized Minister of the Government of the Federation can exercise directive powers over the Nigerian Police Force with respect to the maintenance and securing of public safety and public order.[59] By section 305 CFRN 1999, the President also has power to issue

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[56] Article 1 (3) defines terrorism as "any act which is a violation of the criminal laws of a state party and which may endanger the life, physical integrity or freedom of, or cause or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint or to act according to certain principles: or disrupt any public service, the delivery of any essential service to the public or to create a public emergency: or create general insurrection in a state", Declaration of the Second High-Level Intergovernmental Meeting on the Prevention and Combating of Terrorism in Africa, 13-14 October 2004, Algiers, Algeria, adopted in October 2004 at Algiers Mtg/HLIG/ConvTerror/Decl (II) Rev 2.

[57] Ibid p. 7. This resulted in the establishment of the African Centre for the Study and Research on Terrorism (ACSRT). The Centre is established in accordance with Section H Paragraphs 19-21, AU Action Plan for the Prevention and Fight against Terrorism. It ensures coordinated effort among AU Member States and regional mechanisms in preventing and combating terrorism. The centre also helps in implementing the AU counterterrorism framework.- About the African Centre for the Study and Research on Terrorism (ACSRT), 25th January, 2013, African Union Peace and Security: http://www.peaceau.org/en/page/2-3591-static-about-african-centre-for-study-and-research-on-terrorism-ACSRT. Site accessed 24.09.2014.

[58] See sections 5 (4) (a) - (b) & 5 (5) of the of the CFRN 1999.

[59] See section 215 (3) CFRN 1999. Note that much of the burden of fighting Boko Haram in the North Eastern region of Nigeria has fallen on the Nigerian army. Under s 8 of the Armed Forces Act, the President determines the operational use of the armed forces in Nigeria to maintain and secure public order and public safety, Armed Forces Act Cap A20 LFN 2004.

a proclamation of a state of emergency where there is an actual or imminent breakdown of public order and public safety in the Federation or any part thereof.[60]

Clearly, the executive embodied by the President of the Federal Republic of Nigeria wields enormous powers in terms of execution and maintenance of laws enacted by the National Assembly. Furthermore, the President also has powers to ratify international instruments on terrorism and undertake transnational cooperation to fight the scourge of terrorism. This is crucial for the fight against the Boko Haram terror group as well as its international affiliates.

From the legislative angle, section 11 of the CFRN 1999 provides that the National Assembly may make laws for the Federation or any part thereof with respect to maintenance and securing of public safety and public order. While exercising its law making powers, the National Assembly is required to ensure that the three-fold goal of peace, order, and good governance is achieved through those laws.[61] In other words, the legislative chambers are obliged to make laws to satisfy basic needs such as education, housing, health, security and social services.[62]

Flowing from its constitutional powers, the National Assembly sought to address terrorist acts facing the nation through the Terrorism (Prevention) Act (TPA) 2011. The Act seeks to criminalize and punish all acts of terrorism committed in Nigeria. It also seeks the effective implementation of the Convention on the Prevention and Combating of Terrorism and the Convention on the Suppression of the Financing of Terrorism. The Act started as a private member bill and is based on the Commonwealth Secretariat's Model Legislative Provisions on Measures to Combat Terrorism.[63] The TPA has been recently amended by the Terrorism (Prevention) (Amendment) Act 2013. The Amended Act also makes provision for extra-territorial application of the Act and strengthens terrorist financing offences.

It is noteworthy that despite the importance of the TPA 2011 in providing clear definition on acts of terrorism, there were existing laws that can equally be invoked

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60 See section 305 (3) (c), (d) and (f) of the CFRN 1999. Note that s 305(f) allows the President to impose a state of emergency where there is a public danger that clearly constitutes a threat to the existence of Nigeria. Undoubtedly, Boko Haram acts of terror constitute such a threat. On 31 December 2011, President Goodluck Jonathan declared a partial state of emergency in selected local government areas of Borno, Yobe, Plateau and Niger states to stem Boko Haram violence. The emergency proclamation was lifted on 19 July 2012. See 'Jonathan Declares State of Emergency in Borno, Others', The Vanguard newspaper 31 December 2011; M.M. Onuorah and I. Salami, "*Jonathan Lifts State of Emergency in 15 Councils*", The Guardian newspaper, 19 July 2012. See also CKN Nigeria, 15 May 2013, "*State of Emergency Declared in 3 Northern States*", CKN Nigeria: http://www.cknnigeria.com/2013/05/state-of-emergency-declared-in-3.html. Site accessed 28.02.2014.

61 See section 4(2) of the CFRN 1999. The laws must be consistent with the Constitution. The National Assembly can exercise its powers for the purpose of assisting in carrying out a policy which may affect matters which are directly within its legislative competence or even indirectly. See *A.G. Ondo State V. A.G. Federation & 35 Ors* (2002) 6 SC Part 1, p. 62.

62 M.A.O. Anigilaje, "Information Input in Law-making in a Developing Democracy: Nigerian Example", in I.A. Ayua (ed) *Nigerian Current Legal Problems NIALS*, 1998, Vols. 2 & 3, p. 132.

63 Document available at: http://www.docstoc.com/docs/29745346/MODEL-LEGISLATIVE-PROVISIONS-ON-MEASURES-TO-COMBAT-TERRORISM. Site accessed on 28.02.2014. The Terrorism bill went through second reading on September 17, 2008 and was passed into law on 3 June 2011. Note that in an effort to preserve rights and freedoms enshrined in the 1999 CFRN, the Senate Committees on National Security and Intelligence, Foreign Affairs and Human Rights, Judiciary and Legal Matters were involved in drafting the TPA 2011. See B. Agande, "Senate Moves to Combat Terrorism", *Vanguard*, 7 July 2010 p. 8.

against perpetrators of terror. The Criminal Code, for instance, criminalizes acts against marine navigational safety (s 349) and taking hostages (s 365). Also, there are criminal sanctions for assaults and violence against the person (Chapter 25), homicide and infanticide (Chapter 27), offences endangering life or health (Chapter 28).[64] Other laws on explosives, firearms and public order offences are also applicable to terrorism offences.[65] On an institutional basis, section 3 of the Nigerian Security and Civil Defence Corps (NSCDC) Act 2007 empowers the Nigerian Security and Civil Defence Corps (NSCDC) to monitor, investigate and take every necessary step to forestall acts of terrorism and other related matters. The focus of the NSCDC is on the manufacture, possession, requisition of weapons, explosives of nuclear, biological or chemical effect without lawful authority.[66]

With respect to terrorism financing, section 15 of the Economic and Financial Crimes Commission (EFCC) Act 2004 specifically criminalizes terrorism and financing of terrorism. The section enables the Commission to freeze and confiscate assets of terrorists and their associates. The functions of the EFCC are *inter alia* the establishment and maintenance of a system of monitoring international economic and financial crimes in order to identify suspicious transactions and persons involved, maintaining data, statistics, records and reports on persons and organizations involved.[67] Similarly, section 6 (6) of the Public Order Act prohibits organisations from recruiting, collecting funds or soliciting other forms of support for unlawful activities e.g. membership of terrorist groups.[68] Preventing terrorist finance is of course a key preventative mechanism in counter terrorism.

IV. ASSESSING THE ANTI-TERRORISM ACT 2011: DEFINITION OF 'ACTS OF TERRORISM'

Under the TPA 2011 as amended, all acts of terrorism are prohibited. Section 1 TPA states that: a person or body corporate who knowingly in or outside Nigeria directly or indirectly willingly - does, attempts or threatens any act of terrorism; commits an act preparatory to or in furtherance to an act of terrorism; omits to do anything that is reasonably necessary to prevent an act of terrorism; assists or facilitates the activities of persons engaged in an act of terrorism or is an accessory to an offence under this Act; participates as an accomplice in or contributes to the commission of any act of terrorism or offences under this Act; assists, facilitates, organizes or directs the activities of persons or organizations engaged in any act of terrorism; is an accessory to any act of terrorism;

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64 Criminal Code, Cap C38 Laws of the Federation of Nigeria (LFN) 2004.

65 See Explosives Act Cap L5 LFN 2004; Firearms Act F28 LFN 2004; and Public Order Act Cap P 42 LFN 2004.

66 Section 4 (iv) NSCDC Act 2007.

67 See section 6 of the EFCC Act Cap E1 LFN 2004. The Money Laundering (Prohibition) Act 2011 and Central Bank of Nigeria Anti-Money Laundering/Combating the Financing of Terrorism (AML/CFT) Regulation 2009 (as amended) imposes criminal liability on a person or financial institution that knowingly assists in money laundering or fails to report suspicious transactions to the Nigerian Financial Intelligence Unit (NFIU). Also, the Terrorism Prevention (Freezing of International Terrorist Funds and Other Related Measure etc.) Regulation 2011gives effect to TPA 2011 with specific focus on UN Security Council Resolutions 1257 and 1373.

68 Cap 42 LFN 2004.

or incites, promotes or induces any other person by any means whatsoever to commit any act of terrorism or any of the offences referred to in this Act, commits an offence under this Act and is liable on conviction to maximum of death sentence.[69]

The first thing to be noticed from the above is that the provision contemplates that a person accused of contravening this law must deliberately act or facilitate an act of terrorism. Thus, the criminal law principles of *mens rea* and *actus reus* are necessary for the conviction of a person accused under the law.

Secondly, section 1 (3) of the Act defines 'act of terrorism' as an act which is deliberately done with malice, aforethought and which:

(a) may seriously damage a country or an international organization;
(b) is intended or can reasonably be regarded as having been intended to-
    (i) unduly compel a government or international organization to perform or abstain from any act,
    (ii) seriously intimidate a population;
    (iii) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization or
    (iv) otherwise influence such government or international organization by intimidation or coercion and
(c) involves or causes, as the case may be-
    (i) an attack upon a person's life which may cause serious bodily harm or death;
    (ii) kidnapping of a person;
    (iii) destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss;
    (iv) the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purposes in paragraph (b) (iv) of this subsection:
    (v) the manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into and development of biological and chemical weapons without lawful authority;
    (vii) the release of dangerous substance or causing of fires, explosions or floods, the effect of which is to endanger human life;
    (viii) interference with or disruption of the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
(d) an act or omission in or outside Nigeria which constitutes an offence within the scope of a counter-terrorism protocol and conventions duly ratified by Nigeria.
(4) An act which disrupts a service but is committed in pursuance of a protest. However, demonstration or stoppage of work is not a terrorist act within the meaning of this definition provided that the act is not intended to result in any harm referred to in subsection (3) (b) (i), (ii) or (iv) of this section.

[69] See section 1 (1)(2) of the TPA 2011 as amended.

From the extensive definition reproduced above, there are key factors that are essential to and underpin an act of terrorism under Nigerian law. The Boko Haram activities outlined above clearly meet the terms of anti-terrorism legislation. Explosion, murder and intimidation of government in order to impose Islamic law on multi-religious Nigeria is covered by law. Such acts are also against the Nigerian Constitution and cannot be justified under any argument of self determination as the constitutional democratic process allows every Nigerian to participate in the electoral process. In this light, Sharia law has always been available to Muslims in many Northern States in Nigeria as an exercise in democratic choice.

For an act of terror to come within the TPA is must meet certain criteria. These are:

- the act must cause 'serious damage';
- the act must be intended or reasonably be regarded to intend undue compulsion, serious intimidation, serious destabilization or influence a government, international organization or people and
- involves violence, harm, illegal acts, interference or disruption.

The draftsman employs phrases such as 'unduly compel', 'seriously intimidate', 'seriously destabilize' and 'otherwise influence'. Simply put, the motivation for the use of such phrases is not farfetched as terrorism is a sensitive issue and considered to be a serious breach of domestic and international peace. The use of broad strokes is also because terrorist acts have grave consequences on government and communities. As a result of the heightened mischief, the draftsmen of the counter-terrorism law have deemed it wise to insert wide-ranging phrases that capture acts inimical to society.

That said, it is arguable that the definition of 'act of terrorism' is too inclusive and almost vague as governmental authorities are given wide leeway in classification of terrorist acts. Interestingly, the problem of broad definition is not restricted to Nigeria but has been identified as a general defect with anti-terrorism laws.[70] One of the downsides of broad definitions is that it foists uncertainty on the legal system and may pose a difficult obstacle to successful prosecution of suspected terrorists. It is important that provisions of the law should meet certain standards of clarity and precision.[71]

Additionally, it is noteworthy that the definition under the TPA 2011 covers acts or omissions targeted at any country or international organization, without directly making reference to Nigeria as the target. This covers the situation where foreign embassies

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[70] In October 2001, Amnesty International (AI) raised concerns that under the guise of fighting international terrorism, governments have rushed to introduce draconian measures that threaten human rights of their citizens, immigrants and refugees. According to AI, common features of the new anti-terror laws include broad or vague definitions of new offences, wide powers of detention without trial, prolonged incommunicado detention (which is known to facilitate torture), intrusions into privacy, and measures which effectively deny or restrict access to asylum or speeds up deportation. See C. Luminas, "Counter-Terrorism Legislation and the Protection of Human Rights: A Survey of Selected International Practice", *African Human Rights Law Journal,* 2007, Vol. 7, pp. 36-37.

[71] Thus clear and unambiguous words are to be used in statutes which must be given their ordinary meaning. See *Garba v. Federal Civil Service Commission* (1988) 1 NWLR Pt. 71, 449; *Bamaiyi v. A-G Federation & Ors* (2001) 12 NWLR Pt. 727, 468.

are a target for international terrorists, or as occurred in Abuja Nigeria, the bombing of the United Nations building. It is a general principle of criminal law that the subject of the offence must be certain or ascertainable. Thus once it is clear that the target is not necessarily Nigeria, but a foreign government or international institution, then it would be possible to prosecute under the TPA 2011.

Furthermore, by virtue of section 1(3) (d) of the TPA 2011, acts or omission in or outside Nigeria which are offences under any international instrument duly ratified by Nigeria is punishable under the Act. Hence, Nigerian jurisprudence on terrorism is unrestricted as it applies to acts committed outside its borders as well as within. With respect to extra-territorial jurisdiction of the TPA 2011, it is important for municipal anti-terrorist legislation to provide for practical limits in terms of jurisdiction. As K. Roach rightly posits, terrorism prosecutions are difficult enough without a state asserting jurisdiction when another state is in a better position to prosecute.[72]

The provisions of the Act are also extensive with regards to the kinds of actions or omissions criminalized under the Act. From the above definition, terrorist acts directed at individuals, government and public facilities including transport, infrastructure including oil and information system structures and the environment (including causing of fires and flood) are within the purview of the Act. Also, dealing in weapons of nuclear, biological and chemical nature is rightly contemplated by the law in view of modern concerns about terrorism. The end goal is to ensure that constitutional, political and socio-economic structures are not undermined and destabilized to the peril of the state.

The TPA 2011 requires proof of intention to intimidate or influence behaviour of the population, government or international organization concerned. There is, however, no express requirement to prove political, religious or ideological motive or motivation as an element of the act of terrorism. The question of motive or motivation is significant because for matters of terrorism, the potential for harm may depend on the motive or motivation. This seemingly implies that motive/motivation may distinguish a terrorist from an ordinary street criminal.[73]

The TPA provides for a scale of penalties depending on the offences committed. This ranges from a term of imprisonment of not less than 2 or 3 years to 15 or 20 years. In addition, fines can be levied ranging from N5 million to N100 million. The death penalty is the maximum sentence on conviction.[74] The court before which a person is convicted of an offence under the Act may, in addition to any penalty imposed by the court, order the forfeiture of any proceeds or funds traceable to a terrorist act irrespective of the person in whose names such proceeds or funds are held or in whose possession they are found.[75] For corporate bodies found guilty under the Act, in addition to sanctions

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[72] See K. Roach, "A Comparison of South African and Canadian Anti-terrorism Legislation", *African Journal of Criminal Justice,* 2005, Vol. 18, at 133.

[73] See W. McCormack supra note 2 at 16-18.

[74] Section 1 (2) of the Terrorism (Prevention) (Amendment) Act 2013. This new penalty was introduced in 2013 amendment to replace life imprisonment as the maximum sentence in the TPA 2011. The Nigerian National Assembly sought to address public concern about Boko Haram by increasing legal penalties in counter terrorism legislation.

[75] Section 33(1) ibid.

provided, they may be subject to civil proceedings and administrative sanctions by the relevant authorities.[76]

V. SITUATING THE FIGHT AGAINST ACTS OF TERRORISM IN DEMOCRATIC GOVERNANCE

Despite the plethora of international instruments and domestic laws applicable to terrorist acts, Nigeria seemingly struggles to utilize criminal law or anti-terror legislation against terrorist groups. Implementation issues have sometimes been a concern to Nigeria as a developing country. Effectively implementing the law in the face of terrorist acts has been difficult to date, as there has been no conclusive prosecution or conviction either with the law subsisting before the TPA 2011 nor since the enactment of the specialist law.

Hence, the amended TPA 2011 makes the Attorney - General of the Federation (AGF) the authority for the effective implementation and administration of the Act - to strengthen and enhance the existing legal regime to ensure conformity of Nigeria's counter-terrorism laws and policies with international standards and United Nations Conventions on Terrorism; maintain international co-operation essential for preventing and combating international acts of terrorism; and the effective prosecution of terrorism matters.[77] It is doubtful, if this 2013 amendment will automatically result in proper realisation of the TPA 2011 in light of a perceived absence of political will to prosecute on the part of the Nigerian Federal Government.

Furthermore, the amended TPA 2011 sought to resolve the jurisdictional conflict in the earlier law between the offices of the Inspector General of Police (IGP), Director-General of the State Security Services (SSS) and the National Security Adviser (NSA). This resulted in a public fight between the IGP and NSA for authority to take a lead role in the fight against terrorist acts.[78] The problem was that the office of NSA seemed to exist outside the law as there is no mention of the body in the CFRN 1999 nor in any statute. The 2013 amendment has addressed the administrative uncertainty that undermined counter-terrorism efforts.

The amended TPA 2011, established the Office of the National Security Adviser (ONSA) as the coordinating body for all security and enforcement agencies under the Act.[79] The functions of ONSA include: [80]

(a) Provide support to all relevant security, intelligence, law enforcement agencies and military services to prevent and combat acts of terrorism in Nigeria;

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[76] Section 33(2) ibid.

[77] Section 1A (2) of theTerrorism (Prevention) (Amendment) Act 2013.

[78] The TPA 2011, unfortunately, failed to identify the agency with principal responsibility for tackling terrorism. During the drafting of the legislation, there was a view that the State Security Service (SSS) as a special security and intelligence agency should be the lead agency. Another view was to locate anti-terrorism efforts within a special department of the Nigerian Police. Some critics pointed out the general effectiveness of the police in crime fighting as a reason not to overburden the agency with extra responsibilities. See F. Awowole-Browne, Anti-terrorism bill mired in controversy, The Sun newspaper 23 August 2010.

[79] Section 1A (1) of the Terrorism (Prevention) (Amendment) Act 2013.

[80] Section 1A (1) (a) – (d), *Ibid.*

(b) Ensure the effective formulation and implementation of a comprehensive counter-terrorism strategy for Nigeria;
(c) Build capacity for the effective discharge of the functions of all relevant security, intelligence, law enforcement and military services under this Act or any other law on terrorism in Nigeria; and
(d) Do such other acts or things that are necessary for the effective performance of the functions of the relevant security and enforcement agencies under this Act.

While the lead role of the ONSA is now beyond dispute, the TPA 2011 as amended provides a parallel role for law enforcement and security agencies that are responsible for gathering intelligence and investigation of terrorism offences; enforce anti-terrorism laws; conduct research into terrorism prevention measures; and education of the Nigerian public on information provision to the security services.[81] The list of law enforcement and security agencies include the Nigerian Police Force; Department of State Security Services; Economic and Financial Crimes Commission; Nigerian Armed Forces; Nigeria Prison Services; National Agency for the Prohibition of Traffic in Persons; National Drug Law Enforcement Agencies; National Intelligence Agency etc. In the author's view, it is difficult to justify the effectiveness of 12 agencies and counting as valuable institutions combating terrorism.

Legal and institutional failure is perhaps best demonstrated in mounting 'acts of terror' carried out by the Nigerian security forces. Killing the founding head of Boko Haram illustrates the challenge faced by constitutional democracy. The execution of Mohammed Yussuf in police custody after the army had arrested him has seemingly caused more problems than it solved, as the organization has splintered into different groups and cells with conflicting and uncertain radical agenda.[82] This singular incident shows that the rule of law and democratic tenets have not established deep roots in the Nigerian polity. Despite the public scandal, there has been no rigorous response by the FG to uncover and punish the perpetrators of this heinous crime.

In the fight against terrorism and in the guise of protecting citizens, Nigerian government security forces comprising of the military, police and intelligence personnel ("Joint Task Force") have reported been engaged in extrajudicial killing of hundreds of Boko Haram suspects and random members of the communities where attacks have occurred. In addition, the Joint Task Force is said to carry out operations with excessive force, physical abuse, secret detention, extortion, and destruction of private property.[83]

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[81] Section 1A (3) and (4), *ibid.*

[82] Boko Haram has seemingly splintered with the formation of Ansaru, *Jama'atu Ansarul Muslimina Fi Biladis Sudgn,* roughly translated as "Vanguards for the Protection of Muslims in Black Africa", Boko Haram: Splinter group, Ansaru emerges, Vanguard 1 February 2012; Boko Haram Splinter group, Ansaru kills Seven Foreign Captives, Daily Independent 10 March 2013.

[83] Human Rights Watch, October 2012, "*Spiraling Violence: Boko Haram Attacks and Security Forces Abuses in Nigeria*", p. 9: http://www.hrw.org/sites/default/files/reports/nigeria1012webwcover.pdf. Site accessed on 28.02.2014. According to Amnesty International, 950 terror suspects died in the first 6 months of 2013 in detention facilities run by the military JTF, Nigeria: Deaths of Hundreds of Boko Haram Suspects in Custody Requires Investigation: https://www.amnesty.org/en/news/nigeria-deaths-hundreds-boko-haram-suspects-custody-requires-investigation-2013-10-15. Site accessed 28.02.2014.

Other allegations of crimes carried out by security forces in their response to Boko Haram terrorism include: a reprisal attack on Maiduguri, Borno State and the Bama Massacre. In the former situation, after the killing, through the use of an Improvised Explosive Devise, of a Lieutenant leading a Joint Task Force (JTF) patrol along Lagos street, in Gwange area of Maiduguri state, members of the JTF were alleged to have shot indiscriminately at members of the public and burnt 50 houses, shops and vehicles with casualty figures being put at 30.[84] For the Bama Massacre, security forces were alleged to have killed over 180 and destroyed over 2,000 houses in reprisal for Boko Haram attacks in Bama, Borno State. The true picture was revealed by satellite images, contradicting the Nigerian army's report of 36 deaths (30 Boko Haram members and 6 civilians) and 30 houses burnt. Many people were said to have died in an attempt to escape into Lake Chad.[85]

It is increasingly clear that Nigerian citizens are caught between the terrorist rock of Boko Haram and hard reprisal attacks by security forces that are outside the ambit of counter-terrorism laws. There is a need for security forces to respect constitutional rights and liberties of citizens even in the face of the challenging destructive force facing the nation. Abandoning constitutional democratic principles in tackling acts of terror is not only ineffective but counter-productive. Assassinations, unlawful arrests and detention of citizens will more likely to aid terrorists by engendering the sympathy of a traumatized populace.

Without doubt, it is essential that the law be seen to be transparently applicable to crimes committed by Boko Haram suspects as well as rogue members of the JFT. This will ensure cooperation of the general public which is required for intelligence gathering and undermining Boko Haram propaganda that they are engaged in fight to establish Sharia law, which already exists in most Northern States in Nigeria. For this writer, public trust and confidence is the strength of constitutional democracy and this is the ultimate weapon against terrorist acts. Any nation that ignores or undermines democratic safeguards in fighting terrorism will be playing in the same amoral pit as terror groups. Ultimately, such action polarises the country and does not have any beneficial outcomes.

VI. CONCLUSION

This paper has sought to critically analyse and assess constitutional democracy and terrorist acts from the Nigerian perspective. Of note is the fact that Nigerian anti-terrorism jurisprudence is still at an embryonic stage and it is important at this crucial stage to get

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[84] Agency Reporter, 9th October 2012, "*Soldiers go haywire…kill 30, burn 50 houses in Maiduguri to avenge army officer's death*", The Punch: http://www.punchng.com/news/soldiers-go-haywire-kill-30-burn-50-houses-in-maiduguri-to-avenge-army-officers-death/. Site accessed 28.02.2014; Agency Reporter, 9th October 2012, "*10 die in JTF's reprisal for officer's death*", The Nation: http://thenationonlineng.net/new/news/10-die-in-jtfs-reprisal-for-officers-death/. Site accessed 28.02.2014.

[85] George Agba and Sadiq Abubakar, 2nd May 2013, "*Baga Massacre: Human Rights Watch Accuses Army of Cover-Up*", Leadership Newspaper NG: http://www.leadership.ng/news/020513/baga-massacre-human-rights-watch-accuses-army-cover. Site accessed on 28.02.2014; Adam Nossiter, 29th April 2013, "*Massacre in Nigeria Spurs Outcry Over Military Tactics*", NYTimes.com: http://www.nytimes.com/2013/04/30/world/africa/outcry-over-military-tactics-after-massacre-in-nigeria.html?_r=0. Site accessed on 28.02.2014.

it right as a democratic country. Critical tensions generated by terrorism are heightened for a nascent democracy that already faces severe developmental challenges. It is not surprising after its long period of military dictatorship that the Nigerian state is seemingly more comfortable with repression and suppression as opposed to democratic values that lay emphasis on debate and dialogue.[86]

In consonance with constitutional democracy, the Nigerian state has enacted the TPA 2011 as amended, as a response to acts of terrorism. This is despite the fact that terrorist acts are similarly covered under general criminal law. Unfortunately, counter terrorism law does not seem to have ensured an effective, robust but legal response from the poor functioning Nigerian state. To ensure that acts of terrorism do not undermine democratic tenets and the Nigerian state, terrorist suspects, victims and the general public are entitled to see the law in action.

There has to be an assurance that the state does not act in a lawless manner outside its constitutional mandate. Otherwise there may a fatal weakening of public trust and faith in the democratic state. Simply put, the proponents of terror will have succeeded in their goal of destroying the Nigerian State.

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[86] That said, news reports of dialogue between the FG and Boko Haram to provide amnesty for acts of terrorism has divided the general public. Though talks between the Presidential Committee on Dialogue and Resolution of Security Challenges in the North and Boko Haram seem to have collapsed, there is a view that the rule of law should prevail with members of Boko Haram as well as rogue members of the security services facing the full penalty of the law, Temidayo Akinsuyi, 17th October 2013, "*Boko Haram: Reviewing FG's Amnesty Debacle"*, Daily Independent: http://dailyindependentnig.com/2013/04/boko-haram-reviewing-fgs-amnesty-debacle/. Site accessed on 28.02.2014.

In Quest of a Legal Framework for Domestic Workers in Bangladesh

Md. Raisul Islam Sourav*

Abstract

Bangladeshi domestic workers suffer from lack of legal protection. There are a lot of laws, but none can ensure the rights of the domestic workers separately. Albeit, the Constitution of the People's Republic of Bangladesh guaranteed some rights of the domestic workers impliedly. However, domestic workers can seek redress under ordinary civil and criminal laws of Bangladesh. Nonetheless, they need some sort of special treatment, because they work in private place and in more vulnerable situation. In addition, the nature of their work is quite different from other traditional work sectors. There is no provision for their working hours, leave, minimum wages, holiday, maternity benefits etc. Though the ILO Convention No 189 has been adopted to ensure the rights of the domestic workers but Bangladesh is not a state party to the convention. Hence they need a new piece of legislation to protect their employment rights. This research paper aims to find out the lacunas of existing laws of Bangladesh and recommend to enact a new law in this regard.

I. INTRODUCTION

Most of the Bangladeshi middle class families are very familiar with domestic worker, though they do not recognize them as "worker" and do not recognize their rights to get minimum wages, allowances, fixed working hours, leave, bonus, weekly holiday, maternity benefits etc. As a result, they do not get any leave during any festival period and usually work until midnight. In addition, the existing labour laws of Bangladesh also deny their rights and do not include them as worker.[1] Consequently, this community becomes vulnerable and disenfranchised and they do not have ways to ventilate the injustices.[2] Further, they do not have any practical and effectual legal means to enforce their rights.

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* MD. RAISUL ISLAM SOURAV achieved his LL.B (Hons) & LL.M degree from Northern University Bangladesh (NUB); currently he works as a Senior Lecturer & Coordinator, Department of Law, Dhaka International University (DIU), Dhaka, Bangladesh. Contact Address: Raisul Islam Sourav, Senior Lecturer & Coordinator, Department of Law, Dhaka International University (DIU), 66, Green Road (9th floor), Dhaka-1205, Bangladesh. E-mail: sourav.mollick@gmail.com Blog: www.legalviewsofsourav.blogspot.com Cell: +88 01912 298 126, Facebook: www.facebook.com/raisul.sourav

1 Bangladesh Labour (Amendment) Act 2013, s. (1)(4).

2 Adams, Kathleen, "Home & Hegemony: Domestic Service and Identity Politics in South and Southeast Asia," *University of Michigan Press*, 2000, Michigan.

For the legislators and other stakeholders, domestic workers are not in the agenda because of their powerlessness.[3] This research paper is aimed to explore the reasons behind the vulnerability of the domestic workers in Bangladesh and to find out the loopholes in existing law along with some suggestions to change the situation.

A. *Legal Definition of Domestic Worker*

The term "Domestic Worker" is very recent trend to recognize them as worker. Formerly they were known as servant, housemate, helping hand etc. However, formally The Domestic Workers Convention 2011 (Convention No. 189 of ILO) first recognizes domestic work as "work" and persons engaged in this sort of work as domestic worker and also introduce a set of rights for these workers. According to the Convention No. 189 (Decent Work for Domestic Workers), work performed in or for a household or households is domestic work and any person engaged in domestic work within an employment relationship is domestic worker.

