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Dowry Prohibition Laws in Bangladesh: Problems of Implementation

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Abstract

The practice of dowry, which is neither supported by personal law nor State laws, has become an acute problem resulting in breakage of social malady and texture in Bangladesh in recent years. The dangerous aspect relating to it is the physical and mental torture on the wife due to inadequate or non-payment of dowry. Every year a number of women are tortured, killed and considerable numbers of women commit suicide for this existing evil custom. To deal with this social menace, the Parliament of Bangladesh enacted the Dowry Prohibition Act, 1980, which was subsequently amended in 1982, 1984 and 1986. In 2000, a more stringent law i.e. the 'Women and Children (Repression Prevention) Act, 2000' was passed by the Parliament to prevent cruelty against women including dowry-related violence. This Act was amended in 2003 to remove certain loopholes and to make it more severe. But all the efforts of the government ended in vain, as a good number of instances are being reported regarding torture and oppression of women every now and then due to dowry. Although specific laws have been formulated to deal with these matters, these laws are not effectively implemented to eradicate the practice of dowry from the society and to stop the violence against women relating to dowry due to various problems. Thus, based on detailed fieldwork, this paper is an attempt to identify the problems that hinder the effective enforcement of the dowry prohibition laws in Bangladesh.

I. Introduction

Generally the term 'dowry' means the property both in cash and kind that a bride brings with her at the time of her marriage.[1] Nasrin defines 'dowry' as "cash money, goods, valuable items or property that the bride's family gives to the groom's family upon marriage."[2] According to Section 2 of the Dowry Prohibition Act, 1980:

> Dowry means 'any property or valuable security given or agreed to be given at the time of marriage or at any time either directly or indirectly: a) by one party of the marriage to the other, or b) by the parents of bride or bridegroom or any other person to either party to the marriage.

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1 Teays Wanda (1991) THE BURNING BRIDE The Dowry Problem in India, *Journal of Feminist Studies Religion*, 7(2), p.29.

2 Nasrin Shahana (2012) *Crime or Custom? Dowry Practice in Rural Bangladesh*, Germany: Lambert Academic Publishing, p.7.

However, the Dowry Prohibition (Amendment) Ordinance, 1984 has extended the definition of dowry to 'any property or valuable security given at the time of marriage or at any time' by substituting the earlier words 'at, before or after the marriage'.[3]

The practice of dowry is not recognised in Islam and, as such, it is not a part of Muslim marriage in Bangladesh.[4] Yet, the demand for, or the payment of, dowry at the time or after marriage has become widespread among rural than urban population where it is treated almost as an essential component of every marriage contract. The custom of the payment of dowry may be traced to the Hindu marriage as traditional Hindu law does not recognise the right of daughters to inherit[5] from the deceased parent's property. Consequently the practice of the payment of dowry developed to compensate the daughters gradually infiltrated into the Muslim marriage in Bangladesh mainly in the 1970s.[6] The Bangladeshi Muslim society is greatly influenced by many Hindu customs since Bangladesh was a part of Indian Sub-Continent during the British regime. Thus, it seems relevant to the point to the influence of Hindu customs on marriage transactions from interaction and contact with Hindu society, leading to the adoption of many customs, dowry being one of those.[7] Although, in earlier Hindu period, dowry would be given for the benefit of the brides but, in Muslim marriages in Bangladesh, it has become an effective tool to accumulate money from the brides' family by applying force and coercion where the brides actually get nothing.[8] Sometimes, women are subjected to torture, cruel or inhuman treatment and murder when their parents/guardians fail to make the dowry payment in time. Demand of dowry may take place even well after the marriage and in case of non-compliance, women may face the actual, or, threat of, abandonment, divorce and physical as well as mental torture.[9] Consequently, sometimes women prefer to commit suicide when they do not find any prospect of getting support from the parent or guardian.[10]

In response to the growing incidence of dowry violences in Bangladesh, the Parliament enacted the Dowry Prohibition Act in 1980.[11] This Act has described the conduct of demanding or taking and giving dowry as a criminal offence punishable with a maximum penalty of one year imprisonment or with a fine or with both. To prevent the increasing numbers of cases in dowry related cruelty, the Cruelty to Women (Deterrent

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3 The words "at the time of marriage or at any time" were substituted for the words "at or" by Section 2 of the Dowry Prohibition (Amendment) Ordinance, 1984 (Ordinance No. LXIV of 1984).

4 Huda Shahnaz (2006) Dowry in Bangladesh: Compromising Women's Rights, *South Asia Research*, 26(3), p.249.

5 According to the Muslim inheritance law, daughters get half whereas sons get full share in their deceased parents' property. But, the custom of dowry is not definitely developed due to the provision of inheritance rather it is the greedy mentality of the grooms and their parents.

6 Nasrin Shahana (2011) Crime or Custom? Motivations Behind Dowry Practice in Rural Bangladesh, *Indian Journal of Gender Studies*, 18(1), p.28.

7 Ameen Nusrat (1997) Dowry in Bangladesh: How many more deaths to its end?, *The Dhaka University Studies*, Part- F, Vol. VIII (1), p.128.

8 Supra 4, p.253.

9 *Ibid*., p.251.

10 Rozario Shanti (2009) Dowry in Rural Bangladesh: An intractable problem? In T. Bradely et.al. (Ed.), *Dowry Bridging the Gap between Theory and Practice,* London: Zed Books, p.48.

11 Act No. XXXV of 1980.The Act was amended in 1982, 1984 and 1986 to fulfill certain gaps and to make the Act more effective.

Punishment) Ordinance of 1983 was enacted, but was then repealed and substituted by the Repression against Women and Children (Special Provision) Act of 1995. This Act provided severe punishment for crimes of dowry violence against women. In 2000, a new law namely, 'the Women and Children (Repression Prevention) Act, 2000' was passed by the Parliament which was subsequently modified in 2003 to combat violence against women and children including dowry-related cruelty. This Act has repealed the Act of 1995. Thus, now, to prevent and punish dowry-related offences, two laws i.e. the Dowry Prohibition Act, 1980 ('Act of 1980') and the Women and Children (Repression Prevention) Act, 2000 ('Act of 2000') are in force in Bangladesh. The offences under the Act of 1980 are triable in Magistrate Court whereas the offences under the Act of 2000 are triable by the Special Tribunals known as *Nari-O- Shishu Nirjatan Daman* Tribunal.

Despite these stiff legal strategies, the practice of dowry has been continuing and violence relating to dowry is increasing, and is partaking in ingenious forms beyond one's usual imagination.[12] A cursory view of the national daily newspapers' reports will show that the current year has witnessed a number of gruesome dowry-related violence against women which indicate that the dowry prohibition laws are not successful in detering the violence.[13] According to the report of the Police Headquarters, it is seen that from 2001 to 2011, a total of 48,511[14] cases on dowry related violence were filed in the country. This statistic, however, does not portray the actual number of cases involving dowry-related violence as many occurrences go unreported. Additionally, the police do not maintain any data as to disposal of cases relating to dowry violence in a year nor they do have statistics as to the number of filing and dissolving of complaints under the Dowry Prohibition Act, 1980, for dowry demand. But, after studying fifteen unreported cases of the Magistrate Court on dowry demand and fifteen unreported cases of Tribunals on dowry violence, it is found that most of the cases (around 77%) resulted in acquittal and around 23% were in conviction. The highest rate of acquittal indicates that the existing laws are not enforced properly to deter dowry related offences. The questions then may be raised: why are the laws not successful in preventing the dowry violence? What are the problems of enforcement of the dowry prohibition laws? This paper addresses these questions based on primary and secondary sources. Primary data were obtained from a research project entitled 'Enforcement of the Dowry Prohibition Laws in Bangladesh: A Legal Study.' The secondary sources comprise books, journal articles, research reports, dissertation and newspaper reports.

In this qualitative study, the main method of data collection was the face-to-face informal interview based on a particular questionnaire. Interviews with 50 married women who paid the dowry and faced torture due to the inadequate payment or non - payment of dowry in time were conducted in *Pirgacha Upazilla* of *Rangpur,* a northern district of Bangladesh. The women were from Muslim community and their age limit was from 20-30 years old. Field work was conducted from August to October 2012 through the technique of purposive sampling method. Assistance was obtained from one gatekeeper

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12 Haque Ridwanul (2012) *Training Manual for Judges and Public Prosecutors on Violence against Women*, Dhaka: Judicial Administration Training Institute, p.20.

13 Odhikar (2013), Human Rights Monitoring Report, 1-31 July.

14 Unpublished statistics have been collected from the Police Headquarters, Dhaka in December 2012.

from that locality and the local office of BRAC[15] for selecting the respondents easily and conducting the fieldwork smoothly. Additionally, the persons who are directly involved in law enforcement such as judges, magistrates, police officials and the lawyers were interviewed to understand the problems of enforcement of the dowry prohibition laws more emphatically. Thus, the following discussion will begin with the analysis of the major flaws of the Dowry Prohibition Act, 1980, and the Women and Children (Repression Prevention) Act of 2000. The discussion will then illustrate the other problems - the role of police and the judiciary, problems of establishing the case before the court, structural problems and social attitudes or attitude of the victims and the community as regards the legal mechanism. Finally, the article wraps up the analysis by providing new suggestions towards the effective implementation of the dowry prohibition laws in Bangladesh.

II. Major Flaws of Dowry Prohibition Laws

A. The Dowry Prohibition Act, 1980

Section 2 of the Act of 1980 prohibits dowry which is given as a consideration of marriage. It implies that a close link between dowry and consideration of marriage is essential to establish an offence under this section. Therefore, a post- marriage gift does not appear to be regarded as dowry unless it is made as a consideration of marriage.[16] This creates scope for both the families of husband and wife to label dowry as a gift and to escape punishment as provided in the law. For example, a rigid application of this provision in *Poddar vs. Saha*[17] failed to provide a legal recognition of taking dowry. In this case, the High Court Division considers two prime issues: (1) what constitutes dowry and (ii) whether dowry was taken as consideration of marriage. The Court reasoned that any money or property must satisfy the definition of dowry as under the Act of 1980 in order to call it a dowry. It maintained that what stands out prominently [from the definition] is that the property or valuable security is to be given as consideration for the marriage of the parties which then becomes a dowry. Finally, the Court held that the demanded dowry in this case was not a consideration of marriage and thus it did not constitute dowry.

Again, the explanation to section 2 of the Dowry Prohibition Act, 1980, declares that the gifts which are made at the time of marriage to either party to the marriage in the form of any articles the value of which does not exceed *TK* 500 (US$6.5) shall not be regarded as dowry unless they are made in consideration for the marriage. This presumes that gifts the value of which does not exceed 500 *TK* (US$6.5) are not deemed to be dowry unless made in consideration for the marriage. This also contemplates that if the value of the gift exceeds *TK* 500 (US$6.5), it must have been given as consideration for

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15 BRAC stands for Bangladesh Rural Advancement Committee, one of the renowned non-governmental development organisations in the world based in Bangladesh. It was established in 1972 by Sir Fazle Hasan Abed.

16 Begum Afroza (2004) Protection of Women's Rights in Bangladesh: A Legal Study in an International and Comparative Perspective. Unpublished *PhD thesis*, Australia: University of Wollongong, p.255.

17 *Mihir Lal Saha Poddar @ Mihir Kumar Poddar Vs. Zhunu Rani Saha* (1985) 37 DLR (Dhaka Bench). p.228. It is regarded as the first reported cases on dowry demand in Bangladesh.

the marriage.[18] Thus, the law does not take into account the changing form of marriage transactions.

As regards the punishment for dowry-related offences, section 3 of the Act places less emphasis on penalties. This Act leaves much discretion with the Court to reduce the sentence, and imprisonment is equated with a fine. Thus, penalties under section 3 seem to be vulnerable due to the possibility of scope of biasness on the part of the Magistrate as Badruddoza (2002) says, 'in repression cases against women usually the offender is more powerful and it is a matter of great shame to say that even many judicial members are corrupt and sometimes the judgment can be bought.'[19]

In assessing criminal liability, section 3 of the Act puts dowry - giver and dowry - taker in equal place. In so doing, it fails to recognise that the gravity of criminality and immorality involved in taking dowry is more severe and more blameworthy.[20] This is because in nearly all cases, dowry is motivated by the greed through the manipulation of the superior bargaining power of the groom's family. The Joint Committee of the Parliament of India rightly said that the dowry- givers '… do not give dowry out of their free will but are compelled to do so'.[21] Thus, the deeply entrenched socio-cultural values attached to the marriage ceremony in Bangladesh, a smooth completion of marriage and concern for the daughter's happiness influences the parents to provide dowry as mentioned. On numerous occasions, parents need to incur huge financial liability to satisfy the demands of the in-laws. Certainly, this liability does not represent their voluntary choices for offering dowries in favour of in-laws.[22] The Act disregards this particular situation of the bride's parents. Besides, when provision of punishment is kept for the giver and taker, no giver can be expected to come forward to make a complaint.[23] Lawyers have found the fact that by making both parties liable under the Act makes it less likely that a complaint will be filed. Even when one party is innocent, the other party may threaten to file a counter complaint.[24] One of the lawyers of Dhaka Judge Court commented, 'until and unless the law is amended to make only the dowry taker liable to be punished, the Act will not be effective to eradicate the dowry from the society.' The reality is that, no case has been filed or prosecuted against the dowry givers in Bangladesh although more than three decades have passed after the enactment of the Act.

Section 4 of the Act, 1980 makes 'direct and indirect demand', for dowry, an offence. But, neither the Act defines the term 'indirect demand', nor any guidelines are

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18 Monsoor Taslima (2008) *Management of Gender Relations Violence Against Women and Criminal Justice System in Bangladesh,* Dhaka: The British Council, p.37.

19 Badruddoza A.S.M. (2002) Plight of Women in Bangladesh, *PUCL Bulletin*, December, p.2.

20 Kaushik S.Tara (2003) The Essential Nexus Between the Transformative Laws and Culture: The Ineffectiveness of Dowry Prohibition Laws of India, *Santa Clara Journal of International Law*, 1(1), p.88; See also Kishwar Madhu Purnima (2005) Strategies for Combating the Culture of Dowry and Domestic Violence in India, *Violence against Women: Good practices in combating and eliminating violence against women* in Expert Group meeting, Austria: Vienna, p.14.

21 Nangia Ashu (1997) The Tragedy of Bride Burning in India: How Should the Law Address it? *Brooklyn Journal of International Law*, 22, p.666.

22 Supra 16, p.257.

23 Supra 21, p.667.

24 Ameen Nusrat (2005) *Wife Abuse in Bangladesh: An Unrecognised Offence*, Dhaka: The University Press Limited, p.58.

developed by the parliament or concerned ministry or judiciary of the country to shed some light on to the definition of this term. In the absence of such clarification, many undue expectations of the in-laws and their fulfillment might remain beyond the scope of 'indirect demand'.[25] This sort of implicit tactic of obtaining dowry also tends to physically or emotionally abuse a newly wedded woman within the four walls of the matrimonial home when she deserves to be treated well.[26] Moreover, such a situation leaves no scope to assess in-laws' treatments towards her, or to differentiate between undue expectation and 'indirect demand' by an independent witness.

Section 7 of the Act clearly states, 'no court shall take cognizance of any such offence except on a complaint made within one year from the date of the offence'. It is quite a surprising exception included in this Act, because, generally, the law of limitation does not apply in criminal cases. Moreover, the term 'no court shall take cognizance' as used in the section is absolute in form and this does not leave for any scope for 'condonation of delay'.[27] One of the lawyers of the Magistrate court of Dhaka expressed:

> The time limit as embodied in the section 7 is a stumbling block to implement the Act properly and, in most of the dowry demand cases the lawyer of the defendants try to establish that this is an occurrence of more than one year ago and hence, the case is not sustainable.

According to section 8 of the Act, 'every offence… shall be non-cognizable, non-bailable and compoundable'. Under the Act of 1980, offences are only cognizable if a complaint is filed with a Magistrate of First Class. This is in contrast to a normal criminal case with which may be lodged with police. Because of this procedural requirement, those wishing to report any violation of the Act of 1980 cannot do so at the local police station rather, they most likely must employ the services of a lawyer to register the complaint in the Magistrate Court. Given that the victims of dowry demand are often very poor and are unable to take assistance from the law enforcing agencies makes the Act ineffective and often fails to protect the victims from dowry demand.[28]

B. The Women and Children (Repression Prevention) Act, 2000

Section 11 of the Act provides severe penalties for dowry related violence. Besides, along with the offence of murder and the attempt to murder for dowry, in this section 'attempt to cause hurt for dowry' has also been included as an offence and, accordingly, the section is divided into three parts: (a) causing death or attempt to cause death, (b) to cause grievous hurt or attempt to cause hurt, and (c) to cause simple hurt. But, what acts or attitudes will amount to an attempt to cause hurt for dowry has not been mentioned in the Act, thus, leaving the law absolutely vague. Furthermore, the pertinent section does not provide

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25 Supra 21, p.667.
26 Supra 16, p.260.
27 Abu Bakar Khandakar (1989) *A Hand Book on the Dowry Prohibition Act of 1980 and the Cruelty to Women (Deterrent Punishment) Ordinance of 1983*, Dhaka. p.1.
28 Supra 7, p.148.

any punishment for 'attempt to cause hurt for dowry'. But from a careful reading of the section it appears that the legislators intended to impose the same punishment provided for causing hurt and grievous hurt for dowry but they have omitted the words 'attempt to cause….' mistakenly. Such careless drafting of law leaves the scope for different interpretation and make the application of law confusing.[29]

Again, the Act provides the punishment for physical abuse and cruelty but, neither the principal Act nor the amendment made the provision for psychological abuse of women by their husbands and in-laws. Moreover, if a woman commits suicide due to mental torture, there is no provision in this Act for the punishment of the abettor of suicide.[30]

Section 18 of the Act provides that the investigation must be completed within 120 days. Additionally, section 18(iii)(a) provides, if the investigating officer fails to complete the investigation within 120 days, then another investigating officer may be appointed for doing so and will complete the investigation within another 30 days. But, it is not mentioned in the Act that, what will happen if the investigating officer who is subsequently appointed fails to complete his task within 30 days. However, the reality is that most of the investigations are not completed within this time period due to various reasons.[31] One of the Sub-Inspectors of Kalabagan Police Station, Dhaka expressed that 120 days is not enough to complete the investigation. As he said:

> We go to the place of occurrence but hardly find the witnesses to talk to us. Moreover, the neighbors of the victims are not helpful in this regard. Sometimes they misguide us by providing false information. Furthermore, we conduct the investigation of other cases at the same time, and cannot concentrate on a particular case like dowry violence.