This work may comprise cleaning house, cooking, washing and ironing clothes, taking care of children or elderly or sick members of a family, gardening, guarding the house, driving and even taking care of domestic pets. A domestic worker may work on full-time or part-time basis; may be employed by a single household or by multiple employers; may be residing in the household of the employer (live-in worker) or may be living in his or her own residence (live-out). A domestic worker may be working in a country of which she/he is not a national.[4] A large number of men also work in this sector i.e. as gardeners, drivers or butlers. However, it remains a highly feminized sector. However, domestic work and worker has the following features:

a) The workplace is a private home;
b) The work performed has to do with servicing the household;
c) The work is carried out on behalf of the direct employer;
d) The work performed must be done on a regular basis and in a continuous manner;
e) The employer shall not derive any pecuniary gain from the activity done by the domestic worker and
f) The work is performed in return for remuneration, either in cash and/or in any kind.

The employer of a domestic worker may be a member of the household for which the work is performed or an agency or enterprise that employs domestic workers and makes them available to households. Nevertheless, the nature of domestic work is different from other traditional industrial work.[5] Hence, they require special treatment and special law to protect their rights as worker.

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[3] Anderson, Bridget, "*Doing the Dirty Work: the Global Politics of Domestic Labour*," Zed Books, 2000, London.
[4] Convention No. 189.
[5] Ismail Hossain,, "*Structural Adjustment: Policies and Labour Market in Bangladesh*," CIRDAP, 1998, Dhaka.

II. CONSTITUTIONAL SAFEGUARDS FOR DOMESTIC WORKERS IN BANGLASDESH

The Constitution of the People's Republic of Bangladesh is the solemn expression of will of the common people of Bangladesh.[6] They achieved this golden piece of Bill of Rights through the great freedom fight in 1971 and they paid an ocean of blood for this. This is a Constitution adopted, enacted and given by the people for themselves.[7] Thus, the constitutional spirit authorizes that the rights of the neglected sections of the society are guaranteed, including those of the domestic workers.

Bangladesh has four guiding principles in its Constitution. One of the four guiding principles of the Constitution is socialism meaning economic and social justice[8] which imposes an obligation on the shoulder of the State to uphold the rights of the deprived sections of people of the country. Chapter II of the Constitution ensures development of the position of marginal and deprived people, like domestic worker, which are the guiding principles as well as fundamental principles of state policy of Bangladesh. Some of these relevant principles are:

1) Fundamental human rights and freedoms and respect for dignity of the human beings.[9]
2) The State is responsible to emancipate the toiling masses, the peasants and workers, and backward sections of the people from all forms of exploitation.[10]
3) The State responsibility to ensure the provision of basic necessities, right to work at reasonable wages, right to reasonable rest, recreation and leisure and right to social security.[11]
4) Free and compulsory education for the inhabitants of Bangladesh.[12]
5) Work is a right, a duty and a matter of honour for every citizen.[13]

Everybody shall be paid for his work on the basis of the principle 'from each according to his abilities, to each according to his work'.[14] It further says that the State shall endeavour to create conditions in which human labour in every form, intellectual and physical, shall become a fuller expression of creative endeavour and of the human personality.

Albeit these principles are not judicially enforceable in the court of law as per the provision of the Constitution.[15] However, these principles shall be fundamental to the governance of Bangladesh, shall be applied by the State in making of laws, shall be a

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6 Mahmudul Islam, "*Constitutional Law of Bangladesh*," 2nd ed., Mullick Brothers, 2010, Dhaka.
7 Preamble of the Constitution of the People's Republic of Bangladesh.
8 Preamble & Art. 8 of the Constitution of Bangladesh.
9 Article 11 of the Constitution of Bangladesh.
10 Art. 14 of the Constitution of Bangladesh.
11 Art. 15 of the Constitution of Bangladesh.
12 Art. 17 of the Constitution of Bangladesh.
13 Art. 20 of the Constitution of Bangladesh.
14 Anker, Richard, "*Gender and Jobs*," International Labour Office, 1998, Geneva.
15 *Dr. Mohiuddin Farooque* v. Bangladesh [1997] 49 DLR (AD) 1 and Arts. 8-25 of the Constitution of Bangladesh.

guide to the interpretation of the Constitution and of the other laws of Bangladesh and shall form the basis of the work of the State and its citizens.[16]

Further, part III of the Constitution provides fundamental rights, which are judicially enforceable and guaranteed by the Constitution itself. These rights are enforceable by the High Court Division of the Supreme Court of Bangladesh under its Writ (Judicial Review) jurisdiction.[17] As a citizen of Bangladesh all domestic workers are entitled to enjoy all these following fundamental rights:

1) Article 27 declares that all citizens are equal before the law and are entitled to equal protection of law.
2) Article 28 enumerates that the State shall not discriminate against any citizen on grounds of religion, race, caste, sex or place of birth. Women shall have equal rights with men in all fields of the State. However, it further states that nothing shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens. Hence, the Constitution undoubtedly permits statutes approving affirmative action for backward sections of citizens like domestic workers.
3) Article 31 states that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with the law.
4) Article 34 prohibits all forms of forced labour.
5) Article 38 says that every citizen shall have the right to form associations or unions.

In case of violation of any of the above mentioned fundamental rights, which are to be interpreted in the light of the preamble and the fundamental principles, the aggrieved person can file a writ petition before the High Court Division.[18] Apart from the fundamental rights guaranteed under the Constitution, every person has other legal rights recognized by various statutes. The High Court Division may also take steps *suo moto* for legal rights violated by the government if there is no other equally efficacious remedy. Public interest litigation in Bangladesh has grown, and now any person can move the court representing the interests of the underprivileged or the under-represented.

III. PROTECTION ENSURED BY ORDINARY LAWS OF BANGLADESH

Aside from the Constitution, there are few ordinary laws, which can protect the rights of domestic workers as an ordinary citizen of Bangladesh. However, there is no single special law in Bangladesh which deals with domestic worker exclusively except the Domestic Servants' Registration Ordinance 1961.

A. The Domestic Servants' Registration Ordinance 1961

The only statute in Bangladesh directly dealing with domestic workers is the Domestic Servants' Registration Ordinance 1961. The purpose of this Ordinance appears clear from

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[16] Mahmudul Islam, "*Constitutional Law of Bangladesh*," 2nd ed., Mullick Brothers, 2010, Dhaka.
[17] Arts. 44 & 102 of the Constitution of Bangladesh.
[18] Art. 44 of the Constitution of Bangladesh.

its title, it is to oblige domestic workers to register with the police. The Act says that if a domestic worker fails to register with the police station, he shall be punished with simple imprisonment which may extend to one month or with fine which may extent to 100 taka or with both. [19] It is interesting that this Ordinance was made applicable for only five police stations of the Dhaka metropolitan area. Apart from registration, this Act comprising of only nine sections, do not touch any other aspect. Apparently, the purpose of the statute of 1961 was not to improve the fate of domestic workers, but to assist employers to find domestic workers in case they commit any offence and run away. Even in the area of its jurisdiction, the five police stations, the Act is not implemented and the domestic workers do not actually register with the police.

Beside this, the definitions provided by this law needs to be extended. This definition does not attempt to define "household affairs" and thus can be interpreted in a very wide sense including guards, gardeners, vehicle drivers etc. [20] Albeit, the entire informal sector cannot be included in the legal discourse relating to domestic workers, many categories not commonly regarded as domestic workers should be included in the definition so that legal protection can be given.[21] Apparently, the identifying criteria should not be working in 'household' but 'working in a household or doing similar works'.[22] Again, presence of 'wages' should not be an identifying factor at all. The most important criteria should be whether she is working for her own family or for someone else.

B. The Labour Act 2006

Formerly the labour laws of Bangladesh consisted of various statutes, each dealing with one or more aspects. However, the Labour Act 2006 repealed most of the earlier statutes and modified some others.[23] Now this single statute provides almost entire labour law related provisions applicable in Bangladesh. Nonetheless, the Labour Act excludes domestic workers from its ambit. Section 1(4)(o) expressly provides that the law shall not be applicable to domestic servants. The implication of this provision is very clear.[24] Domestic workers cannot claim any of the rights guaranteed under the Act of 2006.

Furthermore, there is no scope for them to go to the labour courts, which is established exclusively for labour matters. It is very interesting to note that in certain cases, the Act of 2006 actually goes backwards. For example the Minimum Wages Ordinance 1961[25] included domestic workers within its definition of workers and as such their minimum wages could be fixed through the mechanism provided by the Ordinance. The Act of 2006 has repealed this Ordinance and incorporated the provisions of the Ordinance of 1961

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19 Section 5.

20 Section 2(a).

21 Selim Jahan, "*Domestic Service Labour Force: The Bangladesh Perspective*," Institute for Law and Development, 1991, Dhaka.

22 Dr. Ahmed Naim, "*Safeguarding the Rights of Domestic Workers: Existing Laws and Ways to Move Forward,*" Democracywatch and International Labour Organization, 2009, Dhaka.

23 Section 353.

24 Jan Breman, "A Dualistic Labour System? A Critique of the 'Informal Sector," *Economic and Political Weekly*, 1976, Vol. 11, No. 48, Pp. 1870-1876.

25 Ordinance No. XXXIV of 1961 (Bangladesh).

in Chapter 11 including formation and functions of a Minimum Wage Board. Similarly, the Children (Pledging of Labour) Act 1933[26] provided that all agreements to pledge the labour of children were void. This was also repealed by the Act of 2006 without making any alternative for the domestic workers.[27]

C. The Prevention of Suppression Against Women and Children Act 2000

The Prevention of Suppression Against Women and Children Act 2000 promulgates to take stringent measures against crimes oppressing women and children.[28] Many of the provisions of this statute deal with issues that are relevant for domestic workers, for examples section 4 deals with death, attempt to murder, grievous hurt or mutilation by using corrosive, incendiary or poisonous substances (especially throwing of acid); section 5 deals with trafficking of women for prostitution and allied matters; section 6 provides for trafficking and stealing of children; section 7 deals with kidnapping and abduction of women and children; section 9 deals with rape and section 9A covers situations where women are led to suicide because of acts of others; section 13 provides for children born after rape; and section 14 protects privacy of women and children from media exposure.

The punishments for the crimes defined under the Act are very stringent. The Act establishes a tribunal to effectively adjudicate these matters and provides for detailed procedures. Although the Act of 2000 covers many aspects relevant for domestic workers, it was promulgated to safeguard women and children in general and no specific attention is given specifically to the domestic workers.

D. The Children Act 2013

The Children Act 2013 is the major legislation that aims to protect children. This statute provides for the creation of juvenile courts and a separate system of trial for children. It provides for probation officers, establishment and operation of certified institutions for offender children, protection of their privacy, their custody during and after trial etc. The court may also issue a warrant to search for a child. Since a considerable portion of the domestic workers are children, the Act is very relevant in safeguarding their rights and interests.

Section 34 of the Act has special relevance as it provides for penalty when a child is assaulted, ill-treated or neglected by a person having charge or care of the child. The remedy, being imprisonment for two years and/or fine not exceeding taka one thousand, however is very minimal. However, section 44 provides that if a person secures a child ostensibly for the purpose of menial labour in a factory or other establishment, but in fact

[26] Act No. II of 1933 (Bangladesh).

[27] Section 35 of the Act of 2006 incorporates the provisions of the Act of 1933 for children who are not domestic workers.

[28] Faruque, Dr. Abdullah Al, "*Analysis of Decisions of the Higher Judiciary on Protection of Women's Rights in Bangladesh,"* National Human Rights Commission of Bangladesh, 2013, Dhaka.

exploits the child for his own ends, withholds or lives on his earnings, shall be punishable with fine which may extend to one thousand taka. These provisions, if property followed, can be used by any conscious citizen to save child domestic workers from torture and abuse even when the child's natural parents are absent or silent.

E. The Penal Code 1860

Any act that has been defined by law as a crime is punishable by the courts of law. Apart from the Penal Code 1860, many other laws define criminal acts in Bangladesh. All criminal acts are adjudicated by criminal courts[29] and the domestic workers, like any other citizen, are under the jurisdiction of the criminal courts. Under the Penal Code, especially relevant for the domestic workers are culpable homicide,[30] murder,[31] hurt,[32] grievous hurt,[33] wrongful restraint,[34] wrongful confinement,[35] assault,[36] kidnapping,[37] abduction,[38] rape,[39] and theft.[40] These and many other provisions of criminal law apply to domestic workers in the same way in which they apply to other citizens. There is however no statute that specifically deals with domestic workers and declares an act to be a criminal act considering the special circumstances of the domestic workers.

F. The Domestic Violence (Prevention & Protection) Act 2010

Recently enacted the Domestic Violence (Prevention & Protection) Act 2010 does not cover domestic workers under the purview of the said law. In accordance with the provision of this law, only a female & child family member can get protection under this Act. Hence, an unknown domestic worker who is not a member of her employer's family cannot take shelter under this law to prevent abuse against her.

G. The Contract Act 1872

Whenever a domestic worker starts to work in a household, there is an agreement between the employer and the worker. This agreement is almost oral. Yet it cannot be ignored that there is an understanding between the parties. The most important term of the understanding is often the amount of money the worker will get at the end of the

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29 Alhaj Zahirul Huq, "*Penal Code,*" 5th ed., 2010, Anupam Gyan Bhander, 2010, Dhaka.
30 Section 299.
31 Section 300.
32 Section 319.
33 Section 320.
34 Section 339.
35 Section 340.
36 Section 351.
37 Section 359.
38 Section 362.
39 Section 375.
40 Section 378.

month as salary.[41] There may be other terms such as how many times she can take a vacation to visit her village home, how many times she will be given new clothes by the employer etc. Accordingly, even if not formal, written or exhaustive, the parties enter into an agreement. This agreement is enforceable under the Contract Act, 1872. This is also a service contract.

The relationship between the domestic worker and his/her employer is one of "master-servant" relationship.[42] Under this relationship, the employer is always the dominant partner and can impose unfavourable terms. But as long as the employer follows the terms agreed between the parties, the worker cannot protest. The employer however has certain limitations under the established legal principles.[43] For example, he cannot violate the fundamental right of a worker even when the worker agrees to surrender the right. Again, a worker cannot be dismissed on ground of any default unless given an opportunity of fair hearing. It follows that in case of any violation of the service contract, or any injury sustained by the worker, a case of compensation can be filed before the civil courts. The civil courts also have power to issue directions and declare any action taken by an employer to be illegal. The legal provisions are thus not ambiguous.

But the problem lies in implementing these provisions since it depends upon each individual contract between the employer and the domestic worker. Domestic workers are mostly illiterate and unaware of their legal rights. Further, it is very difficult for them to enforce their rights through legal proceeding. On the other hand, the employer stands on a strong footing where he/she has the means to appoint expert lawyer to defeat the poor worker. Hence, the domestic workers need legal literacy and free legal aid to battle against their giant lords.

H. The National Child Labour Elimination Policy 2010

The definition of 'child' differs between one statute and another and a clear definition of the terms 'child labour' or 'child labourers' are not found anywhere.[44] In these circumstances, the age-based definitions of child and adolescents as given in the Bangladesh Labour Act, 2006 are followed in every discussion relating to child labour. According to the definition, work performed by a child will be considered as child labour but the term 'child labourer' should not be used here rather he may be termed as a child engaged in labour. The policy advocates a friendly world for the children engaged in work and provides a standard framework concerning education, health, working environment, specific working conditions, recreation, treatment, security, social awareness building for managing and reducing risks of child abuse by employers etc.[45]

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[41] Philippa Smales, "*The Right to Unite: A Handbook on Domestic Worker Rights across Asia,*" Asia Pacific Forum on Women, Law and Development (APWLD).

[42] Siddiqui, K., "*Better Days, Better Lives*," 1st ed., The University Press Limited, 2001, Dhaka.

[43] Selim, Nadia, "*Domestic Service in Bangladesh: A Case Study in Dhaka,"* Expressions Ltd., 2009, Dhaka.

[44] Maria, Amparita S. Sta., "Study on the Legal Protection of Child Domestic Workers in the Asia-Pacific,*" International Labour Office*.

[45] Living Inside Room Outside Law: A Study on Child Domestic Worker and the Role of Govt. and Civil Society, *ASK and Save the Children*, 2010, Dhaka.

Matters concerning children are regulated by the Ministry of Women and Children Affairs and labour related issues are by the Ministry of Labour and Employment. But no ministry is wholly authorised to administer the child labour issues.[46] That is why the policy articulates recommendation for giving the entire responsibility of supervising every issue concerning child labour to the Ministry of Labour and Employment as a focal Ministry. A Child Labour Unit is also suggested for coordinating all the activities that are mentioned in the Policy of 2010. Furthermore, the policy points out that a National Child Labour Welfare Council can also be created by the experts in child labour studies whose duty will be to observe the circumstances of child labour at national and international level with a view to making recommendations to the government.

Therefore, different statutes of Bangladesh have defined children differently according to the different labour sectors, though the National Child Labour Elimination Policy 2010 has made the age of child labour specific. In fact, the above provisions of different Acts do not prohibit child labour rather insert provisions for the employment of children. The reason behind this may be that if child labour is absolutely forbidden, that will severely affect children and their families who depend on the income of children and children may be involved with more exploitative informal activities (which do not come under the purview of the above Acts).[47] So child labour cannot be eliminated from the society totally as yet.[48] That is why steps should be taken to decrease it gradually.[49] In this case the laws regarding child labour should be more child-friendly.[50]

IV. PROTECTION ENSURED BY THE JUDGMENT OF THE SUPREME COURT OF BANGLADESH

Domestic workers are the most disadvantaged and deprived segments of society in Bangladesh. In particular, child and female domestic workers are often abused and subjected to torture and other forms of inhuman treatment. ***Bangladesh National Women Lawyers Association (BNWLA) Vs. Govt. of Bangladesh***[51] is the first judicial pronouncement to investigate the legality of such practices in Bangladesh. This Public Interest Litigation (PIL) had been filed in view of a news item published in a national daily newspaper of Bangladesh on the abuse of domestic workers and numerous other examples of violence inflicted upon domestic workers, in particular child and female domestic workers.

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[46] Aktar, Sharmin and Abdullah, Abu Syead Muhammed, "Protecting Child Labour in Bangladesh: Domestic Laws Versus International Instruments," *Bangladesh e-Journal of Sociology*, January 2013, Vol-10, No. 01, Dhaka.

[47] Khair, Sumaiya, "Limiting Child Labour: The Impact of Protective Legislation in Bangladesh," *The Dhaka University Studies*, *Part-F,* 1996, Vol. 7, No. 1, Dhaka.

[48] Rahman, G. Shamsur, "*Laws Relating to Children in Bangladesh*," Bangladesh *Shishu* (Children) Academy, 1994, Dhaka.

[49] Rahman, M., "Child Labour and Human Rights: Bangladesh Perspective," *The Dhaka University Studies, Part-F*, 1994, Vol. 5, No. 1, Dhaka.

[50] Vittachi, A., "*Stolen Childhood: In Search of the Rights of the Child*," Polity Press in Association with North-South Productions and Channel Four, 1989, Cambridge.

[51] Writ petition no. 3598 of 2010.

It was submitted by the petitioner that the children and women, who were engaged as domestic help, found themselves in a helpless situation being far away from home and no one to turn to in times of need. There is no record maintained by anyone with regard to the women and children employed in the domestic sector and it so happens on many occasions that even the family members of the children are unable to trace their whereabouts until it is too late. The government should take steps so that the employment of women and children in the domestic sector may be monitored and their rights as worker projected in accordance with the Constitution and the law of the land. They are subjected to inhuman torture sometimes leading to death and at other times leading to suicide.

It is also a fact that female domestic workers, in particular, are subjected to physical as well as sexual abuse. In many cases, action is taken against the employers by filing cases with the police station, but the police are reluctant to record any case against the perpetrators, particularly since they are well-to-do and influential persons. It should be noteworthy that the definition of worker under the Bangladesh Labour (Amendment) Act, 2013 does not include anyone engaged in work as a domestic worker. The National Child Labour Elimination Policy, 2010 also does not clearly show up to what age a child would be totally prohibited from working. The policy shows that children under the age of 14 years shall not be employed in regular work.

The court highlighted that such a situation should not be allowed to continue and it is unfortunate that such service has not been recognized as such and finds no place in the labour laws. The court suggested that the beneficial provisions outlined in the three policy documents namely, Domestic Worker Protection and Welfare Policy 2010 (Draft), National Child Labour Elimination Policy, 2010 and the Children Policy 2011 must be brought into effect at once so that the benefits of the provisions of those policies may be given to the domestic workers. It was also suggested by the court that children between the ages of 14 to 18, who are engaged in the domestic sector, should be incorporated automatically within the provisions of the Labour Act. There should be a system of registration and monitoring of all persons engaged in domestic work. In the above facts and circumstances, the court issued the following directions to the government:

1. In order to make the provision and concept of compulsory primary education to be meaningful, we direct the government to take immediate steps to prohibit employment of children up to the age of 12 from any type of employment, including employment in the domestic sector, particularly with the view to ensuring that children up to the age of 12 attend school and obtain the basic education which is necessary as a foundation for their future life.
2. Education/training of domestic workers aged between 13 and 18 must be ensured by the employers either by allowing them to attend educational or vocational training institutes or by alternative domestic arrangements suitable to the concerned worker.
3. The government should implement the provisions mentioned in the National Child Labour Elimination Policy 2010 and establish a focal Ministry/focal point, Child Labour Unit and National Child Labour Welfare Council in order to ensure implementation of the policies as mentioned in the Policy of 2010.

4. The government should include domestic workers within the definition of "worker" in the Bangladesh Labour Act, 2006 and also to implement all the beneficial provisions of the draft Domestic Worker Protection and Welfare Policy 2010 as announced by the government.
5. The cases relating to violence upon domestic workers must be monitored and prosecution of the perpetrators must be ensured by the government. The government has a duty to protect all citizens of Bangladesh, be they rich or poor. It must not be forgotten that the domestic workers come from poverty- stricken backgrounds and deserve all the more protection from the government and the authorities set up by the government.
6. In order to prevent trafficking, in particular, and also to monitor the movement of young children from the villages to the urban areas, parents must be required to register at the local Union *Parishad* the name and address of the person to whom the child is being sent for the purpose of employment. The Chairman of the Union *Parishad* must be required to maintain a register with the details of any children of his Union who are sent away from the locality for the purpose of being engaged in any employment. If any middleman is involved, then his/her name and other details must be entered in the register.
7. Government is directed to ensure mandatory registration of all domestic workers by all employers engaging in their household any child or other domestic worker and to maintain an effective system through the respective local government units such as *Pourashava* or Municipal Corporations in all towns and cities for tracking down each and every change of employment or transfer of all the registered domestic workers from one household to another.
8. Government should take steps to promulgate law making it mandatory for employers to ensure health check up of domestic workers at least once in every two months.
9. The legal framework must be strengthened in order to ensure all the benefits of regulated working hours, rest, recreation, home-visits, salary etc. of all domestic workers.
10. Laws must also ensure proper medical treatment and compensation by the employers for all domestic workers, who suffer any illness, injury or fatality during the course of their employment or as a result of it.

V. PROPOSED LEGISLATION ON THE REGISTRATION AND PROTECTION OF THE DOMESTIC WORKERS IN BANGLADESH

Leading human rights NGO *Ain O Shalish Kendro* (ASK) has drafted a law on domestic workers in 2012 titled the Domestic Workers' Registration and Protection Act 2012 and submitted it to the Ministry of Labour & Employment for enactment. However, till now there is no visible sign to enact the said law. The objects of the ASK proposed law are:

- To uphold the constitutional guarantee to ensure dignity of labour;
- To bring all domestic workers within a legal frame work;

- Make provisions for proper documentation of employment of domestic workers; and
- To substitute the existing discriminatory law (the Domestic Servants' Registration Ordinance 1961)

The Act mostly contains the provisions and procedure for registration of domestic workers; the whole scheme of the Act is so devised that the registration along with other provisions of the Act will ensure protection of the domestic workers; issues like assault, torture and other forms of violence against domestic workers can be addressed by the existing legislations such as the Suppression Against Women and Children Act 2000, and the Penal Code 1860; and the Act is not intended to contain penal provisions; rather it would be a regulatory law.

The proposed law also suggests procedure to register domestic workers such as: employer to register employment of domestic worker within 10 working days. Section 2 of the proposed Domestic Workers' Registration and Protection Act, 2012 defines "Domestic Worker" & "Child Domestic Worker" as follows: "**Domestic worker**" is defined as any person who is employed for household works in consideration of wages or any other benefit. "**Juvenile domestic worker**" as any domestic worker within the age of 12-18 years and '**child domestic worker**' as any domestic worker below the age of 12 years.

VI. RECOMMENDATIONS

To protect the rights of the domestic workers there need to be in place a sound and functioning institutional framework that will ensure the legal provisions and policies are observed as well as enforced properly and actions will be taken to protect the domestic workers if the Bill of Rights for Domestic Workers are violated and the guilty will be punished accordingly. A district unit needs to be formed to help domestic workers under the Ministry of Social Welfare which would take the lead in passing laws, overseeing its enforcement and acting as a platform where all the relevant actors i.e. community organizations, NGOs, private sector, bilateral and multilateral donors can mobilize their agenda, resources and actions.

In addition, sufficient help centers should be established in different parts of the country where domestic servants can seek help in cases of cruelty, violence and a violation of their bill of rights. The existence of these help centers should be made widely known. The centers should also be easily accessible by having extended hours of operations. Furthermore, they should be equipped with minimum medical facilities, including counseling, to deal with extreme situations of violence and cruelty. These centers will also provide social interaction so that live-in maids can come to simply socialize and meet others in order to alleviate their isolation. Workers from these centers should have the power from the government to visit employers' houses, particularly where children are employed. For extreme cases where domestics are locked up and cannot access these centers, a hot-line system should be in place.

Alongside these help centers and telephone hotlines, a department under the law enforcement agencies should be established that would be geared towards solely focusing on investigating cases of violation of bills of rights for domestic workers, particularly for

cruelty and violence against them. This department should make sure that the training of police be more sensitive to cases of domestic workers and engage women police officers in such cases who may be more sensitive to cruelty and violence to domestic workers. In cases of the violation of the bill of rights for domestic workers, their contracts and violence, a domestic workers' special court should be created. More government funding and official support should be given to the existing drop in schools for child workers operated by private NGOs.

All the policy measures mentioned above would need widespread public and policy advocacy. Public advocacy is generally led by civil society. But in the area of policy advocacy, the proposed unit on domestic help under the Ministry of Social Welfare can interact with parliamentarians and convince them about the need for legal and institutional frameworks such that the politicians give the political support needed in parliament to get all the policy measures passed. The Ministry can also work towards creating alliance among the private and public entities working in public advocacy and generate social awareness.

VII. CONCLUSION

A special piece of legislation for the domestic workers could be a proper solution to uphold their rights. Albeit, mere enactment of a new law may not be able to bring changes over night, if we do not change our mind set. More humanitarian approach towards the domestic workers can ensure more contentment in the mind of them.

The Government of Bangladesh should take initiatives immediately for appropriate legal reforms and other necessary actions to implement the above mentioned recommendations. However, the current governance deficit in Bangladesh has further aggravated the situation because the duty bearers such as lawmakers, executives, police, and government officials remain insensitive to domestic workers' rights. It is noteworthy to mention that the Government is committed to protect the citizens but it lacks depth of understanding and consistent planning. That is why action at the national level is needed now, as timely steps can only bring positive impact towards domestic labourer from all tiers of the society. But in case of taking action in full conformity with reality, all the factors such as, economic, social, political, cultural have to be taken into consideration.

Further initiatives have to be taken at first to keep child domestic workers away from exploitative and dangerous works and to provide all of them appointment letter, identity card and other necessary things to ensure the payment of their wages and other rights as workers. Apart from these, Governmental bodies should ensure all rights of domestic workers like other workers.

However, Bangladesh is obliged under both national and international law to protect and promote the rights and interests of the domestic workers. The Constitution of the People's Republic of Bangladesh guarantees basic and fundamental human rights. These rights are the guiding principles for formulating policies and laws relating to domestic workers. Bangladesh will have to be a signatory State of the ILO C189 very soon, so then these initiatives will be widespread and the affluent, elite countries and international organizations will come forward to help the government and NGOs, not only in case of financial assistance but also in the actual performance of the field level work.

Selected Legal Issues Concerning Surrogacy in Malaysia*

Sridevi Thambapillay**

Abstract

Surrogacy, which originates from the Latin term "*surrogatus*" (substitute), generally refers to an arrangement where a woman bears a child for another woman. The Oxford dictionary defines surrogacy as the process of giving birth as a surrogate mother or of arranging such a birth. Surrogacy can be used for two purposes, i.e. commercial or altruistic. Generally, there are two types of surrogacy, i.e., first IVF or Gestational surrogacy and secondly, traditional or natural surrogacy. The former refers to a situation where a woman, whose uterus has been removed but still has her ovaries, provides her eggs to be in vitro with her husband's sperms by the IVF or ICSI procedure. The embryo is then transferred into the uterus of a surrogate mother. On the other hand, the latter refers to a situation where the surrogate is inseminated with the sperm of the male partner of an infertile couple. Surrogacy cases in Malaysia are on the rise. However, it is disheartening to note that the Malaysian legislature has not passed any specific law to govern the issue of surrogacy. Many couples who are unable to conceive a child enter into a surrogacy arrangement without realizing the consequences of this arrangement. Hence, the purpose of this paper is to look at certain legal issues that may arise as a result of a surrogacy arrangement. Basically, four legal issues would be discussed in this paper: first, the legitimate status of the child concerned, the right to guardianship and custody of the child, the child's right to maintenance and the child's right to inheritance. The writer would then make an attempt to suggest reforms to the issues above and also examine the possibility of enacting a law concerning surrogacy. In discussing the abovementioned issues, reference would be made to surrogacy laws in other jurisdictions, such as Queensland (Australia) and India.

I. INTRODUCTION

Science and technology has advanced rapidly in the last century. Medical science has advanced in such a manner that it could be said to take over the role of God as the Creator. The writer states this in the context of medical science assisting childless couples conceive a child through the assisted reproduction process. This is done by adopting the following methods: Intra-Uterine Insemination (IUI), In Vitro Fertilization (IVF) and Intra-Cytoplasmic Sperm Injection (ICSI).

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** LLB(Hons)(Mal), LLM (Mal) PhD student/Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur. Correspondence concerning this article should be addressed to Sridevi Thambapillay, Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur: E-mail: sridevit@um.edu.my

These methods could be performed on the childless couples themselves or in the alternative, via a surrogate mother. For the purposes of this paper, the writer would focus on surrogacy arrangements where the childless couple (referred to as "intended parents" in this paper) would seek the assistance of a surrogate mother to carry the embryo throughout the pregnancy.

The number of childless couples in Malaysia unfortunately is on the rise. As such, these couples tend to resort to surrogacy arrangements with the hope of getting a child. However, they do not think of the legal consequences that would arise. Thus, the purpose of this paper is to examine the legal issues that may arise as a result of a surrogacy arrangement. The writer would specifically focus on four legal issues, i.e., the legitimate status of the child concerned, the right to guardianship and custody of the child, the child's right to maintenance and the child's right to inheritance. Finally, the writer would refer to the position in other jurisdictions such as Queensland (Australia) and India and make an attempt to suggest reforms to overcome the problems that may arise as a result of a surrogacy arrangement.

II. FERTILITY RATE IN MALAYSIA

Malaysia, a multiracial nation, consists of the following races i.e. the Malays (who are considered the natives or "Bumiputeras"), other Bumiputeras or natives, Chinese, Indians and others. The total fertility rate in Malaysia reached the replacement level i.e. 2.1 which started from the year 2010 and remained in the following year, 2011. The fertility rate for each race could be seen as follows:

Fertility rate according to race - ethnicity

Race	2010	2011
Total	2.1	2.1
Malays	2.7	2.7
Other Bumiputeras	2.4	2.3
Chinese	1.5	1.5
Indians	1.7	1.6
Others	1.1	1.1

Source: Vital Statistic, Malaysia 2011, Department of Statistics, Malaysia.[1]

The analysis above shows that the fertility rate for the Malays and the other Bumiputeras still recorded above the replacement level at 2.7 and 2.3 respectively for every woman aged 15-49 years. However the rates for the Chinese, Indians and Others remained below the replacement level at 1.5, 1.6 and 1.0 respectively in the year 2011.

1 Vital Statistics Malaysia 2011, Department of Statistic, Malaysia, Nov.2012: http://statistics.gov.my/portal/images/stories/files/LatestReleases/vital/Vital_Statistic_Malaysia_2011.pdf. Site accessed on 28.2.2013.

III. MEANING OF SURROGACY

Before examining the four legal issues, it is pertinent to know the meaning of surrogacy. "Surrogacy" originates from the Latin word "*surrogatus*" (substitute). The Oxford dictionary defines surrogacy as the process of giving birth as a surrogate mother or of arranging such a birth. The Merriam-Webster encyclopaedia defines surrogacy as the practice of serving as a surrogate mother.[2]

Surrogacy has also been described as "a gift of modern science which has given infertile couples the opportunity to enjoy the fundamental right of parenting a child.[3] It is also a "term used when a woman agrees to become pregnant and deliver a child for a contracted party. This gives infertile couples the opportunity to enjoy the fundamental right of parenting children".[4]

There are generally two types of surrogacy options: traditional and gestational. A traditional surrogate is a woman who donates her own egg and then carries the pregnancy. The surrogate's egg is fertilized through artificial insemination with the husband's sperm or a donor's sperm. On the other hand, a gestational surrogate is in no way related to the child she carries, either biologically or genetically. She becomes pregnant through the process of IVF, where the embryo or embryos created from the eggs and sperms from the intended parents or donors are implanted in her uterus for the gestational period of forty weeks.

There are two types of surrogacy arrangements between the intended parents and the surrogate: altruistic, where the surrogate does not receive any financial reward and secondly, commercial, where she (the surrogate) is financially compensated.[5]

Usually, surrogates are relatives or friends of the intended parents. She (the surrogate) must be in good health. It is not an easy task being a surrogate as it is an emotionally and physically demanding task. It is pertinent that the surrogate has emotional support and practical help throughout and after the pregnancy.[6] Surrogacy has been legally accepted in most of the developed nations, while it is still not allowed in certain developing countries.

In Malaysia, there is no law passed on surrogacy. However, where Muslims are concerned (note that 60% of the population of 27 million in Malaysia are Muslims), the National Council of Islamic Religious Affairs issued a *fatw*a (binding ruling) barring surrogacy in 2008. This is because in Islam, it is not permissible for a married male's sperm to be implanted into the egg of another woman as he is not married to this woman. The child would then be considered as his child born out of wedlock.[7] However, where

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2 Meriam-Webster, *An Encyclopaedia Britannica Company*: www. merriam-webster.com/medical/surrogacy. Site accessed on 1.3.2013.

3 James Johnson, September 16, 2009, *Surrogacy- A Gift of Modern Science*, Health, general community, http://www.thefreelibrary.com/Surrogacy+-A+Gift+of+Modern+Science-aO10735986532">Surrogacy-AGift ofModernScience. Site accessed on 1.3.2013.

4 *Ibid.*

5 *Ibid*.

6 *Ibid.*

7 1st March 2011, *Surrogacy banned under Malaysian fatwa,* Free Malaysia Today: www.freemalaysiatoday.com/category/nation/2011/03/01/surrogacy-banned-under-Malaysian-fatwa/ . Site accessed on 1.3. 2013.

non-Muslims are concerned, legal issues arise once the surrogate delivers the child and surrenders the child to the intended parents.

IV. LEGAL ISSUES

A. Legitimate status of the child

The first legal issue that arises concern the legitimate status of the child born as a result of a surrogacy arrangement. Is the child considered legitimate or illegitimate under the law? As far as a traditional surrogacy is concerned, there is no issue as to the legitimate status of the child as the wife's egg is fertilised through artificial insemination with the husband's sperm. There is no involvement of any third party. Hence the child is considered a legitimate child of the intended parents. However, the problem arises in the case of a gestational surrogacy where the sperm of the intended parent is fertilised with the egg of a surrogate and the embryo is implanted in the uterus of the latter. As mentioned earlier, under Islamic law such a child would be considered as a child born out of wedlock.

So far as non-Muslims are concerned, there are no legislation defining the meaning of a "legitimate child". The closest legislation that could be referred to is the Evidence Act 1950.[8] Section 112 of the Evidence Act, which follows the common law position, provides for the presumption of legitimacy as follows:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The above presumption is rebuttable. Before looking at how the presumption could be rebutted, it is pertinent to first look at who is presumed to be a legitimate person under this Act. Upon reading the above provision, two presumptions arise as to the legitimacy of a person:

> a. the person was born during the continuance of a valid marriage between his mother and any man; or
> b. the person was born two hundred and eighty days after the dissolution of his parents' marriage on condition the mother remains unmarried.

The above presumptions could be rebutted if it could be proven that the parties to the marriage did not have access to each other at the time the child could have been begotten. The question that arises at this juncture is what is meant by "non-access"? This has been explained by Mimi Kamariah Majid in her book *Family Law in Malaysia*[9] as follows:

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8 Act 56.

9 Mimi Kamariah Majid, *Family Law in Malaysia*, Malayan Law Journal, Kuala Lumpur 1999.

> Non-access may be proved if the parties are physically separated, as in the case when the husband or wife has to leave for abroad or stays apart from the other spouse because of employment or other reasons. Non-access may also be proved if the husband is proved to be impotent or incapacitated at the relevant point of time.[10]

An interesting case on this issue was decided in New Zealand in 1931, i.e. the case of *Ah Chuck and Needham*.[11] In this case, both the husband and wife, Mr and Mrs Hedges, were Caucasians. In 1928, the wife gave birth to a child with Mongoloid features. Ah Chuck was a market gardener who worked near their house and frequently visited the Hedges. Thus, the issue arose as to the legitimacy of the child and whether the child's father was Ah Chuck. The court having looked at the evidence, stated as follows:[12]

> There is no evidence of any kind which would justify me in concluding that the normal and natural human relations which exist between husband and wife did not subsist in the case of Hedges and his wife when the child was conceived.
>
> It is open to the appellant to prove that it was a natural impossibility for the husband to be the father of the child. Proof might be given that intercourse between husband and wife was impossible that husband and wife were so separated by distance that access could never have taken place. Again, proof might be given that Hedges was impotent, and proof of impotence would suffice to bastardize the child. No such proof was given in the present case.

Thus, the presumption of legitimacy in the above case could not be rebutted.

Applying the two presumptions stated in section 112 of the Evidence Act to the status of a child born out of a surrogacy arrangement, specifically in a gestational surrogacy, where the sperm of the intended parent is fertilised with the surrogate's egg, it could be noted that neither of the above presumptions apply. This is due to the fact that in the first presumption, it must be shown that the child was born during the continuance of a valid marriage between his mother and any man. In this case, both his biological father and mother are not married. In fact, they may be total strangers. The same reason applies to the second presumption as well. The second presumption states that if the parents' marriage has been dissolved, the child should be born within two hundred and eighty days from the date of dissolution of the marriage on condition that the mother remains unmarried. In the case of a gestational surrogacy, the child's "parents" were never married in the first place.

Having observed that both the presumptions of legitimacy do not arise in the case of a gestational surrogacy, the child concerned is prima facie deemed to be an illegitimate child in the eyes of the law. It is disheartening to note that the child would be considered as a child born out of wedlock through no fault of his or her. In such a case, he or she would not enjoy the rights enjoyed by a legitimate child pertaining to certain legal matters, such

[10] *Ibid* at p. 204.
[11] [1931] NZLR 559.
[12] *Ibid*, per Hardman J. at p. 564.

as the right to inheritance of his or her parents' property. Hence, it is submitted that the intended parents fail to realize this issue when they enter into a surrogacy arrangement with a surrogate.

On the other hand, the position of a child born in a traditional surrogacy is different. In this method the child's biological parents are married and thus the first presumption under section 112 of the Evidence Act would apply.

> In conclusion on the issue of the legitimate status of a child, a child born in a traditional surrogacy is deemed to be legitimate under the Evidence Act, whereas a child born in a gestational surrogacy is deemed to be illegitimate.

B. Guardianship and Custody of the Child

The second legal issue that arises is pertaining to the right to guardianship and custody of the child concerned. In a gestational surrogacy, generally, the surrogacy arrangement ends with the surrogate handing the baby over to the intended parents. However, there are situations when the surrogate, after giving birth to the child, refuses to hand the child over. The issue, then, of who has the right to guardianship and custody over the child arises.

Before discussing the above issue in depth, it is first important to know the meaning of "guardianship and custody". To a lay person, guardianship and custody mean the same. However, in law, it is not so. A "guardian" has been defined by Mimi Kamariah Majid, in her book *Family Law in Malaysia*, to mean as a person "who has powers over a child's upbringing, care, discipline and religion" and "custody" refers to "the state of having certain rights over a child which rights may include care and control of the child".[13]

Generally, a person who is given the custody of a child has the child physically living with him or her. However, when it comes to whether the person who has custody also has the right to decide the children's education and other important matters, it is not necessarily so. In the case of *Dipper v Dipper*,[14] Ormrod LJ stated as follows:[15]

> In day-to-day matters the parent with custody is naturally in control. To suggest that a parent with custody dominates the situation so far as education or any other serious matter is concerned is quite wrong.

Thus, if there is an issue as to the upbringing of the child concerned, it has to be decided by the court.

Guardianship and custody issues in Malaysia are governed by two statutes, i.e. the Guardianship of Infants Act 1961[16] ("GIA") and the Law Reform (Marriage and Divorce) Act 1976 ("LRA").[17] Reverting to the issue in hand, i.e. in a gestational surrogacy,

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[13] *Supra* n 9 at p.252.
[14] [1980] 2 All ER 722.
[15] *Ibid* at p.731.
[16] Act 351.
[17] Act 164.

can the surrogate claim that she is the guardian and has the right to the custody of the child? The provision in the Guardianship of Infants Act pertaining to who has the right to guardianship and custody of a child would be referred to. The relevant provision is section 5 of the GIA which provides as follows:

> **Equality of parental rights**
> 5.(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.
>
> (2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

Section 5 of the GIA gives both the biological parents of a child equal right in relation to the custody and upbringing of the child. However, this would generally be applicable to a situation where the biological parents of the child are legally married to one another. Therefore, would this also apply to a child born by way of a gestational surrogacy? In order to answer this question, two issues have to be addressed.

First, as discussed under Part IV (A) of this article, a child born by way of a gestational surrogacy would be deemed to be illegitimate under section 112 of the Evidence Act as his or her parents are not legally married to one another. This leads us to the second issue, i.e. whether the GIA applies to illegitimate children? Section 2 of the GIA, which is the Interpretation provision defines "infant" as a "person who has not attained his majority". There is no mention at all whether "infant" under this Act includes an illegitimate child.

As the GIA is silent on the issue of guardianship and custody of an illegitimate child, reference would have to be made to the common law position. The landmark case on this issue is *Barnado v McHugh.*[18] In this case, the court had to decide who was the rightful guardian of an illegitimate child, who was left by the mother in the Home for Destitute Children for twelve years. Halsbury LC at the House of Lords decided as follows:[19]

> It is clear ... that the law has placed upon the mother of an illegitimate child obligations which ought to, and in my opinion, do, bring with them corresponding rights. Whether the right is ... a *prima facie* right to the custody of the child, or whether it be the settled view of the Court of Equity that the mother's wishes ought to be consulted, if she has not forfeited the right to be consulted by any misconduct of her own, seems to me to be immaterial to decide, since I am of the opinion that no misconduct is established against this mother which disentitles her to exercise rights to be considered in respect of the custody of this child.

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18 [1891] AC 388.
19 *Ibid* at pp. 395-396.

In the case of *In re CT (An Infant)*,[20] the court held that the titles "father" and "mother" of a child refer to those who are married to one another and the marriage is a valid one under the law. Roxborough J stated as follows:[21]

> ... *prima facie,* the titles "father" and "mother" belong only to those who have become so in the manner known to and approved by the law.

Therefore, following the above decision, in order for a father and mother to get custody of a child, they must be legally married to each other. In other words, the case goes to show that a putative father and a de facto mother of an illegitimate child have no right to guardianship and custody of their child.

The first local case to decide on the issue whether the GIA applies to illegitimate children is *Re Balasingam and Paravathy.*[22] This was an application by a de facto mother to get custody of her two infant children. Raja Azlan Shah J in holding that the GIA does not apply to illegitimate children stated as follows:[23]

> The Guardianship of Infants Act does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate other than in ... section 1(2)(a) would seem to favour the provision that Parliament intended the Act not to apply to illegitimate children.
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> Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v Galloway,*[24] it is safe to say that "infant" means a legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father ", "mother" or "infant" can be construed to mean an illegitimate or de facto parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

Hence, in an application for the guardianship and custody of illegitimate children, the above decision makes it clear that the GIA is not applicable, which means that section 5 of the GIA providing for the equality of parental rights over a child is not applicable. In such a case, the next pertinent question that arises is who has the right to guardianship and custody of the child concerned?

In the case of *T v O*[25] which was decided after *Re Balasingam and Paravathy,* the court agreed with the decision in that case that "the natural mother of an illegitimate child is the person in whom the parental rights and duties will vest exclusively, in the absence of a court order." The natural father has no right over the infant if there is no court order.

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[20] [1957] Ch 48.
[21] *Ibid* at p.56.
[22] [1970] 2 MLJ 74.
[23] *Ibid* at p.75.
[24] [1955] 3 All ER 429.
[25] [1993] 1 MLJ 168.

On the contrary, there are two cases decided after the above cases which have decided otherwise. The High Court in *Tam Ley Chian v Seah Heng Lye*[26] held that by virtue of section 24 of the Courts of Judicature Act 1964, the High Court has jurisdiction to appoint and control guardians of infants, which must include illegitimate infants. The High Court did not refer to the decision in *Re Balasingam and Paravathy*. In the case of *Low Pek Nai v Koh Chye Guan @ Koh Chai Guan*,[27] the High Court held that the GIA applied to illegitimate children, the reason being that since section 3 of the GIA in relation to Muslim infants contemplates legitimate and illegitimate infants, the GIA should apply to illegitimate children as well for non-Muslim children.

However, in the following year, the High Court in *Khoo Liang Keow v Tee Ming Kook*[28] did not agree with the decision in *Low Pek Nai*. The High Court agreed with the decision in *Re Balasingam and Paravathy* and stated that in the absence of any express provisions in the GIA on non-Muslim illegitimate children, the Parliament must have intended that the Act does not apply to illegitimate children. In *Low Pak Houng v Tan Kok Keong*,[29] the court held that section 5 of the GIA is intended to apply to a lawful father. Therefore, the putative father of an illegitimate child cannot claim guardianship under this Act. In the case of an illegitimate child, the mother has rights over and obligations towards her illegitimate child.

Therefore, having looked at the cases above, the current position in Malaysia is that the putative father of an illegitimate child does not have any rights or obligations on the child. The mother has all such rights. Reverting to the issue of whether a surrogate could claim the right to guardianship and custody of her child, the answer is yes as the child is deemed to be an illegitimate child and the majority of the cases as discussed above have held in favour of the mother.

C. Right to Maintenance

The third legal issue which would be discussed here is regarding the right to maintenance of a child born as a result of a surrogacy arrangement. There are two questions that arise here, i.e. first, whether the child does have a right to claim maintenance and if the answer is yes, the second question is from whom does he or she claim maintenance? The maintenance laws in Malaysia concerning non-Muslims are:

a) The Married Women and Children (Maintenance) Act 1950[30]
b) The LRA

Before discussing the right to maintenance under the abovementioned statutes, it is to be noted that in so far as a child born in a traditional surrogacy is concerned, his or her right to claim for maintenance from his or her biological parents is not an issue, as he or she is deemed a legitimate child and his or her rights are enshrined in the

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26 [1993] 3 MLJ 696.
27 [1995] 2 CLJ 110.
28 [1996] 2 CLJ 631.
29 [1998]2 MLJ 322.
30 Act 263.

abovementioned statutes. The problem, however, arises in a gestational surrogacy, as the child born is deemed to be an illegitimate child and as such does he or she have a right to claim maintenance under the abovementioned statutes? As an illegitimate child is not allowed to claim maintenance under the LRA unless he or she is adopted, the writer will focus on the Married Women and Children (Maintenance) Act 1950.[31]

Section 3(2) of the Married Women and Children (Maintenance) Act 1950 ("the 1950 Act") provides as follows:

> If any person refuses or neglects to maintain an illegitimate child of his which is unable to maintain itself, a court, upon due proof thereof, may order such person to make such monthly allowance as to the court seems reasonable.

The above provision confers the right to claim maintenance on an illegitimate child from his putative father. Generally, when an illegitimate child is claiming maintenance from his putative father, he or she has the onus of proving his or her paternity. This could be done by adducing his or her birth certificate if it has the name of the putative father stated or entered as the father of the child. In the alternative, a DNA test would have to be carried out.[32] Unfortunately, the child would face a problem when the putative father refuses to undergo a DNA test. The court too cannot compel him (the father) to do so as there is no law in Malaysia which gives the court the power to compel a person to take such a test for the purpose of proving paternity. However, such a problem would not arise in a surrogacy arrangement as the male intended parent would not dispute the child's paternity as in the first instance, he willingly gave his sperm to be fertilized with the surrogate's egg with the hope of getting a child.

The second issue that arises is who has the duty to pay maintenance to the child or in other words from whom can the child claim maintenance? Upon reading section 3(2) of the 1950 Act, there is no doubt that the putative father of the child has the duty to maintain the child. However, the issue that arises is whether the mother of the child too has a duty to maintain the child. "Mother" here could refer to the surrogate mother as well as the female intended parent. It is submitted that once the surrogate hands over the baby to the intended parents, she generally would have nothing to do with the child anymore and thus the child should not be able to claim maintenance from her. On the other hand, the female intended parent, once she receives the baby from the surrogate, "steps into the shoes of the surrogate". Therefore, the issue is whether the child could also claim maintenance from the female intended parent under the 1950 Act. Unfortunately there is no authority on this issue and authors have submitted that this issue is arguable.[33]

D. Right to Inheritance

The final legal issue that would be examined in this paper is concerning the right of the child concerned to inherit his or her parents' property upon the death of the latter.

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[31] See section 2 of the LRA for the definition of the term "*child of marriage*".

[32] *Supra* n 9 at p.314.

[33] *Supra* n 9.

Generally, when a person dies, it is said that he has either died testate (leaving a will) or died intestate (without leaving a will). Basically, when a person dies testate thus naming his beneficiaries in his will, the position is more or less settled. However, parties who were not named in the will, or even those named in the will as beneficiaries but are not satisfied with the distribution of the deceased's estate, may want to contest the said will under the Inheritance (Family Provision) Act 1971.[34] Section 3(1) of this Act provides that:

> Where a person dies domiciled in Malaysia leaving -
> (a) a wife or husband;
> (b) a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself;
> (c) an infant son; or
> (d) a son, who is, by reason of some mental or physical disability, incapable of maintaining himself;
> then, if the court on application by or on behalf of any such wife, husband, daughter or son as aforesaid (in this Act referred to as a "dependent" of the deceased) is of the opinion that the disposition of the deceased's estate effected by his will, or the law relating to intestacy, the combination of his will and that law, is not such as to make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's net estate for the maintenance of that dependant.

The next issue is whether "son" and "daughter" stated in section 3(1) above refer only to legitimate children or do they include illegitimate children as well. Section 2 of the Act defines "son" and "daughter" as follows:

> "son" and "daughter" respectively include a male or female child adopted by the deceased under the provisions of any written law relating to adoption of children for the time being in force and also the son or daughter of the deceased *en ventre sa mere* at the date of the deceased.

The above definition refers to legitimate children, adopted children and even an unborn foetus, thus leaving out illegitimate children. The issue then is if it includes "an unborn foetus", would it then include an unborn illegitimate child of the deceased? There is no authority on this issue yet.

When the deceased dies intestate, the Distribution Act 1958[35] would come in to decide the distribution of the deceased's property. Section 6 lists down the categories of persons who are entitled to his or her property. Basically, there are three categories of persons:

a) spouse
b) issues
c) parents.

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[34] Act 39.
[35] Act 300.

For our purposes, the question is whether "issue" here refers to only legitimate issues or does it include illegitimate issues (for example, children born by way of a gestational surrogacy)? Section 3 of the Act defines "issue" as follows:

> "issue" includes children and the descendants of the deceased children.

Section 3 goes on to define who a "child" is as follows:

> "child" means a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any of such wives, but does not include an adopted child other than a child adopted under the provisions of the Adoption Act 1952.[36]

The above definition clearly excludes illegitimate children. Hence, a child born by way of a gestational surrogacy, unfortunately, would not be able to inherit his intended parents' property upon their demise. It is submitted that in order to protect the interest of such a child, it is best for the intended parents to write a will naming the child concerned therein as a beneficiary.

V. COMPARISON WITH THE LAW IN OTHER JURISDICTIONS

Having discussed the four legal issues that may arise as a result of a surrogacy arrangement, it is observed that the child concerned, specifically a child born by way of a gestational surrogacy, would be deemed illegitimate in the eyes of the law and therefore would be deprived of his basic rights. There are no laws on surrogacy yet in Malaysia in order to resolve the above issues. Hence, the writer would next examine surrogacy laws which are already in force or have been drafted in other jurisdictions such as Queensland, Australia and India respectively in order to see if these laws adequately protect the rights of children born as a result of a surrogacy arrangement.

A. Queensland, Australia

The Parliament in the state of Queensland, Australia passed the Surrogacy Act 2010.[37] The preamble to the Act provides as follows:

> An Act about surrogacy, to provide for the court-sanctioned transfer of parentage of children born as a result of particular surrogacy arrangements, to prohibit commercial surrogacy arrangements, to make particular related amendments of the Adoption Act 2009, the Births, Deaths and Marriages Registration Act 2003, and the regulation under that Act, the Criminal Code, the Domicile Act 1981, the Evidence Act 1977, the Guardianship and Administration Act 2000 and the Powers of Attorney Act 1998, to amend the Status of Children Act 1978 for particular purposes and to make minor and consequential amendments of the Acts as stated in schedule 1.

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[36] Act 257.
[37] Act No.2 of 2010.

It is clear from the preamble that the Act prohibits commercial surrogacy, thereby only permitting altruistic surrogacies in Queensland. The Act was also passed, mainly to provide for transfer of parentage of children born as a result of surrogacy arrangements, which is sanctioned by the courts. The issue that arises here is whether it was passed to protect the welfare and best interests of the children concerned.

Reference could be made to section 5 of the Act in order to answer the question above. Section 5 in providing the main object of this Act, states, *inter alia,* in paragraph (b) as follows:

> The main objects of this Act are -
> (a) ...
> (b) in the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result -
> (i) to establish procedures to ensure parties to the arrangement understand its nature and implications; and
> (ii) to safeguard the child's wellbeing and best interests.

The objectives stated above are two-fold and actually answers the intention of the writer in writing this paper. First, it states that the Act intends to establish procedures so that the parties to a surrogacy arrangement *understand its nature and implications* of such an arrangement. This is very important as was stated in the beginning of this paper. Intended parents who enter into a surrogacy arrangement without understanding the nature and implications of this arrangement could be in for a shock later when legal issues as have been discussed above arise. Secondly, the Act states that it also aims *to safeguard the child's wellbeing and best interests*. This actually, in the writer's opinion, is the most important factor which should be considered by the legislation.

The above concern is in fact stated in section 6 of the Act which states the "*Guiding principles*" as follows:

> **6. Guiding principles**
>
> (1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

The above principle places importance on the wellbeing, and best interests of the child, not only through his or her childhood period, but also for "the rest of his life". Section 5 further explains the principles which would be administered in safeguarding the wellbeing and best interests of the child concerned as follows:

> (2) Subject to subsection (1), this Act is to be administered according to the following principles -
> (a) a child born as a result of a surrogacy arrangement should be cared for in a way that -
> (i) ensures a safe, stable and nurturing family and home life; and

> (ii) promotes openness and honesty about the child's birth parentage; and
> (iii) promotes the development of the child's emotional, mental, physical and social wellbeing;
> (b) the same status, protection and support shall be available to a child born as a result of a surrogacy arrangement regardless of -
> (i) how the child was conceived under the arrangement; or
> (ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or
> (iii) the relationship status of the persons who become the child's parents as a result of a transfer of parentage;
> (c) the long-term health and well being of parents to a surrogacy arrangement and their families should be promoted;
> (d) the autonomy of consenting adults in their private lives should be respected.

This Act ensures that the child concerned is provided with a safe, stable and nurturing family and home life and the development of the child's emotional, mental, physical and social wellbeing. Upon perusing the above section, the writer is of the opinion that the most important part is paragraph (b) which expressly states, *inter alia,* that regardless of how the child was conceived under the surrogacy arrangement or whether there was a genetic relationship between the child and any of the parties to the arrangement, the same status, protection and support should be available to the child. This means that no matter whether the child was conceived by way of a traditional surrogacy or a gestational surrogacy, he or she should be given the same status, protection and support. It is submitted that "status" here, though not defined in the Act, could be presumed to refer to the legitimate status of the child. If this presumption is accepted, this would resolve the problem of the illegitimate status of a child born by way of a gestational surrogacy and the legal issues that arise thereafter.

Apart from resolving the issue of the legitimate status of the child, this Act also resolves the problem of the surrogate mother refusing to hand over the child to the intended parents. Reference could be made to section 39 of the Act which provides on the "Effect of a parentage order". In order for this section to be applicable, the intended parents have to obtain a parentage order from the court provided for under sections 21 to 38.[38] The effect of a parentage order is provided for under section 39(2) as follows:

> (2) On the making of the parentage order -
> (a) the child becomes a child of the intended parent, or intended parents, and the intended parent or intended parents, become the parent, or parents of the child; and
> (b) the child stops being a child of a birth parent and a birth parent stops being a parent of the child.

Therefore, once a parentage order is issued by the court, the birth mother or the surrogate ceases to be the parent of the child concerned and the intended parents step into

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[38] Part 2 of the Act.

the shoes of the surrogate, thereby answering the question of who is the lawful guardian entitled to have custody of the child.

B. India

India could be described as a leader in international surrogacy. Many infertile couples seek Indian females as surrogate due to the relatively low cost. Commercial surrogacy has been legal since 2002. The issue of commercial surrogacy arose in the landmark case of baby Manji or "Baby M" (Japanese Baby), where a Japanese man's sperm and an egg from an unknown donor were fertilised through IVF in Gujarat in July 2008. The Supreme Court held that commercial surrogacy is permissible in India and directed the legislature to pass a law to govern surrogacy arrangements in India.[39]

As a result of the above case, the Law Commission of India submitted its 228th Report on "*Need For Legislation To Regulate Assisted Reproductive Technology Clinics As Well As Rights and Obligations of Parties To A Surrogacy"*. The Commission has strongly recommended against commercial surrogacy.[40]

The Assisted Reproductive Technology Bill 2010 aiming to regulate the surrogacy business in India was passed to provide for a national framework for accreditations, regulation and supervision of assisted technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto.[41]

Chapter VII of the Bill spells out the Rights and Duties of Patients, Donors, Surrogates and Children. Section 34(1) states that both the intended parents and the surrogate shall enter into a surrogacy arrangement and this agreement shall be legally enforceable. Subsection (2) goes on to state that all expenses until the child is ready to be delivered to the intended parents shall be borne by them.

Section 34(3) is a pertinent provision in this Bill as it expressly permits the surrogate to receive monetary compensation from the intended parents. When comparing this statute to the Surrogacy Act of Queensland, it could be noted that this proposed law allows commercial surrogacy whereas the Australian law expressly prohibits it.

Section 34(4) provides that a surrogate mother shall relinquish all parental rights over the child. This is an extremely important provision as it prohibits the surrogate from claiming parental rights over the child either after the child is born or at a later date. This is also to protect the welfare of the child in order to avoid any confusion in the future as to the identity of his or her biological mother.

Section 34(1) of the Bill provides that the intended parents are legally bound to accept the custody of the child irrespective of any abnormality that the child may have. This provision is to ensure that the intended parents do not breach the agreement on the

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39 S*urrogacy Laws India,* Legally Yours: http://www.surrogacylawsindia.com/legality.php?id=%207&menu_id=71. Site accessed on 1.3.2013.

40 *Ibid*.

41 Statement of Objects and Reasons.

ground that the child was born abnormal. If the intended parents refuse to accept the custody of the child, it would constitute an offence under this Bill.

Section 35 constitutes a very important provision as it determines the status of the child. Subsection (1) provides that a child born to a married couple through the use of assisted reproductive technology shall be presumed to be the legitimate child of the couple, having been born in wedlock, and with the consent of both spouses, and shall have identical legal rights as a legitimate child born through traditional surrogacy. There is no mention of the status of a child born from a gestational surrogacy. Nevertheless, subsection (7) would come in handy to help solve this problem. Subsection (7) states that the birth certificate of a child born through the use of assisted reproductive technology shall contain the name of the parents who sought such use. Therefore, it is possible to assume that the status of a child born using the gestational surrogacy method would be deemed to be a legitimate child under this Act.