Again, Section 20 provides that the trial should be completed within 180 days. But, in Bangladesh no case under the *Nari-Shishu* Tribunal has yet been settled within the prescribed time period.[32] In this regard, one of the tribunal judges said, 'it is not possible to settle a dowry violence case within 180 days in the present criminal justice system.'

III. Role of Law Enforcing Agencies

A. Role of the Police

The police force is the principal agency of the criminal justice for the enforcement of laws.[33] They arrest the criminals, conduct investigation and in the Magistrate Court,

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[29] Tania Sharmin Jahan (2007) Special Criminal Legislation for Violence Against Women and Children- A Critical Examination, Special Issue: *Bangladesh Journal of Law*, p.209.

[30] Zahan Asma Aktar (2005) *Bangladeshe Nari Nirzaton abong Aingoto Kathamo: Ain Proyogkari Pratishthansomuher Bhumika (*in Bangla). Bangladesh Freedom Foundation: Forum on Women in Security and International Affairs, p.35.

[31] Naripokhho (2001), Women and Children (Repression Prevention) Act, 2000: An Assessment, Dhaka.

[32] Nari-Shishu Tribunal is established under s. 25 of the Women Children (Repression Prevention) Act, 2000. By analysing around 15 cases of the Tribunals both reported and unreported, not a single case could be found which was settled within 180 days.

[33] Khandakar Abu Bakar (2011) The Investigation and Criminal Justice. *MLR (Journal*), 16, p.51.

the prosecutions are conducted by the court Police Inspectors. From the recording of the FIR[34] up to execution of the judgment of the Court, police play a significant role in criminal justice system.

However, the study[35] shows that one of the main reasons for the non-enforcement of the dowry prohibition laws is ineffective and defective role of police. This ineffective role starts from filing the case and continues till the final settlement of the cases.[36] When the victims or her guardians go to police station to lodge an FIR, police show reluctance to file it properly and sometimes file it under wrong section of the Act.[37] According to a report of a Bangla newspaper Abdul Hoque, the father of the dowry victim Khadiza went to police station to file the case, but without recording the case police advised him to go to the Court and, since the Court was closed in December he came back without lodging the case.[38] Sometimes police take bribe for recording the cases. One of the respondents named Parul Akter (real name) shared during the interview that, she along with her father went to *Pirgacha* police station to file a case against her husband for torturing her for dowry, but the then duty officer demand *TK*10,000 (US$128.53) as bribe, due to which they came back home without filing the complaint. Another respondent replied with anger, 'to deal with the police is another type of violence.' Without admitting these complaints against them, some police officials said, 'most of the accusation of dowry violence are false and fabricated, people do it to harass others if there is any conflict between them on any family issue.' Thus, the attitudes of the police towards the dowry related offences are not really helpful for enforcing the laws.

Investigation is an important part of a criminal case and the success of criminal justice mostly depends on the effective investigation report which is again conducted by the police officers. In dowry violence cases, like as other criminal cases, police enjoy unfettered power during investigation where even the Court cannot interfere. A criminal case is said to have a positive result when the investigation is done on correct line for drawing up of a police report.[39] Likewise, the manipulation of the investigating process by the police has been one of the serious obstacles for getting a favourable remedy in dowry violence cases. A number of lapses appear during the process of investigation which effectively destroys the credibility of cases.[40] For example, statements of reliable and important witnesses are almost never recorded in due time. Moreover, relevant witnesses' failures to accompany the police to the relevant spot at the relevant time

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34 F.I.R. is the abbreviation of First Information Report which can be filed to the police station regarding cognisable offence under Section 154 of the Code of Criminal Procedure, 1898.

35 During the fieldwork, it was found that about 80% of the respondents were dissatisfied with the behaviour of police.

36 Supra 24, p.62.

37 Greenberg G. Judith (2003) Criminalising Dowry Deaths: The Indian Experience, *Journal of Gender, Social Policy & the Law*, 11(2), p.803 ; See also Monsoor Taslima (2003) Dowry Problem in Bangladesh: Legal and Socio-Cultural Perspectives, *The Dhaka University Studies*, Part-F, 14(1), p.12.

38 Khandakar Anis (2013) Advise to go to the Court without taking the case, *The Daily Prothom Alo* on January 7, p.7.

39 Chowdhury Asad Hossain (2011) All about Criminal Law, *BLD (Journal)*, 31, p.4.

40 Supra 33, p.52.

further compound the difficulties.[41] The failure of the police to investigate properly and to take proper action helps many offenders to go legally unchallenged.[42] Besides, due to corruption and politicization of the police department, they sometimes submit defective investigation report.[43] One of the tribunal judges of Dhaka expressed his view that, 'from my experience I have seen that in most of the cases police submit final report by taking bribe from the accused parties and in other cases present weak charge sheet.' Apart from corruption and manipulation in investigation, it was revealed that investigations are often conducted by junior and inexperienced police officers who may not be well versed with technicalities required to carry out effective investigations. In addition, they engage with a lot of functions at the same time and as such, cannot concentrate on the investigation of a particular case.[44] Thus, the police officials suggested that, 'the investigation should be conducted by experienced and senior police officers.'

B. The Role of the Judiciary

Although an increase in the number of dowry violence cases is evident, only a small proportion is reported, of which fewer ultimately reach to the trial and judgment stage.[45] What ails the Bangladeshi judiciary, preventing it from performing its duty as protector of justice? On being asked about possible explanations, a sample of 20 judicial magistrates and 10 judges of the tribunal interviewed opined that 'the courts are at the mercy of the evidence placed before them.' Chowdhury (1998) stated in her study:

> Faulty and fabricated evidence or a complete lack of it, circumstantial evidence which might prove to be inadequate, lack of proof and corroborative evidence, prime witnesses turning hostile and hesitating to depose, and the self-contradictory nature of the legal provisions, were cited as major difficulties faced by the court in arriving at a fair and just verdict.[46]

Besides the procedural insufficiency, the attitude of the judiciary towards gender equality which stems from the values of the patriarchal society of which they are a part may be seen as an important component in preventing a truly impartial appraisal of dowry offences. During the interview with the judicial magistrates, only 3 out of 20 (one is female), that is only 15%, expressed their opinion that they tried the dowry demand cases

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41 Khair Sumaiya (1999) Violence Against Women: Ideologies in Law and Society, *Bangladesh Journal of Law*, 3(2), p.154.

42 For example in *Akbar vs. State* (1999) 51 DLR 268 (court explains how faulty investigations of the case by the police helps the accused escape punishment).

43 Musa Sainabou (2012) Dowry-Murders in India: The Law & Its Role in the Continuance of the Wife Burning Phenomenon, *Northwestern Interdisciplinary Law Review*, V(I), p.240.

44 Police go to arrest the accused, perform protocol duties, appear at the court to be witnesses in other cases and engaged in maintaining law and order situation such as conflict between political parties.

45 Supra 16, p.275; See also, Menski F. Warner (1998) Legal Strategies for Curbing the Dowry Problem in Werner F. Menski (Ed.), *South Asians and the dowry problem*, London: Trentham Books & SOAS, p.104.

46 Chowdhury Manjaree (1998) Miles to go: An Assessment of the Enforcement Hurdles in the Implementation of the Anti-dowry Law in India. In Werner F. Menski (Ed.), *South Asians and the Dowry Problem*, London: Trentham Books & SOAS, p.156.

more sympathetically and from the aspects of the establishment of women's rights and women's access to justice. Again, with the interview of tribunal judges, it was found that none of them tried the dowry violence cases from the perspective of women's rights rather they depend on concrete evidence and follow the principle of innocence.[47] However, some scholars consider it as the patriarchal mentality of the judges which is an obstacle to render justice to the female victims.[48] Thus, Sarkar (1985) remarks that, 'judicial commitment to social justice and declaration of the need to promote gender justice often brings in conflict with the years of unquestioned principles of male dominance and women's inferior status.'[49]

Again, it is seen that in dowry violence cases, sometimes the attitudes of the judges and magistrates are not women friendly. They also consider, like the police, that most of the cases relating to dowry demand and dowry violence are false and concocted.[50] During the fieldwork, the hearing of one of the case on dowry violence was observed and it was found that the judge warned the complainant about filing a false case and wasting the time of the Court on trivial issues. In this case, the victim was a poor woman from a rural area and could not adduce sufficient evidence as the incident took place in her in-laws house. The failure of proving the case before the Court however, does not mean that it is false. Thus, making such observations, without considering the situation of the female victim, reflect the attitude of judges which is not really practical to mitigate the untold sufferings of the ever increasing victims of dowry related violence.

If, after facing all the hurdles, a dowry violence case ended up in conviction, but in the High Court Division, most of those cases are dismissed by acquitting the accused.[51] Without considering the intent of the Act, the higher judiciary considers the cases of dowry violence from the perspective of traditional principles of criminal justice. This is reflected in their judgments.[52] One tribunal judge was of the opinion that, 'the higher courts consider the issues more liberally, that's why the offenders who are convicted by the tribunal are acquitted in the higher court.' In many reported cases[53] it is seen that, the court uphold a very restrictive approach and placed much emphasis on formal wording of the law instead of its intent. For example, in the case of *Kishore Kumar Dutta v. State*,[54] where there was no ocular evidence of the occurrence, the High Court Division held that, 'the allegation for causing hurt is not for any demand of dowry hence section 11 (b) of the Act is not attracted.' Again, in the case of *Nakib Ashraf and another v. State and another*,[55]

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47 Of course the judges will settle the cases according to laws and principles of criminal justice, but where there is scope to apply discretion, it is suggested that they should apply their discretion and judicial activism.

48 Vindhya U. (2000) Dowry Deaths in Andhra Pradesh, India: Response of the Criminal Justice System, *Violence Against Women*, 6, p.1097; See also, Supra 43, p.243; Supra 18, p.38.

49 Sarkar Lotika (1985) Women and the Law*, Annual Survey of Indian Law*, New Delhi: Indian Law Institute, 493

50 In response to a question relating to the reasons of high number of acquittal, the magistrates replied, 'actually most of the complaints are false hence, it seems the offenders are acquitted.'

51 Supra41, p.156; Supra 18, p.38.

52 Supra 21,p.233;Supra16, p.279.

53 Reported cases mean judgments which are reported in Law Reports like DLR (Dhaka Law Reports), BLD (Bangladesh Legal Decisions), BLT (Bangladesh Law Times), MLR (Mainstream Law Reports) etc.

54 15 BLT (2007) (HCD) 174-181.

55 14 MLR (2009) (HCD) 286.

the High Court Division, totally ignoring the circumstantial evidence, observed that when no injury is caused to the wife and the occurrence takes place elsewhere in which the relatives of the wife are assaulted by the accused in demand for dowry, the allegations do not constitute offence punishable under section 11(c) of the Act of 2000. In *Abul Kalam Azad vs. State*,[56] the accused got acquittal from the High Court Division and the Court's observation was that, 'since the prosecution has failed to prove beyond reasonable doubt that the death of the bride was due to dowry demand, the accused should be acquitted.'

Thus, there is a marked disinclination of the judiciary to impose exemplary punishments against persons accused of dowry violence against women despite the strict measures laid out the relevant Acts. One of the Tribunal judge said in this regard, 'since severe penalty is not charged with and example is not set that's why violence is continuing and the offenders dare to commit such types of crime time and again.'

IV. Problems of adducing evidence and to prove

Another problem to enforce the dowry prohibition laws arises when the case is started for formal trial. Before the Court, all criminal cases have to be proved beyond reasonable doubt and the onus to prove the guilt is primarily upon the complainant or prosecution. But, it is quite difficult to prove the case by providing sufficient evidence as the incident took place within the four walls of the husband's house. Since most dowry related crimes occur within the household of the victim's in-laws, the in-laws and husband are in a perfect position to alter or destroy evidence of the crime.[57] Of course, none in the household will be willing to testify against one another.[58] Regarding the standard of proof of guilt, it was found that in about 60% (out of 30 cases of both the magistrate's court and tribunal) of the cases, the accused was acquitted because the complainant failed to prove the guilt beyond reasonable doubt, or because the statement of the complainant was too vague, inconsistent or unclear. Inconsistency between the statement of the complainant in the Court, and the one made to the police at the time of lodging the FIR or the one made later during investigation, is another factor that is often exploited.[59]

One important reason for failure to succeed in prosecutions is that often a large time gap exists between the incident of cruelty and the filing of the FIR.[60] The complainant generally remains tensed and scared while filing the FIR in the police station and also in the court at the time of trial. Due to anxiety and fear they cannot logically present themselves. One of the Public Prosecutor of Tribunal No. 3, Dhaka expressed his view, 'due to illiteracy and ignorance, the female victims sometimes cannot properly communicate with the lawyer.' As they fail to produce the exact minute details of the facts in the Court at the time of trial, alleged 'inconsistencies' or 'vagueness' creep into their depositions. Sometimes, the defence lawyers pamper in unnecessary character

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56 58 DLR (2006) (AD) 26.

57 Manchandia Purna (2005) Practical Steps Towards Eliminating Dowry and Bride-Burning in India, *Tulane J. of Int'l & Comp. Law*, 13, p.321.

58 Supra 20, p.112.

59 Palkar Vineta (2003) Failing Gender Justice in Anti-Dowry Law, *South Asia Research*, 23(2), p.185.

60 Supra 48, p.1098.

analyses of the victims without focusing on the actual context. In the process, victims may suppress the real evidence. As a result, conviction becomes difficult in the absence of supportive evidence.[61]

Again, in dowry death cases, there is a common tendency among the law enforcing agencies to treat the occurrence as accidental or suicidal.[62] Sometimes, medical evidences (autopsy or post-mortem report) certify the death as suicidal or accidental. The doctors do it by taking bribe or under political pressure.[63] But, Dr. Kazi Golam Mukhlesur Rahman, one of the forensic medicine expert of Dhaka Medical College said that,[64] 'if the post-mortem or autopsy is conducted properly the reasons behind the death is easily understood.' Khair (1999) clearly identifies, 'after giving the reports, the medical experts remain absent in the Court to corroborate their reports tips the trial in favour of the accused.'[65] Moreover, post-mortem being frequently conducted by non-professionals often produces erroneous results in which case the judgment of the court may go in favour of the accused.[66]

V. Structural Problems

The other major difficulty in law enforcement lies in women's limited access to the Courts. The intrinsic mechanisms for pressing charges against perpetrators of violence are beyond the comprehension of most women. Khair (1999) states, 'as there is no centralised source of services for oppressed women, they have no idea where to go or whom to contact in case of emergency.'[67] Indeed, the government has established the 'One Stop Crisis Centre' (OCC) in 8 Medical College Hospital, 40 districts and 20 *upazillas* for rendering health care, legal assistance and social service but till now, these services are not accessible to most of the women specially to those who are from rural areas of Bangladesh.[68] Moreover, the insufficient number of Magistrates, Judges and Courts, lack of infrastructure facility and non-friendly environment of the court are other hurdles to enforce the dowry prohibition laws effectively.[69]

According to the Women and Children (Repression Prevention) Act, 2000 there is provision of establishing the Tribunal in every district and if necessary there may be more than one Tribunal in one district.[70] But, till 31 December 2012, there were only 42 Tribunals in the whole of Bangladesh and some districts such as *Munshiganj*, *Gopalganj*, *Laxmipur*, *Meherpur* etc. are running without Tribunal.[71] In these districts, Session Judges discharge the functions as Tribunal judges which create extra burden on them and also

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61 Supra 41, p.156.
62 Supra 2, p.74.
63 Mia Abdur Rahim (2013) Role of Doctors in the Criminal Proceedings of Bangladesh with Special Reference to Women's Access to Justice, *IOSR Journal of Humanities and Social Science*, 7(5), p.48.
64 Informal conversation held on November 2012.
65 Supra 41, p.154.
66 Supra 63, p.46.
67 Supra 41, p.155.
68 Supra 18, p.61.
69 Sarkar Ashutosh (2013) Backlog of Cases, *The Daily Star,* March 18, available at http://www.thedailystar.net/beta2/news/backlog-of-cases/.
70 For example, in Dhaka there are 5 *Nari-Shishu* Tribunal and in Chittagong there are 3 Tribunals.
71 Source: Ministry of Law, Justice and Parliamentary Affairs.

create a lot of problems towards the effective enforcement of laws. Moreover, it was found that the environment of these courts and tribunals are not women friendly, many people who are not related to the case or the Court were roaming around there. They sometimes try to pursue the justice seekers in various ways, and the women who come to the Court for seeking legal remedies feel embarrassed by the behavior of such outsiders.[72]

VI. Social attitudes towards the legal mechanism

A. Position of the female victims

Dowry crimes may be linked to socially structured and highly distorted traditional expectations about dowry giving, engineered to foster the inferior status of the women.[73] There is a pronounced tendency for women not only to accept such treatment but to conceal its occurrence in order to protect the male ego and family honour.[74] In the Bangladeshi culture, it seems odd that a wife reports to the police about being battered by her husband. While the practical mechanisms for complaining about dowry are far beyond most villagers, one of the greatest barriers for women to go to Court is the realisation that she will not be welcomed back to her own home if she makes an official complaint.[75] They either acquiesce to the unreasonable demands or condone such violence, and take it as their destiny.

Some scholars claim that 'ignorance of law' is one of the reasons for non-enforcement of laws.[76] But, it was found in this study that a good number of respondents have idea about the laws, which is shown below in the Tables:

Table-1: Knowledge about the Dowry Prohibition Act, 1980

	Frequency	Percentage
Heard about the Act	21	42%
Know the details of the Act	10	20%
Do not know the Act	19	38%
Total	50	100%

Table-2: Knowledge about the Women and Children (Repression Prevention) Act, 2000

	Frequency	Percentage
Heard about the Act	15	30%
Know the details of the Act	13	26%
Do not know the Act	22	44%
Total	50	100%

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72 This situation was observed during the visit in Dhaka Judges' Court area to talk to the Tribunal Judge.
73 Supra 46, p.159.
74 Supra 41, p.154.
75 Supra 4, p.261.
76 Ameen Nusrat (2000) Law and the State's Response towards Violence Against Women, *Bangladesh Journal of Law*, 4(1&2), p.40.

More than 50% of the respondents are aware of law, but only few know the details about the law. Despite the knowledge of law, around 47% respondents are reluctant to take any action under these Acts. One of the respondents named Shorifa Begum said, 'we prefer to settle the dispute by local *shalish* as it is common in our locality.' Although the dowry offences are compoundable under the Dowry Prohibition Act, 1980, it cannot be the alternative in dowry violence cases under the Act of 2000. Another respondent Nurnehar Khatun placed a counter-question, 'should I take any action against my husband?' Yet, it is the overall picture in most of the cases in rural areas. However, in rural society of Bangladesh, beating of wife is regarded as the prerogative of husband, at whose feet supposedly lies the heaven of wives.[77]

Sometimes, women do not take action due to fear of dissolution of marriage. Roksana a 30 years old victim woman said:

> If I file the case against my husband he will divorce me, then what will happen to me and my children. I know, my parents will not accept me as they are living with my brothers' family whose financial condition is also not so good. So, it is better to stay with husband by enduring some abuses.

Further, in family, the traditional patriarchal values are imposed by the parents and it works as training to accept and habituate with male-biased norms. A woman finds herself under pressure from her family to return to a violent marriage and adjust to the ways of her 'real' home, reinforcing the concept that her natal home is no longer her home.[78]

In this study, some female victims, although they are few in numbers, were found who really want to take legal action against their husbands. But, due to the cost of filing the case and other things such as to appoint lawyers discourage them to go to the Court. Jesmin said, 'once I thought to file the complaint but, my relatives asked me that there is huge financial cost relating to case which I will not be able to incur.' Thus, the women of that locality are totally ignorant of the government legal aid program.

B. Position of the community

The victims' immediate neighbours and other local residents are an important source of information which has great bearing on her decision to report the crime.[79] However, existing literature indicates that dowry disputes are generally accepted as a 'family affair' requiring no neighborly intervention.[80] There is enough misconception in Bangladeshi society that such violence exists because the girl might have provoked it. Neighbours desist from reporting anything for fear of losing the goodwill of their immediate neighbours, going to the lengths of sanctioning another dowry-based marriage for the same murderer.[81] Thus, the young women, though more willing to rebel against an unjust system that

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77 Supra 41, p.155.
78 Supra 46, p.159.
79 Supra 4, p.80.
80 Supra 43, p.241.
81 Jha Shankar Uma & Pujari Premlata (1996) *Indian Women Today: Tradition, modernity and change*, New Delhi: Kanishka, p.39.

devalues them, are still generally compelled to put up with continual atrocities because of deeply ingrained subservience to customs and mortifying fear of the stigma of single existence in an inflexible and dogmatic society.[82]

VII. Conclusion

The observations made above suggest that there are a lot of hurdles in the way of effective enforcement of dowry prohibition laws. The success of any law depends on proper implementation, whereas without proper enforcement, the law remains only on the pages of the books or mere a 'paper tiger'. To prevent the dowry violence and to protect the women from evil consequences of dowry, firstly the existing laws must be free from loopholes. Unless the government takes measures to amend the inherent weaknesses within the dowry prohibition laws, dowry-related offences will continue to be a prevalent occurrence within Bangladeshi society. Thus, it can be suggested that laws dealing with dowry and violence relating to it need to be reconceptualised to mitigate the experiences of disadvantaged women in Bangladesh and to provide them with more appropriate remedies.

While draconian laws, increased police enforcement, and a more responsive judiciary is necessary to the process of eradicating dowry and abuse relating to dowry from the society. By vigorously prosecuting and convicting perpetrators of dowry violence and increasing the expected punishment of such crimes, the law enforcing agency can play an effective role to deter the dowry violence. In this context, the exercise of sustained judicial activism by the judges and changing mentality of police, without excusing dowry violence as a private family matter and considering dowry violence cases are false, can go a long way for proper enforcement of laws. The study shows more than 50% respondents know any one of the Acts but, only a small number (around 20%) is aware of both the Acts. Again, the female victims have no idea about the government legal aid program. So, the government should strengthen its' program to educate the women not only of dowry prohibition laws but also of other relevant laws and its' legal aid programs.

By providing necessary information to police, the neighbours can play an active role for enforcing the laws. They should realise that same occurrence can be happened to their daughters, sisters and relatives. Above all, the women who are the victims of this evil practice have to come forward and raise their voice against this social menace. To eradicate the roots of dowry the women must wake up to their conscience. They have to realise that the inferiority imposed on them is not their destiny rather their deprivation. Such deprivation can be removed only when the women will be conscious about their rights as the laws provide to them.

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[82] Grover Kanta (1990) *Burning Flesh*, New Delhi: Vikas, p.25.

Privatisation of Pension Scheme in Nigeria: Analysis and Appraisal of the Pension Reform Act, 2004

Kehinde Anifalaje*

Abstract

The enactment of the Pension Reform Act, (PRA) 2004 is evidence of a great change in pension administration and management in Nigeria considering the abysmal failure of the old pension scheme to provide retired public servants pensions and gratuities as and when due. The PRA, 2004 displaces to a large extent the Pay-As-You-Go system of the repealed Pension Act, 1974 and enthrones a new pension regime described as the defined-contribution scheme which entails the transformation of the financial and administrative structure of the pension system. The central feature of the new system is the establishment of individual capitalization fund and the consignment of pension fund assets to private-sector organizations for greater efficiency and maximal return on investment under strict regulation and supervision of the regulatory authorities. This paper focuses on an analysis of the new pension law in Nigeria. It also examines the extent of the privatization of the pension scheme in Nigeria and the economic and social implications of privatization of pension schemes in general. The paper also highlights defects in the law and proffer suitable reform proposals. The paper concludes with a discussion on the level of socio-economic development in the country, especially the level of poverty and argues for the establishment of a social-assistance-based national old-age pension that would provide means-tested benefits to the elderly poor population.

I. Introduction

Over the past three decades, pension reforms have occupied the front burner in social security discourse across the world with many countries instituting major structural reforms in their pension systems to have beneficial effects on the economy and to provide a more secure old age income.[1] In Nigeria, after a life span of about thirty (30) years, the Pension Act, 1974[2] which regulated retirement benefits for civil servants and employees of

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1 Chile, under General Pinochet's military regime pioneered the structural reform process in 1981, replacing the PAYG system with privately-run individual savings accounts. During the 1990s, Peru (1992-1993), Colombia (1993-1994), Bolivia (1997), and Mexico (1995-1997) implemented comparable reforms. However, the public system was not phased out for those currently in the civil service. Reforms in Argentina (1994) and Uruguay (1995-96) consisted of setting up mixed systems including a reformed PAYG system and private individual savings accounts. See OECD, *Economic Survey of Chile,*, OECD, (2003) and (2005).

2 Re-enacted as Cap. P4, Laws of the Federation of Nigeria (LFN), 2004.

scheduled statutory bodies and government-owned companies[3] was repealed[4] and a new Act, the Pension Reform Act (PRA), 2004, which is generally believed would provide a more progressive and financially-sustainable pension scheme for the country was enacted. Generally, old age or retirement is one of the nine minimum standards of social security or contingencies listed in the International Labour Organisation's Social Security (Minimum Standards) Convention 1952, No. 102 that is required to be provided by any viable social security scheme. The contingency covered is survival beyond a prescribed age.[5] In Nigeria, pensions and gratuities are a constitutionally recognised right to which a public servant who qualifies for them are entitled on retirement against the government.[6] However, the Pension Act, 1974, operated on the Pay-As-You-Go (PAYG)[7] basis did not actually fulfill its major objective of providing these pensions and gratuities to the target beneficiaries as it was bedeviled by a number of problems ranging from unpredictable and unsteady budgetary allocation,[8] corruption, outright embezzlement of pension funds, bureaucracy and lack of effective management systems to demographic change.[9] Similarly, the Nigeria Social Insurance Trust Fund established under the Nigeria Social Insurance Trust Fund (NSITF) Act, 1993[10] for the private sector to provide like benefits to any contributor to the Fund who had satisfied the applicable prescribed conditions[11] was also faced with the challenge of non-remittance of contributions to the Fund by some establishments[12] coupled with the administrative inefficiency of the management of the Fund to bring the culprits to book. Against this backdrop, the introduction of the contributory pension scheme which the PRA entails is thus generally viewed as the much-needed panacea to effectively tackle the lingering budgetary deficit and to infuse sanity and stability into the pension management and administration in Nigeria. Furthermore, the PRA has also sought to unify pension regimes for public-sector and private-sector workers with a shift from the "defined-benefit" scheme to the "defined-contribution" scheme. Consistent with the global trend in pension reforms, the new pension scheme

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3 See Second Schedule to the Pension Act, 1974.

4 See sec. 99 of the Pension Reform Act, 2004.

5 See Art 26 of the Social Security (Minimum Standards) Convention 1952, No 102 and Art. 15 of the Invalidity, Old Age and Survivors Benefit Convention 1967, No. 128.

6 See Secs 173 and 210 respectively of the Constitution of the Federal Republic of Nigeria 1999. See also B.O. Nwabueze, *Military Rule and Social Justice in Nigeria,* Spectrum, (1993) at p.177 and the case of *Momodu* v *Nigerian Union of Local Government Employees & Ors* (1994) 8 NWLR (Part 362) 336 at p.350 S.C..

7 The PAYG system is one in which annual revenues dedicated to the system approximately equal annual expenditures. The Pension Scheme under the Pension Act, 1974 was operated on the PAYG system and funded from the Consolidated Revenue Fund of the Government – See section 2 thereof.

8 The yearly budgetary allocation for pension was one of the most vulnerable items in budget implementation with the result that the pensions liability of the government as at Year 2004 when the Pension Reform Act was enacted was estimated at about ₦2 trillion. See *The Guardian* (Nigeria) , 28 Sept. 2004, 7.

9 It was revealed sometime that in some of the government agencies, the pensioners had outnumbered active workers thereby putting excessive pressure on government's revenue. See *The Guardian,* (Nigeria), 28 Sept 2004, 7.

10 Re-enacted as Cap N 88, LFN, 2004.

11 See section 16 of the NSITF Act, 1993 and regulation 30 of the NSITF (General) Regulations, 1994.

12 For example, as at 2004 when the new Pension Reform Act came into effect, a total of ₦917, 277,841.05 comprising deductions made from workers' salaries as well as the employers' contributions was yet to be remitted by employers across the country into the NSIT Fund. See *The Guardian* (Nigeria), 2 August 2004, 1.

under the PRA, 2004 is a public-private partnership Scheme in the sense that it is a privately-managed and market-driven pre-funded Scheme with government providing regulatory and supervisory roles to ensure compliance by relevant stakeholders as well as the ultimate success of the Scheme. It is expected that apart from ensuring the financial viability and sustainability of the pension system, the PRA would hopefully *inter alia* provide a simple, transparent, cost effective system that would guarantee payment of retirement benefits as and when due to claimants to enable them live out their senior years with dignity and security. Moreover, the Scheme is expected to impact positively on the broader economy through its generation of long-term national savings which will in turn facilitate capital accumulation that could deepen and strengthen the capital markets, enhance strategic investments in social infrastructure as well as facilitate economic growth for poverty reduction and wealth generation.[13]

This paper is therefore concerned with an analysis and appraisal of the Pension Reform Act, 2004. To do this meaningfully, we shall discuss the pith of the Act with a view to highlighting the lacunae in the law and proffering appropriate remedial measures. The paper will also focus attention on the allied socio-economic implications of privatisation of pension schemes in general on some of the basic principles of social security. The peculiar nature of the reform has made a comparative excursion inevitable in order to know the approaches taken by some other countries that have similarly implemented a structural reform of their pension system. An attempt will also be made to present the need to have a social-assistance-based national old-age pension for deserving elderly poor. A consideration of the provisions of the Act will be our first focus to which we now turn.

II. The Pension Reform Act: An Overview.

The Pension Reform Act, 2004 is divided into fourteen (14) parts of one hundred and three (103) sections. Our review of the Act would be focused on the salient provisions thereof as enunciated hereinafter.

A. The Declared Objectives of the Pension Scheme

The objectives of the pension scheme as listed in section 2 of the PRA include ensuring that every person who has worked in either the Public Service of the Federation, Federal Capital Territory or Private Sector receives his retirement benefits as and when due; assisting improvident individuals by ensuring that they save in order to cater for their livelihood during old age and establishing a uniform set of rules, regulations and standards for the administration and payments of retirement benefits for the Public Service of the Federation, Federal Capital Territory and the Private Sector.

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[13] See World Bank, *Averting Old Age Crisis: Policies to Protect the Old and Promote Growth,* World Bank and Oxford University Press, (1994). See also National Pension Commission, *The Pension Reform*, being text of a paper presented by the National Pension Commission at the BPSR/CAPAM IN-COUNTRY CUSTOMIZED STAKEHOLDERS SEMINAR at le'Meridien Hotel, Abuja between 8 and 10August 2006, 1 at 3.

B. Coverage

Section 1 of the Act establishes for any employment in Nigeria, a Contributory Pension Scheme (hereinafter referred to as "the Scheme") for payment of retirement benefits of employees to whom the Scheme applies. The categories of persons to whom the Act particularly applies are employees in the Public Service of the Federation, Federal Capital Territory and any Private Sector Organisation that has five (5) or more employees in its employment. However, by section 8 of the Act, exemption from the Scheme has been made for any employee who at the commencement of the Act is entitled to retirement benefits under any pension scheme existing before the commencement of the Act but has three (3) or less years to retire in accordance with the term of his or her employment; judicial officers such as justices of the Supreme Court and the Court of Appeal covered by section 291 of the Constitution of the Federal Republic of Nigeria, 1999 and existing pensioners. These categories of workers are to derive retirement benefits under the existing pension schemes hitherto applicable to them. Section 9(4) of the Act however allows any person ordinarily exempted by it to make voluntary contributions under the Scheme.

C. Financing

In line with the global trend in the privatisation of pension schemes, the Scheme is designed as an individual, fully-funded retirement accounts managed by private sector organisations. As such, the Scheme is required to be financed jointly by both the employee and the employer. Thus, at the end of every month, every employer and employee to whom the Scheme applies is required by section 9 of the Act to contribute a minimum of seven and half per cent each of the employee's monthly emoluments. In the case of the military, to make up the 15 per cent contribution required by the Act, the employer is required to contribute a minimum of twelve and one - half per cent while the employee contributes two and half percent. In order to ensure simplicity and transparency, section 11 of the Act requires every employee to maintain a Retirement Savings Account (RSA) in his name with any Pensions Fund Administrator (PFA) of his choice with Personal Identification Number peculiar to each employee. Such RSA is expected to be an individual capitalisation fund which establishes a connection between the employee's personal effort and the reward. The employer, after making the necessary statutory deductions is required under section 11(5) of the Act, to remit the total sum of contributions payable under the Act to the Pension Fund Custodian (PFC) specified by the PFA of the employee to the exclusive order of such PFA. To ensure prompt remittance of such contributions by the employer, section 11(7) of the Act has provided for appropriate penalty for any employer who fails to remit the contributions within seven (7) working days from the day the employee is paid his salary. Such employer is, in addition to making the remittance already due, liable to a penalty of not less than 2 per cent of the total contribution that remains unpaid for each month or part of each month the default continues and such amount of the penalty is recoverable as a debt owing to the employee's RSA as the case may be. In addition to the actual contributions made into the RSA by employers and employees, all income earned from investment of pension funds under the Act are by section 70(1) of the Act required to be placed to the credit of individual RSA holder save

for clearly defined and reasonable fees, charges, costs and expenses of transactions made by the PFAs. Government's contribution to the Fund in its capacity as an employer is to be a charge on the Consolidated Revenue Fund of the Federation under section 11(8) of the Act. In case of any delay in remitting the statutory amounts, the Director-General of the National Pension Commission is mandated by section 11(9) of the Act to request the Accountant-General of the Federation to remit the amounts immediately before incurring any other expenditure. This is to guard against the unfortunate situation of the repealed Pension Act, where huge pension liabilities were acquired from unstable budgetary allocations for pension purposes.

The Act is however flexible in its provisions regarding the percentage to be contributed and by whom such is to be paid. Under section 9(2) of the Act, allowance is made for any employer who wishes to bear the full burden of contributing the required minimum of 15 per cent to do so. Also, under section 9(5) thereof*,* an employee may in addition to the prescribed total contributions required of him and his employer make voluntary contributions to his RSA. Moreover, under section 9(6) of the Act, an opportunity is further given to both the employer and employee on agreement between themselves to revise upwards, from time to time, the prescribed rate of contribution. The foregoing provisions of section 9(5) and (6*)* of the Act are salutary as they would further enthrone and promote the culture of long-term private savings among the employers and employees especially improvident workers since whatever fund credited to their RSA is personal to them and enures for their benefit only. This will further guarantee a relatively comfortable living standard at old age because the more money the worker contributes to the account, the more money he is expected to get on his retirement. Also, unlike the PAYG system, those who retire early bear the cost of their early retirement in the form of lower accumulations and benefits rather than passing on the costs to others and undermining the financial viability of the Scheme, as it occurs in most defined-benefit plans. It is also noteworthy that by section 13 of the Act, the RSA opened by an employee pursuant to section 11 of the Act, being a personal account, is portable as the employee transfers his service or employment from one employer or organisation to another. Thus, the account remains fully funded at all times just like a personal savings account and employee's pension rights are conserved even when the employer changes. This will no doubt engender labour mobility, as employees do not need to worry about any adverse implications of changing jobs on their pensions. Furthermore, in order to engender healthy competition and greater efficiency among PFAs, a RSA holder is at liberty under section 11(2) of the Act to transfer his account from one PFA to another taking with him the entire accumulated funds. However, to check unbridled campaigns by PFAs to woo contributors, such transfer has been limited to only once in a year as of right. It would appear from the provisions of section 11(2) of the Act that any subsequent request for transfer within a given year may be granted only upon giving convincing reason for such transfer. Unless the worker opts to buy an annuity on his retirement, RSA on the death of the owner is passed on as part of the deceased's estate to be shared among his survivors.