However, this Bill is yet to become law in India. It would in fact solve many legal issues once it is enforced.

VI. RECOMMENDATIONS

Having looked at the serious legal issues that may arise in Malaysia as a result of surrogacy arrangements (especially gestational surrogacies), the writer would next attempt to recommend certain measures to resolve the abovementioned issues. The main issue that needs to be addressed here is concerning the legitimate status of a child born by way of a gestational surrogacy. As stated earlier, such child would be deemed illegitimate in the eyes of the law.

In order to overcome this problem, it is submitted that the child should be legitimated. One way of legitimating an illegitimate child is through adoption. The intended parents would have to apply to the court under the Adoption Act 1952[42] for an adoption order, having complied with the conditions stated in the said Act. Upon the adoption order being made by the court, they would become the legal parents of the child. Section 9 of the Adoption Act 1952 states the effect of an adoption order as follows:

> 9(1). Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent, guardian of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock:
>
> Provided that, in any case where two spouses are the adopters such spouses shall in respect of matters provided in this subsection and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the

[42] Act 257.

> adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother, respectively.

Hence, once the adoption order is made by the court, all the right, duties and obligation of the biological parents are relinquished and are transferred to the adoptive parents.

At this juncture, a very pertinent issue needs to be highlighted. Section 6 of the Adoption Act states the matters the court has to consider before issuing an adoption order. One of the matters stated in section 6(c) is that neither the applicant nor the parent or guardian has received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant or the parent or the guardian any payment or other reward in consideration of the adoption except such as the Court may sanction. Therefore, if the surrogacy arrangement between the intended parents and the surrogate is a commercial surrogacy, it would not be possible for the intended parents to adopt the said child as the Adoption Act prohibits altogether any monetary payment in exchange for the child. The reason behind this prohibition is that a child should not be treated as a chattel.

As an alternative to the above recommendation to adopt the child concerned, with the rising number of infertile couples resorting to surrogacy as a way for them to have a child and the increasing popularity of surrogacy, the writer would recommend that a law be passed to regulate surrogacy arrangements in Malaysia, as has been done in other jurisdictions. It is also pertinent for the legislature to come up with such laws quickly. This is due to the fact that there is no surrogacy law, the children born as a result of surrogacy arrangements would be deprived of their basic rights, as has been discussed earlier.

In addition to the above measures, it is also pertinent for the medico-legal institutions in the country such as the Malaysian Medical Association and the Bar Council to conduct legal clinics to educate the intended parents and surrogates on the legal issues that would arise as a result of surrogacy arrangements. The position concerning the Muslims wanting to resort to surrogacy is resolved as a result of the *fatwa* issued in 2008. The problem therefore is concerning non-Muslims wanting to enter into surrogacy arrangements.

VII. CONCLUSION

In conclusion, it is submitted that it is disheartening to note that the development of Malaysian law is not on par with the development of medical science in the nation. Medical science has made it easy for childless couples to resort to surrogacy methods to have a child. All they have to do is to seek medical advice from a medical practitioner who is a specialist in infertility.

On the other hand, the legislature is left far behind in enacting laws to regulate surrogacy arrangements in order to ensure that the rights of all the parties concerned, especially the child, are protected. This is a serious issue that the country has to grapple in the coming years if the legislature does not make any attempt to enact a law to regulate surrogacy in Malaysia for the non-Muslims.

Directors' Duties of Care, Skill and Diligence: An Analysis of Some Developments in Malaysia[†]

Sujata Balan,* Saw Tiong Guan,** Sarah Tan Yen Ling***

Abstract

In 2007, the Malaysian Companies Act 1965 was amended to incorporate new provisions to deal with directors' duties of care, skill, and diligence and their powers of delegation and reliance on information provided by others. In addition, a 'business judgment rule' was inserted into the Act. This article examines, from the Malaysian perspective, the origins of these novel provisions, their contents, the need for enacting them and their likely impact on business processes and managerial decisions made by company directors in Malaysia.

I. INTRODUCTION

There is a growing trend towards better corporate governance in Malaysia. Since the implementation of key legislation such as (amongst others) the Malaysian Code of Corporate Governance (MCGG) introduced in 2000 and amended in 2007, the 2007 amendment to the Malaysian Companies Act (the Act) and the Financial Services Act 2013, there has been a shift in the focus of corporate governance towards a more accountable business environment. In 2007, the Malaysian Companies Act 1965("the Act") was amended to incorporate provisions to deal with director's duties of care, skill, and diligence and their powers of delegation and reliance on information provided by others. The standard of care expected of a director has evolved from a previously silent self-regulated position, relying heavily on the assumption of honesty and reasonable diligence, to a more structured system.

In addition, a complementary provision was inserted into the Act, namely a 'business judgment rule', intended to protect directors from liability for their business judgments, provided that certain requirements are fulfilled. The old position prior to the amendment took the view that courts substituted their inexperience in the world of commerce for the assumption of good faith by directors. This position operated on the presumption that independent and more business-savvy directors with extensive commercial knowledge could be relied on to act honestly and rationally.

† This article is dedicated to the late Professor Dato' P. Balan who was a source of wise counsel and great inspiration.

* Senior Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia

** Senior Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia

*** Lecturer, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia

This article discusses these two pertinent developments in Malaysia,[1] examines the origins of these novel provisions, their contents, the need for enacting them and their (likely) impact on company directors in Malaysia. It also intends to demonstrate that the courts are no longer leaving the question of sound business judgements squarely on the dictates of commerce. Current changes in the law are skewing directors towards taking more reasonable and considered decisions for the benefit of the company.

II. THE ENGLISH AND AUSTRALIAN HERITAGE

Malaysia's bond with English company law began in the last quarter of the nineteenth century when the legislature of the Straits Settlements[2] enacted its first Companies Ordinance based on the Companies Act 1862 of England. The current legislation on companies in Malaysia, the Companies Act 1965, is based on the Uniform Companies Act 1961 of Australia, also a descendant of English legislation on companies. The Malaysian Act is not a Code and a substantial part of the law in Malaysia is derived from case law. English case law on companies applies in Malaysia by reason of s 3 of the Malaysian Civil Law Act 1956 which provides that English common law and equity as they stood on the cut-off dates specified in the Act apply in so far as the local circumstances of the states of Malaysia and their respective inhabitants permit.[3] The cut-off dates are: (a) 7 April 1956 for West Malaysia, (b) 12 December 1949 for Sarawak, and (c) 1 December 1951 for Sabah. As a result of this strong link with English law, cases on company law decided before the cut-off dates continue to apply in Malaysia,[4] while English cases decided after the cut-off dates are not binding but are of persuasive authority. Another outcome of this link with English law is the enduring interest in Malaysia about new developments in the company law in England and other common law jurisdictions to which English company law jurisprudence has travelled. Australian case law has no binding effect in Malaysia although they are highly persuasive. Scattered references to Australian case law can be found in many Malaysian decisions.[5]

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1 The *Companies (Amendment Act) 2007* (Act A1299), the Act through which these amendments were achieved, also made other significant changes regarding directors' duties. For a discussion of these changes, see Balan, Sujata and Lingam, S.T,'The Effects of the Companies (Amendment) Act 2007 on Directors' Duties in Malaysia: Some Observations',(2007) 5(2)*Asia Law Review*, pp 115-163 and Mohammad Rizal Salim, 'Company Law Reform in Malaysia: The Role and Duties of Directors'(2009) *International Company and Commercial Law Review*, p 142.

2 At that time the Straits Settlements comprised Penang and Malacca and the island of Singapore.

3 For further discussion of the reception of English Law in Malaysia under the *Civil Law Act 1956* see Wan Arfah Hamzah, *A First Look at the Malaysian Legal System* (Oxford Fajar, 2009) pp 115 - 149; Sharifah Suhanah Syed Ahmad, *Malaysian Legal System* (2nd ed, Butterworths Asia, 2007) pp 177 – 196; and Wu Min Aun, *The Malaysian Legal System* (2nd ed, Longman, 1999) pp 89 – 144.

4 *PJTV Denson (M) Sdn Bhd* v *Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136, *Ng Pak Cheong* v *Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64 and *The Board of Trustees of the Sabah Foundation &Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469 are examples of cases where English law on the fiduciary duties of a director was applied by the Malaysian courts.

5 See for instance *Tan Guan Eng* v *BH Low Holdings Sdn Bhd* [1992] 1 MLJ 105, *Lim Hean Pin* v *Thean Seng Co Ltd* [1992] 2 MLJ 10,*Gula Perak Sdn Bhd* v *Agro Products (M) Sdn Bhd* [1989] 1 MLJ 442, *Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar& 17 Ors* [2008] 2 MLJ 915 and *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616.

III. DIRECTORS' DUTIES: DEVELOPMENT OF THE LAW IN THE PAST TWO CENTURIES

A. Dynamic growth of company law did not include the law relating to directors' duties of care, skill and diligence

A general observation that may be made of company law in England and other common law jurisdictions is that it has, in the form of either statutes or case law, developed and advanced at a tremendous pace in the past two centuries.[6] A striking feature of this dynamic growth was the evolution of strict principles governing directors' fiduciary duties to their companies, a development achieved mainly through the unrelenting efforts of judges to ensure that directors acted honestly and did not use their position to feather their own nests. Despite the vibrant growth of *this* aspect of company law, negligible attention was given, until recently, to the development of a closely connected area to directors' fiduciary duties – the duties of care, skill and diligence that directors owe to their companies. Until the closing years of the twentieth century little judicial attention was displayed in England and other common law jurisdictions to evolve clear principles regarding this subject. The cases display reluctance by the courts to enter the boardroom and cast their judgment over management or risk-taking decisions of directors, probably because it was a function for which judges are inadequately trained and ill-equipped to decide.[7]

This lack of judicial enthusiasm to develop this area of the law may have stemmed mainly from the fact that most directors were part-time directors without any contractual obligations to the companies they served. Further the office of director was not recognised as a profession, or as a profession which required its holder to display specific skills.[8] Most of them were elected not because of their qualifications, skills or commercial acumen but because of the respectable and influential positions that they enjoyed in society. The end result of all these was that the courts refrained from applying the strict standard of care, skill or diligence imposed upon trustees or agents or employees to company directors and, until recent years, set lenient standards for directors.

A lack of zeal to develop this area of law was also displayed by the legislature. Until recently, the legislature had failed to demonstrate any visible eagerness to advance the law in this area by statutory involvement. In recent years, the demands of modern commerce, the increased emphasis on good governance and the calls for stricter standards from law reformers, have compelled the legislatures of many countries to enact special provisions to deal with the subject of directors' duties of care and skill. Two examples

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6 An item of evidence of this tremendous growth is the massive size of the present Companies Act 2006 of the United Kingdom and the Corporations Act 2001 of Australia.

7 See *Gower's Principles of Modern Company Law* (4th ed, London: Stevens & Sons, 1979) at pp 602-604 for a vivid account of the disinclination of the courts to impose a stricter degree of skill and diligence. Whilst referring to the difficulty faced by judges in examining boardroom decisions Gower commented (at p 602):

> Whereas their training and experience made them well-equipped to adjudicate on questions of loyalty and good faith, they move with less assurance among complicated problems of economics and business administration. Hence they display an understandable reluctance to interfere with the directors' business judgment-a reluctance of which many examples will be found throughout the whole area of company law.

8 See *Farrar's Company Law* (4th ed, London: Butterworths, 1998) at pp 391-2.

are the relevant provisions enacted in the United Kingdom in 2006 by the Companies Act 2006[9] and in Malaysia by the Companies (Amendment) Act 2007 (Act A1299).[10] These provisions are discussed below.

B. The case of Re City Equitable Fire Insurance Co Ltd : A brief revisit

For about seven decades, English law on directors' duties of care and skill was influenced by Romer J's celebrated dictum in the1925 case of *Re City Equitable Fire Insurance Co Ltd.*[11] It was generally assumed that the dictum also applied in Malaysia, although there is no direct judicial authority on this point.

In the course of his judgment, Romer J made a survey of the leading cases on the subject and expressed the view that the legal position regarding directors' duties of care, skill and diligence was reflected in three propositions.[12] A brief analysis of each these propositions is a helpful prologue for a proper exposition of the new statutory developments that will be examined in the later parts of this article.

The first proposition dealt with a director's duty of skill. His Lordship said:

> A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience.[13]

This proposition, which prescribed a subjective element ('be expected from a person of his knowledge and experience'), has been the subject of constant criticism by judges and commentators.[14] The skill required of a director was linked to his 'knowledge and experience'. It can be seen that this subjective standard favoured a director with little or

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[9] See section 174 of the *Companies Act 2006*.

[10] A new provision, s 132(1A), was inserted into the *Companies Act 1965* by the *Companies (Amendment) Act 2007*.

[11] [1925] Ch 407. In this case, a company went into winding up after it lost an enormous sum of money. The losses were caused mainly by the deliberate fraud and other "nefarious activities" of its managing director, G.L. Bevan. The defendants in this case were Bevan's trusting colleagues on the board. They were all part-time directors. The liquidator (the plaintiff) of the company sought to make them liable for some of the losses. The plaintiff alleged that the losses were caused by the defendants' negligence, although the plaintiff admitted they were all honest individuals. The directors escaped liability because of article 150 of the company's articles of association which protected them from liability. Such a clause will be invalid today. See for example, s 140 of the Malaysian *Companies Act 1965* and s 232 of the United Kingdom *Companies Act 2006*.

[12] Professor John Farrar classifies Romer J's views into four propositions. See Farrar, Director's Duties of Care, Issues of Classification, Solvency and Business Judgment and the Dangers of Legal Transplants, (2011) 23 SAcLJ 745 at 00 747-750.

[13] [1925] Ch 407 at p 428.

[14] See for instance High Level Finance Committee Report on Corporate Governance (Malaysia) Ch 6 paras 2.2.51-2.2.65;*Daniels and Ors v Anderson and Ors*(1995)16 ACSR 607 at p 659 (New South Wales Court of Appeal). But critics of *Re City Equitable Fire Insurance Co Ltd* may have misread Romer J's first proposition. See Hicks, 'Directors' Liability for Management Errors', (1994) 110 *Law Quarterly Review* p 390 for a thought-provoking analysis of the case.

no knowledge and experience.[15] A director with less skill and experience had a higher prospect of escaping liability for negligence than his or her counterpart who had greater skill and experience. The subjective standard was in fact a strong dissuasion for directors to improve their knowledge, skill, experience and professionalism as they will then be required to perform and carry out their duties on a higher standard.

It is not clear from Romer J's judgment whether the first proposition applied to both part-time and full-time salaried directors. The defendants before his Lordship in *Re City* were all part-time directors and it is highly probable that the learned judge had in mind a part-time director. It is submitted that even in the nonchalant era in which *Re City* was decided this lenient proposition could not have applied to the skill expected from full-time salaried directors.[16]

English case law began to move away from Romer J's subjective standard in the closing years of the twentieth century. This move culminated in the enactment of s 174 of the Companies Act *2006*, a provision which adopts a new and stricter two-fold objective/subjective test and which is crafted to apply to both part-time and full-time salaried directors. The legislature in Malaysia has inserted a similar statutory provision in s 132(1A) of the Companies Act 1965 in 2007 and this will be further discussed below.

Romer J's second proposition dealt with a director's duty of diligence. His Lordship said:

> A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever in the circumstances he is reasonably able to do so.[17]

This proposition was meant to reflect the law as it stood in 1925 and it is fairly certain that Romer J must have intended it to apply to a part-time director of his day. The indulgent

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15 *In re Brazilian Rubber Plantations and Estates Ltd* [1907] 1 Ch 425 Neville J made the following remarks *(obiter)* about a director of a rubber company (at p 437):

> He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance; while if he is acquainted with the rubber business he must give the company the advantage of his knowledge when transacting the company's business.

16 See also the views expressed in Gower and Davies, *Principles of Modern Company Law* (8th ed, London: Sweet and Maxwell, 2008) at p 489.

17 [1925] Ch 407 at p 429.

attitude in the second proposition is reflected in the relevant case law of the later part of the nineteenth century.[18]

It is apparent that Romer J's second proposition would be inappropriate for full-time or executive directors of his time, who would have been expected to give their full attention to the companies in which they serve as directors. Further, it may not be an appropriate standard for the present day's non-executive or independent director, even though such a director is a part-time official. As the years passed after the *Re City* case, the importance of the role played by non-executive, part-time or independent directors in achieving effective corporate governance has become a feature of emphasis in many jurisdictions. Although such directors need not give full-time attention to the affairs of the company, they must take active steps to understand the company's structure, its constitution, its business operations, its internal controls and keep themselves informed of its affairs. Further, although they are a part-time directors, greater diligence may be demanded of them in attending meetings.[19]

Romer J's third proposition dealt with delegation of the duties of a director. His Lordship said:

> In respect of all duties that having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is, in the absence of grounds of suspicion, justified in trusting that official to perform such duties honestly.[20]

This third proposition is, as a general rule, true today as it was in 1925 and may apply to both executive and non-executive directors. Except in the case of very small companies it is impossible for a board of directors to discharge their duties without delegating some of the duties to its skilled managers and employees. It is inevitable that directors will need to rely on those persons, and on persons who supply them with information, to be

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18 For example, in *Re Denham & Co* (1883) 25 Ch D 752 a director did not attend board meetings for four years. He was held to be not personally responsible for fraudulent reports and balance sheets issued and passed by his fellow directors. In *Re Cardiff Savings Bank, The Marquis of Bute's Case* [1892] 2 Ch 101 the Marquis was described as the President of a bank which had seventeen trustees and thirty-seven managers. During his lifetime he attended only one meeting of the company, that is, a meeting of the bank's trustees and managers in 1869 and for more than two decades thereafter, took no part in the affairs of the bank. The bank suffered severe losses when the negligent manner in which it was managed enabled one of its officers to perpetrate frauds on the bank. These events ultimately caused the winding-up of the bank. Stirling J rejected an attempt by the liquidator to seek compensation from the Marquis, stating, in an oft-quoted dictum (at p109):

> But neglect or omission to attend meetings is not in my opinion, the same thing as neglect or omission of a duty which ought to be performed at those meetings. If, indeed he had had the knowledge or notice of either that no meetings of trustees or managers were being held, or that a duty which ought to be discharged at those meetings was not being performed, it might be right to hold that he was guilty of neglect of the duty.

19 It is worth noting that under article 72(f) of Table A (that is, the model set of articles provided under the Fourth Schedule of the *Companies Act 1965* and which is adopted by many companies in Malaysia), the office of a director shall become vacant if the director is, without the permission of his fellow directors, absent for six months from board meetings held during the said six months.

20 [1925] Ch 407 at p 429.

honest and efficient. In the words of Halsbury LC in the case of *Dovey v Cory*:[21] 'The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management.' At common law the justification for directors' trusting a person to whom they had delegated their duties or a person who provides them with information would depend on the circumstances of each case. Among the factors relevant are the provisions in the company's articles regarding delegation of duties/responsibilities, whether the duty delegated was in fact delegable, the needs and exigencies of the business, the absence of grounds of mistrust or suspicion regarding the official's competence and honesty, and the absence of personal negligence on the part of the director in the selection of the delegate. The third proposition would not protect directors if they had placed unjustifiable or 'unquestioning reliance'[22] on a delegate to discharge the function or duty delegated. Directors should not assume that their power of delegation entitles them to abdicate all responsibility for supervision.[23]

IV. THE DEPARTURE FROM THE SUBJECTIVE YARDSTICK IN RE CITY EQUITABLE FIRE INSURANCE CO LTD AND THE ADOPTION OF A TWOFOLD 'OBJECTIVE/ SUBJECTIVE' STANDARD OF CARE

A. Section 214(4) of the Insolvency Act 1986 of the United Kingdom and its dual objective/subjective standard

A significant development in United Kingdom, which will subsequently have an important effect on Malaysian company law, was the enactment of s 214(4) of the Insolvency Act 1986, a provision related to wrongful trading. Under the provision a pertinent factor to establish a director's liability for wrongful trading is whether the facts which the director of a company ought to have known or ascertained, the conclusions which he ought to have reached and the steps which he ought to have taken, are those which would be known, or ascertained, or reached, or taken by '*a reasonably diligent person having both-(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried by that director in relation to the company, and (b) the general knowledge, skill and experience that director has*'(writer's emphasis).

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21 [1901] AC 477 at p 486.

22 Per Langley J in *Equitable Life Insurance Society* v *Bowley and others* [2004] 1 BCLC 180 at p 189. See also the case of *Dochester Finance Co Ltd and another* v *Stebbing and others* [1989] BCLC 498 where two non-executive directors of the company, P and H, left its management to S, another director. No board meetings of the company were held. P and H made infrequent visits to the company's office. They signed a number of cheques in blank. The cheques were misused by S. The court held that P and H were negligent in providing S with cheques signed in blank. Foster J noted (at p 505) that: 'Apart from that they not only failed to exhibit the necessary skill and care in the performance of their duties as directors, but they also failed to perform any duty at all as directors of Dorchester'.

23 This subject has witnessed some case law activity in England in recent years. See Mayson, French and Ryan, *Company Law* (22nd ed, Oxford: OUP, 2005) at pp 519-520 and Gower and Davies, (note 16 above), pp 491-4 for a discussion of the recent case law development in England.

The standard prescribed in the section has two limbs. The first is the objective standard which every director must meet to escape liability for wrongful trading. However, a director who has satisfied this objective standard may still be liable if he or she does not satisfy the subjective standard prescribed in the second limb of the provision, if it is applicable to the director. This subjective standard is based on the additional knowledge, skill and experience of the director, if he or she has any. As will be seen below, the enactment of s 214(4) of the Insolvency Act 1986 had important consequences for the United Kingdom and Malaysia.

B. Judicial rejection in the United Kingdom of the 'subjective' standard as set out in Re City Equitable Fire Insurance Co Ltd and the adoption of an 'objective/subjective' yardstick

In England, another important event occurred in 1991 when Hoffman J accepted without argument, a submission from counsel appearing for one of the defendants in *Norman* v *Theodore Goddard*[24] that the test for whether a director has satisfied the standard of care owed to his company 'was accurately stated in section 214(4) of the Insolvency Act 1986'.[25] Three years later, the same judge in *Re D'Jan of England Ltd*[26] once again accepted this twofold objective/subjective standard set out in s 214(4) as a provision which correctly states the common law on the subject.[27]

In 1998 the Law Commission of England and Wales and the Scottish Law Commission described these new developments as 'a remarkable example of the modernisation of the law by judges'.[28] However it must be pointed out, with respect, that this new approach had an unusual and somewhat controversial feature in that it advocated the application to the common law duty of care, a standard enacted by statute for the specific purpose of wrongful trading.[29]

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24 [1991] BCLC 1028.

25 *Ibid* at pp 1030-1031.

26 [1994]1 BCLC 561.

27 In this case, a proposal form signed by a director for fire insurance for his company contained a material misrepresentation. Subsequently, a fire occurred at the company's premises and its stock was destroyed. The insurers repudiated the policy and denied liability for the loss on account of the misrepresentation. Later the company went into liquidation and the liquidator brought proceedings against the director alleging that the director was negligent in signing the proposal form. Hoffman LJ held that the director was negligent and went on to note ([1994]1 BCLC 561 at p 563):

> In my view, the duty of care owed by a director at common law is accurately stated in s 214(4) of the *Insolvency Act 1986*… Both on the objective test, and having seen [the director concerned], on the subjective test, I think that he did not show reasonable diligence when he signed the form. He was therefore in breach of his duty to the company.

Hoffman LJ also held that this was an appropriate case for the court to exercise its discretion in favour of the defendant-director under s 717 of the *Companies Act 1985* of England which empowered the court to relieve a director wholly or in part from liability in certain specified circumstances if the court considered that the director concerned had acted reasonably and ought fairly to be excused. A similar provision is found in s 354 of the Malaysian *Companies Act 1965*.

28 See the Consultation Paper No 153, 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties' (London: Stationery Office, 1998) (para 13.19 at p 283). The Paper is available online at <http://www.justice.gov.uk/lawcommission/areas/649.htm>.

29 See Farrar, (note 8 above), p 395. See also Mayson, French and Ryan, (note 23 above), pp 518-9.

C. Australia

In Australia in the nineteen-nineties (1990s) the traditional approach to directors' duties of skill, care and diligence was seriously challenged in the *AWA* litigation,[30] which demonstrated a remarkable and unconventional new approach in this area of the law.[31] The majority in the Court of Appeal of New South Wales (Clarke and Sheller JJA) were of the opinion that the subjective standard used in the older cases were out-dated and, more significantly, that directors' liability for breach of the duty of care could be founded in the common law tort of negligence.[32] In the view of the majority:[33]

> We are of the opinion that a director owes to the company a duty to take reasonable care in the performance of the office. As the law of negligence has developed, no satisfactory policy ground survives for excluding directors from the general requirement that they exercise reasonable care in the performance of their office. A director's fiduciary obligations do not preclude the common law duty of care.

The legal position in Australia became more certain when it codified this area of the law. The current position is found in s 180(1) of the Corporations Act 2001 which reads:

> (1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
> (a) were a director or officer of a corporation in the corporation's circumstances; and
> (b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.[34]

It can be seen that s 180(1) lays down a standard of care and diligence which is not linked to subjective elements. It is measured against whata "reasonable person" would exercise if he or she occupied the actual position held by the director and had the same responsibilities associated with that position in "the corporation's circumstances".[35] Obviously the phrase "the corporations' circumstances" is a wide term and may include a number of items, for example, the category, size, nature, financial status of the company concerned as well the contents of its constitution.[36] A criticism that can made of s 180(1) is that whilst it refers

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30 *AWA Ltd* v *Daniels and Ors*(1992) 10 ACLC 933 (Rogers CJ (Comm D)) and *Daniels and Ors v Anderson and Ors*(1995)16 ACSR 607; (1995) 13 ACLC 614 (New South Wales Court of Appeal).

31 See Professor Farrar's illuminating analysis of the *AWA* case in Farrar, Directors' Duties of Care, (2011) SAcLJ 745 at pp 752-753.

32 [1995] 16 ACSR 607 at p 656.

33 *Ibid* at p 668.

34 Section 180 (1) is a civil penalty provision (see section 1317E and *Australian Securities and Investment Commission*v *Flugge* [2008] VSC 473, at 556-8).

35 Austin and Ramsey, *Ford's Principles of Corporation Law* (13th ed, Australia: Butterworths, 2007) pp 389-395 contains useful case law examples and illustrations where s 180(1) and the corresponding provisions that it replaced were applied

36 See *Australian Securities and Investment Commission* v *Rich* (2009) NSWSC 1229, at part [7201] of Austin J's judgment.

to the standard for "care and diligence" it makes no mention of the standard for the skill required of a director,[37] causing the legal position regarding this subject to be unclear.[38]

A related development in Australia is the enactment of a business judgment rule as a possible defence for directors where it is alleged that they had breached s 180(1). This matter is dealt with in part 8 below.

V. CODIFICATION OF THE LAW RELATING TO DIRECTORS' SKILL, CARE AND DILIGENCE IN THE UNITED KINGDOM

In 1998, the Law Commission of England and Wales and the Scottish Law Commission issued a joint Consultation Paper entitled 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties'[39] and invited respondents to comment on the Paper's proposal to state a director's duty of care and skill in statutory form. The Consultation Paper offered for the consideration three options regarding the standard of care, skill and diligence that was to be stated in a statutory provision. They were (i) a subjective test based on the traditional standard in *Re City*; (ii) a dual objective/subjective standard as illustrated by s 214(4) of the Insolvency Act 1986;[40] and (iii) a purely objective standard, namely, a duty to exercise the care, skill and diligence of a reasonable person having both the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company.

The Commissions' Report[41] indicates that the majority of the respondents rejected the subjective test in the first option and the purely objective test in the third option. The majority of those who rejected the first option were of the opinion that a subjective

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[37] It will be seen that in 2006, the United Kingdom adopted a dual objective-subjective standard for directors' duty of care, skill and diligence in s 174 of the *Companies Act 2006*. Malaysia followed suit in 2007 by inserting into its *Companies Act 1965* a similar provision (s 132(1A)) on this subject. Both provisions deal expressly with a director's duty of care, skill and diligence.

[38] See a valuable discussion in Austin and Ramsey, Ford's Principles of Corporation Law (13th ed, Australia: Butterworths, 2007) at p 389. See also Professor Farrar's comments on the subject of skill in Farrar, Directors' Duties of Care, (2011) SAcLJ 745 at 751.

[39] The Consultation Paper (LCCP 153)(London: Stationery Office, 1998) is available online at <http://www.lawcom.gov.uk> under the section 'Closed Consultations'. The Paper is hereafter referred to in this article as 'Consultation Paper (LCCP 153)'. An outcome of this exercise was the Commissions' Report also entitled 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties' (Law Com 261) (Scot Law Com No173)(London: Stationery Office, 1999, Cm 4436).
The Commissions' project was not meant to be 'a self-contained exercise'. It aimed to contribute to a wider Company Law Review undertaken by the British Government's Department of Trade and Industry ("DTI"). This article does not deal with DTI's review exercise which began in 1998 (for more information on this exercise, see DTI, *Company Law Reform: Modern Company Law for a Competitive Economy*) and culminated in the DTI's Final Report in two volumes (URN 01/943, 2001). The Final Report led to the British Government's production of a White Paper and ultimately to the passing of the *Companies Act 2006* by the British Parliament. See Gower and Davies, (note 16 above) pp ci-cii and 55-57 for a brief account of this development and some of its associated literature.

[40] See part IV above for a discussion of this provision.

[41] Report, Law Com 261 (Cm 4436, 1999).

test would impose too low a standard for contemporary commerce.[42] The respondents who opposed the purely objective test in the third option thought that such a standard would not be appropriate for skilled directors, as directors with particular skills should be expected to utilise such skills.[43] The Report also states that the vast majority of the respondents preferred the dual objective/subjective standard proposed in the second option and supported its codification in statutory form. The dual standard was preferred as it duly took into account differing levels of a director's skill, knowledge and experience.[44]

The Report recommended that a director's duty of care, skill and diligence should be enacted in statutory form and that the standard should be judged by an objective/subjective test, having regard to the functions of the particular director and the circumstances of the company.[45] This recommendation of the Law Commissions contributed to the enactment of s 174 of the Companies Act 2006,[46] which is a simplified and neater version of s 214(4) of the Insolvency Act 1986.[47]

VI. DIRECTORS' DUTIES OF CARE, SKILL AND DILIGENCE IN MALAYSIA

A. Section 132 of the Companies Act 1965 before its repeal

Section 132(1) of the Malaysian *Companies Act 1965* was, before its repeal and replacement by other provisions under the Companies (Amendment) Act 2007, an incomplete and somewhat reluctant attempt by legislature to enact a statutory provision to deal with a director's duties to his or her company. The said provision imposed a general obligation on a director 'to act honestly and use reasonable diligence in the discharge of his duties'. A director who breached the duties stated under section 132(1) would commit a criminal offence. The section, a reproduction of s 124 of the Australian Uniform Companies Act 1961 had its genesis in 1958 when it was inserted into the Victorian Companies Code.[48] While the section imposed duties of honesty and 'reasonable diligence', it made no reference to a director's duty of care or the standard required for such a duty. Whilst referring to this omission in s 107 of the Victorian Companies Code, the Full Victorian

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42 *Ibid*, para 5.13-5.17 at pp 50-51.