In addition to the contributions specified in section 9(1), section 9(3) of the Act has also mandated every employer to maintain life insurance policy in favour of every employee for a minimum of three times the annual total emolument of the employee.

D. The Benefit Structure of the Pension Scheme

Generally, retirement benefits under the Scheme depend on the contributions made over a person's working career and the investment income on accumulated balances. As a general rule, by section 3(1) of the Act, a worker is not entitled to make any withdrawal from his RSA before attaining the age of 50 years or retirement. This provision is expected to curtail unnecessary withdrawals that may defeat the objective of maintaining a reasonable standard of living for the worker after retirement. However, upon attaining the age of 50 years or upon retirement, whichever is later, section 4 of the Act permits the holder of RSA to make such withdrawals from the balance standing to the credit of his RSA, which can either be a programmed monthly or quarterly withdrawals calculated on the basis of an expected life span or a lump sum withdrawal. Where it is a lump sum however, the amount left in the account after the withdrawal must be sufficient to procure an annuity or fund programmed withdrawals that will produce an amount not less than 50 per cent of his annual remuneration as at the date of his/her retirement. The account holder also has the option of purchasing annuity for life from a life insurance company licensed by the National Insurance Commission with monthly or quarterly payments. However, in such exceptional cases as those contained in section 3 (2) of the Act, where any employee is retired on the advice of a suitably qualified physician or a properly constituted medical board certifying that the employee is no longer mentally or physically capable of carrying out the functions of his office; or is retired due to his total or permanent disability either of mind or body; or retires before the age of 50 years in accordance with the terms and conditions of his employment, the holder of a RSA may be allowed to make withdrawals from his RSA. Nevertheless, any employee retired on health grounds on the advice of a physician or a medical board may re-enter the Scheme upon securing another employment if he can show that his fitness has been reviewed and that he is currently mentally and physically capable of carrying out the functions of his office. Also, in the case of retirement of an employee before the age of 50 years pursuant to the terms and conditions of his employment, the worker is entitled to withdraw a lump sum of money not more than 25 per cent of the credit standing in his RSA if he/she is unable to secure another employment six months after the previous one.

Survivors' benefits under the Act are derivable from the total sums in the RSA of the holder at the time of death and from the life insurance policy maintained by the employer. Thus, on the death of an employee, section 5 of the Act requires that the deceased's entitlements under the life insurance policy be paid into his/her RSA. The PFA is thereafter required to apply the total amount in such RSA in accordance with the aforementioned provisions of section 4 of the Act in favour of the beneficiary under a will; or the spouse and children of the deceased or in the absence of a wife and child, to the recorded next-of –kin or any person designated by him during his life time or in the absence of such designation, to any person appointed by the Probate Registry as the administrator of the estate of the deceased. Where an employee is missing and is not found within a period of one year from the date he was declared missing, and a Board of inquiry set up by the Commission concludes that it is reasonable to presume that he has died, the above provisions of section 5 shall also apply to his RSA.

Moreover, in line with what obtains in privatised schemes in other countries such as in Chile and Argentina,[14] and as part of government's intrinsic responsibility for social protection to ensure that retirees will not fall into poverty, the Act in section 71thereof provides for a minimum pension guarantee to all RSA holders who have contributed for a number of years to a licensed PFA.

The Act has also provided some measure of tax incentives in respect of contributions and retirement benefits to ensure that retirees under the Act take the full benefit of their hard-earned savings. First, in order to reduce the impact of making the required contributions to the Scheme on their expenditure, section 10 of the Act has made such contributions by an employee to the Scheme part of tax deductible expenses in the computation of tax payable by an employer or employee under the relevant income tax law. Similarly, section 7 of the Act has exempted from taxation any amount payable as retirement benefit under the Scheme. The justification for this has been premised on the fact that necessary tax under the Pay-As-You-Earn Income tax would have been paid when the monthly salaries are paid out to workers. To deduct tax from such retirement benefits therefore would amount to double taxation. However, in order to discourage indiscriminate withdrawals in respect of additional voluntary contributions made by an employee to his RSA, any withdrawal made before the end of 5 years from the date such voluntary contribution is made is subject to tax at the point of withdrawal under the provisions of section 7(2*)* of the Act.

E. Accrued Retirement Benefits and Transitional Arrangements

Accrued retirement benefits of any employee (such as gratuity and pension) under any existing pension scheme and who has over three (3) years to retire before the commencement of the new Scheme have been adequately addressed by the Act through the creation of a vested pension from the employment relationships that had existed before the commencement of the PRA. In effect, the pension right and gratuity accrued from the employment contract up to the commencement of the Act would be calculated as if the employment contract had ended then in accordance with existing contract of service. Thus, in respect of employees in the Public Service of the Federation and Federal Capital Territory where the pension scheme was unfunded, the retirement benefits in respect of accrued or past service earned by an employee is required under section 12 of the Act, to be computed by the Government in accordance with the terms of contract of service existing before the commencement of the Act. Each employee is thereafter to be issued with a Federal Government Retirement Bond, redeemable only upon retirement of such

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[14] In Chile for instance, workers are eligible for Chile's minimum pension guarantee which is about twenty five per cent of the average wage, after twenty years of contributions, meaning that the government tops up the benefits of these workers to the guaranteed point if their own accumulation does not suffice. In contrast, Argentina pays all workers with at least thirty years of contributions a flat benefit of about twenty five per cent of the average wages plus an additional one per cent for every year above thirty up to forty five years. See U.S.Social Security Administration, *Social Security Programs Throughout the World: the Americas, 2003,* Office of Research, Evaluation and Statistics*,* (2003) 1 at 29 & 61.

employee, which is equivalent to the total retirement benefit that was due to him/ her as at the commencement of the Act. The proceeds of the bond so redeemed shall then be transferred to the credit of the RSA of the employee and applied in accordance with the provisions of section 4 of the Act. The issuance of the Federal Government Retirement Bonds would hopefully solve to a large extent the issue of Transition Cost which has been a major challenge to pension reform in most countries as Government would not have to furnish immediately the entire accrued pension funds necessary to change to the new system. And as a means of ensuring that the Federal Government is able to redeem such retirement bonds as and when due, section 29 of the Act has mandated the Central bank of Nigeria to establish, invest and manage funds to be known as the "Retirement Benefit Bond Redemption Funds" in respect of the Federal Public Service and Federal Capital Territory. The Redemption Funds are required to be credited with 5 per cent of the total monthly wage bill payable to employees in the Public Service of the Federation and Federal Capital Territory. Payments into the Redemption Fund shall however cease after all the retirement bonds issued have been redeemed.[15]

For private sector employees, the employer is also required to compute the retirement benefits in respect of accrued or past service earned by each employee in accordance with the existing contract of service and credit the RSA of each employee with any funds to which the employee is entitled. For contributors under the NSITF Act, the NSITF is required by section 42 of the Act to compute for each contributor or beneficiary the contributions made and attributable income thereto within the context of NSITF Act, 1993 before the commencement of the PRA. Such amount is then required to be deposited in the RSA to be opened by the NSITF for each contributor or beneficiary. The funds credited to such RSA of a contributor are to remain with the PFA of the NSITF for not less than 5 years from the commencement of the Act. Thereafter, each beneficiary is free to determine which PFA will manage these funds on his or her behalf. In the event of an insufficiency of funds to meet the accrued liability of any employee by an employer, the shortfall shall immediately become a debt of the relevant employer and be treated with same priority as salaries owed. A written acknowledgement to that effect as well as the terms of repayment of such obligation to be agreed with the employee is required to be issued to the concerned employee. Notice to that effect is also required to be given to the National Pension Commission by virtue of section 12(2) of the Act.

Section 30 of the Act has also established Pension Transitional Arrangement Department for the Public Service of the Federation and the Federal Capital Territory, comprising the existing pension boards, or offices in the public service of the Federation and the Federal Capital Territory.[16] The Pension Transitional Arrangement Department which consists of the Civil Service Pension Department; the Military Pension Department;

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[15] In order to meet its obligations to retirees under the Act, the Federal Government has floated a ₦1.68 trillion bond covering a 30 – year period from 2007 to the year 2037. The bonds are to have a fixed coupon rate, non-tradeable, exempted from taxes, certificated and are only redeemable upon retirement. The Debt Management Office is to act as the issuer on behalf of the Federal Government while the Central Bank of Nigeria and the Ministry of Justice are to act as Registrar and Solicitors to the issue respectively. See The *Guardian (*Nigeria), 26 June 2007, 1 at 17. As at September 2007, the Federal Government has paid ₦47.24 billion to the Redemption Fund Account. See *This Day* (Nigeria), 8 December 2007, 1 at 3.

[16] See Section 31 of the PRA, 2004.

the Police Pension Department; the Customs, Immigration and Prisons Pension Department and the Security Agencies Pension Department are to ensure that existing pensioners and category of officers exempted by the Act in section 8 thereof are paid their gratuity and pension as and when due.[17] These Pension Transitional Arrangement Departments, which are also to be regulated and supervised by the Commission, are to cease to exist after the death of the last pensioner or category of employees entitled to retire with pension before the commencement of the Act.[18]

F. Regulatory and Managing Authorities of the Pension Scheme

Consistent with the global trend in privatization of pension schemes, the regulation and supervision of the Scheme are vested in the government while the custody, investment and general management of the pension funds generated under the Scheme have been vested in private companies licensed for such under the Act. Thus, the regulatory and supervisory authority of the Scheme comprises the National Pension Commission (NPC), an agency of the Federal Government, while the managing institutions are designated as the Pension Fund Administrators (PFAs) and the Pension Fund Custodians (PFCs).

(1) National Pension Commission

The apex body saddled with the responsibility for regulating, supervising and ensuring the effective administration of the Scheme is the National Pension Commission (hereinafter referred to as "the Commission") established under section 14 of the Act, membership of which is drawn from all relevant stakeholders in the industry. In order to underscore the importance of the success of the Scheme to the Government, the President of the Federal Republic of Nigeria is empowered under section 16(3) of the Act to appoint one person each from the six geo-political zones of Nigeria subject to the confirmation of the Senate,[19] to serve as the Chairman, the Director-General and members of the Commission other than ex-officio members. In the pursuit of its regulatory and supervisory functions under the Act, the Commission is required under section 20 of the Act to *inter alia* issue guidelines for the investment of pension funds; approve, license, regulate and supervise pension fund administrators, pension fund custodians and other institutions relating to pension matters as the Commission may, from time to time, determine; establish standards, rules and guidelines for the management of the pension funds and perform such other duties which, in the opinion of the Commission, are necessary or expedient for the discharge of its functions under the Act. In addition, the Commission has also been generally empowered to *inter alia* formulate, direct and oversee the overall policy on pension matters in the country and to establish standards, rules and regulations for the management of the pension funds under the Act. The whole tenor of the mandate and activities of the Commission under the Act is generally to provide the necessary ethical and oversight functions that would ensure not only the safety of pension funds but also provide the necessary stability in the new pension regime.

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17 See Section 33 of the PRA, 2004

18 See Section 38 of the PRA, 2004.

19 See generally section 16 of the PRA, 2004.

(2) Pension Fund Administrators

The Commission, in pursuance of its regulatory functions is required under section 44 of the Act to license Pension Fund Administrators (PFAs) who shall be responsible generally for the management of the pension funds in the RSA of employees opened pursuant to section 11 of the Act. Section 44 of the Act specifically charges the PFAs with the responsibility of opening RSA for every employee with a Personal Identity Number attached;[20] investing and managing pension funds and assets; maintaining books of account on all transactions relating to pension funds managed by it; providing regular information on investment strategy, market returns and other performance indicators to the Commission and employees or beneficiaries of the RSA; providing customer service support to employees, including access to employees account balances and statements on demand; causing to be paid retirement benefits to employees in accordance with the provisions of the Act and carrying out other functions as may be directed, from time to time, by the Commission. The PFAs as institutional investors would hopefully facilitate increased market integrity, transparency, corporate governance and overall growth of the capital market.

To be licensed as a PFA, section 50 of the Act requires that an applicant must be a limited liability company incorporated under the Companies and Allied Matters Act, 1990 with the object of managing pension fund; must have a paid up share capital of ₦150, 000,000.00 (One hundred and fifty million naira) or such sum as may be prescribed, from time to time, by the Commission; must satisfy the Commission that it has the professional capacity to manage pension funds and administer retirement benefits; must not have been a manager or administrator of any fund which was mismanaged or has been in distress due to any fault, either fully or partially, of the PFA or any of its subscribers, directors or officers and must undertake to the satisfaction of the Commission that it shall not be engaged in any business other than the management of pension funds.

(3) Pension Fund Custodians

Although PFAs are generally charged with the management and investment of pension funds, responsibility for the custody of such pension funds and assets is however given to other bodies called Pension Funds Custodians (PFCs) who are also required to be licensed by the Commission.[21] The functions of the PFC as listed under section 47 of the Act are to receive the total contributions remitted by the employer on behalf of the PFA within 24 hours of the receipt of contributions from any employer; notify the PFA within 24 hours of the receipt of contributions from any employer; hold pension funds and assets in safe custody on trust for the employee and beneficiaries of the RSA; on behalf of the

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[20] The Commission has revealed that as at the third quarter of year 2007, the total number of registered employees for the pension scheme stood at 2.68 million with employees from both the Federal and State Governments making up 47.39 per cent and 24.63 per cent respectively of the total number of registered contributors while the private sector accounted for only 27.98 per cent of the total contributors. It has also revealed that during the period, the value of the Fund under the management of licensed PFAs had risen to ₦666.84 billion - see *This Day* (Nigeria) 8 December 2007, 1 at 2.

[21] See Section 51 of the PRA, 2004.

PFA, settle transactions and undertake activities relating to the administration of pension fund investments including the collection of dividends and related activities; report to the Commission on matters relating to the assets being held by it on behalf of any PFA at such intervals as may be determined, from time to time, by the Commission; undertake statistical analysis on the investments and returns on investments with respect to pension funds in its custody and provide data and information to the PFA and the Commission; and execute in favour of the PFA relevant proxy for the purpose of voting in relation to the investments.

To be licensed as a PFC, section 52 of the Act requires that an applicant must be a licensed financial institution registered under the Companies and Allied Matters Act; must have a minimum net worth of ₦5,000,000,000.00 (Five billion naira) unimpaired by losses or is wholly owned by a company with a minimum net worth of such amount unimpaired by losses or any such sum as may be prescribed, from time to time, by the Commission and must have a total balance sheet of at least ₦125,000,000,000.00 (one hundred and twenty five billion naira) and or is wholly owned by a licensed financial institution with a total balance sheet of at least such amount. Furthermore, the Custodian Company is required to issue a guarantee to the full sum and value of pension funds and assets held by it or to be held by it. It is also required to undertake to hold the pension fund assets to the exclusive order of the PFA on trust for the respective employees as may be instructed by the PFA appointed by each employee and must not have been a Custodian of any fund which was mismanaged or has been in distress due to any default, either fully or partially of the Custodian. In addition, an applicant must also be ready to satisfy such additional requirements as may be prescribed, from time to time, by the Commission.

(4) Closed Pension Fund Administrators

In addition to licensed PFAs, who are generally new entrants into the business of managing pension funds, the PRA under sections 39 and 40 has also given opportunity to private organisations who had their own pension schemes before the commencement of the Act to apply to the Commission to be licensed as Closed Pension Fund Administrators (CPFA) to manage the pension funds either directly or through a wholly owned subsidiary of such employer dedicated exclusively to the management of such funds. Once registered as such, all the applicable provisions of the Act on regulation and supervision of PFAs by the Commission is applicable to them. The closed pension scheme is required *inter alia* to be fully funded at all times and any shortfall is to be made up within ninety (90) days; pension funds and assets are to be fully segregated from the funds and assets of the employer and are to be held by a licensed PFC. Moreover, every employee in such existing scheme is given the freedom under section 39(1)(d) of the Act to exercise the option of either staying under such existing scheme or coming under the Scheme established under the PRA. Where the employee chooses to come under the new Scheme of the PRA, the employer is required to compute and credit to the account of such employee the contributions and distributable income earned as at the date the employee exercises such an option subject to further rules and guidelines issued by the Commission. Such amount is then required to be transferred to the RSA of the employee maintained with a PFA of his choice.

To be licensed as a CPFA under section 40 of the Act however, the applicant must *inter-alia* hold a minimum pension funds and assets of ₦500, 000,000.00 (Five Hundred Million Naira) and above; must also be a limited liability company incorporated under the Companies and Allied Matter Act, 1990; must not have been a manager or administrator of any fund which was mismanaged or has been in distress due to any fault, either fully or partially, of the organisation or any of its subscribers, directors or officers and must undertake to the satisfaction of the Commission that it shall not be engaged in any business other than the management of pension funds. Also, the employer must demonstrate that it possesses managerial capacity for the management of pension fund and assets for a period not less than 5 years before the commencement of the Act.

The establishment of the PFAs and PFCs with separate functions respectively by the Act as highlighted above gives an assurance of accountability and transparency with respect to dealings with the RSAs of employees. It is generally geared against mismanagement and misappropriation of pension funds and ensures the solvency of the system. Thus, in the extreme case that a PFA goes bankrupt or is wound up, individual funds would remain unaffected. The RSA holder would only have to transfer his/her account to another PFA.[22] Furthermore, the condition precedent in terms of financial base required of an applicant before being licensed as either a PFA or a PFC is a precautionary measure by the Act to ensure and guarantee the safety of workers' fund as well as remove any likelihood of loss of workers funds as a result of a weak financial base of these major operators. The choice of private control of the Pension funds by the PRA, 2004 is also salutary not only because it has followed the trend in the countries that have adopted structural reforms of their pension schemes but also because private control maximises the likelihood that the investment strategy of these PFAs is more likely to be driven by economic considerations and the need to give the highest return on savings rather than being governed by political considerations. It is common knowledge in Nigeria that most government-controlled enterprises such as the Power Holding Company Nigeria Plc and the Nigeria Telecommunications Plc neither provide quality service delivery nor make as much profits as their counterparts in the private sector.

G. Imminent Safeguards for the Pension Scheme

The PRA has in its several provisions provided adequate safeguard measures to ensure the overall safety of pension funds and to aid the quick detection of any act capable of undermining the integrity of the Scheme. The first of such safeguard measures is the official design and objective to nip in the bud sharp practices and unconscionable conduct which could bring the Scheme into disrepute which has been eloquently projected in several sections of the Act. These include the maintenance of proper books of account and financial record; the appointment of qualified external auditors not later than four months from the end of the year and publication of audited accounts by every PFA and PFC under section 56 of the Act as well as the submission of such audited accounts and

[22] See e.g. section 54(6) of the PRA which mandates the Commission to transfer RSAs being managed by either a PFA whose licence is revoked or pension fund assets being held by a PFC whose licence is revoked to another PFA or PFC respectively.

annual report on pension funds to the Commission under section 57 of the Act. Appropriate disclosure of relevant information is expected to be made by the external auditors to the Commission under section 58 of the Act on any extreme situation such as evidence of imminent financial collapse of the PFA or PFC or where they believe that a fraud or other misappropriation has been committed by the directors or the management of the PFA or PFC or have evidence of an attempt by the directors or senior management to commit such fraud or misappropriation.

The second category of the safeguard measures concerns provisions geared towards preserving the integrity of the pension funds as would be found for example under section 60 of the Act, which makes it mandatory for the PFC to at all times maintain all pension funds and assets in its custody to the exclusive order of the relevant PFA and must not utilise any pension fund or assets in its custody to meet its own financial obligation to any person whatsoever; the maintenance of a statutory reserve fund to be credited annually with 12.5 per cent of the net profit after tax or such other percentage of the net profit as the Commission may from time to time stipulate as contingency fund by every PFA under section 69 of the Ac*t* and the regular risk rating of investment instruments by Risk Management Committee and Investment Strategy Committee to be set up by every PFA under section 66 of the Act. Furthermore, section 65 of the Act has forbidding every PFA from keeping pension funds or assets with a PFC in which the PFA has any business interest, shares or any link whosoever. Also, no employee of the PFA is to engage in any business transaction or trade in any manner whatsoever with the PFA as a counterpart or with the subsidiary in relation to pension fund or assets. Also, in order to ensure the integrity of transactions relating to investments, section 75 of the Act, has prohibited a PFA from investing pension fund assets in the shares or any other securities issued by the PFA or PFC or a shareholder of the PFA or PFC. Also, a PFA has been prohibited under section 76 of the Act from selling pension fund assets to itself; any employee, shareholder, director or affiliate of the PFA or any of their spouses or those related to them; affiliates of any shareholder of the PFA; the custodian holding pension fund assets to the order of the PFA or purchase any pension fund assets or apply such assets under its management by way of loans or credits or as collateral for any loan taken by any person. The Commission has also been empowered under section 77 of the Act to impose additional restrictions on investments where such restrictions are made with the objects of protecting the interest of the beneficiaries of the RSAs.

The third category of the safeguard measures concerns the express disqualification and exclusion of certain individuals from the management of pension funds. Thus, the ethical leverage in the PRA has been considerably strengthened by the combined provisions of sections 50 and 52 which has on the one hand denied individuals of questionable background the opportunity to participate in the management of pension funds and sections 62 and 63 which have on the other hand denied employment to any person that has had his employment terminated on the ground of fraud. Furthermore, the Commission is empowered under section 88 of the Act to cause to be removed from office any director or officer of a PFA or PFC found guilty of financial misconduct or dishonesty. Thus, the Act has sought to ensure that only credible, trustworthy, qualified professionals and persons of high integrity are entrusted with the pension funds.

The fourth category of the safeguard measures concerns the general power of supervision and examination given to the Commission. Thus, as a means of pursuing the goal of disclosure of relevant information by licensed PFAs and PFCs, section 79 through section 84 of the Act has generally empowered the Commission to inspect, examine or investigate any of the activities of licensed PFAs and PFCs through periodic examination of relevant documents of these bodies. Under section 97 of the Act, the Commission has also been empowered to make regulations generally for the carrying into effect the provisions of the Act. Such regulations, which in law, have equal force as if they themselves are statutes on their own in their inherent legal capacity, are to serve as a source of making supplementary provisions to the Act thereby making it a virile and living law.

The fifth category of the safeguard measures concerns the strict regulation to provide for risk control strategies to curtail losses in the investment drive of PFAs. Thus, restrictions have been placed on the portfolios in which pension funds may be invested in order to rule out highly volatile and concentrated portfolios and to ensure that investments provide real rates of return during both up and down financial markets. The Act in section 73 thereof, has laid down clear-cut guidelines for investment of pension funds and has largely restricted such investments to bonds, bills and other securities issued or guaranteed by the Federal Government and the Central Bank of Nigeria; bonds, debentures, redeemable preference shares and other debt instruments issued by corporate entities and listed on a stock Exchange registered under Investments and Securities Act, 1999; ordinary shares of public limited companies listed on a Stock Exchange with good track records of having declared and paid dividends in the preceding five years; bank deposits and bank securities; investment certificates of closed-end investment fund or hybrid investment funds listed on a Stock Exchange with a good track records of earning; units sold by open-end investment funds or specialist open-end investment funds listed on the Stock Exchange recognised by the Commission: bonds and other debt securities issued by listed companies; Real Estate Investment and such other instruments as the Commission may, from time to time prescribe. These portfolios are presumably safe and will hopefully give high returns on investment. By section 77 of the Act, the Commission is generally empowered to impose additional restrictions on investments by PFAs where expedient to protect the interest of the beneficiaries of the RSAs. The restrictions placed on the investment drive of the PFAs as highlighted above may however curtail ingenuity on the part of the PFA to make foray into areas, which in their independent judgement, may yield appreciable returns than those listed in the Act. Subject to the subsisting Central Bank of Nigeria foreign exchange rules, investment of pension fund assets outside the territory of the Federal Republic of Nigeria is permissible under section 74(2) of the Act upon approval by the President on the recommendation of the Commission. One hopes that the Commission and the operators of the Scheme would seize this opportunity to invest in a broad range of securities not only within the country but also in international markets to minimize country-specific risk. The recent depreciation of stocks in the Nigerian market ought to serve as a warning signal to PFAs of the danger of restricting their investment portfolio drive to the country.[23]

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[23] For example, between March and July 2008, investors lost a whopping sum of N2.03 trillion to stock market crash in Nigeria. See *The Guardian,*(Nigeria) 5 July 2008, 1 at 48.

Moreover, as a means of ensuring safe and sound investment strategies, the Act in its section 66 has mandated every PFA to establish standing committees such as Risk Management Committee and the Investment Strategy Committee. The Risk Management Committee is generally charged *inter alia* with the responsibility of determining the risk profile of the investment portfolios of the PFA and determining the level of reserves to cover the risks of the investment portfolios while The Investment Strategy Committee on the other hand is saddled *inter alia* with the responsibility of formulating strategies for complying with investment guidelines issued by the Commission; determining an optimal investment mix consistent with risk profile agreed by the board of the PFA; evaluating the value of the daily marked-to-marked portfolios and making proposals to the board of the PFA; on periodic basis, reviewing the performance of the major securities of the investment portfolios of the PFA and carrying out such other functions relating to investment strategy as the board of the PFA may from time to time, determine.

The sixth category of the safeguard measures concerns the general powers given to the Commission in its supervisory capacity to impose appropriate sanctions on erring licensed PFA or PFC. As such, in deserving situations, the Commission has the power to impose penalties ranging from a fine of between N250, 000.00 (Two hundred and fifty thousand naira) to N5, 000,000.00 (Five million naira). In addition, the directors and officers of such PFA or PFC may be liable on conviction to a term of imprisonment ranging from three to ten years. As a sanction of last resort, the Commission has the power under section 54 of the Act to revoke the licence of obdurate or unyielding PFA or PFC. The law however requires that the affected PFA or PFC be granted a fair hearing before revocation of its licence.

Lastly, under section 98 of the Act, the safety of pension funds and assets in the custody of any licensed PFC in the event of its being wound up, liquidated or where it otherwise ceases to carry on the business for which it was licensed, has been further guaranteed by prohibiting the use of such pension funds and assets in the custody of such PFC to meet the claims of any of the Custodian's creditors. In addition, such pension funds and assets cannot be seized or be subject of execution of a judgement debt or stopped from transfer to another Custodian.

H. Legal Proceedings

Under section 91 of the Act, the Federal High Court has been vested with the jurisdiction to try any offence committed under the Act while a dispute resolution network is also available under section 92 through section 94 of the Act to minimise litigations in Court. The effect of giving exclusive jurisdiction to the Federal High Court is to render trial of such offences by any other court a nullity and to avoid unnecessary delays that may arise if such offences were to be tried by other regular courts. By the combined provisions of sections 95 and 96 of the Act, any person who intends to commence any suit against the Commission is required to first serve a written notice of such intention upon the Commission 30days before instituting such action stating *inter alia* the relief which he claims. It would appear that service of such notice is a condition precedent to competently maintaining any suit against the Commission in a law court.

By and large, the Pension Reform Act, 2004 has by its far-reaching provisions laid a solid foundation not only for a transparent, fully-funded and self-sustaining pension scheme but also for an efficient management of pension funds and assets which hopefully would fulfill the yearnings and aspirations of the average Nigerian worker to live a stress-free and dignified life in old-age. However, like in all privatised pension systems such as we have in Chile, Singapore and Argentina, the privatisation of the pension scheme in Nigeria has altered some of the basic principles of social security such as income redistribution and solidarity. A discussion on this should be our next focus.

III. Socio-Economic Implications of Privatisation

Notwithstanding the possible positive indirect effects of privatisation, such as fostering economic growth and the development of the capital market, it has been suggested that more attention needs also to be given to possible negative indirect effects, such as increased exposure to market risks, decreased coverage for low-income groups and adverse distributional effects for certain vulnerable groups such as the low-income earners and women.[24] One of the basic objectives of social security is income re-distribution with a view to reducing social inequalities and inequity, which has helped to reduce poverty in several countries.[25] The PAYG system benefit formular is generally progressive and redistributes income within and across generations based on lifetime earnings rather than current income, although, such schemes sometimes do include vertical redistribution as well, providing a better return on contributions for low – wage workers. Thus, within the category of persons covered by these schemes, re-distribution of income does take place between the healthy and the sick; the economically active and inactive persons, that is, the elderly or invalid workers; persons with a job and those who are unemployed, single persons or married couples without children and persons who have family responsibilities (horizontal redistribution) and, as the case may be, between the rich and the poor (vertical redistribution) and to some extent between persons earning a high or moderate wage and lower paid workers as a result of the methods used for calculating charges and benefits..[26] Such income redistribution tends to increase the nation's average propensity to consume and stimulate global demand and employment. Viewed from this perspective, benefits produce an anti–cyclical effect that is particularly useful in periods of economic recession and high unemployment.[27] For instance, in the United States of America, there is considerable evidence that reliance by the elderly on their children has declined since the advent of social security and this has also contributed to the economic gains of the aged as measured by the decline in the proportion of the poor.[28] To the extent

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[24] See J. B. Williamson and F.C. Pampel, "Does the Privatization of Social Security Make Sense for Developing Nations?" in 51 *International Social Security Review*, (1998), 3-31 at 28.

[25] A.W.Clausen, Poverty *in the Developing Countries,,* The World Bank, (1985) 6.

[26] H. J. Aaron, *Economic Effects of Social Security,* The Brookings Institution., (1982), 82

[27] Alain and C. Euzeby, "Social security financing methods: Labour costs and employment in industrialized market economy countries", in ILO, *Financing Social Security: The Options – An International Analysis,* ILO, (1984), 51 - 85 at 52.

[28] H. J. Aaron, supra, note 26 at 71.

that social security reduces transfers from others to the elderly, it leaves the consumption possibilities of the elderly unchanged, and the relief for the non – elderly from transfers they would otherwise feel obligated to make represents an immediate offset to the payroll taxes they pay, leaving their consumption unaffected.[29] Furthermore, the combination of income sources available to the elderly in many developed countries suffices to prevent them from having lower incomes on the average than do the non-elderly and to prevent real consumption opportunities from declining at retirement.[30] In pre–funded, privately–managed schemes which are currently being adopted in many countries including Nigeria however, the principle of income redistribution is a non-issue except in those instances where government guarantees payment of minimum pension to workers who have contributed for a specified number of years. By their nature, defined-contribution plans build in less redistribution within and across generations. Privatised retirement account is basically a compulsory individual insurance system with no intentional redistribution in favour of low-income workers. Indeed, some features of privatisation do give rise to regressive redistribution in favour of high-income workers. For example, the structure of commission charged by pension fund administrators especially the flat rate such as we have in Chile do have negative impact on the savings of lower-income groups by crediting them with a much lower rate of return than high-income workers.[31] Variations in returns of pension managers may also adversely affect lower-income groups, although, these are generally limited by the required minimum relative returns on pension funds. In Chile for instance, the authorities impose on Pension Fund Administration Companies Superintendency or AFPs for short, and guarantee in case of AFP failure, a minimum investment return relative to the average for all pension funds while in Nigeria, section 72 of the PRA requires "maintenance of fair returns on amount invested". Generally however, more inequities are being created by privately-funded schemes, since the defined-contribution system guarantees larger pensions to the high-income groups, whereas the low-income groups will receive small pensions, or only the minimum pensions in the countries in which there is provision for such. Some of these new inequities are linked to the performance of the investment and the interest rate at the time of retirement, which will have a direct impact on the size of the annuity. Indeed, workers with identical earnings history may have different retirement incomes based on their individual-specific investment experiences. Other inequities of the defined-contribution system in favour of high earners stem from the way annuities markets and privately managed defined-contribution systems operate. Low-wage earners are likely to have a higher discount rate and suffer a greater utility loss since their income is lower; the required contribution represents a higher proportion of their total income; and they are less able to have other sources of savings.[32] Indeed, it has been aptly stated that:

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29 Ibid at 23.

30 Ibid at 71.

31 See S. Borzutsky, Social security privatization: the lessons from the Chilean experience for other Latin American countries and the USA, 12 *International Journal of Social Welfare,* (2003) 86-96 at 89.

32 Ibid at *93*.

> "The new systems show both promise and evidence of being more efficient than the old. They have also eliminated or greatly reduced some of the pre-existing equity problems stemming from poorly designed defined-benefits formulas and pay-as-you-go finance methods. At the same time, they have introduced new equity problems, stemming from annuity pricing, saving offsets, administrative costs, imperfect information and inequality under choice. Thus, perverse redistributions within cohorts are still possible, although intergenerational redistributions are less likely."[33]

Thus, while privatised pension schemes may be greatly beneficial to high-income earners as aforementioned and those who enter into such schemes early in their job career, the same could not be said of low-income earners as well as late entrants to such schemes. This is necessarily so since the value of pension largely depends on the amount of capital accumulated in the savings account. This amount in turn depends *inter alia* on salary, the years of contribution, retirement age, the life expectancy of the retiree, the vagaries of the commercial market in terms of rate of return on investment and commissions and fees charged by pension fund administrators.[34] Also put at a disadvantage are women who spend less time in the labour market because of child-bearing and child-rearing responsibilities which also creates more equity problems in such schemes.

Another objective of social security is the pivotal role it plays as mechanisms of social solidarity and social cohesion in two major ways, depending on the method of financing.[35] Solidarity has been defined as "a sense of non-calculating co-operation based on identification with a common cause." The individual is viewed as "embedded in social contexts" rather than as an independent agent, and thus solidarity is not a characteristic of particular individuals but instead reflects "a specific type of association among people."[36] Therefore, an individual secured by the State against the risks of life, as by a guaranteed minimum income even during a period of unemployment, would naturally feel that society cares for him and his interests, and may thus be able to identify with it, and to feel a sense of belonging with other members. Where protection is provided, not through direct state funding, but by workers or residents pooling their resources together to cover one another and pay out cash benefit as and when anyone of them is affected by a covered risk, a sense of inter-dependence, of community and of solidarity would thereby have been generated among them.[37] The value of the insurance lies partly in the sense of security, in knowing, as an individual, that one is adequately insured if one's income ceases. In privatised pension schemes however, the principle of solidarity has been eliminated since the system is basically a compulsory individual insurance

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33 E. James, Pension Reform: An efficiency - Equity Trade Off?*,* in N. Birsdall N, C. Graham, R. Sabot , (eds). *Beyond Trade Off: Market Reforms and Equitable Growth in Latin America*, Interamerican Development Bank, (1998), at 270.

34 See e.g. sec 70 of the PRA.

35 R. Walker, Poverty and Social Exclusion in Europe in A.Walker, and C. Walker, (eds) *Britain Divided: The Growth of Social Exclusion in the 1980s and 1990s.*. CPAG Ltd, (1997) .48-74 at 66.

36 See R. B. Saltman. and H.F.W. Dubois, The Historical and Social Base of Social Health Insurance Systems in R. B. Saltman,. R. Busse, and J. Figueras, (eds) *Social Health Insurance in Western Europe*, England, (2004) 21-31 at 27.

37 B. O. Nwabueze, *Social Security in Nigeria,* Nigerian Institute of Advanced Legal Studies, (1989) at 12

system. Thus, providing for retirement is an individual responsibility. Even in a partial privatisation such as for example, the Argentina pension scheme, there is likely to be a break in the principles of social solidarity and equity that have long been an integral part of the social security system.[38]

In addition to the general negative impacts of privatised pension schemes highlighted above, the Nigerian Pension Reform Act is fraught with some inadequacies which could undermine the overall objectives of the Scheme. It is an examination of these inadequacies that we should now turn.