43 *Ibid.*

44 *Ibid.*

45 *Ibid,* para 15.20 at p 51.

46 See also the United Kingdom White Paper on Company Law Reform (Cmnd 6456, 2005).

47 Section 174 reads as follows:
Duty to exercise reasonable care, skill and diligence **E+W+S+N.I.**
(1) A director of a company must exercise reasonable care, skill and diligence.
(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—
(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
(b) the general knowledge, skill and experience that the director has.
For an illuminating discussion on the codification of the duty of care, skill and diligence in s 174 of the Companies Act 2006, see Tamo Zwinge, "An analysis of the duty of care in the United Kingdom in comparison with the German duty of care", (2011) *International Company and Commercial Law Review*, p 33.

48 See *Daniels and Ors v Anderson and Ors* (1995)16 ACSR 607, 660 (New South Wales Court of Appeal).

Court in *Byrne* v *Baker*[49] noted that: 'What the legislature by the subsection is demanding of honest directors is diligence only; and the degree of diligence demanded is what is reasonable in the circumstances and no more.' There was no opportunity for Malaysian courts to apply s 132(1) of the Companies Act 1965 in a case involving directors' duties of care and skill. It was generally assumed until 2007[50] that the common law as elucidated in the *Re City* case concerning this area of the law applied in Malaysia.[51]

B. Adoption of an objective/subjective standard in Malaysia

In late 1997, a financial storm swept across Asia causing economic turbulence in many Asian countries. In Malaysia one of the effects of this Asian financial crisis was the increased urgency of the need for a strong and effective corporate governance regime to protect companies in times of economic turmoil. It led to the appointment of a High Level Finance Committee on Corporate Governance in 1998 by the Malaysian Government. The Committee reported in 1999 and its Report is a well-researched and thought-provoking document. A part of the Report deals with law reform. Suggestions were made for amendments to the Companies Act 1965 as measures to achieve greater and stricter corporate governance. Significantly, on the subject of directors' duties of care, skill and diligence, the Report rejected the old subjective standard of the common law. In this regard, the Report stated emphatically that s 132(1) 'should NOT[52] be amended to clarify that the standard of care imposed is with reference to the particular circumstances of the director'.[53] In August 2006, another Malaysian institution, the Corporate Law Reform Committee,[54] issued its Consultative Document 5 entitled 'Clarifying and Reformulating the Directors' Role and Duties'.[55] With regard to the subject of directors' duties of care, skill and diligence, the Committee put forward a proposal that the dual objective/subjective standard as proposed for the United Kingdom be accepted.[56] The Committee chose to recommend an objective/subjective standard based on the UK model instead of the Australian provision in s 180(1) of the *Corporations Act 2001*. This was because the UK approach clearly proposed that actual knowledge and experience of the director

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49 (1964) VR 443 at p 452.

50 That is, until the adoption of a dual objective/subjective standard by s 132(1A) of the *Companies (Amendment Act) 2007* of Malaysia.

51 See for instance *Abdul Mohd Khalid* v *Dato Haji Mustaffa Kamal* [2003] 5 CLJ 85 where the case of *Re City Equitable Fire Insurance Company Co Ltd* was referred to. See also *Ho Hup Construction Company Bhd v Bukit Jalil Development Sdn Bhd & Ors* [2012] 1 CLJ 649.

52 The Committee's emphasis.

53 Chapter 6 of the Committee's Report at para 2.2.65. The words 'standard of care imposed is with reference to the particular circumstances of the director' refers to the subjective standard stated in *Re City Equitable Fire Insurance Co Ltd*: see the Corporate Law Reform Committee Consultative Document 5 entitled 'Clarifying and Reformulating the Directors' Role and Duties', Section C: Clarifying and Reformulating the Directors' Role and Duties, para 3.8.

54 The Corporate Law Reform Committee was established in 2003 by the Malaysian Government to review Malaysia's corporate laws. The Committee's Final Report bearing the title *Review of the Companies Act 1965-Final Report* was issued in 2008 and is available at <http://www.ssm.com.my/en/docs/CRLC>.

55 Hereafter referred to as CLRC, Consultative Document 5.

56 CLRC, Consultative Document 5, Section C, para 3.9, page 48.

concerned be taken into account as an addition to the minimum standard.[57]About 70% of the individuals and institutions who submitted responses to the Committee supported the proposal.[58] The upshot of this was that Companies Act 1965 was amended in 2007 to add a specific provision, s 132(1A), which adopts the objective/subjective standard as prescribed in s 174 of the Companies Act 2006 of the United Kingdom. Section 132(1A) reads:

> A director of a company shall exercise reasonable care, skill and diligence with-
> (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
> (b) any additional knowledge, skill and experience which the director in fact has.

It is pertinent to note that by virtue of the general definition of the term "director" in s 4 (the definition section of the Act) the new provision applies to a shadow director,[59] an alternate or substitute director. In addition s 132(6) casts a wider net by stating that *for the purposes of the new provision* the term "director" includes the "chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called".

It was pointed out earlier that the standard created by the new s132(1A) has an objective and a subjective limb. Some further comment on the two limbs is pertinent where this standard is applied to a director's duty of care, skill and diligence. The objective component in limb (a) creates a standard that 'looks at the notional knowledge and experience that may reasonably be expected of a person *in the same position* as the director'.[60] Its wording allows for flexibility and is able to take into account the specific position of the director concerned. While it has the advantage of being able to cater for executive, non-executive and independent directors and directors of large and small companies, does the provision take into consideration the reality that not all directors have a similar or requisite experience and know-how? This becomes pertinent in a family-owned company where the board of directors may be appointed from siblings and off-spring of the owner or main shareholders of the company. Such persons may not necessarily have the requisite "knowledge, skill and experience expected of a director having the same responsibilities". Such circumstances are not uncommon in Malaysian companies. Malaysia has a unique corporate ownership structure, not unlike its developing neighbours; characterised by crossholdings, a high percentage of ownership concentration

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57 *Ibid*, para 3.8

58 CLRC, *Responses and Comments Received on Consultative Document 'Clarifying and Reformulating the Directors Role and Duties'*.

59 A Malaysian decision which considered the meaning of the term "shadow director' under the Companies Act 1965 is *Cepatwawasan Group Bhd & Anor v Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & 17 Ors* [2008] 2 MLJ 915.

60 See Report of the Law Commission of England and Wales and the Scottish Law Commission entitled 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties' (Law Com 261) (Scot Law Com No173) (London: Stationery Office, 1999, Cmnd 4436) (para 5.7 at p 48), in the context of its proposal to codify the English position. The Report is available online at <http://www.justice.gov.uk/lawcommission/publications/company-director-regulating-conflicts-of-interestformatting-a-statement.htm>.

and dominant family-owned, owner-managed or government linked characteristics.[61] It has been reported that approximately 40% (out of a total of 238 Malaysian companies reviewed) were dominated and held by a single shareholder.[62] A more recent report went further to suggest that of the top 150 Malaysian companies reviewed, on average the largest shareholders held a strong and persuasive 43% share of the company.[63] Family businesses have been reported to contribute more than half the Gross Domestic Product in Malaysia[64] and it has even been said that the boards of family-owned companies are commonly dominated by family members or close family friends, with few truly independent directors.[65]

In Malaysia as with many Asian countries, cultural values, family and personal connections carry much influence, often giving rise to charges of nepotism and cronyism in Asia. Commercial transactions and business deals are often based on personal ties, trust and relationships. While it may be said company laws work well in Anglo-American environments where the theory of agency (which ensures that company directors and shareholders' interests are aligned to ensure a profit-making entity) management and business in Malaysia (as in most of Asia) consider these cultural values and relationships as equally if not more important.[66] Family businesses in particular do not necessarily prescribe to 'open' concepts of corporate governance, instead their business habits and practices are often ingrained in the 'old-ways' of doing things; based on practices and culture inherited from their founders.[67]

While culture, family ties and values make up one aspect of doing business in Malaysia, family businesses do recognise that to remain competitive, strong corporate governance practices are still required.[68]

Returning to the objective standard as contained in the first limb of the provision, it may be said that it is the minimum benchmark which every director must satisfy. Therefore in a Malaysian and perhaps Asian context, directors appointed on a basis other than his or her experience and expertise, must take cognisance of the objective standard they are required to satisfy. Where a director has additional knowledge, skill, experience or expertise, he or she must meet an increased subjective standard set out in

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[61] See generally, Claessens, S et.al. (2000)"The Separation of ownership and control in East Asian Corporations", Journal of Financial Economics, 58 pp 81-112; Thillainathan R (1999) "Corporate Governance and Restructuring in Malaysia – A Review of Markets, Mechanisms, Agents and the Legal Infrastructure", World Bank/OECD Survey of Corporate Governance.

[62] *Ibid*, Claessen S et.al (2000)

[63] Tam and Tan (2007) "Ownership, Governance and Firm Performance in Malaysia", *Corporate Governance: An International Review*, 15(2) pp 208-222.

[64] Nuig CYK, (2002) "Asian Family Businesses: From Riches to Rags?" Malaysian Business, 2:27.

[65] Meng SC (2009) "Are these Directors Truly Independent?" The Edge, January 17.

[66] Helen Anderson (ed), "Directors' Personal Liability for Corporate Fault: A Comparative Analysis" (2008) (Netherlands: Kluwer Law International) p187.

[67] Ow-Yong, K & Cheah KG (2000), "Corporate Governance Codes: A comparison between Malaysia and the UK", Corporate Governance: An International Review 8(2): 125-132.

[68] Although one study suggests that family firms tend to be reluctant to appoint independent directors for fear of losing control of the board, or are generally afraid of new ideas, viewpoints or simply new ways to doing things. See generally Ward JL (1991), "Creating Effective Boards for Private Enterprises", (San Francisco: Jossey-Bass)

limb (b) (the second limb). A person elected or appointed to the board of directors may possess special skill, knowledge, experience or expertise. Indeed, in some situations he or she may be elected or appointed because the company hopes to rely upon and benefit from his or her skill, knowledge, experience or expertise. Such a director is expected to use this skill, knowledge, experience or expertise whilst serving as a director of the company. Thus, if a lawyer is appointed to a board, the standard applied to him or her must have regard to his or her legal knowledge, experience and expertise in cases where this director participates in a board decision which is related to law. There is no unfairness to such a person if the law expects him or her to use the special/additional knowledge and experience that he or she possesses.[69] However this subjective criterion in the second limb need not be considered if a director does not meet the minimum objective yardstick in the first limb of the section.

In the ultimate analysis, the codification of the law in s 132(1A) will certainly benefit directors and their legal advisers as it brings a higher degree of certainty to this area of law relating to directors. Significantly, the enactment of s 132(1A) puts to an end to the uncertainties in Malaysia regarding the application of the first two propositions stated by Romer J in *Re City Equitable Fire Insurance Co Ltd.*[70] The enactment of s 132(1A) in Malaysia is a fair compromise to meet the demands of modern times. The complexities of contemporary companies and their transactions demand higher standards of care, skill and diligence from directors and it is submitted that the standard required by s 132(1A) is acceptable for this purpose.

Be that as it may, while the provision places a benchmark duty on all directors it would be a fair point to note that inexperienced directors[71] who might not be able to meet the minimum objective test may well be advised to take certain precautionary measures. Needless to say, an immensely practical step for inexperienced directors is to equip themselves with a rudimentary understanding of their duties, rights and liabilities as a company director. There are courses in Malaysia organised by the Securities Commission and the Malaysian Association of Company Directors (MACD), amongst others, that promote such knowledge and awareness. Studies have demonstrated that directors with higher education and training are better and more adept at handling the problems and challenges that arise in the course of business.[72] In family owned companies where directors may be concerned about being presumed as a 'free-rider', additional educational background could go some way to consider business strategies or investment evaluation decisions that need to be made, thus negating the presumption.[73] In addition,

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[69] See the arguments to the contrary in Professor Farrar's *Directors' Duties of Care* (2011) SAcLJ 745 at 751.

[70] See above at 3(a), (b) and (c).

[71] Bearing in mind that the functions and responsibilities of a director are unlike those at managerial positions. The responsibilities or a director are unique to his position and appointment. It is also recommended under the Malaysian Code on Corporate Governance (Revised 2007) that directors possess the requisite skills, knowledge and experience for the job.

[72] Sebora TC, and Wakefield MW (1998), "Antecedents of Conflict or Business Issues in Family Firms", Journal of Entrepreneurship Education 1:2-18.

[73] Castillo J and Wakefield MW (2006), "An Exploration of Firm Performance Factors in Family Businesses: Do Families Value on the "Bottom Line"?", Journal of Small Business Strategy 17(2): 37-51.

these directors could also consider delegating and/or obtaining professional advice either internally or externally, as is allowed under law thereby alleviating the heavy burden of the responsibility. The right of a director to delegate his or her duties/responsibilities and to rely on information supplied by others is discussed in part 7 below.

VII. DELEGATION AND RELIANCE ON INFORMATION PROVIDED BY OTHERS

In recent years, a question which has arisen in some jurisdictions is whether there should be a codification of the common law principles on a director's right to delegate his or her duties/responsibilities and to rely on information supplied by others. In the United Kingdom, the question was raised in 1998 when a joint Consultation Paper[74] was issued by the Law Commission of England and Wales and the Scottish Law Commission. The majority of the responses received by the Commissions on the issue were not in favour of codification of the common law principles concerning this area of the law and preferred its development to be left to the courts.[75] On its part, the Commissions were of the view that the law was still developing and thus, the setting out of detailed instances in a statute when a director may rely on a third party 'are likely to be too restrictive and fail to deal with a situation in which a director should be able to rely on another'.[76] In addition, empirical research carried out on behalf of the Commissions did not indicate 'undue concern'[77] amongst directors about the twin topics of delegation and reliance on information provided by others. The upshot of this exercise was a recommendation by the Commissions that it was not necessary for a codification of the law on this subject.

Australia chose to legislate on the subject. As a result of the Corporate Law Economic Reform Program Act 1999 new statutory provisions were introduced allowing delegation by directors.

In Malaysia, the High Level Finance Committee Report on Corporate Governance had in 1999,[78] recommended that the directors' power to delegate and the rule that directors may rely on the information provided by others, be put in statutory form.[79] A similar proposal was made in August 2006 by Malaysia's Corporate Law Reform Committee.[80] A majority of the individuals and institutions who submitted responses to the Committee supported this proposal.[81] In 2007 the Companies Act 1965 was amended by inserting into it provisions relating to the subjects of directors' right of delegation and reliance on information provided by others. These provisions are discussed below.

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[74] The Consultation paper was entitled 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties'. For more details of the Consultation Paper see note 39 above.

[75] Report, Law Com 261 (Cm 4436), para 5.34 at p 55.

[76] *Ibid*, para 5.36 at p 55.

[77] *Ibid,* para 5.37 at p 55.

[78] See also part VI of the article.

[79] See Ch 6 paras 3.1.1-3.1.4 at pp 140-1 of the Report.

[80] In its Consultation Document 5 referred to in part 6 above. See p 52 para 3.16 of the Document.

[81] CLRC, *Responses and Comments Received on Consultative Document 'Clarifying and Reformulating the Directors Role and Duties'*.

A. Delegation of duties/responsibilities

Two new subsections (based on similar provisions in the Australian Corporations Act 2001 and the New Zealand Companies Act 1993) were added as subsections to s 132 of the Malaysian Companies Act 1965 to deal with the subject of delegation of duties/responsibilities. The first, s 132(1F), reads:

> Except as is otherwise provided by this Act, the memorandum or articles of association of the company or any resolution of the board of directors or shareholders of the company, the directors may delegate any power of the board of directors to any committee to the board of directors, director, officer, employee, expert or any other person and where the directors have delegated any power, the directors are responsible for the exercise of such power by the delegatee as if such power had been exercised by the directors themselves.

Section 132(1F) must be read together with its counterpart s 132(1G). Although s 132(1F) states that 'the directors are responsible for the exercise of such power by the delegatee as if such power had been exercised by the directors themselves', s 132(1G) provides that they would not be accountable for their delegatee's misdeeds if they can show that:

(a) they believed on reasonable grounds at all pertinent times that the delegatee would use the power delegated in conformity with the duties of the director under the Companies Act 1965 and the company's constitution, and

(b) the directors believed on reasonable grounds and in good faith and after making a proper enquiry (where the circumstances indicated that there was a need for an investigation) that the delegatee was reliable and competent to effect the power delegated.

These new statutory provisions are useful to inform directors about the extent of a director's powers of delegation but do not appear to add anything new to the existing principles at common law that a director's exercise of the power of delegation must be responsible, honest and informed. It may also be noted that subsections (1F) and (1G) are not a complete codification of the common law on the subject. They omit to state the common law rule that the power to delegate is subject to reasonable supervision or monitoring by the directors. However, this omission will not dissuade the courts from holding that directors must take some practical step to monitor or supervise the implementation of the functions delegated unless the circumstances indicate that supervision may be reasonably excused.

B. Reliance on information provided by others

If directors are unable to rely on others to obtain information, they would be forced to spend a great deal of their time verifying many items of information that comes before them in the discharge of their duties. The ensuing delay and its negative effect on the functions of the board need no further elaboration.[82] The need for allowing directors to rely on others in order to obtain information was dealt with by both the High Level

[82] See High Level Finance Committee Report on Corporate Governance, Ch 6, para 3.1.3 at p 140.

Finance Committee Report on Corporate Governance[83] and the Corporate Law Reform Committee.[84] In 2007 the Companies (Amendment) Act 2007 inserted a new subsection (1C) to s 132 of the Companies Act 1965 to deal with this subject. The new provision, which is based on s 138 of the New Zealand Companies Act 1993, provides that a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements or other financial data prepared, presented or made by the persons mentioned in the subsection. Amongst the persons mentioned are: (i) an officer of the company whom the director believes on reasonable grounds to be reliable and competent in respect of the matters concerned and (ii) any other person retained by the company in connection with matters involving skills or expertise, where the directors believe on reasonable grounds that the matters concerned are within that persons' professional or expert competence.[85] Reliance is deemed to have been made on reasonable grounds where it is made in good faith and after the director has made an independent assessment of the information, advice, opinion, report, statement or financial data having regard to his knowledge of the company and the complexity of its structure and operation.

Section 132(1C) is important in that it informs directors that they may rely on information provided by others but total abrogation of responsibility, or unquestioning reliance or reliance without inquiry where inquiry is warranted or reliance without independent assessment of the information, will not protect them from liability. Secondly those involved in training and advising directors about the law on this subject will find that they have a simpler task to carry out because they do not have to refer to intricate common law principles concerning the subject.

VIII. THE BUSINESS JUDGMENT RULE IN MALAYSIA

A. The business judgment rule

A primary responsibility of the board of directors of a commercial company is to enhance the prosperity of its business. However, commercial endeavours and risk-taking invariably go hand in hand and every business venture has its prospects as well as its hazards. At times an honest business decision of directors may prove to be a grave error of judgment which causes severe loss to the company. As a measure of protection for directors, a 'business judgment rule' has emerged in certain jurisdictions. The rule shields directors from liability for a business judgment that has gone wrong if they had exercised an informed judgment with responsibility, honesty and in the best interest of the company. In many states in America this so-called 'safe harbour' principle was developed by judicial

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83 *Ibid*.

84 See Consultative Document 5, CLRC, paras 3.10 – 3.15 at pp 49-52.

85 Other persons stated in the subsection includes: (i) another director concerning matters within that directors' authority or (ii) any committee of the board (on which the delegating director did not serve) concerning matters within that committee's authority.

doctrine and has been described as 'a judicial gloss on duty of care standards that sharply reduces exposure to liability'.[86]

B. United Kingdom

In the United Kingdom, the Law Commissions did not recommend the enactment of a statutory business judgment rule on the ground that there was no need for such a rule. English courts have shown a traditional disinclination to review bona fide commercial decisions of directors. In the words of Dillon J in *Devlin* v *Slough Estates Ltd*:[87] 'The court does not interfere with the business judgment of directors in the absence of allegations of mala fides'.[88]

In part of this article reference was made to the Consultation Paper issued in 1998 by the Law Commissions of England and Wales and the Scottish Law Commission.[89] This Consultation Paper invited respondents to comment on whether this traditional reluctance of English courts to interfere with the business judgments of directors should be enacted in statutory form, assuming that the objective/subjective standard recommended by the Paper in respect of directors' duties of care, skill and diligence,[90] is also adopted. The Commission was of the view that there would be a need for the rule if there was evidence that directors were apprehensive about the proposed enactment of the new and stricter objective/subjective standard for directors' duties of care, skill and diligence. The Commissions' Report issued in 1999 indicates that the majority of the responses received were not in favour of enacting a business judgment rule in statutory form.[91] Most of those who were against the enactment of such a rule pointed out that the courts already respect bona fide business judgments under the common law. The Report also points out that an empirical research carried out on behalf of the Commissions did not reveal any particular concern amongst directors about the introduction of the new objective/subjective standard of care.[92] Consequently the Commissions' Report did not recommend the enactment of a business judgment rule.[93] Therefore, the current Companies Act 2006 of the United Kingdom does not contain any provision on the subject.

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[86] The American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (1994), cited and discussed in the Report of the Law Commission of England and Wales and the Scottish Law Commission headed 'Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties', para 5.22 at p 52. See note 39 above for more details about the Report.

[87] [1983] BCLC 497, 504.

[88] See also *Dovey* v *Cory* [1901] AC 477 at p 488. A forceful statement that indicates the common law's unwillingness to second guess directors' business decisions is that of the Privy Council in *Howard Smith Ltd* v *Ampol Ltd* [1974] AC 821 at p 832 as follows: 'There is no appeal on merits from management decisions to courts of law; nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.'

[89] See note 39 above for more details of the Consultation Paper.

[90] See part 5 above for a discussion of directors' duties of care, skill and diligence.

[91] Report, Law Com 261 (Cm 4436) para 5.26-5.27 at p 53.

[92] *Ibid,* para 5.29 at p 53.

[93] *Ibid.*

C. Australia

In Australia a business judgment rule in statutory form was introduced by Corporate Law Economic Reform Program Act 1999. This was after it was considered and recommended by various committees such as the Standing Committee on Legal and Constitutional Affairs in 1989, Companies and Securities Law Review Committee in 1990, and the Companies and Securities Advisory Committee in 1991.[94] The Explanatory Memorandum to the CLERP Bill in supporting the statutory enactment expressed the view that "a failure to expressly acknowledge that directors should not be liable for decisions made in good faith and with due care, may lead to failure by the company and its directors to take advantage of opportunities that involve responsible risk taking".[95] The current Australian provision is found in s 180(2) of the Corporations Act 2001.[96]

D. Section 132(1B) of the Companies Act 1965 of Malaysia

In 1999, Malaysia's High Level Finance Committee Report on Corporate Governance recommended the enactment of a statutory business judgment rule.[97] The Committee felt that such a statutory business judgment rule was necessary when considered together with the extensive codification of fiduciary duties and the duties of skill and care and the introduction of a statutory derivative action as recommended in its Report.

In addition, in August 2006 the Corporate Law Reform Committee of Malaysia in its Consultation Paper 5 suggested the adoption of a business judgment rule based on s 180(2) of the Australian Corporations Act 2001.[98] In recommending the need for a statutory formulation of the business judgment rule, the Committee agreed with the Australian view that the absence of a statutory rule may cause a company to suffer loss as a result of the company and its directors failing to take advantage of business opportunities that involve responsible risk-taking.[99]

The Committee's proposal received the support of about 70% of the individuals and institutions who submitted responses to it on this matter.[100] Resulting from this the Companies (Amendment) Act 2007 inserted a new provision, s 132(1B), into the *Companies Act 1965*. The provision reads as follows:

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[94] See Explanatory Memorandum to the CLERP Bill para 6.2

[95] *Ibid* para 6. 3

[96] Section 180(2) reads:

A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:

(a) make the judgment in good faith for a proper purpose; and

(b) do not have a material personal interest in the subject matter of the judgment; and

(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and

(d) rationally believe that the judgment is in the best interests of the corporation.

The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.

[97] See Ch 6 para 3.2 of the Report.

[98] See para 3.17 at pp 54-5.

[99] See Consultative Document 5, CLRC, paras 3.18 at p 54

[100] CLRC, *Responses and Comments Received on Consultative Document 'Clarifying and Reformulating the Directors Role and Duties'*.

> A director who makes a business judgment[101] is deemed to meet the requirements of the duty under subsection (1A)[102] and the equivalent duties under the common law and in equity if the director-
> A. makes the business judgment in good faith for a proper purpose;
> B. does not have a material personal interest in the subject matter of the business judgment;
> C. is informed about the subject matter of the business judgment to the extent the
> D. director reasonably believes to be appropriate under the circumstances; and *reasonably*[103] believes that the business judgment is in the best interest of the company.

A comparison between the Malaysian and Australian provisions will reveal a number of differences. Whilst the former applies to "a director", the latter concerns "a director or other officer".[104] The definition of the term "director" in s 4 of the Malaysian Act includes a shadow director, an alternate or substitute director.[105] Section 4also defines the term "officer" as including a secretary or employee of a company, a receiver and manager of any part of the undertaking of a company appointed under any instrument and a liquidator appointed in a voluntary winding up. The statutory business judgment rule would have applied to the officers mentioned in s 4, if Malaysia had adopted s 180(2) of the Australian provision in its original form.

It can be seen that the s 132(1B) gives extensive protection from liability for negligence if the four requirements as set out in the section are satisfied. Significantly, a director who satisfies the requirements of these four items is also presumed to meet the requirements of the new dual objective/subjective standard under s 132(1A) in respect of his duty of care, skill and diligence. A pertinent question is whether s 132(1B) will protect honest directors if they have made a serious and extremely unwise error of judgment that causes a substantial loss to their company? In Australia one of the requirements for the business judgment rule to apply (as stated in paragraph (d) of s 180(2)) is that the affected directors must "rationally" believe that the business judgment is in the best interest of the company. The Australian section makes an attempt to amplify this requirement by stating that "*a director's or officer's belief that the judgment is in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold*".[106] Two changes were made when the Malaysian legislature adopted s 180(2). First the phrase "rationally believes" in the Australian section was replaced

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[101] Section 132(6) defines 'business judgment' as 'any decision on whether or not to take action in respect of a matter relevant to the business of the company'.

[102] That is s 132(1A) which deals with a director's duties of care, skill and diligence. See part 6 above for a discussion of the duties.

[103] Writer's emphasis.

[104] For a definition of the term "officer" under the Corporations Act 2001 of Australia, see s 9 of that Act.

[105] Further, the effect of s 132(6) is that for the purposes of the new provision in s 132(1B) the term "director" includes the "chief executive officer, the chief operating officer, the chief financial controller or any other person primarily responsible for the operations or financial management of a company, by whatever name called".

[106] Writer's emphasis.

with the phrase "reasonably believes" in paragraph (d) of the Malaysian provision in s 132(1B). Secondly the Malaysian legislature chose not to include the passage quoted above in italics as part of its section 132(1B) probably because of this change in wording.

When can a director's belief that his business judgement is in the best interest of the company be deemed reasonable? At this stage it is difficult to anticipate how the Malaysian courts will interpret the requirement of reasonable belief mentioned in paragraph (d) and how far they will go in using the rule to protect directors. Needless to say, it is the facts of each case which will decide the issue of reasonableness. *Pioneer Haven Sdn Bhd* v *Ho Hup Construction Co Bhd & Anor and other appeals*[107] was a recent case in which the facts did not present any difficulty to the court regarding the application of the business judgment rule. In this case five of the ten defendants were non-executive directors of the plaintiff company. It was alleged that they had breached their duty of care in committing the company to a Joint Development Agreement ("JDA") entered into by the company's subsidiary. There was evidence that they had made inquiries from the management about the JDA and had independently assessed the information and advice given to them before they had made their judgment. They were also informed by the managing director of the company that a reputable firm of solicitors were appointed to advise the company on the JDA. It was held by the Court of Appeal that the directors had made a business judgment and they could rely on the business judgment rule in s 132(1B). The Court said:[108]

> In view of it being a business judgment within the deeming provision of s 132(1B) of the Act which they made at [the plaintiff's] board meeting…. the court should be slow to interfere with it. This deeming provision is a statutory recognition of the common law principle that courts are reluctant to pass judgment on the merits of a business decision taken in good faith or to substitute such decisions with their own. It must also not be lost sight of that none of the said directors…had any personal interest in the JDA. There was neither any allegation nor proof whatsoever that they had acted in the collusion with the other defendants to act to the detriment of [the plaintiff].

E. Does Malaysia need a business judgment rule?

As discussed above, one of the reasons why the Law Commissions in the United Kingdom did not recommend the adoption of a statutory business judgment rule was because of the existence of judicial precedent that indicated that the courts would not interfere with honest and responsible business judgments made by directors. If a statutory business judgment rule in the form of s 132(1B) had not been enacted in Malaysia, the courts would have followed English case law relevant to the subject. This fact may be used by critics to express the view that s 132(1B) is an unnecessary addition to the Malaysian Companies Act.[109] The authors of this article do not agree with this view. It is submitted

[107] [2012] 3 MLJ 616.

[108] *Ibid* at p 661.

[109] In Australia there has been much debate on the need for enacting a business judgment rule in statutory form. See Ford's Principles of Corporation Law, note 38 at p 396 and 398. See also Farrar, Directors' Duties of Care, (2011) SAcLJ 745 at 759 to 760.

that the enactment of section 132(1B) has its merits and that it is a welcome development. The existence of a clear statutory provision on the subject will certainly benefit company directors, their legal advisers as well as the courts. Although it cannot be denied that codification may bring with it its own problems, this article submits that it is easier to extract the law, the requirements and the limits of the business judgment rule from a statutory provision like s 132(1B) than from English case law on the same subject. With the exception of the possible difficulty that may encountered in construing requirements of paragraph (d) of s 132(1B), the enactment of the section has helped to make the law more understandable to directors and certain to their legal advisers. Those involved in training and advising directors about responsible business decisions and risk-taking and the law associated with these matters may now find that they have an easier task to perform.