IV. Perceived Defects in the PRA, 2004

One major gap in the PRA 2004 is its limited coverage. The Act in section 1(2) thereof, has expressly limited its application to all employees in the Public Service of the Federation, Federal Capital Territory as well as employees in the Private Sector who are in employment in an organisation wherein there are five (5) or more employees. By section 102 of the Act, "Public Service of the Federation" is as defined in section 318 of the Constitution of the Federal Republic of Nigeria, 1999 to wit – "the service of the Federation in any capacity in respect of the Government of the Federation" while "Public Service of a State" is defined as "the service of the State in any capacity in respect of the Government of the State". Since these definitions are mutually exclusive, the Act has expressly excluded employees in the Public Service of a State or a Local Government. There is no stated provision in the Act placing any obligation on the State Governments to mandate compliance with the provisions of the Act in order to safeguard the future well being of their employees which currently constitute about seventy (70) per cent of the nation's public sector workforce. The exclusion of State and Local Government employees from the provisions of the PRA is not however without some justification in view of the Constitutional arrangement which has placed pensions, gratuities and other like benefits under the exclusive legislative power of the National Assembly.[39] In this circumstance, the legislative competence of the National Assembly does not extend to officers in the Public Service of a State or Local Government. However, by limiting coverage in the private sector to organisations where there are five or more employees is untenable. Given the nature of the Nigerian economy whereby a larger percentage of the population are in self-employment in the informal sector, it is clear that quite a large number of employments have been excluded. The option of voluntary participation to this category of people in section 9(4) of the Act smacks of insincerity on the part of the policymakers when one considers the socio-economic challenges to which many are exposed. The income of an average Nigerian worker is barely sufficient to sustain him and

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[38] For example, in Chile, the reform transforms the notion of solidarity, both in its role and its content. Solidarity is not a fundamental notion and, as, such, it is not expressed in the entire system but is reserved for those cases in which the principle of individual responsibility cannot be applied, as in the case of the pensions or welfare pensions. In this unique private insurance system, the State intervenes at selected stages, most importantly, it intervenes at the onset by enforcing enrolment into the system and at the final stages by providing minimum and welfare pensions. - S. Borzutsky,. Supra, note 31 at 95.

[39] See the Second Schedule to the Constitution of the Federal Republic of Nigeria, 1999.

his household. For this reason, many would not readily join the Scheme unless they are compelled to do so. Moreover, the general socio–economic conditions in the country have generally worsened beyond imagination. The rate of unemployment in the country is very high. About 70 per cent of Nigerians or two–thirds of the Nigerian people are said to be living below poverty level, living in absolute poverty with not even the barest essentials to support minimally decent human life[40] Indeed, as at 2004 when the PRA was enacted, the population of Nigeria living below the international poverty benchmark of US $1 a day was 70.2 per cent. At the then level of the country's population of 126.2 million, this translated into about 89 million people living in abject poverty thereby making Nigeria a nation with the highest concentration of people living in extreme poverty.[41] Available statistics also show that Nigeria has continued to fair badly in global development indicators as it was ranked 156th out of 187 countries surveyed by the United Nations Development Programme (UNDP) in 2011..[42] On the other hand however, the inclusion of the military in the PRA is not in tune with global trend whereby such security service personnel have been retained under the PAYG system. For instance, in *Chile* where the privately-managed funded scheme was first introduced in 1981, the Armed Forces and the Police are still under unfunded schemes.[43] Also, in Argentina, the military and the police are exempted from the new scheme.[44]

Secondly, basing the rate of contribution payable by an employee on his "monthly emoluments" which has been defined in section 102 of the Act as "a total sum of basic salary, housing allowance and transport allowance" is inequitable. The allowances for housing and transport payable to an employee serve as some form of incentives to enhance the employee's productive capacity and are targeted towards meeting the specific needs of housing and transport.

Also, while the Act in section 9(5) thereof has permitted, upon agreement between an employer and an employee, an upward revision of the contributions above the recommended minimum of fifteen (15) per cent, there is no where in the Act permitting a downward revision, insofar as such revision does not fall below the recommended minimum percentage.

Generally, the Act would also appear to be limited in its focus. The main objective of the Act as stated *inter alia* in section 2 thereof is mainly to provide retirement benefits to contributors under the Scheme. The Scheme need not be a purely retirement savings scheme. With the total rate of contribution fixed at fifteen (15) per cent of an employee's monthly emoluments coupled with the opportunity provided under section 9(5) to make voluntary contributions, the Scheme ought to be programmed in such a way that it would

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40 National Planning Commission, *National Economic Empowerment and Development Strategy,*, NPC, (2004), at *xii; .The Guardian* (Nigeria) 15 October 2004, at 2.

41 *The Guardian,* (Nigeria), 19 September 2004 at 14.See also *Guardian,* (Nigeria), 7 September 2004, at 96

42 See UNDP Human Development Index Report (HDI), 2011. available at http:// assemblyonline.info/?p=14577. (last accessed April 10, 2012)

43 S. Borzutsky, supra, note 31 at 91.

44 See J. B. Williamson, J.B. and F. C. Paupal, supra, note 24 at 17.

allow the use of funds on other merit goods such as housing and education as it is done in Schemes of this nature in some other countries such as Singapore.[45]

Moreover, notwithstanding the seemingly good intention of the provisions of section 7(2) of the Act to discourage indiscriminate withdrawals before the end of five years from the date any voluntary contribution is made into a RSA, the corollary purpose of encouraging more savings is unwittingly being jeopardised by imposing taxation on such savings at the point of withdrawal. Such taxation is tantamount to double taxation on such savings since requisite taxation would have been paid initially by the employee under the relevant income taxation law. The said provision of section 7(2) of the Act is also inconsistent with the provisions of section 10 thereof which has made contributions by an employee or an employer part of tax deductible expenses in the computation of tax payable by such an employee or employer under the relevant income tax law.

Furthermore, the use of annuities in the provisions of section 4(1)(b) of the Act may inadvertently cause unintentional redistribution that may be perverse by penalizing low-income workers. In theory, life annuities should take into account the shorter life expectancy of poorer people. With life expectancy in Nigeria currently put at fifty-four (54) years,[46] deferring the purchase of annuity until retirement as the Act suggests may not give the employee/beneficiary the opportunity of deriving appreciable interest from such annuity when it matures in his lifetime. Also, low-income workers not only do not benefit from lower annuity prices, but may also pay much higher commission charges for their life annuities than high-income workers. Also, section 4(1)(a) of the Act which has given the option of programmed monthly or quarterly withdrawals "calculated on the basis of an expected life span" to the holder of a RSA upon retirement or attaining the age of fifty years has not provided any guideline or criteria upon which to calculate the life expectancy.

Another defect in the Act would be found in section 5(2) thereof which provides that:

> "5(2) – The pension fund administrator shall apply the amount paid under subsection (1) of this section in accordance with section 4 of this Act in favour of the beneficiary under a will or the **spouse** and children of the deceased or **in the absence of a wife** and child, to the recorded next–of-kin **. . . " (**Emphasis supplied).

While the Act in one breath has given recognition to "spouse" of the deceased account holder which in Family Law could be interpreted to mean either the "wife" or the "husband", it has in another breath within the same section, given recognition only to a

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[45] The Pension Scheme of Singapore designated as the Central Provident Fund operates four types of individual accounts. Apart from the pure mandatory retirement savings account, the Scheme gives workers additional opportunity for investment in approved securities and for spending on education, health insurance and housing. In addition, workers are required to keep a minimum sum in their account after reaching age 55, which is adequate to purchase on retirement at age 62 a minimum life annuity, equal to 25 per cent of average earnings. To achieve these objectives, contributions under the Central Provident Fund are allocated to three separate accounts and individual savings can be accessed under different specified conditions. See U.S.Social Security Administration, *Social Security Programs Throughout the World:: Asia and the Pacific,, 2004,* Office of Research, Statistics and Evaluation,, (2004), 1 at 166.

[46] See WHO, *Country Cooperation Strategy; Federal Republic of Nigeria, 2008 – 2013.,* WHO, (2009), at 4.

"wife" as beneficiary. Thus, in the event that the wife predeceased the husband, it would therefore mean that the husband may not benefit from the deceased wife's RSA going by the provisions of this section as it is presently worded. This certainly could not have been the intendment of the law.

Also, the presumption of death after about one year of declaring an employee missing is rather too short when compared with the provisions of section 144(1) of the Evidence Act which requires a period of seven years before such a person is presumed dead.

Section 71(2) of the PRA which requires the NSITF to provide every contributing citizen Social Security Insurance Services other than pension in accordance with the NSITF Act, 1993 is just a blanket provision which has failed to provide any detailed statutory support for the acknowledged role of the NSITF to provide such other services.

The foregoing identified defects in the Nigerian Pension Law have revealed the need for Nigerian policymakers to take appropriate corrective measures in addressing them. To this end, the following reform proposals are being put forward.

V. Imperatives for Further Reforms

For a complete harmonisation of all laws relating to pension in Nigeria and in view of the fact that the Pension Act 1979 under which all the constituent States in Nigeria derive their respective Pension Laws[47] has been repealed by the provisions of section 99 of the PRA, 2004, it is imperative that every State adopts the new PRA through the enactment of appropriate State (Adoption and Adaptation) Law in order to secure the future well being of officers in the Public Service of the States and their respective Local Governments.[48]

Restriction of coverage to establishments where there are at least five or more employees ought to be removed to give equal opportunity to employees of establishments with fewer number as well as other self-employed people to participate on the same platform as those to whom the Act is currently applicable. Indeed, except for the Armed Forces and the Police who remain under unfunded schemes, the Chilean privatised scheme is mandatory for all employed workers but optional for the self-employed while in Argentina, all workers including both employees and the self-employed, with few exceptions such as for example, the military, the police, and provincial civil servants, must join the new Integrated Pension System called *sistema Integrado de Jubilaciones y Pensiones.*[49] It is gratifying to note in this respect that Jigawa State, which is one of the States in Nigeria that have adopted the Scheme has modified the provisions of the

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47 See for example, The Pension Act (Adoption and Adaptation) Law, 1990 of Ondo State and the Pension Law of Lagos State, Cap 141, Laws of Lagos State of Nigeria 1994 where the provisions of the Pension Act, 1979 have been adopted and applied with such modifications and adaptations as may be necessary to officers in the Public Service of the respective States.

48 It is gratifying to note however that the National Council of States had adopted the Scheme for the whole country and has asked the Commission to develop a model for the States to modify based on their peculiarities. The Commission had disclosed that as at December 2007, only about nine States out of the thirty six states in the country are yet to take any significant steps towards implementing the Scheme in their respective States. See *This Day* (Nigeria) 8 December 2007, at 2.

49 See J. B. Williamson, and F. C. Paupal, supra, note 24 , 12 & 17.

Act in respect of coverage to include participation of people in the informal sector such as commercial motorcycle operators, artisans and craftsmen who are required to make a monthly contribution of ₦1, 000.00 (One thousand naira) into the Fund. Each contributor is only required to pay sixty per cent of this sum while the balance of forty per cent is to be borne by the State and Local Government Councils on behalf of the participants.[50] On the other hand, in line with the global trend in Schemes of this nature highlighted above, the armed forces and allied security services personnel ought to and should be excluded from the contributory pension scheme of the PRA in appreciation of the sensitive nature of their profession and the selfless service they render to the country.

Contributions payable by an employee ought to be based on the employee's basic salary as opposed to the "monthly emoluments" on which it is currently based. This would give more opportunity to the employees to meet the specific needs of housing and transport for which the allowances are paid.

Section 9(5) of the Act ought to be amended to give allowance to the employer and the employee upon agreement, for a downward revision of the contributions of which they have previously adjusted upwards above the recommended minimum percentage insofar as such downward revision does not fall below the recommended minimum of fifteen per cent of the employee's "monthly emoluments".

Apart from the retirement benefits provided by the Act, the Scheme should, with a little increase in the contribution rate, have a wider objective of meeting other social needs of contributors such as housing and education along the line of the pension scheme of Singapore.[51] In this vein, the National Housing Fund Act[52] may be integrated with the PRA. This will hopefully eliminate allegations of corruption and mismanagement of funds that have persistently been leveled against the managing authorities of the National Housing Fund Scheme.

The seemingly inconsistent provisions of section 7(2) and section 10 of the Act which have raised the issue of double taxation ought to be resolved by eliminating any form of taxation on withdrawals from RSA.

The Commission should intervene by way of appropriate regulation to ensure that annuities bought pursuant to the provisions of section 4(1)(b) of the Act are adjusted on actuarially fair terms. The conversion of savings into annuities or programmed withdrawals may indeed be good for the economy if adjusted on actuarially fair terms as it provides an incentive for continued work which increases the nation's labour force and productive capacity since the annual annuity or withdrawal will automatically be larger for those who work longer. Such regulation may make such annuities payable as variable annuities; price-indexed or inflation-indexed as it is the practice in Chile where workers at retirement may use their accumulated funds to either purchase inflation-indexed annuities from a private company or sign up for the periodic withdrawal plan.[53]

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50 See *The Guardian,* (Nigeria) , 22 February 2005, 1 at 51.

51 See note 53.

52 Cap N45, LFN, 2004.

53 See J. B.Williamson, and F. C. Paupal, supra, note 24 at 12.

Appropriate guidelines or criteria for the determination of the expected life span of retirees under the Act should also be provided by the Commission.

Also, the provisions of section 5(2) of the Act ought to be amended to remove the inherent ambiguity so as to give equal and incontestable recognition to the surviving "husband" as a beneficiary of the RSA of a deceased wife.

The requirement of one (1) year for presumption of death in case of a missing RSA holder ought also to be amended to bring it at par with the requirement of seven (7) years under the provisions of the Evidence Act.

In all, it is hoped that the pool of funds that would be available from long-term savings engendered by the Act would be properly utilised to be of immense benefit to the national economy as it is envisaged.[54] It is also imperative that the National Pension Commission be very alert in its statutory responsibilities to ensure due compliance by all stakeholders to the provisions of the Pension Reform Act and any regulation made pursuant thereto and to swiftly identify and bring to book as quickly as possible any person or establishment found wanting in any manner. This will no doubt build the confidence of the public in the Scheme as well as ensure its continued integrity and sustainability. The co-operation of other regulatory agencies such as the Securities and Exchange Commission, the National Insurance Commission and the Nigerian Stock Exchange is also crucial to the successful implementation of the Scheme on issues such as life insurance cover, annuities and risk- rating of investments.

VI. Conclusion

The Pension Reform Act represents a bold initiative on the part of Nigerian government to address the perennial problems associated with pension administration and payment of pension under the erstwhile P-A-Y-G system. One is hopeful that if the Act is amended along the proposals highlighted above, the whole system would be further strengthened to the abiding benefit of all concerned. However, while acknowledging the fact that one's family ought to and should still be the primary source of support in old age, the poverty level in the country as well as the prevailing socio-economic realities in the country call for a measure of social support for the needy elderly in appropriate cases. In Nigeria and indeed in Africa, one of the consequences of social and economic transformation has been the gradual weakening of traditional forms of social security based on the extended family and kinship ties. As such, the sense of family and charitable responsibility for older members of the society has gradually reduced. An increasing number of the elderly are no longer enjoying any form of support whatever either from their immediate or extended family with many of them taking to the streets to beg for their livelihood. This ought not to be so in view of the provisions of section 16(2)(d) of the 1999 Constitution which have enjoined Government to ensure that suitable and adequate old age care and pension are *inter alia* provided for all citizens. Although these Constitutional provisions are contained in the Fundamental Objectives and Directive

[54] Pension fund assets in Nigeria was said to have risen to N2.45 trillion by March 2012.- See *The Guardian,* (Nigeria), 22 March 2012, at 20.

Principles of State Policy which provisions are declared non-justiciable by section 6(6)(c) of the said Constitution in the sense that they cannot be secured in a court of law by any person who alleges an infringement of his right in respect of any of them, they however go a long way if pursued as a political programme by any government to further the ends of liberty, equity and justice in the Nigerian society. In this vein, the Nigerian policymakers ought to seize the advantage of the window of opportunity provided by the provisions of section 71(2) of the PRA to institutionalise a social assistance-based old age benefit that would provide means-tested old age benefit to persons aged 65 and over who also meet other eligibility criteria prescribed by law. Indeed, one of the common features of structural social security reforms in most countries is the separate arrangement that is usually made for the poverty-prevention part of the old age system. In Chile for instance, apart from supplementing the individual account when the accumulated private fund, after 20 years of contributions is insufficient to finance a minimum pension, the State also pays welfare pensions to the needy elderly because they are disabled or because they are aged 65 or more.[55] Also, in Singapore, the Government has instituted a public-assistance pension scheme that offers to destitute old people a small pension that is half the size of the minimum pension imposed under the Central Provident Fund and amounts to 12% of average earnings.[56] Similarly, some other African countries including South Africa and Mauritius, though not having privatised pension systems, have successfully implemented non-contributory, old age benefit programme to provide a minimum income for the needy elderly. For instance, in South Africa**,** under the Social Assistance Act, 2004, No. 13*,* entitlement to a basic pension, which is financed from the general taxation, is subject to a means test for every man and woman who has attained the age of 65 years and 60 years respectively.[57] The South Africa's old age pension is said to reach 1.9 million beneficiaries, about 85 per cent of the eligible population. The scheme is also said to have reduced the poverty gap for pensioners by 94 per cent.[58] Also, in Mauritius, the government provides all residents, citizens and non citizens alike, who are aged 60 or older with non-contributory basic pension.[59] The proposed scheme in Nigeria should however be structured in a way that would decidedly stimulate State Governments to buy into it through the provision of necessary financial support towards its implementation. Undoubtedly, a scheme such as this, given the required political will and unwavering commitment on the part of Nigerian policymakers would go a long way in reducing the incidence of poverty and destitution at old age for the less privileged ones.

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55 See S. Borzutsky supra, note 31 at 91.

56 See M.G Asher, "The Pension System in Singapore" Social Protection Discussion Paper No. 9919, World Bank, (1999).

57 See Sections 5 and 10 of the Social Assistance Act, 2004, No. 13 (South Africa).

58 See ILO, *Facts on Social Security in Africa,* available at www.ilo.org/public/english/bureau/inf.download (last accessed 27 May 2005).

59 See U.S.Social Security Administration, *Social Security Programs Throughout the World: Africa, 2003,* Office of Research, Statistics and Evaluation, (2003) at 98.

Towards Sustainable Public Procurement in China: Policy and Regulatory Framework, Current Developments and The Case For A Consolidated Green Public Procurement Code

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ABSTRACT

This paper presents an assessment of the effectiveness of China's current green procurement system by reviewing the current Chinese laws governing public procurement, energy, environment, resources and government assert management, and the operating green government procurement projects, and in a number of cases, through site interviews. It is augured that there are great potentials for the development of sustainable public procurement policy in China given the huge size of the Chinese government procurement market, and the unprecedented political and legal environment for such developments. However, the effectiveness of the current systems is limited. To effectively implement the current green procurement policy and better exploit the potential of sustainable procurement, it is submitted that green procurement policies are implemented through "procedural extension" and "coverage expansion" of the current green procurement systems and these aspects are consolidated into a sustainable public procurement code. The proposed Code would help embrace the concept and framework of sustainable procurement, and confirm, clarify, coordinate and improve the current green procurement systems as well as bring awareness to the government procurement professionals of the many environmental requirements in other area of rules and standards other than public procurement, and thus contributes to the sustainable development goals in general.