There is another important reason why this article supports the codification of the business judgment rule in s 132(1B). Case law of the closing years of the twentieth century and the recent inclusion of the objective/subjective standard as a statutory provision in the Malaysian Companies Act 1965 are indications that the courts and the legislature take a serious view of the subject of directors' negligence. A possible dampening effect of these new developments in Malaysia is that it may encourage directors to be overly cautious or unadventurous in their business decisions and to be unenthusiastic about venturing into businesses which involve risk-taking. The stricter standard of care that has arisen as a result of the adoption of the objective/subjective standard may also be a matter of concern for prospective directors of companies, particularly prospective independent directors. The business judgment rule as embodied in s 132(1B) may allay doubts amongst honest directors as to whether they would be made liable for their company's losses if a bona fide and informed business judgment that they had made in the interests of the company had gone wrong.

IX. CONCLUSION

Malaysia has always demonstrated a commitment to reform and update its company law so that it may meet the challenges of changing times.[110] The enactment of the new statutory provisions dealing with directors' duties of care, skill and diligence and the business judgment rule illustrates Malaysia's commitment to modernise its company laws. Regardless of the statistical percentage of family-owned companies in Malaysia or the influence of values and culture on business practices, the promotion of good corporate governance is certain. Although family companies have different characteristics than non-family companies, the end result remains the same: to ensure that decisions made meet a standard of diligence expected of a director. As a result, the introduction of the objective/

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[110] Some critics may disagree but this article will support its view by pointing out that the Companies Act 1965 has been amended no less than seventeen times since its inception to incorporate various measures of reform. In addition a significant step for reform was demonstrated when the Corporate Law Reform Committee was established in 2003 by the Malaysian Government to review Malaysia's corporate laws. The Committee's Final Report bearing the title "Review of the Companies Act 1965-Final Report" contains an impressive number of proposals for the reform of Malaysia's corporate laws, some which have been already implemented by the Companies (Amendment) Act 2007.

subjective standard in the new s 132(1A) regarding directors' duties of care, skill and diligence creates a standard which is necessary for modern times. Persons accepting the office of director should realise that the days of passive part-time director are now over and the courts will no longer take an indulgent attitude if directors neglect their duties. Further the enactment of s 132(1A) lays to rest the uncertainty that had governed this area of the law in Malaysia.

Despite the common heritage between the United Kingdom and Malaysia, the fact that the United Kingdom had rejected the enactment of a statutory business judgment rule should not be used to argue that Malaysia should have done likewise. The statutory business judgment rule created by s 132(1B) may ensure the new and stricter standard of care imposed by s 132(1A) does not dampen the spirit of enterprise of directors. The limited liability regime and the separate legal identity doctrine have made the registered company a popular vehicle for the undertaking of one or more business activities. It is commonplace that commercial activity cannot be divorced from its accompanying risks and risk-taking in business ventures may sometimes prove disastrous for a company. But extreme caution, conservatism and defensive management may hinder the progress of commercial companies and serve to defeat the purpose for which such companies are formed. The new business judgment rule embodied in s 132(1B) is not to shield directors from liability if they breach their duty of care but to assure them that they will be protected from liability if they make honest and informed business judgments regarding matters which they reasonably believe to be in the company's interest and the matter is one in which they have no personal interest.

The Development of the Anglo-Muhammadan Law in India

Andrea Borroni*
Marco Seghesio**

Abstract

The Anglo-Muhammadan Law represents a peculiarity within the current context of comparative law, owing to its threefold nature of Muslim personal law, influenced by the Common Law, and belonging to the broader Indian legal system. Nonetheless, despite its singularity, it represents a field of study which is frequently overlooked. The present essay attempts, at least to some extent, to shed light upon it. In the first place, the article provides an historical overview of the development of the Anglo-Muhammadan Law, focusing on the main transformations and innovations introduced by the British and their unavoidable legal, social and religious consequences. This essay, however, illustrates, in addition, that, despite a powerful drive towards uniformity fostered by the prevailing system, the Anglo-Muhammadan Law preserves the distinctive features of the community it governs, for identity reason. Hence, the peculiar outcomes of the evolution of this branch of law could serve as a model to other national legislators facing similar issues within multicultural and multiethnic contexts.

I. INTRODUCTION

The present essay deals with the articulate issue of the Anglo-Muhammadan Law, namely the body of laws based on Islamic Law but reshaped by British jurists which was initially applied to Indian Muslims in colonial courts and which, notwithstanding India's independence in 1947, is still in force, though partly amended, owing to the necessity for it to be tailored to the historical and social evolution of the Country.

After a short introduction of the subject matter, the first part of the essay focuses on Islam, its legal tenets and sources of law, an unavoidable premise in order to grasp the extent of the Anglo-Muhammadan Law; while, the second part describes its historical development, providing the British administrators' point of view, and its fundamentals together with its consequences on traditional Islamic Law and India's legal system.

* Researcher of Private Comparative Law at the Second University of Naples, Faculty of "Studi Politici e Alta Formazione Europea e Mediterranea" "Jean Monnet". J.D., 2000, University of Pavia (summa cum laude), LL.M., 2006, Louisiana State University, three years Doctorate program in Comparative law, 2006, University of Trento.

** PhD student in Comparative Law and Processes of Integration at the Second University of Naples, Faculty of "Studi Politici e Alta Formazione Europea e Mediterranea" "Jean Monnet". J.D., 2011, University of Pavia (summa cum laude).

II. THE ANGLO-MUHAMMADAN LAW – DEFINITION

Though the term Anglo-Muhammadan Law sounds, to some extent, self-explanatory, it is necessary, as a matter of clarity, to briefly define it so as to outline, with precision, the scope of such Law.[1]

The name "Anglo-Muhammadan Law" or "Muhammadan Law" was "given to this branch of law by the Anglo-Indian courts"[2] during British rule in India, for they used to call Islamic Law as "the Law of Muhammad which was however a wrong definition",[3] for Muhammad is the Prophet and Islam recognizes God as the only legislator, although Muhammad can be regarded as the law-giver in relation to the Sunnah. Hence, the Anglo-Muhammadan Law refers to the "branch of personal law" that British administrators applied "to those who belonged to Muslim religion in accordance with the principles of their own school or sub-school".[4] As a personal law, the Muhammandan Law belongs to private law, and deals with and regulates individuals' personal matters, namely those issues which directly concern their personality,[5] arising from their family and the environment in which they have been raised; therefore they can also be called Family Laws.[6]

Family matters in India[7] are rooted in religion, hence, depending on one's faith, different personal laws are then applied,[8] which entails that since several religious communities are present, different personal law systems are likewise in force (Muslim personal law, Hindu personal law, Christian personal law, etc.).[9] Due to their religious base and unlike secular laws which apply to all citizens of a State, personal laws govern

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1 This term has been coined to define the body of laws created by British-inspired Muslim courts, which merged Islamic legal principles with common law principles so as "to provide a system of legal redress for Muslims living in British India", A. M. Emon, "Conceiving Islamic Law In A Pluralist Society: History, Politics And Multicultural Jurisprudence", *Singapore Journal of Legal Studies*, December 2006, p. 340.

2 R. K. Sinha, *The Muslim Law - Muslim Law as applied in India*, 6th ed., Central Law Agency, 2006, p 11.

3 *Id.*

4 N. H. Jhabvala, *Principles of Muhammadan Law*, 1977, Jamnadas and Co., p. 11. The difference among schools and sub-schools mentioned here refers to the two main Muslim groups: the Sunnis and the Shias. "The [original] divergence between the two groups of sects was chiefly *political* and *dynastic*. Doctrinal and legal differences began to grow only in the course of time." See *id.*, p. 23. Such distinction led to the development of the Sunni and the Shia schools of thought, each of which gave birth to various sub-schools. The most important Sunni school is the Hanafi School, to which the majority of Sunnis in India belongs, while the most important Shia school is the Ithna-Asharis, to which the majority of Shias in India belongs. Different laws and rules of construction must be applied according to the belonging group. *Id.*, pp. 24-25.

5 Issues such as marriage, inheritance, divorce etc. See R. K. Sinha, *supra* note 2, p 1.

6 *Id.*

7 Unlike the Indian legal system, the French one is based on the principle of the secularity of the State which is also shared by Italy, although an exception is made within the field of family matters for the legally binding religious marriage (*matrimonio concordatario*).

8 In particular, as regards marriage, in 1872 two Acts were passed: the Christian Marriage Act, regulating the lawful celebration of a marriage in which at least one party was Christian, and the Special Marriage Act, whose provisions concerned civil marriage among those individuals which declared themselves as neither Jews, Muslims, Hindus nor Christians. See A. Gledhill, "The Influence Of Common Law And Equity On Hindu Law Since 1800", *The International and Comparative Law Quarterly* , 1954, Vol. 3, p. 589.

9 R. K. Sinha, *supra* note 2, p. 1.

only those individuals "who answer a given description";[10] Muslims by birth or by conversion[11] are subjected to Muslim Personal Law.

Moreover, personal laws, unlike general laws, are not territorial laws, therefore their application is not constrained by state boundaries but "within certain limits, [they move] with the person".[12]

III. ISLAM AND ISLAMIC LAW: ORIGIN, DEVELOPMENT AND SOURCES OF LAW

The British judges appointed to adjudicate cases in Indian colonial courts assumed they were correctly interpreting and, consequently, applying Islamic Law to Muslims. However, they had little or no knowledge of Islam and its legal theory since they had been educated according to the British judicial and legal systems (Common Law). They imposed their bias as well as their disrespectful attitude on Indian Muslims, who as Islamic believers also felt deprived "of their sense of identity [. . .] [by such a] hybrid legal system".[13] It is, therefore, appropriate to briefly linger on the fundamentals of Islam and Islamic Law, before addressing more specifically the issues related to the Anglo-Muhammadan law, so as to clearly understand the differences as well as the influence[14] between the two systems.

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10 N. H. Jhabvala, *supra* note 4, p. 11.

11 "On conversion to Islam, the convert is deemed to have completely renounced his former religion and status." See N. H. Jhabvala, *supra* note 4, p. 21. However, for the conversion to Islam to be considered lawful, and allow for the application of Muslim law in personal matters, the converted Muslim has to "prove that his intention in adopting Islam was *bona fide*", see R. K. Sinha, *supra* note 2, p. 4 and for further details on the conversion methods, see *id.*, pp. 2-3.

12 R. K. Sinha, *supra* note 2, p. 1. See the judgment of the Supreme Court (India), , *The Controller of Estate Duty, Mysore, Bangalore Vs. Haji Abdul Sattar Sait & ors.*, [1973] 1 S.C.R. 231, concerning the issue of conversion to another faith and, in particular, the conversion of an entire community, such as the Khojas and Cutchi Memos cases. The Court held that "[a]ccording to Mohamedan Law a person converting to Mohamedanism changes not only his religion but also his personal law" (though this rule applies only to individual conversions) confirming in this way the personal nature of the Anglo-Muhammadan Law.

13 S. K. Rashid, "Islamization of 'Muhammadan Law' in India", *American Journal of Islamic Social Science*, 1988, Vol. 5, p. 136.

14 It is worth introducing here the concept of legal transplant, so as to explain the interrelations among the British legal system and Muslim Law. The notion of legal transplant was first formulated by Alan Watson. See A. Watson, *Legal Transplants: An Approach to Comparative Law*, 2nd ed., The University of Georgia Press, 1993 and, furthermore, A. Watson, "Comparative Law and Legal Change", *Cambridge L. J.*, 1978, p. 313 and A. Watson*, The Evolution of Law*, The J. Hopkins Univ. Press,1989. The author lists nine relevant factors for the accomplishment of a legal transplant: pressure force, opposition force, transplant bias, discretion factor, generality factor, societal inertia, felt-needs, source of law and law-shaping lawyers. See A. Watson, "Comparative Law and Legal Change", *Cambridge L.J.*, 1978, p. 322. The concept of legal transplant represents a partial reception in a different legal system of one or more parts of the Law of a third State. This type of reception, deriving from the transplant of the law, results directly from the phenomenon of the circulation of legal models (circulation and reception can be joint together in the single notion of legal flow. See M. Lupoi, *Sistemi giuridici comparati. Traccia di un corso*, Ed. Scientifiche Italiane, 2001. The justification of legal transplants is based on the objective homogeneity of the market, which increases especially in case of technical or neutral laws. (G. Ajani, *Sistemi Giuridici Comparati*, G. Giappichelli, 2006, 37). So, on the basis of internal and external factors, legal products are analyzed and compared in order to determine the best

The cradle of Islam lies in the Arabian Peninsula, where Muhammad was born (in Mecca, in the 6th century A.D.) and received the message from God, which he, His Prophet, then spread among people.[15] Islam is therefore the last revealed religion and the word "Islam" in Arabic means "submission",[16] namely "the complete submission to the One Almighty God".[17] Each Muslim believes "in only one God and Muhammad is His Prophet";[18] from this basic statement, it is possible to derive two fundamental features of this religion: i) unlike Paganism, which was the prevalent faith in South Arabia at the time, Islam is monotheistic and ii) Muhammad was a man, chosen by God (Allah) as His Prophet, to accomplish to propagate His message among people; so, his actions were inspired and guided by God.

In Islam, law and religion are deeply intertwined. The *Quran* is Muslims' Divine Book, it contains God's words as they were revealed to Muhammad through the angel Gabriel and were then recorded by the Prophet's companions while he recited them under Divine inspiration and afterwards they were written down by his followers and collected to form the *Quran*.[19]

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rules and laws to regulate specific legal cases. The economic analysis of law, though trying to legitimize this phenomenon, provides a solution which, as usual, relates to the notion of efficiency (Watson instead referred to the concept of "prestige", *i.e.* the most prestigious model is the one which is then reproduced). The comparative efficiency, as duly explained G. Aiani, *supra,* p. 31, occurs when examining a law it may appear imperfect if compared with an ideal and abstract situation, but it will however be the best solution ever with regard to the institutional framework and from a historical perspective concerning the functioning of the aforesaid Law (path dependency theory). Cf. J.L. Halpérin, "Western Legal Transplants and India", *Jindal Global L. R.*, 2010, Vol. 2, p. 1, the author addresses the specific issue of legal transplants in India, maintaining that

> India can appear as an extraordinary laboratory for studying legal transplants, if one considers the presence of Portuguese and French legal transplants in corresponding constituencies, the development of Anglo-Hindu Law and Anglo-Mohammedan Law, the borrowing of techniques from the civil law tradition by the writers of the Indian Penal Code and the Indian Contract Law, and of course the maintenance of these laws, and many others from the colonial period, in the contemporary Indian legal order.

The British adopted two policies concerning legal transplants, namely straight transplants from English Law and indirect transplants, and by means of the latter, they reshaped Hindu and Muslim personal laws, see J.L. Halpérin, *supra*, p. 6. These transplants, which are concretely represented by the various Acts promulgated in India during the last period of colonial power, shared some specific features, namely they were "produced by British authorities with the help of British lawyers who wanted to simplify, stylize and rationalize English Law". J.L. Halpérin, *supra*, p. 12. However, it ought to be noted that when Western laws were transplanted into colonies' legal systems, this was meant to protect Western interests and prevent the application of such local laws to Western adventurers. See W. Mensky, *Comparative Law in a Global Context - The Legal Systems of Asia and Africa*, 2nd ed., Cambridge University Press, 2006, p. 37. Moreover, legal transplants have also to be considered from the point of view of the transformation, evolution they have been subject to within the legal system which has received them, indeed "foreign inputs in the Indian legal order have produced many noteworthy outcomes, especially in constitutional and international law", cf. J.L. Halpérin, *supra*, p. 3.

[15] N. H. Jhabvala, *supra* note 4, p. 2.

[16] Nevertheless, the term submission does not entail any passive stance, but it rather implies that each Muslim "strive[s] to realize actively God's will in space-time, i.e. in history", J. L. Esposito, "Perspectives on Islamic Law Reform: the Case of Pakistan", *N.Y.U. Int'l L. & Pol.*, 1980-1981, Vol. 13, p. 218.

[17] N. H. Jhabvala, *supra* note 4, p. 4.

[18] *Id.*, p. 11.

[19] *Id.*, p. 4 and p. 27.

Although part of the verses of the *Quran*[20] deal with legal principles, Muslims never regarded it as a code of law, therefore it "[was] never directly applied as [a] source of legal precept[s]",[21] as opposed to the practice followed by British jurists in India.[22] The *Quran* has a wide scope and illustrated a large number of general rules and principles which were meant to regulate all aspects of human life: however, not all situations were, and could possibly be, delineated.[23] Besides, in some cases, the meaning of the Holy Book is rather vague and invites various interpretations from classical Muslim scholars.[24] As a result, other, more precise, sources of guidance were necessary, and this led to the creation of the *Shari'ah*, which grew out of the attempts made by early Muslims, as they confronted immediate social and political problems, to devise a legal system in keeping with the code of behavior called for by the Holy Qur'an and the hadith.[25]

Hence, Muslims recognise and follow the *Shari'ah* as their Law, which is "based on the[se] Divine commandments and Prophetic guidance of Muhammad",[26] inspired by Allah and then collected in the *Quran* (*Al-Kitab*). So, Muslim Law regulates a man's relationship both with God and with his peers, encompassing criminal and civil matters as well.

The Islamic notion of Law, as opposed to the one developed within the Western tradition (Civil and Common Laws alike), lies in its source of validity. In fact, in the latter, the legislator or the judge (in traditional Common Law systems) are the supreme lawmakers; whereas, the *Shari'ah* is the 'Right Way of Religion'. Islam is grounded on

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[20] The precise number of such verses is however hard to calculate, as, given the authors' dissenting opinions, they may range from a minimum of 80 to a maximum of 600, though only a tiny part of them is deemed to concern legal issues in a strict sense. See A. M. Emon, *supra* note 1, p. 334.

[21] M. R. Anderson, "Islamic Law and the Colonial Encounter in British India", *WLUML Occasional Paper n. 7*, 1996, p. 11.

[22] Different schools of law (*madhahib*) have developed over centuries and their interpretations of Islamic Law are all considered equally orthodox. Therefore, in order to determine the rule of Muslim Law applying to a specific region or Country, it is advisable "to start with a text of substantive law, rather than the *Qur'an* or traditions of the Prophet", A. M. Emon, *supra* note 1, p. 336. For comprehensive overview of the different Islamic schools, see F. Castro, *Il modello Islamico*, (edited by G.M. Piccinelli), 2nd ed., G. Giappichelli, 2007.

[23] Legal injunctions in the *Quran* are scattered in its various chapters and they constitute just a small portion of its total 6,235 verses. The injunctions deal with issues related to family law, inheritance, and criminal punishments. The explanations of such injunctions offered by the *Quran* provide guidance for their broad understanding. However, while some of them are definitive in their application and cannot, therefore, be subject to further interpretation, others are somehow open to multiple understandings. The multiplicity of meanings is mainly due to the *Quran*'s variation in the grammatical use of language. In order to resolve such ambiguity, assistance from other Quranic verses and, then, from the Prophetic traditions is required. See A. A. Ibrahim, "The Rise of Customary Businesses in International Financial Markets: An Introduction to Islamic Finance and the Challenges of International Integration", *AM. U. INT'L L. REV.*, 2008, Vol.23, p. 677.

[24] H. A. Hamoudi, "The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law", *Am. J. Comp. L.*, 2008, Vol. 53, p. 435. The author affirms that the *Shari'ah* was initially developed mainly through casuistic means by jurists from different schools of thought who interpreted the religious texts according to their personal views as well as through interpretative techniques, e.g. *qiyas*.

[25] M. K. Lewis, M. L. Algaoud, *Islamic Banking*, Edward Elgar, 2001, pp. 20-21.

[26] S. K. Rashid, *supra* note 13, p. 137.

the unique sovereignty of God as the only law-giver, so the entire legislation must comply with His will and, as it derives from Him, it ought to be considered as immutable as God.

Allah's directions, which are also mirrored and expanded upon in the Prophet's teachings, assumptions and actions (*hadith*) that form the *Sunna* (namely the Islamic tradition of correct behaviour), concern all human spiritual, moral and temporal conducts.[27] Such Divine directions, together with the *hadith*, form the essential foundation of the *Shari'ah*, whose meaning in Arabic is, in fact, "the path leading to a watering place",[28] that is the path to be followed in order "to achieve success in this world and the hereafter".[29] Muslims who comply with the precepts of the *Shari'ah* will then obtain religious and temporal benefits. As the *Shari'ah* contains "directions [that] are obligatory, [and] some [that] are only desirable",[30] it shall be considered the Muslim code of conduct, rather than a body of laws as usually conceived in a Western perspective.[31]

According to Islamic tradition, Muslim Law was not offered to men ready-made, but it rather had to be "built", by relying on its acknowledged sources, namely the *Quran* and the *sunna*. In fact, Islamic jurisprudence arose from the interpretation of these two texts made by learned people, the 'scholars' (*ulama*), who derived rules suitable to regulate people's life from them. One of the strongest accusations made against British rulers was that they misinterpreted the *Shari'ah*, owing to their disregard for the traditional *ijtihad*; this is the science of interpretation applied to Muslim holy texts and based on the principle that custom and interpretation may complement God's laws, provided the consistency of the former with the latter, and as long as in the *Quran* or in the *sunna* no provisions exist regarding the matter at issue.[32]

It follows that the two aforementioned texts constitute the primary written sources of the *Shari'ah*. For clarity, it is worth adding that, though the *sunna* and the *hadith* are mentioned here as a single source, a distinction between them exists. The *hadith*,[33] namely

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27 R. K. Sinha, *supra* note 2, p. 9.

28 S. K. Rashid, *supra* note 13, p. 136.

29 *Id.*

30 R. K. Sinha, *supra* note 2, p. 9.

31 The following example clearly outlines the different nature of the *Shari'ah* as opposed to the other legal systems. According to the doctrine of servitude, which is typical of Islam, "a thing or an action may be either Good, (*husn*), i.e. morally beautiful, or Evil (*kubh*), i.e. morally ugly" (*Id.*), and people "cannot understand what good and evil are, *unless* [they] are guided in the matter by a divinely inspired Prophet" (see N. H. Jhabvala, *supra* note 4, p. 7). Therefore, the commandments of Allah are divided into five categories [i.e. *wdgib* (obligation), *mandfib* (recommended), *mubah* (permitted), *makrih* (disapproved/disliked) and *haram* (forbidden/prohibited)] and each human action is assigned a Divine value, "so that everyone can himself judge the worth of his action, its beauty [. . .] or its ugliness". This fivefold classification of the commandments of Allah is the framework on which the *Shari'ah* rests in order to govern the conduct of Muslims, although it does not technically establish any lawfully binding provisions.

32 Konrad Zweigert & Hein Kötz, *Introduzione al diritto comparato*, Giuffrè Editore, 1992, Vol.1, p. 378.

33 Actually, some scholars disagree on the value of *hadith* as reliable source of law due to its oral origin (A. M. Emon, *supra* note 1, p. 334); to cite few examples, Joseph Schacht maintains that the traditions of the Prophet are forgeries, consequently, one cannot rely upon them [J. Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford, 1967], whereas Fazlur Rahman argues that they represent the Muslim collective memory about the Prophet, though some historical and theological contradictions emerge from them [F. Rahman, *Islamic Methodologies in History*, Central Institute for Islamic Research,1965].

the traditions of the Prophet, are the "records of his actions and sayings",[34] while the *sunnah* is "the precept of the Prophet".[35] The difference between these two lies in the fact that "the *hadith* is the story of a particular saying or occurrence; [whereas] *sunnah* is the rule of law deduced from the Prophet's behaviour."[36] In addition to them, the *Shari'ah* is based on two other sources, namely *ijmaa* and *qiyas*. *Ijmaa* is the "consensus of the founders of the law, or of the community as expressed by the most learned",[37] hence, it consists in the agreement of the learned (Muslim jurists) on a specific legal issue.[38] And *qiyas* are "a collection of rules or principles deducible, by the methods of analogy and interpretation, from the first three sources".[39] This last source has been established at a later stage and is a complement to the previous three,[40] made necessary by the wide range of new needs engendered by the territorial spread of Islam throughout the centuries.[41]

As above stated, Islamic Law, though being Divine in nature, is the result of man's commitment to its interpretation so as to widen the scope of God's directions in order to cover also the regulation of such circumstances which had not been addressed neither in Allah's commandments nor in traditions of the Prophet. For this purpose, Islamic jurists have shaped the science of *fiqh* on the basis of the *Shari'ah* sources, so as to establish what is lawful and what is not, what is actually permitted and what is forbidden.[42] Which means that the *fiqh* is deemed part of the secular law, namely it represents the law enforced by legal authorities.[43]

IV. THE ANGLO-MUHAMMADAN LAW: DEVELOPMENT AND GROUNDS

The current Indian legal system is the result of the presence of various personal law traditions, each belonging to one of the country's diverse groups,[44] along with the

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34 N. H. Jhabvala, *supra* note 4, p. 7.

35 *Id.*, p. 27.

36 *Id.*, p. 28. The author says that "one of the greatest differences between the Sunnis and the Shias is that the Shias do not give credence to a *hadith, unless* it emanates from the household of the Prophet".

37 *Id.*

38 According to the classical view, the community in its entirety cannot err, as opposed to the individual. See *Id.*

39 *Id.*, p. 29.

40 *Id*.

41 The four sources of the *Shari'ah* (i.e. *Quran*, *sunnah* and *hadith*, *ijmaa* and *qiyas*) are the four roots of the Islamic Law, whose doctrine was formulated by As-Safi, a famous Muslim jurist, in order to provide a reliable and fixed method to determine the rules applicable to Muslims (see K. Zweigert & H. Kötz, *supra* note 32, pp. 378-379). Such doctrine, which was highly welcomed and implemented by Islamic jurists, was meant to tackle the problem of the presence of different, and to some extent contradictory, opinions within the Islamic jurisprudence, derived from the application of the *fiqh* the means through which the *Shari'ah* regulates concrete and factual circumstances.

42 S. K. Rashid, *supra* note 13, p. 138. The *fiqh* is "the product of reasonings [sic] and deductions" (*id.*) on the grounds of the knowledge derived from the *Shari'ah* sources. It is the means through which the *Shari'ah* regulates concrete and factual circumstances, so it can be considered the case law of Islamic jurists. The distinctive features between the *Shari'ah* and the *fiqh* can be summarized as follows: the former has a wider scope than the latter, as the latter deals only with secular rights and obligations, moreover, the former is divine in nature, while the latter is made by man.

43 R. K. Sinha, *supra* note 2, p. 9.

44 In India, the Hindu community is by far the widest, and is followed by the Islamic one. See A. Gambaro & R. Sacco, *Trattato di Diritto Comparato - Sistemi Giuridici Comparati*, UTET, 1998, p. 485.

influences arising from the many foreign dominations.[45] Hence, a brief overview of Indian history ought to be provided so as to outline the social and legal context in which the British intervened.

In the 2nd millennium B.C., the territory of India was occupied by an Indo-European population, whose mother tongue was Sanskrit, and which laid the foundation of what would later become Hinduism. After this first long period of Hindu rule, India suffered alternate dominations. Back in the 8th century Islam started to spread through the sub-continent. However, it was not until the beginning of the 1st millennium A.D. that a Muslim sultan, Aibek, reigned in Delhi. Thereafter, the Muslim power reached its height in the 16th century with the Mughal Emperor, Akbar, and his descendants. As this empire grew, Islam gained further ground throughout India, and particularly in some regions (such as the Punjab and Kashmir) until the arrival of British colonists.[46]

The British rule in India started in the 18th century. The main goal of the early colonization period was to obtain the maximum possible revenue from the colony with the minimum expenditure of their own political and military resources.[47] This was in line with the initial British presence in the sub-continent, as it started under the authority of the East India Company, [48] whose purpose was indeed the exploitation of the local resources (land revenues) and trading activities. In order to achieve these goals the Company needed to adapt and tolerate many aspects of the pre-colonial Indian society, as well as relying upon the cooperation of native intermediaries and indigenous police forces, so as to maintain the effective control over the country without resorting to a wide use of military force.[49] Therefore, the first British administrators decided to "exercise power by adapting themselves to the contours of the pre-colonial political system, including law."[50] The preceding political system was, as stated above, the Mughal Empire, whose emperors were Muslims, belonging to the Hanafi school (the major Sunni school). For that reason "the Hanafi law was [then] administered till the establishment of British rule".[51] Accordingly, the application of the *Shari'ah* was initially tolerated by the British for the

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45 The policy of retention of local personal law systems was applied throughout the British Empire, giving rise to many hybrid systems, along with the Anglo-Muhammadan Law, such as the "Anglo-customary law systems in Africa, [. . .] Anglo-Hindu Law systems in India, Anglo-Buddhist law in Burma", see V.V. Palmer, "Mixed Legal Systems…and the Myth of Pure Laws", *Louisiana L. R.*, 2007, Vol. 67, p. 1216.

46 A. Gambaro & R. Sacco, *supra* note 44, pp. 493-494. In addition, for a more thorough comparative analysis see the following treaties: *id.*, K. Zweigert & H. Kötz, *supra* note 32, and R. David & C. Jauffret-Spinosi, *I Grandi Sistemi Giuridici Contemporanei*, 5th ed, Cedam, 2004.

47 This attitude was perfectly in line with the idea of Western conquerors that "in Asia, contrary to the American situation, it would not be possible to convert to Christianity the numerous populations they wanted to rule for high profits but with limited expenditures. The costs of implementing common law for indigenous people, they realized, was too heavy for uncertain interests". See J.L. Halpérin, *supra* note 14, p. 2.

48 The East India Company ruled directly over the *muffassal* territories (from the late 18th century till mid 19th century), which were those areas outside the Presidency Towns, i.e. Madras, Calcutta and Bombay, where the Company shared its sovereignty with the British Crown. see A. Gledhill, *supra* note 8, p.576.

49 M. R. Anderson, *supra* note 21, p. 4.

50 *Id.*, pp. 4-5.