I Introduction

Sustainable Procurement is a process whereby organizations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits, not only to the procuring organization, but also to society and the economy, whilst minimizing damage to the environment.[3] Specifically speaking,

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[3] The Sustainable Procurement Task Force (SPTF)(2006), *Working Group 1 – International Benchmarking Final Report.*[On-line]. Available at http://www.sustainable-development.gov.uk/government/task-forces/procurement/documents/wg1-report.pdf [retrieved June 9, 2008]

sustainable procurement takes into consideration not only the purchase cost of the goods or services but also their whole lifecycle cost. Sustainable procurement requires that the possible effects the goods may produce in the whole course of possession on economy, society and environment be taken into the procurement policy making process.

Sustainable procurement indicates that the government supply chain and public service will become more and more low carbon, low rubbish and energy/water conservation, and beneficial to broader sustainable development goal. It also means the construction and management of government asset facilities may take a sustainable policy, reducing carbon emission, waste and consumption of water, and increasing energy efficiency. [4]

In China, sustainable procurement is not a legal concept under the current public procurement laws or other related laws. However, the development in politics and laws in recent years has provided strong political justification and legal basis for sustainable procurement. Remarkable developments for sustainable procurement are also taking place in practice in China.

The second part of this paper reviews the main developments of Chinese laws and regulations towards green energy and environment policy, and analyzes their implications for government procurement. It is submitted that the development of green energy and environment-friendly policies have given impetus to the government procurement of energy efficient and environment friendly products; compared with those market regulatory tools aiming at implementing policies of green energy and environment development, public procurement may provide a more effective tool, i.e. by integrating the green policy into main procurement decisions of each individual contract, regulation through contract provides a more effective means of implementation of the green policies.

Part three then analyzes the main current systems that are in place to implement green procurement policy, i.e. the preferential or compulsory procurement of products that are listed in Energy Conservation Products List for Government Procurement (ECP List) and Environment-labeled Products List for Government Procurement(ELP List). It is found, through a careful analysis of the design and operation of the system, that the preferential or compulsory list is more that of a qualification system for ECPs and ELPs than that of a system that is of any meaningful implication for the listed products in the most important procurement award decision. It is therefore argued that the effectiveness of the system is doubtful and there is a problem of legality for such compulsory system under the current Chinese laws on government procurement and accreditation. The concern is further supported by our findings through several site interviews. Part three also reviews the institutional design of the procurement function in relation to green procurement and it is submitted that the existing procuring function and its organization greatly weaken the possibility for the whole procurement links to consider sustainable factors.

It is therefore submitted that green procurement policies are more effectively implemented through "procedural extension"-integrating the green procurement

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[4] UK Government (2007). *UK Government's Sustainable Procurement Action Plan-Incorporating the government response to the report of the Sustainable Procurement Task Force.*[On-line]. Available at http://www.defra.gov.uk/sustainable/government/documents/SustainableProcurementActionPlan.pdf [Retrieved January 26, 2010]

considerations through out the whole acquisition process decisions -and "coverage expansion"-through the expansion of coverage of green procurement. Part four then analyzes the "procedural extension" aspect of green procurement, with a focus on the three milestone processes that may have major implication for green concerns: green demand, technical specification with a particular attention to the procurement law issues of green labels and award decision with a particular attention to the issues of award decision based on whole life cost. It is submitted that the best green procurement is no procurement and therefore it is crucially important for government to carefully review and control government demand to avoid improper demand and procurement. While the Chinese procurement laws have little impact on demand review and control, other laws and regulations are evolving towards green government demand control, though rather relaxing. It also reviews the Chinese procurement rules that govern technical specification with a particular discussion on the procurement law issues of certification of energy efficiency products for government procurement. It is argued that the current green procurement system which makes listed products a must to enter government procurement market and establishes the government designated organization as the sole recognized certification organization may have the negative effect of unrealistically increasing the burden of green suppliers and unduly restrict competition. Since the advantage of most of the green products lies in whole life costing, it is also argued that a whole life costing method be adopted in award decision. Part four further discusses coverage expansion aspect of the proposal. It is observed that current government green procurement system only covers products and therefore it is argued that the green procurement requirement be expanded to cover both service and works procurement. The legality of the expansion could be solved by a broad interpretation of Article 9 of the Chinese government procurement law which implements a general social and economic policy through procurement. A review of related laws and regulation governing works procurement also reveals that many aspect works procurement are actually governed by other area of laws which can be incorporated into a broader concept and framework of green government procurement law.

Part five concludes. It discusses the potential to establish sustainable procurement and green supply chain through government's buying power. It is observed that the current procurement laws and regulations do not implement a concept of sustainable procurement and green supply chain. A number of challenges can be observed through the current procurement law and revealed during out site interview. One, procuring entities are not aware of concept, means and tools of sustainable procurement including those legal requirements provided for under other areas of laws which are actually an integral parts of sustainable procurement; two, parallel legal framework for the Chinese public procurement may present some problems for wider application of the green procurement policy; third, the existing procuring function and its organization is weak and uncertain and may greatly weaken the possibility for the whole procurement links to consider sustainable factors. Finally, the inherent conflicts between sustainable procurement objective and other objectives may also bring difficulties for implementation of this policy, setting challenges for the implementing capability and development of professionalism.

To address these challenges, it is submitted that there is a strong case for the development of a consolidated green public procurement code. The proposed Code will

embrace the concept and framework of sustainable procurement, and confirm, clarify, coordinate and improve the current green procurement systems and thus contributes to the sustainable development goals in general. Specifically the Code will not only attain the features of the "Procedural extension" and "coverage expansion" discussed in this paper, but also incorporate all aspects of the green policy provided in laws and regulations on energy, environment and resources, laws on government demand, production, consumption and disposal, and the whole supply chain as well. The Code could be in the form of hard law, in a sense that the law is binding and as such a law reform program must be initiated by the national legislature, or alternatively in the form of a soft law, in a sense that only green procurement guide is provided, in which case better policy awareness, coordination, certainty, and consistency can also be achieved.

II The political and legal environment for sustainable public procurement in China: a review of recent developments

For the past decades, while China's economy has undergone continuously rapid development the resource and environment problem are becoming increasingly prominent due to the extensive economic growth pattern. It is thus observed that change of economic growth pattern has been a focus of policy on the political agenda and for the past decades concrete measures have been taken to achieve "energy-conservation and emission reduction" objectives in economic development. For example, The 11th Five-year Plan for National Economic and Social Development made in 2006 set binding targets for the 11th Five-year period (from 2006 to 2010), i.e. the GDP unit energy consumption is to be reduced by 20% and total sum of main pollutants emission cut down by 10%.[5] At the same year, the State Council published its Decision for Strengthening the Work of Energy Conservation, setting down a series of policies and measures to promote energy conservation and emission reduction.[6]

Another move towards sustainable development derives from the Chinese government measures to cope with "climate change" as the global issue of climate change is becoming more and more pressing. In June 2007, the State Council set up a national steering group charged with the responsibility of coping with climate change and achieving the objectives of the energy conservation and emission reduction[7]. In the following months the National Plan for Coping with Climate Change was formulated[8]. Two years later, the national legislature was also on the move: it heard and reviewed the State Council's Work Report on Dealing with Climate Change and urged the executive to place sustainable development high on the agenda of national strategy for industrialization and modernization and take effective measures to cope with climate

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5 A Decision on the Outline of 11th Five-year Plan for National Economic and Social Development by the 4th Meeting of the 10th National People's Representative Conference.

6 State Council Decision on Strengthening Energy Conservation, State Council Issuance No. 28 2006

7 State Council Circular on Setting Up the National Steering Group for Dealing with Climate Change, Energy Conservation and Emission Reduction, State Council Issuance No 18(2007)

8 State Council Circular On Issuing the Chinese National Plan for Dealing with Climate Change, State Council Issuance. No 17(2007)

change.[9] In November, 2009, the State Council made a decision setting up the concrete target for emission reduction to control the emission of greenhouse gases and making it a binding index of long and medium term planning for national economic and social development.[10]

Meanwhile, a number of laws were enacted or amended to implement these sustainable policies in recent years, including the Law on Promotion of Clean Production (2012)[11], the Law on Renewable Energy(2010)[12], the Law on Energy Conservation(2007)[13], State Council Regulation on Energy Conservation by Public Entities(2008),[14] State Council Regulation on Energy Conservation in Civil Construction(2008)[15], the Law on Promotion of Recycled Economy(2008)[16], and the Environment Protection Law (2014)[17].

All these laws, inter alia, granted the government procurement an important role to play to achieve sustainable development goals, requiring preferential or compulsory government procurement of energy-conservation or environmentally labeled products. For example, the Law on Promotion of Clean Production requires, among others, government give preferential consideration in its procurement for those energy-conservation, water-conservation and waste-utilization products. The Law on Energy Conservation requires public entities give preferential treatment in their procurement to those products and equipment that are on the government procurement list of energy conservation products and equipment(referred to hereafter as ECP List) when purchasing energy-consuming products or equipment. The Regulation on Energy Conservation by Public Entities goes even further by requiring compulsory procurement of energy-conservation products. According to this Regulation, public entities should comply with the state's stipulation on compulsory or preferential procurement, and procure products and equipments that are on the ECP List and Environmentally-labeled Products List for Government Procurement (ELP List) and not procure those energy-consuming products or equipments clearly eliminated by the state[18]. The Regulation also requires that the State Council and provincial governments

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9 The Decision of the Standing Committee of the National People Congress on Actively Dealing with Climate Change, Passed at the 10th Meeting of the Standing Committee of the 11th National People's Congress on August 27, 2009.

10 A Decision made by the State Council Standing Committee on November 25, 2009 requires that the CO2 Emission per unit GDP be reduced by 40%-45% bench-marked against the level of that in 2005, and the level of reduction is written into the long and medium term planning of the national economic and social development as a binding index.

11 The Chinese Clean Production Promotion Act, enacted by the 28th Session of Standing Committee of the 9th National People's Congress on June 29, 2002, and 2003, amended on February 2, 2012.

12 The Chinese Renewable Energy Act, enacted by the 14 Session of the Standing Committee of the 10th National People's Congress on February 28, 2005, and, amended on April 1, 2010.

13 The Chinese Energy Conservation Act, enacted on November 1, 1997 and amended on October 28, 2007.

14 State Council Regulation on Energy Conservation by Public Entities (2008), enacted by the 18th State Council Standing Committee on July 23, 2008, and effective on October 1, 2008.

15 Council Regulation on Energy Conservation in Civil Construction(2008), enacted by the 18th State Council Standing Committee on July 23, 2008, and effective on October 1, 2008.

16 The Law on Promotion of Recycled Economy(2008), enacted by the 4th session of the Standing Committee of the 11th National People's Congress, and effective on January 1, 2009.

17 Enacted on December 26, 1989 and amended on April 4, 2014.

18 Article 18 of the Regulation on Energy Conservation by Public Entity.

give priority consideration to those products and equipments with attestation certificate for energy-conservation when preparing the ECP List, and put the products and equipments on the ECP List into the Centralized Procurement Catalogue (CP Catalogue)[19]. The Law on Promotion of Recycled Economy requires governments set up target responsibility for cycled economy, and take such measures as planning, finance, investment and government procurement to promote the development of recycled economy.[20] It also provides for a government procurement policy that is advantageous to the development of recycled economy and requires preferential procurement of products that are energy-, water- or, material-conservation and environment-friendly products and renewable products. [21] The Environment Protection Law requires the state adopt such policies and measures as public finance, taxation, price and government procurement, to encourage and support the development of environmental industry such as environmental technologies and equipments, comprehensive utilization of resources, and environmental services.[22]

The development of these policies and laws provides favorable political environment and legal foundation for the implementation of sustainable procurement, and thus offering huge potential for sustainable development in China. Firstly, government, whose procurement roughly accounts for 15-20% of a country's GDP[23], is itself a giant consumer. By using its purchasing power to opt for goods and services that also respect the environment, it can make an important contribution towards sustainable development. Green purchasing is also about setting an example for others and influencing the market place. By promoting green procurement, public authorities can provide industry with real incentives for developing green technologies. In some product, works and service sectors, the impact can be particularly significant, as public purchasers command a large share of the market (in computers, energy-efficient buildings, public transport, and so on). Secondly, **public entities are a creator of the market for green energy and environment-friendly products**. The market competition mechanism pursued by public procurement itself could help generate market mechanism for green products. The scale of government procurement can also help green energy suppliers realize scale economy, cutting down the cost of those green energy and environment friendly products, and thus speed up the differentiation of green market. Last but not least, Sustainable procurement can even create a new kind and more effective regulation through supplier compliance of individual contract that requires green product and service through out the whole supply chain. Effectively enforced regulations – e.g., energy efficiency standards for

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19 Article 19 of the Regulation on Energy Conservation by Public Entity. A CP Catalogue is generally taken as a mechanism for centralized procurement. For more detailed discussion of this mechanism, see Cao Fuguo, China's Government Procurement Policy And Institutional Framework: History, Structure And Operation, Handbook of International Government Procurement, in Khi V. Thai(ed.), *International Handbook of Government Procurement*, Francis and Taylor Group, 2009.

20 Article 8 of the Recycled Economy Promotion Act.

21 Article 47 of the Recycled Economy Promotion Act.

22 Article 21 of the Chinese Environment Protection Law, as amended in 2014.

23 European Commission (2004). *A report on the functioning of Public Procurement markets in the EU: benefits from the application of EU directives and challenges for the future.*[On-line].Available at http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf [retrieved December 12,2013].

appliances – could in principle achieve a similar outcome. Problems arise, however, where government's enforcement capacity is weak or where, due to political lobbying by affected industry groups for example, legislation or regulation may be blocked. In contrast, contract regulation provides an effective instrument to attain the green goal by enforcing green requirement through individual contract terms and conditions to which suppliers must comply. The incentive for supplier compliance of green procurement and supply chain is apparently true given the immense government's buying power and the risk of exclusion from government procurement market or lost of contract in case of noncompliance. The effectiveness of this mechanism is further strengthened by the peculiar bid protest system that is available to the aggrieved suppliers. If public entities or the successful suppliers fail to comply with these green procurement requirements, a disadvantaged supplier may file a complaint for redress, a private enforcement mechanism which would effectively implement the proclaimed green policy in individual contract.

However, as will be argued in part 3 and 4 below, the effectiveness of the current green procurement systems is limited and that further reform is needed to realize the huge potential of sustainable procurement.

III Current Developments for Sustainable Procurement and Assessment of the Enforcement Mechanism

A The government procurement system for ECPs

Legal foundations for government procurement of ECPs

The Chinese Government Procurement Law(GPL) enacted in 2002 stipulates in article 9 that "Government procurement shall be conducted in such a manner as to facilitate achievement of the economic and social development policy goals of the State, including but not limited to **environmental protection**, assistance of underdeveloped or ethnic minority regions, and promotion of small and medium-sized enterprises." While the provision does not literally provide for procurement policy for energy-conservation product, it could be argued that such policy can be founded on this provision since energy conservation policy is an environmentally sensitive policy, and is thus clearly inseparable from environment protection policy. In other words, procurement policy for environmental purpose under article 9 can be interpreted broadly to apply to green energy procurement policy. A more expansive approach would be to interpret the foundation of procurement for green energy related products under the procurement law against the broader context of "economic and social development policy" that the article seeks to promote as green energy policy is apparently one of the focuses of national policies and strategies for sustainable development, as discussed in part 1.

In fact, it was with the remarkable developments of the government procurement law and the energy conservation policies that comes the current system for procurement of ECPs.[24].The later enacted Energy Conservation Act(2007) places the issue of energy

[24] A Circular on Conducting Resource Conservation Activities by the State Council Office (issued in April 2004) requires that the finance departments of government at different levels support resource conservation and its comprehensive utility, and put energy- and water-conservation equipment (product) on the government procurement catalogue.

conservation on“ the first priority of the national energy development strategy” and explicitly requires public entities to give preferential procurement consideration to the products and equipments on the ECP List. These developments indicate that the significant development of energy conservation policy and law itself has endowed government procurement with an important role to play,[25] and government procurement policy for energy conservation ***products*** is well founded on the energy laws themselves and doesn't necessarily need to rely on the interpretation of the government procurement law. However, the case is different when works and service procurement is concerned as the energy laws provide for government procurement policies only for products (see further discussion in part 4.2)

Preferential system for procurement of energy conservation products

The current system of government procurement of ECPs was formally implemented in December 2004 when the Ministry of Finance (MoF) and the National Development and Reform Commission (NDRC) jointly published the Opinion on Implementing Government Procurement of Energy Conservation Products (ECP Opinion). According to the ECP Opinion, government purchasers shall accord preferential consideration to ECPs in their procurement, and gradually phase out those products of low energy efficiency.

By the ECP Opinion, categories of ECPs that fall under the scope of government procurement are determined and published in the form of ECP List which will be duly updated, expanded and published. The categories are jointly selected by MoF and NDRC from the certified ECPs by the state-approved ECP certification agency considering the comprehensive circumstances such as government procurement reform process, and technology and market maturity for ECPs. The **Circular on Establishing System of Compulsory Government Procurement of ECPs further requires the authorities to formulate the ECP List in a scientific way and lays down the conditions for inclusion:** firstly, the listed products should be ECPs certified by state-accredited certification agencies with prominent energy conservation effects; secondly, the product should be mass produced with mature technology and reliable qualities; thirdly, the product should have a sound supply system and an excellent after-service capacity; fourthly, suppliers of the products should meet the requirements of government procurement law for the suppliers of government procurement.

The nature and value of “preferential” ECP List

According to the ECP Opinion, government entities are required to give preferential consideration to energy efficient products fallen under the ECP List in their procurement decision provided that the level of technology and services of that product can satisfy the purchase requirement. The procuring entities are also required to clearly stipulate, in the

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[25] The preference for reusable energy and energy efficiency is no longer an marginal issue of environment policy, but rather a fundamental issue of national economy and security. For further discussion, see, Kunzlik, Peter(2009). Chapter 9 “The Procurement of Green Energy” in Arrowsmith, Sue, and Kunzilk, Peter (Eds.) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions*, UK:Cambridge University Press:377.

bid document (including the documents for negotiation under the negotiated procedure and for request for quotation as applicable), the energy efficiency requirement for the products, the range of preference accorded to the ECPs and the evaluation criteria and methods.