51 N. H. Jhabvala, *supra* note 4, p.10.

sake of the broader interests at stake. However, over time, this policy changed,[52] owing to the gradual consolidation of the British power in India.[53]

Nevertheless, though early on the British colonization in India was rather tolerant and partially maintained the previous indigenous structures, innovations and changes were later introduced. In fact, new institutions were created which incorporated the old native mechanisms.[54] Among them, according to the Hastings Plan of 1772,[55] a new colonial law court system was established. Such plan set "a hierarchy of civil and criminal courts [. . .] charged with the task of applying indigenous legal norms"[56] in matters such as marriage, inheritance, caste and other religious usages.[57] These courts had to apply the two different systems of personal laws, namely Muslim and Hindu,[58] with respect to cases regarding the abovementioned family matters.[59] As a result, the population was divided into two main categories: Muslims and Hindu, regardless of the differences within each religious group. However, it is worth noting that, initially, the impact of this new colonial court system on Indian society was limited. In fact, on the one hand, only the local and regional gentry and Indian élite[60] relied upon this system, considering it a convenient method to settle their disputes, while the poor or the individuals belonging to lower tiers of society continued to trust those "local bodies which had acquired privileges of autonomy under the Mughal rule that persisted during the colonial period".[61] On the other hand, such new institutions were often exploited by the wealthy natives to their

[52] The reforms implemented by the British concerned above all the three traditional categories of personal matters, i.e. marriage, divorce and inheritance. See J.L Esposito, *supra* note 16, pp. 221-222.

[53] S. K. Rashid, *supra* note 13, pp. 139-140.

[54] M. R. Anderson, *supra* note 21, p. 5.

[55] Warren Hasting was appointed Governor of Bengal and as the indigenous administration of justice was almost on the verge of collapsing, he was authorized by the East India company to make major changes in the administration of justice. Hence, he formulated the Judicial Plan of 1772, which consisted of 37 regulations dealing with civil and criminal laws. Such plan aimed at correcting the defects of the judiciary system without destroying the traditions of the indigenous systems. Sucheta Mehra, *Development of Adalat System during the time of Warren Hastings*: http://www.legalservicesindia.com/article/article/development-of-adalat-system-during-the-time-of-warren-hastings-252-1.html. Site accessed on 11.02.2014.

[56] M. R. Anderson, *supra* note 21, p. 5. In 1773 *muffassal* courts were established in those territories governed by the East India Company. These courts were manned by the Company's servants, while those in Presidency tows were staffed by British lawyers appointed by royal charter; these two judicial systems were merged only in 1861. Notwithstanding the presence of such distinct local systems, there was only one last court of appeal, the Privy Council, whose decisions were binding on all Indian courts. see A. Gledhill, *supra* note 8, pp. 578-579.

[57] N. H. Jhabvala, *supra* note 4, p. 11. In particular, as regards Hindu Law, this was applied "in matters of succession, inheritance, the joint family, partition, maintenance, gifts, wills and religious usage and institution" (A. Gledhill, *supra* note 8, p. 580).

[58] "The system developed from 1773 imposed a degree of rigidity and uniformity upon the Hindu Law which it had not known earlier", A. Gledhill, *supra* note 8, p. 578.

[59] R. K. Sinha, *supra* note 2, pp. 4-5.

[60] In general, the local élite of the Muslim countries, or regions, ruled by the British allowed for the substitution of several parts of the Islamic Law with Western rules or codes, with the exclusion of family matters, which, on the other hand, were not "replaced by Western law, but [. . .] reformed through a process of reinterpretation" J. L. Esposito, *supra* note 16, p. 217.

[61] M. R. Anderson, *supra* note 21, p. 6.

own advantage, as through them they could preserve and strengthen their autonomy and predominance within their community group.[62]

So, when the British arrived in India, they found a multiethnic society, characterized by the coexistence of several religious groups and by a strong political and legal fragmentation. Frequently, even within the same community many different practices prevailed and many different local authorities were followed. In such circumstances British rulers were faced with a serious control issue, worsened by their early attitude towards the administration of the colony, i.e. their attempt to rule it with the minimum effort and involvement, while, at the same time, try to gain the most profit from it. Therefore, British administrators had to conceive an effective solution to tackle such problem, which substantially lay in obtaining "simple, reliable, and reasonably accurate understandings of indigenous social life without sacrificing great labour and capital".[63] Following from this, the implementation of such solution gave rise to the Anglo-Muhammadan jurisprudence,[64] which was essentially based on "legal assumptions as well as law officers, translations, textbooks, codifications, and new legal technologies".[65]

A. The Genesis Of The Anglo-Muhammadan Law

British rulers founded the creation of the Anglo-Muhammadan law on some basic assumptions which were, however, misleading and which mirrored their deep lack of knowledge of the indigenous society. According to the aforementioned Hastings Plan, native laws could be incorporated into "the British-based legal institutions without significantly compromising the integrity of either".[66] Starting from this erroneous assumption, British administrators investigated the native legal systems, and, with regard to Indian Muslims, the authority of the *Shari'ah*. Nevertheless, due to the complexity of this system of laws and to the British need for a simple and one-size-fits-all legal approach, they reduced the *Shari'ah* to "a set of more or less homogenous legal rules";[67] an operation which resulted in the fact that "every aspect [thereof] was ridiculed, belittled or truncated".[68] The presumption that a single and fixed set of rules could apply to all Muslims was both against Islamic doctrine, and inadequate to respect the legal peculiarities of life of the different Muslim groups.[69]

Moreover, on the basis of such presumption, British rulers made a further mistake: namely, they chose to rely upon certain traditional and orthodox Islamic texts, treating

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[62] *Id.*, pp. 6-7

[63] *Id.*, p. 10.

[64] The creation of the framework of the Anglo-Muhammadan Law took place in the first century of the British colonial power. *Id.*

[65] *Id.*, p. 10.

[66] *Id.*

[67] *Id.*, p. 11.

[68] S. K. Rashid, *supra* note 13, p. 135. The author affirms that

> the British colonialists deprived the Muslims of their sense of identity by substituting a good part of the Shari'ah with the English law and systematically mutilated the rest of it into a hybrid legal system [the] 'Muhammadan Law'.

[69] M. R. Anderson, *supra* note 21, p. 11. This simplification of the *Shari'ah* did not distinguish either between Sunnis and Shias.

them as legally binding, and applying them more widely and rigorously than it was ever done in the pre-colonial era.[70] Hence, they directly applied the *Quran* as well as the other legal texts (such as the *al-Hidaya*[71]), which, on the contrary, were normally interpreted and translated into legal provisions and practice by the authority of the *qady*.[72] In fact, British administrators asserted the supremacy of the text over its interpretation, based on the assumption that only ancient legal texts could offer a reliable knowledge of the Indian legal framework. However, they lacked the proper understanding of the social environment to which the laws should have been tailored, and this, eventually, resulted in their disrespectful application.[73]

Returning to the colonial court system, the Hastings Plan established that it ought to have been based on the British model as regards procedure and adjudication, but ought to also have entailed the presence of native law officers, "*maulavis* and *pandit"*,[74] in an advisory function.

With particular regard to *maulavis*, their function consisted in answering the courts' questions (which were usually formulated in an abstract manner, without any relevant details of the actual case) as regards specific Islamic law matters by means of a *fatwa*, or a legal interpretation, which was then rigidly applied by British judges to settle the related case. In other words, the legal principle drawn by the *maulavis* from the circumstances of the case at hand was theoretical so that it could be implemented on judges' choice (and discretion) to adjudicate also later cases. Nonetheless, the *maulavis* would often disagree on a particular legal issue, owing to the judicial discretion in applying the *Shari'ah* principles which the Islamic legal theory had ever allowed for. Such diversity of opinions with regard to legal matters was unacceptable to British judges as it did not fit their

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70 *Id.*, p. 3.

71 "*Al-Hidaya*, a twelth century text of Central Asia origin that primarily relied upon [. . .] the two pupils of Abu-Hanifa", *Id.*, p. 9.

72 The *qadis* were legal scholars who, during the Mughal Empire and well after it into the colonial period, were appointed as functionaries in charge of the administration of justice applying the *Shari'ah*. The decision of the British administrators to abolish the office of *qadis* (Kazi Act of 1864) and to replace them with English judges, was strongly contested by Muslims, and it is considered one of the leading factors of the changes in the Muslim Law. See S.K. Rashid, *supra* note 13, pp. 140-141. In other colonies, such as British Nigeria and French Algeria, the *Shari'ah* underwent a similar evolution, though in these Countries, "even after the colonial domination, *Qadis* continued to administer the *Shari'ah*", as opposed to British India, were any request to reintroduce their office was rejected by the colonial power (S.K. Rashid, *supra* note 13, p. 140).

73 *Id.*, p. 11. By relying only upon texts, the British reduced Muslims and Islamic Law to a fixed image, in which any deviation from their content was considered an hazard which could prejudice the truth of Islam. Consequently, in so doing, the colonialists "contributed to the view that Islamic law is an unchanging, inflexible religious code", A. M. Emon, *supra* note 1, p. 340. This attitude can be regarded as an advantageous stratagem used by British rulers to preserve the *status quo* in their colonies; in fact, an unchangeable legal system results also in unchangeable rights, institutions and laws which do not allow for any transformation in the subjugated population.

74 M. R. Anderson, *supra* note 21, p. 5. They were respectively experts of Muslim and Hindu Law. *Pandits* were Hindu Law officers of the courts who ought to give their opinion to British judges on the basis of *sastras*. The Sanskrit texts contained however an "ideal law, never susceptible of complete and identical application, but subject to modification by custom", which varied greatly owning to various circumstances such as time, space, family and caste. Nevertheless, British judges relied upon *sastras* as they would have done with English laws. See A. Gledhill, *supra* note 8, pp. 576-577.

judicial framework and their rigid textual approach; therefore, *maulavis*, together with *pandits*, became more and more mistrusted and eventually excluded from colonial courts.

The Common Law principle of binding precedent was adopted instead.[75] In 1864, the Act XI officially excluded them from the colonial courts, which entailed that the Anglo-Muhammadan Law was to be entirely administered by British judges.[76] This enactment produced unhealthy effects on the *Shari'ah*.[77]

Afterwards, as in the late 19th century the colonial power consolidated its authority and increased its ability to effectively handle indigenous resistance, British influence on the Indian legal system was no longer restricted to the adoption of Common Law tenets (such as the doctrine of binding precedent and the principle of equity), but rather resulted in the substitution of laws of British origin for large portions of the Anglo-Muhammadan Law.[78] In fact, the alteration of the *Shari'ah* in favor of the British laws can be specifically traced back to the constitution of the third Law Commission in 1861, which passed six enactments,[79] which "generally superseded the principles of the *Shari'ah* in their respective fields".[80]

Subsequent to the exclusion of native officers from the courts, and, given the supremacy accorded to the textual approach, the next measure adopted by the British administrators consisted in translating indigenous laws and legal sources into English so as to enable British judges to autonomously interpret and apply them. The first translations were completed in the 18th century and concerned the *al-Hidaya*[81] (translated from Arabic into Persian, and then into English in 1791)[82] and the *al-Sirajiyya*, a treatise on inheritance (translated into English in 1792). However, at that time, British judges still relied upon the advisory function of the native officers; therefore, the actual effect that those translations produced was to establish an "essentialist, static Islam incapable of change from within".[83] Nevertheless, in the 19th century, British judges resorted more consistently to such translations, that were considered reliable sources, though they

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75 The Anglo-Indian court system adopted along with the doctrine of *stare decisis*, or binding precedent, also the Common Law principle of *communis error facit jus*, whose application led judges to definitely abandon the use of Sanskrit texts and replace them with court decisions. A. Gledhill, *supra* note 8, p. 578.

76 *Id.*, p. 12.

77 S. K. Rashid, *supra* note 13, pp. 141-142.

78 M. R. Anderson, *supra* note 21, p. 7. Such trend could be spotted already in the doctrine of the Hastings Plan, which provided for the application of the principle of justice, equity and good conscience in cases where the indigenous laws provided no rule.

79 Namely, the Indian Succession Act, the Indian Contract Act, the Negotiable Instruments Act, the Indian Evidence Act, the Transfer of Property Act, and the Criminal Procedure Act. See S. K. Rashid, *supra* note 13, p.140.

80 *Id.*

81 In order to understand the Sunni tradition, the British entrusted the English translation of *al-hidaya*, although this text represents only "a short manual of Hanafi law that does not consistently provide the underlying logic or reasoning for the rules of the school", and they did not take into accout a more comprehensive work, i.e. *Sharh al-Hidaya*, which is "a multivolume commentary on [*al-hidaya*] and provides greater jurisprudential insight into the tradition" (A.M. Emon, *supra* note 1, pp. 340-341).

82 The text was firstly translated from Arabic into Persian by three Muslims clerics, and then it was translated into English by Charles Hamilton, whose initial work comprised four volumes, which was however edited and shortened, providing judges and practitioners with an even more reductive overview of Muslim Law. *Id.*, pp. 341-342.

83 M. R. Anderson, *supra* note 21, p. 13.

have never been revised. Another translation was then produced, namely the one of an abridged version of the fatwa *Almagiri*,[84] together with a part of an *Itna 'Ashariya* text (belonging to the Shia school). These three translations accounted for the entire English textual base of the Anglo-Muhammadan law: it is however clear that, given the variety and wide scope of Islamic Law, the limited number of translations resulted in an inadequate and completely insufficient picture of the Muslim personal law.[85]

Further on, influenced by Bentham, who advocated in favour of codification, in 1835 the British established the first Indian Law Commission tasked with formulating an extensive body of rules[86] inspired by the British model, although they limited their involvement to those fields they were particularly interested in, such as justice and commercial activities.[87] As far as personal matters were concerned, however, the British preferred to apply to the various local communities their respective traditional law. As a result, to facilitate the judges' knowledge of such rules the colonial administration also promoted the creation of textbooks, which were "compilations of materials ordered in a thematic way".[88] The first textbook, published in 1825, was a collection of *fatwa* by W. H. MacNaghten, which also contained his generalizations regarding the various legal issues emerging from those legal interpretations. MacNaghten's textbook served as a model for the production of the subsequent colonial textbooks: they offered a simplistic organization of knowledge, where doctrinal differences were minimized and a single rule or solution was proposed for multifaceted issues. Consequently, the *Shari'ah*, as it emerged from such texts, was far from its traditional idea: rather it became "a fixed body of immutable rules beyond the realm of interpretation and judicial discretion"[89], or as defined by S. K. Rashid, "[the] travesty of the *Shari'ah* and its fossilization into 'Muhammadan law'".[90]

B. British Rulers' Main Innovations

In the mid-19th century, British administrators decided to widen the range of sources of the Anglo-Muhammadan Law, and started to focus their attention on custom. Nonetheless, although custom is considered a secondary source of Islamic Law, it is subject to certain restrictions, namely only customs complying with the Shari'ah principles are deemed to have the validity of law. However, the British, in keeping with their policy of simplification and generalization, expected to record[91] customary practices among natives, considering them something commonly acknowledged, of ancient origin and rooted in society, i.e.

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[84] This famous *fatwa* consists in a collection of legal opinions in the *fiqh* tradition, see *id.*, p. 9.

[85] *Id.*, pp. 13-14.

[86] "The Indian codification was something unique, a kind of intermediary model of codification between the continental one in Europe and a few examples of developed statute laws in England", J.L. Halpérin, *supra* 14, p. 13. It could be affirmed that the Anglo-Indian Law was so extensively codified that it exceeded the stage of codification reached by the British law at the time.

[87] See *Id.*, and A. Gambaro & R. Sacco, *supra* note 44, p. 500.

[88] M. R. Anderson, *supra* note 21, p. 14.

[89] *Id.*

[90] S. K. Rashid, *supra* note 13, p.142.

[91] Revenue collectors conducted surveys in each village of the Punjab region in order to ascertain the customary practices. See. M. R. Anderson, *supra* note 21, p. 15.

something that could be codified and then generally applied.[92] As already mentioned, this had the unintended consequence of distorting the very nature of such practices. Furthermore, this approach did not take into account the differences among the various indigenous groups and the need for interpreting those usages in a way consistent with that adopted by the community within which they had been recorded. Nevertheless, the British administrators used them as guidelines for the formulation of policies,[93] even though they lacked two constituent features that each standard ought to possess, namely fixity and stability space and time wise.

Along with the aforementioned changes brought about by British administrators to the pre-colonial legal system, the development of the Anglo-Muhammadan Law was also combined with the introduction of new legal technologies, such as bureaucratic procedures and methods of inquiry.[94] The colonial edifice needed information regarding natives' social life, happenings, practices, etc.; therefore, standardized methods of data collection were implemented: data were categorized and systematized to ease their circulation throughout the colony as well as in England. In addition, other administrative tools were introduced, i.e. regular reports and the use of printed forms for the district administration. Those innovations were unavoidable in order to successfully rule over such a huge and diverse country, but they did not affect common people.

However, some changes did affect common people; one of these, introduced in the field of legal procedure and which proved to be revolutionary, was "the use of documentation in matters of law and evidence".[95] In fact, under *Shari'ah* legal doctrine, "only the spoken testimony of a morally reliable witness [was considered] admissible

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[92] Nonetheless, the British made a selection aimed at excluding the indigenous practices which could interfere with the development of colonial policies and interests.

[93] M. R. Anderson, *supra* note 21, p.15, such codification distorted social life by way of selecting and interpreting material from an external view point.

[94] *Id.*, p. 17. Although procedural law transplants were commonly faced with a strong resistance on the local side, as they clashed with the proceedings traditionally accepted and applied, the Malaysian Islamic case stands for an exception thereto. In fact,

> the secular English models of civil and criminal procedure, of evidence, of trial and appellate structure, and of common law adjudication were, with some modifications, imported across the boundary on a wholesale basis.

In countries, such as Malaysia, in which dual systems coexist, the borrowing of legal procedures between them is eased by the familiarity with the foreign system. Nevertheless, dual systems tend to undergo transformations in the course of time, which may lead to the restoration of the previous (pre-colonial) system, or simply to the end of dualism by choosing to rely upon only one of the two systems. Malaysia represents a peculiar case also in this regard, as, given the discomfort arising from the coexistence of dual systems, in the effort to tackle it, "the dissonance between the rules and institutions of the two is reduced and their content actually converges". Obviously, the systems do not entirely converge, nevertheless, the differences between Malaysian secular law and Islamic law do not derive from a revival of an ancient Islamic law, but rather from the borrowings from current Islamic systems which are deemed similar to the domestic one, such as Pakistan, Singapore and India. D. L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change", *Am. J. Comp. L.*, 1994, Vol. 42, pp. 574-576.

[95] M. R. Anderson, *supra* note 21, p. 17. The moral norms contained in the *Shari'ah* were translated into enforceable rules through the institutional framework of adjudication according to which jurists had to construe the applicable rule by taking into account the actual circumstances of the case at hand, hence "the law was not simply created in an academic vacuum devoid of real world implications", which implied that "the resolution

as evidence before the court".[96] As a matter of fact, in the pre-colonial system the use of documents was allowed but did not hold any validity in terms of legal evidence before the courts. The British introduced the practice of transcribing the witness's deposition into the deponent's language and then formulating summaries in English; even though the legal validity of the oral testimony was initially maintained, as time went by, and in consonance with the mainstream trend of textual supremacy within the Anglo-Muhammadan Law, deposition texts became the only legally binding evidence.[97] It is worth noting that the extensive reliance on written legal texts also fulfilled a subtler purpose: the need for documentary evidence on the one hand, and, on the other, the widespread use of standardized forms in district administration and business transactions, coupled with the very widespread illiteracy among the local population, were geared towards making legal institutions inaccessible to the most part of the natives, as well as denying them the possibility of improving their economic or social condition within the legal framework provided by the colonial power.[98]

The last very important difference between the *Shari'ah* and the Anglo-Muhammadan Law, which ought to be stressed, lies in the sources of law. While the major sources of the former are the *Quran*, the *sunnah* and the *hadith*, the *ijmaa* and the *qiyas*, the latter recognizes, in addition to those, the following four sources: i) the customs and usages, ii) the judicial decisions, iii) the legislation and iv) the principle of justice, equity and good conscience.[99]

Customary laws are considered valid (in so far as they are not in contrast with Anglo-Muhammadan Law) on the basis of the principle that the community in its entirety cannot be mistaken (the same tenet underlying *ijmaa*); and, although they were not acknowledged by the traditional Islamic legal theory, the assumption of validity of the customs and usages, dating back to the Prophet's time, rests upon His silence about them, which has then been identified as their tacit recognition.[100]

As regards judicial decisions, these cannot be truly considered sources of law, however, as they played an important role throughout the development of the Anglo-Muhammadan law, they are regarded as reliable and authoritative legal opinions in

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of a controversy may not have been dependent upon some doctrinal, substantive determination of the law", regardless of the essential role played by adjudication institutions. See A. M. Emon, *supra* note 1, p. 338. Subsequent to the introduction of the Common Law model of judicial procedure, Anglo-Indian proceedings started to entail "the interpretation of documents, the use and avoidance of precedent, the resort to alternative holdings, the invocation of burden of proof", D. L. Horowitz, supra note 95, p. 555. An example of procedural innovation based on the British model, and still present in the current judicial system, is the *muta'ah* litigation in Malaysia. The *muta'ah* obligation deals with wives who have been unjustly divorced and who, therefore, are entitled to receive a compensation calculated on the basis of the means of their former husbands. The problem which lawyers constantly face in this regard consists in proving the assets truly held by the husband as *Shari'ah* courts are not accustomed to extended discovery. So, in order to accomplish their task, lawyers tend resort to civil rules applicable to secular courts, which rely upon Western procedural model. D. L. Horowitz, *supra* note 95, p. 565.

[96] M. R. Anderson, *supra* note 21, p. 17.

[97] *Id.*, p. 18.

[98] *Id.*

[99] N. H. Jhabvala, *supra* note 4, pp. 27-31.

[100] *Id.*, p. 29.

the adjudication of cases. Moreover, the case law resulting from the transplant within the Anglo-Muhammadan Law of the doctrine of binding precedent, is still widely acknowledged in India.[101]

Legislation, instead, comprises those parts of the Anglo-Muhammadan Law which have been regulated through acts of legislature, such as the Shariat Act.[102]

Finally, the principle of justice, equity and good conscience is the one upon which the courts may rely: i) in the event of a conflict of opinion or the lack of any specific rule, and/or ii) when the rigid application of an established rule or its analogical deduction may cause hardship to an individual or will not be suitable for his current needs.[103]

C. The Shariat Act

British rule in India ended formally in 1947, but its legacy as regards legal and judicial matters lived on. In 1937 the various enactments regulating the application of Anglo-Muhammadan Law to Muslims in the different States of India, were replaced by a single act, the Muslim Personal Law Act, or Shariat Act, enacted by the Central Legislature, whose purpose, as stated in the Act itself, was "to make provisions for the application of the Muslim Personal Law (Shariat) to Muslims in India".[104]

The passing of the Shariat Act represented the statutory recognition that Muslim personal Law must be applied to Muslims. Under Section 2 of the Act, courts are bound to apply this law[105] when, "notwithstanding any customs or usage to the contrary" and "save questions relating to agricultural land", a dispute arises among Muslims concerning any of the following matters:

> intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of P.L., marriage, dissolution of marriage, including *talaq,ila,zihar, han, khula* and *Mubara'at*,[106] maintenance, dower, guardianship, gift, trust and trust properties and *wakfs* (other than charities and charitable institutions and charitable and religious endowments).[107]

Obviously, in matters other than these, Indian general laws apply.

It is worth providing some examples regarding the concrete provisions of this Act. Under the Shariat Act, marriage is considered a civil contract, whose rights and obligations arise immediately after its creation,[108] and which can be dissolved by divorce.

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[101] A. Gambaro & R. Sacco, *supra* note 44, p. 501.

[102] Muslim family laws were generally excluded from a direct reformation both by foreign rulers and by domestic governments. In fact, "Muslim nations have enacted reform laws which have merely modified or restricted traditional practices", except for two few Countries, Turkey and Tunisia. J. L. Esposito, *supra* note 16, p. 220.

[103] N. H. Jhabvala, *supra* note 4, pp. 30-31.

[104] *Id.*, p. 13.

[105] In this context, the word Shariat is used to refer to Muhammadan Personal Law and "the use of the word is not thought to import any variations" (S. D. Fardunji Mulla, *Principles of Mahomedan Law*, 20th ed., Lexis Nexis, 2013, p. 4.

[106] These are among the traditional forms of divorce recognized by Muslim Law.

[107] See also R. K. Sinha, *supra* note 2, pp. 4-5.

[108] B. L. Verma, *Development of Indian Legal System*, Deep&Deep Publ., 1987, p. 328.

The following are the various traditional forms of divorce[109] mentioned in the Act. "When divorce proceeds from husband at his will it is known as *talaq*";[110] for a *talaq* to be valid, the husband must have clearly communicated his intention of dissolving the nuptial tie and there must have been a prior attempt at reconciliation between the parties. Divorce by *ila* occurs when a man vows to abstain from sexual intercourse with his wife for a period of time longer than four months and observes this oath. *Zihar* "is a form of inchoate divorce",[111] whereby if the husband compares his wife to one of the female relations he cannot marry, the wife then becomes prohibited unless he performs expiation.[112] *Kuhla* and *Mubara'at* are forms of divorce by mutual consent; the difference is that the former is initiated at the instance of the wife, whereas the offer of divorce in the case of the latter may proceed from either the husband or the wife.[113] With respect to inheritance,[114] a heir is entitled to receive an interest in his ancestors' property only upon their death. Moreover, no distinction is made between movable and immovable property, nor between ancestral or self-obtained property.[115] Furthermore, concerning guardianship, boys, once independent from their mothers' care, are in custody of their natural "guardians", namely their fathers, the executors appointed by their fathers, their grandfathers and the executors appointed by them, or, in case these are absent, by a

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109 In this regard see the judgment of the Supreme Court (India), *Moh. Ahmed Khan v. Shah Bano Begun and ors.* [1985] 3 S.C.R. 844. This is the most famous case in Indian judicial system concerning the concept of divorce in Muslim personal Law and the liability of Muslim husbands to provide for the maintenance of their divorced wives. The judges held that the clauses regarding maintenance were applicable regardless of the personal law governing the parties, as the "wife" is defined as such "irrespective of the religion professed by her or by her husband". The final part of the sentence includes an appeal to the Muslim community made by Dr. Tahir Mahmood who invites Muslims to contribute to the creation of a uniform Indian civil code, rather than striving for securing "an 'immunity' for their traditional personal law from the state legislative jurisdiction". It is also worth noting that this judgment provides an example of harmonization between Muslim and Common Law notions, as it states "[n]ature of Mahr or dower-Whether Mehr is maintenance". Owning to the revolutionary nature of the *Moh. Ahmed Khan Vs. Shah Bano Begun and ors.* adjudication, a petition was made which challenged the constitutional validity of the *Muslim Women (Protection of Rights and Divorce) Act* of 1986. Nevertheless the Supreme Court upheld the validity of the Act. See the judgment of the Supreme Court (India), 28 September 2001.

110 P. Kusum, *Kumud Desai's Indian Law of Marriage&Divorce*, 8th ed., Lexis Nexis Butterworths Wadhwa Nagpur, 2011, p. 341.

111 S. D. Fardunji Mulla, *supra* note 106, p. 402.

112 P. Kusum, *supra* note 111, p. 347.

113 Under Hanafi law, Muslim women were granted only three reasons to lawfully divorce: namely, i) the husband's impotence, ii) the adultery and iii) the exercise of the option of puberty. Besides, a Muslim woman could not unilaterally repudiate the marriage. In order to clarify and improve Muslim women's status in this regard, the Dissolution of Muslim Marriage Act was passed in 1939. This Act drew upon Malikiki law and provided in Section 2(ix) as further grounds of divorce "any other ground which is recognized as valid under Muslim Law" (such as *li'han*, i.e. the husband's wrongful allegation that his wife committed adultery). Further on, the major reform achieved through this Act concerned the use of apostasy as an undisputed means to claim divorce under Hanafi law; that is Muslim women were often driven to renounce their faith or convert to another one so as to be granted divorce. The aforementioned Act established that if a Muslim woman could provide any ground for divorce among those recognized by law, then "her renounciation of her faith or conversion to another religion would not by itself dissolve the marriage", J.L. Esposito, *supra* note 16, pp. 229-231.

114 In this regard, see the judgment of the Supreme Court (India), *Mahdu Kishwar & ors. v State of Bihar & ors.* [1996] 5 S.C.C. 125, concerning the issue of inheritance and specifically the discriminatory nature of certain provisions of the *Chota Nagpur Tenancy Act* of 1908 "which go to provide in favour of the male, succession to property in the male line", being therefore unfair against women. The sentence provides references to the legislation on the matter of inheritance, and among them it mentions the Shariat Law stating that "whereunder the female heir has an unequal share in the inheritance, by and large half of what a male gets."

115 B. L. Verma, *supra* note 109, p. 328.

court.[116] The provisions relating to gifts regulate the transfer of property from a donor to a recipient; three elements are required: i) a declaration made by the donor, ii) its acceptance made by the recipient and iii) the delivery of the possession of the property in question.[117] The most contradictory issue addressed in the Shariat Act concerned the *waqf*,[118] which consisted in the settlement of properties for charitable purposes or in the transfer thereof to the descendants of a family, while protecting them from statutory interference. Under the Anglo-Muhammadan Law, the transfers of property made first for the benefits of a family and then for charitable purposes were no longer considered valid *waqf* unlike what had occurred during the pre-colonial era.[119]

Moreover, this Act brought about two major changes: namely, it abrogated "the customs and usages which [were] contrary to the rules of Muhammadan law",[120] and established that when no provisions concerning a specific legal point were present, Indian courts would "apply the principles of equity, justice and good conscience".[121] The Shariat Act is still in force today, though with some amendments.[122]

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116 *Id.*, pp. 331-332.

117 *Id.*, p. 332. Cf. the sentence of the Supreme Court (India), *Abdul Rahim & ors. v Sk. Abdul Zabar & ors.*[2009] concerning a case of gift under Muslim Law, stating in par. 10 therein that "under Mohammadan Law [gift] is a contract which takes effect through offer and acceptance" and thereafter listing "the conditions to make a valid and complete gift under the Mohammadan Law".

118 Under Section 2 of the *Mussalman Validating Act* 1913 "wakf means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable". This definition has been slightly modified by the *Wakf Ac*t 1995, whose Section 3(r) states that "wakf means the permanent dedication by a person professing Islam, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable" (S. D. Fardunji Mulla, *supra* note 106, p. 196). The *Mussalman Validiting Act* was passed in response to the large scale protests which took place after the Privy Council decision denying the validity of *wakfs-alal-aulad*, despite its recognition under Muslim law. The issue of *waqf* has given rise to controversies also in current India, for an example see the judgment of the Supreme Court (India), *Trustees of Sahebzadi Oalis Kulsum Trust v The Controller of Estate Duty, A.P.*[1998] in which the court held that a trust deed executed in favour of a grand-daughter but "ultimately for the maintenance of a holy shrine" was a "trust [. . .] in the nature of wakf-alal-Aulad. In fact, the recital in the trust deed is to the same effect".

119 B. L. Verma, *supra* note 109, pp. 333-334.

120 N. H. Jhabvala, *supra* note 4, p. 16.

121 R. K. Sinha, *supra* note 2, p. 7. The judgment of the Supreme Court (India), *Ahmedabad Women Action Group (AWAG) & ors. v Union of India* [1997] concerns a Public Interest Litigation challenging the constitutional validity of some Muslim personal Law provisions (such as polygamy, male unilateral *talaq*, Sunni and Shias inheritance laws discriminating against women, etc.). The court dismissed the petitions, and, among the precedent sentences which it mentions in support of its decision, one is particularly interesting, namely the judgment of the case *State of Bombay v. Narasu Appa Mali* [1952] A.I.R. 84, wherein the Judge Gajendragadkar "expressed his opinion on the question whether Part III of the Constitution applies to personal laws" and held that "the personal law do not fail within Article 13 (i) at all." As regards this issue, the Supreme Court, in adjudicating a similar case, though of Hindu law matters, held that

> in our opinion [. . .] Part III of the Constitution does not touch upon personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforces the law as derived from recognized and authoritative sources of Hindu law, i.e., Smritis and commentaries referred to, as interpreted in the judgments of various High Courts, except where such law is altered by any usage or custom or is modifies or abrogated by statute.

See Supreme Court (India), *Sri Krishna Singh v Mathura Ahir and ors.* [1980] 2 S.C.R. 660.

122 With respect to the transitional period of the Shariat Act, see the judgment of the Supreme Court (India), *C. Mohammed Yunus v Syed Unissa and ors.*[1962] 1 S.C.R. 67, which, in fact, states

V. THE CONSEQUENCES OF THE ANGLO-MUHAMMADAN LAW

The previous sections of the present essay have focused on the analysis and the description of the development of both the Anglo-Muhammadan and the Islamic laws, openly highlighting the differences between the two systems and briefly mentioning the alterations brought about by the former on the latter. This section aims at explaining more substantially how the application of British legal and judicial principles as well as colonial methodical procedures historically impacted (and still do) on the Indian legal system.

It is worth remembering that, although in the late 19th century British administrators decided to replace parts of Muslim Law with British rules, the policy of applying personal laws to family matters was never completely abolished, as it represented a useful administrative technique to maintain a better control over the indigenous population.[123] Nevertheless, personal laws underwent substantial alterations owing to their "integration" in the colonial system, and these, with respect to the *Shari'ah*, can be summarized in five major setbacks: i) the adoption of the theory of *stare decisis*, which deprived it of its dynamism, ii) the application of English law, iii) the appointment of non-Muslim judges adjuticating cases involving Muslim legal matters, iv) the judicial misinterpretation of the *Shari'ah* and other Islam classical legal texts, and v) the problems related to Islamic education in today's India.[124]

First, the principle of *stare decisis*[125] belongs to the Common Law system and was obviously alien to the *Shari'ah*, but as the Indian colonial courts "were staffed by British or British-trained judges", "this became the unquestioned principle of the administration of justice".[126] And worse, owing to the gradual exclusion from the judicial system of native officers and the abolition of the office of *qadis*, many judgments of that time were wrongful and contrary to the *Shari'ah*. In addition to the principle of *stare decisis*, British judges, as already stated, relied upon the traditional Islamic texts and rigidly applied them, without accepting any innovative theories adopted by contemporary jurists. This attitude resulted in a strong rigidity and conservatism of the Anglo-Muhammadan law, two

that on the enactment of the Shariat Act 26 of the 1937, as amended by the Madras Act r8 of 1949, the Muslim Personal Law applies in all cases relating to the matters specified notwithstanding any customer usage to the contrary even at the stage of appeals, if other conditions prescribed under the Act are fulfilled.

123 M. R. Anderson, *supra* note 21, p. 8.

124 S. K. Rashid, *supra* note 13, p. 142.

125 The doctrine of *stare decisis* or binding precedent represents the main distinction between Common Law and Civil Law. According to this doctrine a lower court is bound by the prior decisions of a superior one, and, though this part has been abolished in England in 1966, superior courts are also bound by their own precedents. On the basis of such tenet, it follows that the courts have to rely upon a precedent, even though it is an isolated one, regardless of its age, and regardless of whether the principle underlying the precedent decision sounds inadequate to the current circumstances, owing to historical, social and legal changes or further grounds. The rigid application of this doctrine has been somehow reduced as a result of the introduction of the possibility for judges to "distinguish a precedent", when it is deemed inadequate. Nevertheless, judges are still bound to a precedent if its *ratio decidendi* also covers the dispute at hand. See K. Zweigert & H. Kötz, *supra* note 32, pp. 311-314. The application of this principle gives rise then to the development of case law, which is also what the Anglo-Muhammadan Law and the Anglo-Hindu Law have eventually become. See *Id.*, p. 381 and p. 390.

126 S. K. Rashid, *supra* note 13, p. 143.

characteristics which are incompatible with the typical dynamism of the *Shari'ah*.[127] It is worth adding that the constraining approach adopted by the British towards the Islamic Law was also employed with regard to the Hindu Law, which was characterized by the same flexibility and dynamism.[128]

Second, the so called anglicization of the *Shari'ah*[129] began with the Hastings Plan of 1772 which introduced the principle of justice, equity and good conscience.[130] Afterwards, in the late 19th century, this principle led to the generalized application of British laws, in case of conflicting opinions within the Islamic community. As the time went by and British power in India increased, British administrators started replacing part of the *Shari'ah* with British laws and introducing new codes, based on British models. British judges used to apply the principles and concepts[131] of the Common Law, while directly introducing some parts of their own laws so as to regulate particular legal fields;[132] in particular, in the field of property law, starting from 1872, various acts[133] were passed which merely codified the Common Law.[134] As a result, the Anglo-Muhammadan Law can be considered

[127] Consequently, "the Shari'ah ceased to be a growing organism responsive to progressive forces and changing needs" and the resulting Anglo-Muhammadan Law was so peculiar in itself that it "cannot be used as a guide to the rules of Islamic Law as applied in countries which have been outside this system, such as, Saudi Arabia, Egypt, Syria, Iran, Nigeria" S. K. Rashid, *supra* note 13, p. 144.

[128] Hindu traditional Law underwent many changes during the British rule, which in part mirror those that affected the *Shari'ah*, though its transformation could be deemed even more intense, as the notion of a Hindu Law that could fit British standards did not exist, so it was almost invented by altering the Hindu tradition. See J.L. Halpérin, *supra* note 14, p. 15. Just to add some examples, British laws replaced parts of Hindu Law, for instance, property rights were directly replaced by Common Law rules, while other traditional laws were repealed (such as the prohibition on widows to remarry). Further on, the principle of equity, justice and good conscience was applied by judges to determine the rules of law to be followed in adjudicating a case, while the principle of *stare decisis* started to be applied, after the abolition of *pandits* in 1864, when British judges took to relying upon their previous decisions not only as persuasive arguments but rather as binding precedents; such method, however was against Hindu legal tradition, according to which, on the contrary, no court decision could be deemed binding, as the judge ought to try to reach the most equitable solution in relation to the specific circumstances of the case at hand. Besides, also with respect to Hindu legal literature, British judges decided to only rely upon the faulty English translation of few of the very numerous "dharmasutras" and "dharmashastras". See K. Zweigert & H. Kötz, *supra* note 32, pp. 389-390.

[129] S. K. Rashid, *supra* note 13, p. 145.

[130] This principle originally excluded from its sphere of application inheritance and family matters.

[131] In particular, the most important ones consisted in the application of the doctrine of the binding precedent, the principle of justice, equity and good conscience, and the principle of due process by which a court would regard a decision as righteous, if it was the result of just and loyal proceedings. Moreover, in certain cases where the British Law was deemed unsuitable, British judges resorted to non-British models (Scottish, French) and tailored the British framework to fit in with the Indian needs. See A. Gambaro & R. Sacco, *supra* note 44, p. 501.

[132] Those codes concerning specific legal fields were: the Penal Code (1860), the Civil Procedure Code (1859), the Contract Act (1872), the Transfer of Property Act (1882), the Trusts Act (1882), the Specific Relief Act (1872), the Negotiable Instruments Act (1881) and, subsequently, the Succession Act (1865); K. Zweigert & H. Kötz, *supra* note 32, p. 277.

[133] The most valuable example is the Indian Contract Act of 1872 which codified the rules of British Law regarding, for instance the conclusion of a contract, the vices of the will etc. Additional, though similar examples are the Specific Relief Act (1877) and the Transfer of Property Act (1882). See *Id.*

[134] *Id.*, p. 381.

> the *Shari'ah* [. . .] as seen by English judges and interpreted by them with the help of English law, without fully grasping it and thereby aligning it with English principles of equitable justice.[135]

Consequently, what it is now left to Indian Muslims is a hybrid legal system, biased in favor of the Common Law.[136]

Third, the abolition of *qadis* violated the *Shari'ah* prescription, as "only a Muslim, possessing specific qualifications could be a *Qadi*, or judge, to decide cases under the *Shari'ah*".[137] Such specific qualities concerned the *qadi*'s knowledge and competence regarding Islamic faith in its entirety as well as his personal involvement in the decision of a case, for as a practicing Muslim he would be spiritually affected by the outcome of the dispute.[138]

Fourth, from the previous points there derives the subsequent judicial misinterpretation of the *Shari'ah* which took place throughout the colonial period and is, to some extent, still present today. In fact, British judges were involved in the so called "judicial adventurism":[139] they disregarded the given rules of interpretation of the *Shari'ah* as well as the importance of the advisory function of native officers and scholars, in spite of "their less than adequate knowledge of the *Shari'ah*",[140] an attitude which led to judicial misinterpretation.[141]

Fifth, the colonial court system relied not only upon British judges, but also upon Indians educated in British law. In fact, British administrators encouraged the Indian elite,

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[135] *Id.*, p. 146.

[136] British judges do not hesitate to modify "the dominant Islamic ruling when they felt that the Islamic tradition made little meaningful sense". And this attitude was clearly reflected in the decision of the famous *Baker Ali Khan* case, concerning the validity of a *waqf* created through a will. The Privy Council, in settling this case, was confronted with a precedent decision dealing with similar circumstances, i.e. the *Agha Ali Khan* case. Such controversy had been decided by a learned Muslim jurist, who established that, given the fact that the parties were Shi'as, Shi'ah law ought to be applied, which, as opposed to Sunni tradition, considered invalid such form of *waqf.* Regardless of the trustworthy analysis carried out on various Islamic legal sources by the Muslim jurist, the Privy Council attacked the precedent judgment, for they argued that it was based on unreliable ancient texts, and, ignoring the Shi'ah doctrine, decided that a Shi'a could create a *waqf* through a will. This decision not only led to an harmonization between the Sunni and the Shi'a law, but "reduce the scope of Islamic legal analysis." A. M. Emon, *supra* note 1, pp. 343-346.

[137] S. K. Rashid, *supra* note 13, p. 146.

[138] This entails that the necessary legal competence to settle Muslim legal issues could only be possessed by an individual belonging to the Islamic community and who would share in the same moral, social and political views and traditions, all the while acknowledging the expression of cultural norms within the law governing such community which obviously could not be understood by an individual alien to it. *Id.*, p.147. In 1942, an Amendment was proposed in the Central Legislative Council to be attached into the Dissolution of Muslim Marriage Act, "to the effect that only a Muslim judge could take cognizance of matters covered by the Act". Nevertheless, as the British opposed, the amendment was not passed, with the exception of the State of Kashmir where the plea was accepted and resulted in the Jammu and Kashmir Dissolution of Muslim Marriage Act of 1942. *Id.*, *supra* note 13, pp. 147-148.

[139] *Id.*, p. 148.

[140] *Id.*, p. 149.

[141] "The courts, following the British practice, operated on a case law system of legally binding precedents." And "[t]his approach enabled [them] to assert a creative role in elaboration of Islamic Law", as "[t]hey went far beyond their traditional role which was restricted to simply applying the established law", J.L. Esposito, *supra* note 16, p. 221.

namely, those few, who could afford a high level education to attend English law courses in India or in England. Consequently, the indigenous legal systems lost their primacy and were replaced by the study of the European ones. As a result of this, not only the British but the learned Indians as well were sometimes ignorant of the Islamic jurisprudence, a trend which has allowed for the gradual alteration of the interpretation and the enforcement of the Islamic Law to the advantage of the Anglo-Muhammadan Law.[142]

Notwithstanding the serious consequences that the forced introduction of the Common Law in India has brought about, and, above all, its interference in the sphere of personal law, the issue of the Anglo-Muhammadan Law can also be analyzed from a neutral historical perspective, with the purpose of understanding the influence that such crossbreeding has exercised in the evolution of the current Indian State and society.

The effects of colonialism often outlast the actual period of colonial rule, as in many cases the ruled country, once independent, found itself reshaped and altered from within by the systematic changes made by the colonial power. This is exactly what happened in India after its formal independence in 1947. Through almost two centuries of colonial rule, British administrators had introduced and established an effective administrative and judicial system, which obviously served the colonial purpose of maintaining control, but which were eventually left as legacy to the newly-freed country as initial support and base for state administration.[143] The British had tried to categorize and simplify the diversity inherent in the Indian society and these changes did not merely remain an external source of influence, but they were somehow interiorized by Indians.

One of the most striking of developments brought about by this phenomenon is represented by "the rise of a new kind of scripturalist Islam"[144]. As already described above, British administrators chose to rely upon classical Islamic legal texts and follow them strictly regardless of whether they were considered binding sources of law.

However, in the meantime (namely toward the end of the 19th and the early 20th century) a similar scripturalist trend was growing within the worldwide Muslim community, as Islamic scholars committed themselves to reading once again the traditional sacred texts (*Quran* and *hadith*) in order to go back to the roots of their religion. This approach was grounded on the belief that Muslims needed to strictly adhere to textual sources, so as to derive from them the essential dogmas of the Islamic faith, which ought to be protected against the widespread secularization of thought and the subsequent diminishing importance of religion in society. Hence, such approach served the purpose of preserving the "authentic" Muslim identity, especially in those countries where Islam was

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[142] *Id.*, pp. 149-151. Such erosion of the *Shari'ah* continued well after India's independence insomuch as in 1984 the President of All India Muslim Personal Law Board was compelled to send a memorandum to Indian Prime Minister, maintaining that

> any change in the Shari'ah, direct or indirect, through legislation or judicial interpretation, would amount to *mudakhalah fi al din* (interference in religion) in violation of the freedom of religion guaranteed by the Constitution of India under Articles 25 and 26.

S. K. Rashid, *supra* note 13, p. 149.

[143] M. R. Anderson, *supra* note 21, p. 4.

[144] *Id.,* p. 20.

"endangered" by the presence of foreign powers, such as, for instance, India.[145] Besides, as a side effect of British policy, the adoption of scripturalism by Indian Muslims was facilitated by the concurrent British imposition of the orthodox Anglo-Muhammadan Law, based upon a rigid compliance with the strict rules of the Hanafi school, throughout the country.[146]

The great diversity within the Islamic community was also downplayed by the British who tried to impose standard rules to all Muslims. This caused many problems to the colonial courts, which were faced with the application of a fixed personal law system when settling disputes regarding parties, who were instead used to be governed by different personal arrangements. Despite those issues, such simplification provided, however, an important legal framework. In fact, the Indians, all be reluctantly, had to adapt to this new legal context in order to safeguard, as well as enhance, their economic, social and religious status within the colonial State. Owing to the constraints cause by this legal categorization, the only way for local communities to maintain a certain degree of autonomy or political privileges was to follow the new social framework introduced by the British. Indeed, "[t]he search for political allies [. . .] fostered the formation of new coalitions based upon, among other things, Muslim identity".[147]

Lastly, another unexpected development of the Anglo-Muhammadan Law and, one more subversive in nature, concerned the issue of Muslim identity. Indian Muslims could not accept that Muslim law was to be administered by non-Muslim judges as that was not only a violation of the *Shari'ah*, but it also implied changes in the traditional arrangements regarding their personal matters.[148] Therefore, a new vision of Islam developed in India during the last colonial period (late 20th century) around the idea of Muslim identity as opposed to the colonial rule; the same scripturalist and more orthodox approach fostered

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[145] See C. Geertz, *Islam Observed: Religious Development in Morocco and Indonesia*, 1971, pp. 104-105. Though the author addresses the cases of Indonesia and Morocco, he also takes into account the scripturalist approach with respect to Islam at large. Nevertheless, such scripturalist approach, which is based on the doctrine of *taqlid*, i.e. following the law found in the manuals of the schools, does not allow Muslim Law to meet the current needs of the modern society. Thus, to overcome this obstacle, Islamic sources of law ought to be reinterpreted and reformed by means of the right exercise of *ijtihad* (human reasoning), which will permit to maintain a continuity with the past, while "produc[ing] an Islamic legal system capable of meeting the needs and the exigencies of contemporary life." J. L. Esposito, *supra* note 16, p. 240. Furthermore, the same static idea of the *Shari'ah* promoted by British rulers and, partly inherited by Muslims themselves, it has recently proved to be the widespread conception of Islam Law both in Western as well in Eastern Countries (see A. M. Emon, *supra* note 1, pp. 332-333, the author provides the examples of the leadership of the Majlis Ugama Islam Singapura and the Canadian practitioners, who shared the common concept of the *Shari'ah* "as an inflexible code of religious rules, based on the Qur'an and the traditions of the Prophet Muhammad, and immune to change.").

[146] M. R. Anderson, *supra* note 21, p. 20. By reinterpreting Muslim Law, Islamic elite members were trying to resist to the colonial legal imposition and modernization of the *Shari'ah*; however, in so doing, the "multiplicity of opinions, different doctrinal schools, and competing theories of interpretative analysis" which characterized the medieval Islamic Law were set aside in favour of a more static and codified law. This attitude shall be considered Muslims' response to the issue of their political identity, for "the reductive, reified, and determinate concept of Shari'a provide[d] a foundation for defining identity through tradition", countering the widespread of Western values and culture, A. M. Emon, *supra* note 1, pp. 348-351.

[147] M. R. Anderson, *supra* note 21, p. 22.

[148] For example the law of *waqf.*

by the British towards Islamic texts and the prominence they gave to the oversimplification of the Muslim community, fostered the Muslim anti-colonialist struggle.[149]

VI. CONCLUSION

The Anglo-Muhammadan Law appears substantially different from the *Shari'ah*; and, even more so, it can be regarded as an independent system, "a hybrid law, heavily influenced by English principles of law, with rules borrowed from a number of foreign legal systems",[150] or in other words, a transformation of the Shari'ah so as to bring it in line with the colonial principles of law.

It follows, then, that the Anglo-Muhammadan Law may be labeled as a hybrid or mixed system,[151] defined as such by the "presence or interaction of two or more kinds of laws or legal traditions within each system".[152] Hence, those systems entail the presence of rules, techniques, legal procedures and laws derived from different systems, even though, one of them tends, eventually, to prevail.[153] The State of Louisiana and the Québec province represent two valid examples of crossbreeding and coexistence between a system of Civil Law and one of Common Law, which ought to be briefly discussed so as to provide a comparison with the Anglo-Muhammadan Law.

The territory of Louisiana had been a French colony since the 17th century, (despite a short Spanish rule in the late 18th century) until it was sold by Napoleon to the United States in 1803, thereby becoming a member of the Union. Notwithstanding its inclusion in the United States, the Civil Code of Louisiana was drafted on the basis of the French Civil Code. However, over time, Louisiana has been influenced by the legal system of the other States and by federal law, both of which belong to the Common Law tradition; the lack of an independent civil law base in the Country and the distance (both in terms of space and language) from the current French system, coupled with that phenomenon, are likely to increase the Common Law influence.

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149 *Id.*, p. 24.

150 W. Mensky, *supra* note 14, p. 369.

151 The existence of mixed legal systems dates back to ancient times and was generated by the social, political and commercial contacts among peoples. In particular, the Roman Empire and, later on, the Ottoman Empire represent two main historical examples of supranational entities which gave rise to mixed legal systems. As regards the Romans, the creation of mixed systems arose, on the one hand, from the gradual enlargement of the Empire which brought several tribes under its rule, and, on the other hand, from the principle according to which foreign peoples under Roman rule would still be governed by their own personal laws. This approach was embraced also by the German tribes once the Roman Empire collapsed. Given the coexistence of different populations governed by diverse laws, the latter "could not be hermetically separated", so they interacted and influenced each other giving rise to mixed systems of personal laws. Since its foundation in 1299, the Ottoman Empire was a plural legal system which evolved by the 19th century into a mixed system. Like the Romans, the Ottoman rulers applied Muslim law to Muslim people, while allowing non-Muslims to be governed by their own laws, except for criminal law. V. V. Palmer, *supra* note 45, pp. 1212-1215.

152 *Id.*, p. 1205. The author argues that "the current conception of 'mixed system', wherein the sole requirement is only the presence or interaction of two or more kinds of laws or legal traditions within each system" is so broad that it could embrace most of African and Asian systems as well as the classical mixed systems, such as Scotland, Louisiana and Quebec. It follows that a strict application of this conception would result in regarding "the quasi-totality of the legal systems of the world [. . .] as 'mixed legal systems'" *id.*, p. 1206.

153 K. Zweigert & H. Kötz, *supra* note 32, p. 90.

Whereas, the Canadian province of Quebec, was a French colony until 1772, when the entire region became part of the British dominion of Canada. Nonetheless, under the Quebec Act 1774 the citizens of the region were granted the right to be ruled according to French Law. Today's Quebec Law is based on a Civil Code which was formulated in 1886, and, though widely inspired by the Code Napoléon, it also includes matters (such as commercial law) governed by Common Law, which applies to the rest of Canada.

In spite of the similarities between these two hybrid systems, the survival of Civil Law in Quebec seems to be more probable than in Louisiana, as the French tradition is not only present in legislation, but it is also part of the local culture, and, furthermore, within Quebec French is one of the official languages, just like English.[154] The examples of Louisiana and Quebec serve to demonstrate that in hybrid systems there is a tendency on the part of one of the underlying legal traditions to prevail over the other.

Returning to the Anglo-Muhammadan Law, this system can be regarded as a peculiar type of hybrid system, for it is not made up of two, or more, political components, but it is a mixed system that concerns specifically the subjective sphere of personal matters,[155] constituting only a part of the overall Indian legal system, which belongs to a third legal tradition, namely the Hindu Law.

In fact, today's India is a "special case of 'hybridisation' or 'bricolage' between different legal components and perhaps the best illustration of the complex indeterminacy of legal orders".[156] Many former colonies, after their independence, found themselves dealing with the heritage of hybrid legal systems left by foreign rulers;[157] and, frequently, this has led to highly disappointing results. This failure in effectively administering and applying those mixed systems derives directly from the blind introduction of alien legal elements and the enforcement of foreign laws in a third society, without taking into account the importance of the local social and cultural context.[158] In fact, as a general rule, "unifying attempts through statutory reforms will remain largely ineffective unless

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154 *Id.*, pp. 143-146.

155 The peculiarity of the Anglo-Muhammadan Law case lies in its subject matter, namely, Muslim family law. The latter, representing the major part of the *Shari'ah*, stands for the common heritage of the different Islamic nations, to which Muslims will eventually return in order to retrieve their own history and values and to enhance their sense of identity against Western hegemony. See J. L. Esposito, *supra* note 16, p. 245.

156 J.L. Halpérin, *supra* note 14, p. 6.

157 Among such former colonies it is worth mentioning Malaysia, where "the Shari'ah is double affected by the common law", D.L. Horowitz, *supra* note 95, p. 555. In fact, on the one hand, the body of British-derived secular principles which does not apply to Muslims "cover the same fields as those which apply to Muslims", such as, for instance, family law. And, on the other hand, since the start of the Islamic Law codification in the 1980s, statutory provisions were placed before Islamic courts for interpretations, "upgrading" their role in the Country judicial system, similarly to Common Law courts. *Id.*, p. 556.

158 Many post-colonial societies have witnessed the rise of nationalist movements which affirmed the necessity to go back to their authentic cultural roots and pre-colonial institutions. However, at least as regards the legal field, the influence of imported laws or procedure could not be completely wiped out. Nevertheless, the success of legal reforms, including colonial legal transplants, is never predictable, as it does not depend on their "isomorphism with preexisting legal norms or [their] compatibility with specific features of the culture" (D.L. Horowitz, *supra* note 95, p. 578) as shown by Malaysia. In fact, its legal reforms have partly incorporated local elements so as to avoid conflicts on a large scale, while, on the other hand, they have substantially modified other fundamental matters, such as taxation, divorce, *muta'ah*, and the role of quadis' courts, though "none of this seems to have stirred significant rejection", *id.*, p. 579. Thus, it could be assumed that for a legal reform

the community itself modifies its norms".[159] This statement, by W. Mensky, clearly summarizes the current Indian situation, as "many post-colonial Indian judgments reflect the need for gradually reorienting Indian legal system, finding suitable and sustainable local solutions as opposed to those left by the colonial influence".[160] Such a stance of the Indian legal society reflects the default of the positivistic and modernist approach introduced by the British, the so-called "rule of law", whose application after the Country's independence, especially during the 70s, lost credibility as it "favoured the rich and powerful, underwriting huge abuses of law by the elite and by the state itself".[161] Therefore, traditional laws have regained ground and are currently being reinvented so as to fit in the modern Indian system.

In conclusion, from a diachronic perspective, the main effects of English Law upon Muslim Law in India are still a process in progress, and its most ambitious outcome, *i.e.* a uniform legal system, is still incomplete. This process of subliminal uniformity involved in the first place the legal and judicial formants.

Starting from the early 19th century, British judges moved the *Shari'ah* closer to the British tradition, by means of general Common Law principles in order to adjudicate the cases at hand. Subsequently, the legislative format mitigated the great divergences within the Muslim community, by fully replacing parts of the *Shari'ah* principles and institutions with British rules. This attitude reached its height in 1937, with the Shariat Act.

After India's independence, this trend has been fostered by the Supreme Court, which, in consonance with its role as guarantor of the uniform interpretation of the law, has left "less room for conflicting decisions of High Courts",[162] owing to the application of the British doctrine of binding precedent.

Furthermore, such a thirst for uniformity is also evinced by one of the non-self-executing provisions of the Constitution, namely article 44, which reads "[t]he State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India";[163] however, in spite of this exhortation and the position repeatedly adopted by

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to be successful it ought to "tap a powerful aspiration to modernity or find home in an unusually adaptable culture", such as Malaysia. The tolerance of legal contradictory elements within the same system enables the Country to avoid a dogmatic approach in favour of a more pragmatic one. *Id.* The author concludes by arguing that "legal pluralism is likely to endure in many countries", for it ought not be assumed that "what has become, after a lengthy quest, authentic and familiar, however eclectically it was created, can find easy and equivocal acceptance among people whose own search for authenticity may begin and end elsewhere." *Id.*, p. 580.

159 W. Mensky, *supra* note 14, p. 54.

160 *Id.*, p. 56.

161 *Id.*, p. 261.

162 A. Gledhill, *supra* note 8, p. 603.

163 See art. 44 of the Indian Constitution: http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm. Site accessed on 13.03.2014. However, it ought to be mentioned that a petition "to consider the question of enacting a common Civil Code for all citizens in India" has been made, though the Supreme Court dismissed it as it cannot legislate on the matter. See Supreme Court (India), *Maharshi Avadesh v Union of India* [1994] 1 S.C.C. 713. It is likewise evident that in a context so much characterized by religion, it could be argued that such uniformity might be seen as a violation of the fundamental rights to freedom and religion, and in the event such uniformity was reached, then it would be difficult to relegate religion to a specific and limited field.

the Supreme Court over the decades, the legislature has, so far, failed to pass a uniform civil code.[164]

It also bears mentioning that the Anglo-Muhammadan Law as a mixed (personal) system is necessarily entangled in the processes of transformation which the entire legal system is presently undergoing and whose final outcome will largely depend on the interaction among those social, cultural, legal and political factors. Granted, this is true for all legal systems, but it is even more so in India, because there the regulation of personal matters is inextricably linked to the personal law of the citizens which is religious in nature. This entails that the regulation of these matters has strong ties to a person's community and is, therefore, defended as an element of cultural identity from everything that is perceived as an attack from the outside.

This phenomenon affects, in particular, the Muslim minority – in spite of their number[165] –, for they fear that a hypothetical uniform civil code would "codify" the extinction of a part of their identity.[166]

Here is why these peculiarities of the Indian legal system cannot be overlooked if one wants to carry out an accurate comparative legal analysis of the Anglo-Muhammadan law and its historical development.[167]

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164 Among many, see the judgment of the Supreme Court (India), *Smt. Sarla Mugdal, President, Kalyani & ors. v Union of India & ors.* [1995] 3 S.C.C. 635, which deals with the specific circumstances concerning a Hindu husband, who married under Hindu Law, but who has subsequently embraced the Muslim faith and seeks recognition for his second marriage. This case raised once again the issue of a uniform civil code, as "no matrimonial law of general application [exists] in India" and "[t]here is no general matrimonial law regarding mixed marriage other than the statute law" which, however, was not applicable under the circumstances. Hence, the judges argued that "the Governments – which have come and gone [since 1949] have so far failed to make any effort towards 'unified personal law for all Indians", and that if the Hindu Law was codified back in the 1950s so as to uniformly govern the most part of the Indian population, "there is no justification whatsoever to keep in abeyance, any more, the introduction of 'uniform civil code' for all citizens".

165 According to the 2011 census, the Muslims number 138,188,240; however, they only account for 13.4% of the overall population. http://censusindia.gov.in/Census_And_You/religion.aspx. Site accessed on 19.03.2014.

166 After all a legal system

> does not need merely to promote efficiency, or to align particular doctrines with particular opinions or social practices, or to follow developmental imperatives, or to suit the knowledge and interests of lawyers and reformers,

but it ought to be deemed morally appropriate for a specific context. D.L. Horowitz, *supra* note 95, p. 569.

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