By the ECP Opinion, preferential consideration may be applicable where the level of technology and services of that product can satisfy the purchase requirement. This provision seems to indicate that the procurer needs to set up minimum technical requirement. Two circumstances can be envisaged as to the approach to applying the preferential requirement and both are related to the purchaser's requirement. One is the case where there is no requirement for energy efficiency in relation to their demand specification, which entails products outside the ECP List (including non ECPs and ECPs not yet on the ECP List) eligible for the bid. Then a criterion of energy efficiency is included in the succeeding award decision, to the advantage of ECPs and the products with higher energy efficiency, and the weight accorded to it against the comprehensive evaluation criteria. While a product on the ECP List does have an advantage in award decision in relation to the energy efficiency criterion, it does not necessarily mean that the supplier of ECP or the product with higher energy efficiency will win the contact since award decision is generally based on comprehensive factors. A non ECP could win the contact and an ECP that is not on the ECP List could also win the contract if it is more competitive based on the comprehensive evaluation criteria. Then the value of the ECP List is questionable in relation to the preferential policy for procurement of products on the ECP List, in a sense that products outside the ECP List may win the contract.

Under the second circumstance, the specification of the purchaser "demands" does include a requirement for energy efficiency and the preconditions for applying the "preferential treatment" again indicates that the requirement for energy efficiency in technical specification is still a basic requirement so that more energy-efficient products are eligible for bid. Then in the succeeding award decision, a bigger margin of preference is given to those with higher energy efficiency. Under this circumstance, none ECPs are not eligible for bid and competition is among the ECPs. While products with higher energy efficiency may enjoy an advantage in relation to the criterion for energy efficiency and its relative weight against the comprehensive evaluation criteria, the eventual successful bid is still based on the outcome of the comprehensive evaluation process. Again, the products on the ECP List may win the contract and the products outside the ECP List may also win the contract. In this sense, whether a product is covered by the List is not of actual significance.

The system for "compulsory" procurement of ECP

As is in line with the above analysis, products on the ECP List are sometime losing the bid to non listed products in practice, rendering the effect of the preferential procurement policy for listed ECPs void. Policies and measures thus developed later to rescue this situation. In June 2007, the State Council published the Comprehensive Working Plan for Energy Conservation and Emission Reduction, which requires explicitly that the government agencies strengthen their measures for energy-conservation and green procurement and institute a new policy of compulsory procurement for energy-,, water-conservation products and ELPs. A later Circular establishes the categories of such

products for compulsory procurement asterisked within the ECP List.[26] The Circular also lays out the principles to be followed while determining the categories of products for compulsory procurement: firstly, the products are for general purpose use, fit for centralized procurement and have better scale economy; secondly, they have prominent effectiveness in energy efficiency and remarkable value for money; thirdly, there is sufficient supply of such products with a period of minimum 5 suppliers, to ensure adequate products competition and .scope of purchaser selection.

By July 2014, the categories of products for compulsory procurement under the 16th ECP List covers a wide range of products such as air conditioners, lighting products (including both-ends fluorescent lights, self-blast fluorescent lights, one-end fluorescent lights and pipe-shaped fluorescent lights blasts), televisions, electrical water heaters, computers, printers, displays, toilets and water injection well chokes.

Nature of the "compulsory" ECP List and the related procurement policy issues

The compulsory list as a list of eligibility and the strong effect of exclusion

As can be observed, the purpose for establishing the compulsory list system for ECPs is to strengthen the measures to promote government's energy-efficiency policy through government procurement. Under this system, in purchasing the goods covered by this list, the procurers can only select from those on the "compulsory" ECP List. The "compulsory" list is then in effect a qualified supplier/product list. Those not included in this list will not have opportunity to enter the government procurement market. Notwithstanding this list is "open" and adjusted regularly."

While it may be a good practice to maintain a list of approved list of suppliers/ products in government procurement, the compulsory list attains a nature of too strong exclusion, which entails with it an issue of legitimacy under the procurement laws. Firstly, the requirement that the products must be accredited to be eligible for the government procurement market excludes other evidence of product energy efficiency. From the perspective of a sound public procurement law, when the purchaser establishes the list, it adopts the evidence that the covered products are ECPs. With certificate of accredited ECP and the fact that its product is included in the list, a bidder can evidence to a purchaser that its product is qualified ECP (and the degree of efficiency) and eligible for participating in particular procurement and granted preference. The advantage of this practice towards procurement efficiency is obvious since it provides much assurance for purchasers of the information about the scientific attributes of the products involved on its energy efficiency. However, the fact that a product is not included in the list can not preclude suppliers from furnishing the purchasers other sources of evidence for the energy-efficient attributes of a certain product in a particular procurement. In other words, the requirement for only admittance of "attested" evidence and the exclusion of other source of evidence involves an issue of legitimacy under the government procurement law.

26 The Circular on Setting up the System of Compulsory Government Procurement of Energy-conservation Product prepared jointly by MOF and NDRC and issued by the State Council Office in December, 2007.

Secondly, the compulsory list also excludes the authority of other certification agencies which entails with it another element of legitimacy under both the attestation law and procurement law. As will be discussed later in part 4.1.2, the current Chinese laws and policies on certification is aimed at establishing a competitive certification system in China, and the certification by nature and by the legal definition under the Chinese law only attains with it the effect of evidence of scientific attributes of a certain product involved. In other words product certification is voluntary and suppliers are free to decide whether or not and where to have their products certified, or alternatively furnish the purchasers other sources of evidence. Therefore, the requirement for only admitting one certification agency and excluding others is not in line with the current Chinese law and policy on certification and the fact of excluding other sources of evidence with the effect of supplier exclusion in a particular procurement is not in line with sound procurement rules.

The requirement for consideration in bid evaluation and the counter effect of conflicting policies

While the motive for a suppler to have its product accredited and admitted in the list is to win government contract, whether it can in reality win the contract depends on its competitiveness in relative to its competitors. There is a clear requirement on purchasers to consider adequately product energy efficiency in evaluation criteria which must be provided in the bid documentation and presumably a higher score is given to product with higher energy efficiency.

However to what extent the energy-efficient policy is promoted in award decision depends on the weight of the criteria for energy efficiency in relative to other criteria in the comprehensive evaluation system. It is also relevant to accord higher score to product with higher energy efficiency for the purpose of promoting energy-efficient policy. Another way to promote energy-efficiency policy in the award decision is to base the economic decision on whole life cost rather than the purchase cost only. However, our field interviews reveal that the relative weight of the criteria for energy efficiency is low, ranging between 5-8%; almost all award decisions are based on purchase cost, which to a great extent counteracts the advantages the higher energy efficient product enjoys since in many cases products with lower energy efficiency are more competitive in relation to purchase cost; It is also found that in many cases all listed products are given the same score for simplicity of appling the legal requirement, irrespective of the degree of energy efficiency. Therefore it can be argued that the effectiveness of the compulsory list is limited. To make it worse, in some of the reviewed cases, the energy performance of the evaluated products are not considered at all in the award decision due to the alleged conflict of policies arising from a MOF Circular prohibiting further consideration of a factor once it has been used as an eligibility criteria.[27] If this understanding is right, the

[27] MOF Circular on Strengthening the Price Evaluation Management of Government Procurement of Goods and Service (MOF Treasury No 2(2007)) prohibits the use of an eligibility criterion as a bid evaluation factor. It is thus understood by some procurement officers that while the Compulsory Procurement List is in effect used as an eligibility list of suppliers and products, the factor of energy efficiency may not be further used as an evaluation criterion later at the award stage based on the aforementioned Circular.

compulsory list is in effect reduced to an eligibility list only, and consideration of energy performance of the products in the award decision is excluded, which greatly defeats the policy objective that the system intends to achieve.

B The government procurement regime for ELPs

System of "preferential" procurement of ELPs

In order to fulfill the requirements of the government procurement law and related environment protection law and policies, on October 24 of 2006, the then National Environment Protection Bureau (now the Ministry of Environmental Protection, or MEP) and MOF jointly published the Opinion on Implementing Government Procurement of ELPs and the List of Government Procurement of ELPs (ELP List), a milestone development of China's green procurement policy.

According to this Opinion, MOF and MEP co-determines the scope of preferential procurement by category from among the ELPs certified by government-recognized certification agencies in the form of "ELP List" after taking into consideration the level of market maturity, the progress of government procurement reform, and the degree of technological development of each product. The first ELP List included 14 categories of products with 856 models from 81 enterprises. It has since been updated each half year, most recently in July of 2014. The 14th version of the list covers 41 different product types.[28]

The Opinion requires all level government agencies give preferential consideration to ELPs in their procurement with fiscal funds and not to procure products hazardous to environment and human health. If the type of products to be purchased by the purchaser is covered in the list, preference should be given to those listed products provided that the performance, technology, service and other indexes are the same.

In conducting the procurement, the government purchaser should clearly state its environment protection requirement for the products, the qualifications to be achieved by suppliers and their products and the assessment criteria for preferential procurement. Later in a Circular published by the MOF and MEP on adjustment of the list, the system for preferential procurement of ELPs is preserved and its relationship with the ECP List is coordinated.[29] It is stipulated in the Circular that "if the products to be procured by the procurer fall under the scope of the government's compulsory ECP List, procurement should be made from among the ECP List. Those covered by both the preferential lists should be given priority over those covered by only one preferential list." Meanwhile, the Circular further extends the preferential requirement for ELPs to government works procurement: "*Government works procurement should strictly implement the system of government preferential procurement of ELPs.* In determining the main contractor, a procurer and its associated procuring agent should unequivocally fulfill the requirement of the government policy of procuring ELPs."

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[28] It can be noted that there is some overlap between the ECP List and ELP List (e.g. TVs, computers, printers, monitors, photocopiers, solar water heating systems, building materials, and faucet taps), but there are a number of product types unique to the ELP List, including building materials, furniture, paints, solvents, and ceramics.

[29] The Notice of Adjusting the ELPs List by MoF and MEP on August 31, 2009.

It should be noted that although the State Council's Comprehensive Working Plan for Energy Conservation and Emission Reduction (issued in June 2007) provides for a *compulsory* requirement for the procurement of high energy efficient products, water efficient products and *ELPs* for office facilities(such as air conditioners, computers, printers, monitors, copy machines), lighting products and water utilities, the compulsory procurement requirement under the current regime for procurement of ELPs is only confined to energy and water efficient products and not to ELPs so far.

Commentary on the system of "preferential" procurement of ELPs

As the policy of preferential procurement of ELPs is implemented in very much the same way as that of ECPs, readers are kindly referred to Part C of this paper for comment on the effectiveness of the preferential procurement system for ECPs.

C The weakness of institutional design and the procurement functions

Sustainable procurement requires the needs for goods, services, works and utilities be met in a way that achieves value for money on a whole life basis in terms of generating benefits to the organisation, society and the economy, whilst minimising damage to the environment. The allocation of the Chinese procurement function is however confined which delimits the possibility of sustainable policy consideration based on the whole life-cycle process. The issue can be observed from both ***horizontal*** and ***vertical*** perspectives and proposals for further reform are made accordingly.

The *horizontal* perspective of the Chinese Procurement Functions under the GPL

A horizontal perspective of procurement function looks at how procurement is organized among different parts of governments, and to be specific, how government procurement is centralized or decentralized. Despite of the different arguments on the advantages and disadvantages of centralized and decentralized procurement, it is generally recognized that the greater the importance of the procurement activities, the more centralized decisions tends to be. Since environmental management and protection is a major challenge for societies, and can now be considered core for many governments, centralization can play a key role in promoting green procurement policies and establishing an appropriate common standards. The positive effects produced by purchasing environmentally sustainable items through local units can be magnified by large-scale centralized procurement.[30] Thus it can be argued that there is a need for centralizing government procurement for the purpose of green procurement.

Under the Chinese government procurement law, a combination of centralized and decentralized procurement organization is implemented. The law establishes a central procurement agency but confines the scope of its procurement business only to

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[30] Dimitri, Nicola, Dini, Federico, Piga, Gustavo (2009). "When Should Procurement be Centralized?" In Dimitri, Nicola, Piga, Gustavo, Spangnolo, Giancarlo (Eds.) *Handbook of Procurement* ,UK: Cambridge University Press:47-81.

those defined by a Centralized Purchasing Catalogue(CP Catalogue)[31]…supposedly to the procurement for general purpose use. While there is clear policy-maker's intent to centralize the government procurement, the development of government centralized procurement function has proved much more complex. The CP Catalogue, which is prepared by MOF and approved by the State Council at central level and provincial government at local level, proves to be very political, in a sense that the purchase business of different parts of government is actually divided by the mechanism. It can be observed at central level that the supervisory authority (MOF) is also supporting a number of other government departments to set up their own central procurement centers, to the effect that much of the procurement business is allocated among the various procurement centers. At provincial and local level, the organizations of the procurement function are varied, with some government procurement centers subordinated and attached to different part of the government. Some even contract out the procurement function relying commercial procurement company to conduct government procurement. It is thus observed that the position of the centralized procurement center is to a large extent week and uncertain and the benefit of centralized procurement function is yet to be exploited. The situation is further degenerated by the limited scope of procurement competence granted to it by law.

The *vertical* perspective of the Chinese Purchasing Functions under the GPL

Public procurement is by no means confined to the purchase function, rather it is a process which may begins at a point where the procurement needs are established and includes the description of requirements to satisfy the needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, disposal of waste and the impact of this process could be conducted through out the whole supply chains. A vertical perspective of the procurement function looks at how the whole procurement process, from demand management down to the whole supply chain, is divided among different parts of government and the scope of procurement competence granted to the procurement centers who are supposed to be the professional buyers for the government.

The concept for sustainable public procurement requires for integration of energy-conservation/environmental consideration into the whole process decisions, including the definition of government needs for procurement and technical specification, supplier selection, contract terms and conditions, contract performance compliance and even down to the whole supply chain. However, the Chinese public procurement laws to a great extent regulate only the award process and the centralized procurement function is confined to the act of purchase. Such function can not have much say on the definition of government needs and the best way to satisfy the needs; neither can it be involved in contract performance. The limited scope of purchase competence could substantially debilitate the capacity of the procurement function to exploit the potential of sustainable procurement.

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[31] For more knowledge of the CP Catalogue, see Cao Fuguo, China's Government Procurement Policy and Institutional Framework: History, Structure and Operation in Khi V. Thai (ed) *International Handbook of Public Procurement*, p332.

D Assessment of current developments: a summary

To assess the effectiveness of the current Chinese green procurement systems requires quantitative data which is lack at the moment. Without this data, the only way to evaluate the efficacy of the systems is based on published laws and regulations rather than concrete results. A number of observations can be made based on the regulatory analysis with assistance of site interviews:

First, the means to implement sustainable procurement is only limited to that of the ECP List and ELP List, and the implementing effect of the systems themselves is doubtable. Second, the compulsory procurement system has too strong an effect of exclusion and has a problem of legitimacy under both the Chinese laws on government procurement and accreditation. Third, the existing procuring function and its organization considerably weaken the possibility for the whole procurement links to consider sustainable factors.

To effectively implement the green procurement policy and better exploit the potential of sustainable procurement, it is submitted that green procurement policies are implemented through "procedural extension" and "coverage expansion" of the current green procurement systems and these aspects are consolidated into a sustainable public procurement code.

IV Towards a Consolidated Sustainable Public Procurement Code: Procedural Extension and coverage expansion

A Integrating the green procurement considerations through out the whole acquisition process: the Procedural Extension

As discussed earlier, a more effective approach is to integrate the green procurement consideration into the whole acquisition process. This part will focus on the three milestone processes that may have major implication for green concerns: green demand, technical specification with a particular attention to the procurement law issues of green labels and award decision with a particular attention to the issues of award decision based on whole life cost.

Regulatory framework for green government demand

Managing procurement demand

Green purchasing is not always about buying greener products. It may simply means buying less. One should bear in mind that the greenest procurement is no procurement at all. Thus if there are chances to control government or even reduce demand through careful management of the demand and internal reallocation of government assets and resources it would contribute to sustainable procurement as well as value for money. However, government procurement law is generally more concerned with regulating on how to purchase and less likely to control government demand. In China, for example, rules regarding government demand management are generally provided in the regulation on state assets management.[32] The regulations provide for the general principles that

[32] The Provisional Measure on State Asset Management by Executive Entities, MoF order No 35, effective on July 1, 2006. The Provisional Measure on State Asset Management by Public Entities, MoF order No 36, effective on July 1, 2006.

executive agencies must follow while deciding the acquisition of assets, including, inter alia, the demand being appropriate in relation to their function, and frugal;[33].it also place much emphasis on internal reallocation of assets to reduce the case for purchase(article 13).[34] it specifically requires a policy of preference for internal adjustment and renting, rather than purchase, to satisfy government demand for general purpose asset for important conference, large mass activities and contemporary works.[35] while it is plausible that rules one government demand control are in place, it's implementation may be relaxing and varied among departments given the lack of sufficient political checks and general nature of the rules which entails with it much discretion for the user departments.

Setting green government demand: the impact of Chinese environment and energy laws on green government demand

The green standards that the relevant Chinese environment and energy laws establish will have great impact on the government procurement demand.

Firstly, there are national standards for energy efficiency. State establishes the compulsory standards for energy efficiency for construction; the State also establishes the standards for new and renewable energy. The State institutes energy efficiency label system for household appliance, verification system of the level of energy efficiency for product and equipment. The state also provides for the product catalogues that are prohibited for use. Purchasers must follow these legal requirements and conform to these standards when determining procurement demand and formulating technical specification.

Secondly, there is an evaluation and review system for environmental impact and energy efficiency. For example, the Clean Production Promotion Act requires an environmental impact evaluation for new, renovation and expansion construction project. [36] The energy laws require an evaluation and review system for fixed asset investment project. Projects not conforming to these compulsory energy efficiency standards will not be approved or ratified for construction, and if constructed, not allowed to put into operation[37].the evaluation and review system also requires stringent control of the construction scale and standards of the public entities. [38]

Thirdly, quota for energy consumption is formulated. The Energy Conservation Act (Article 16) requires government formulate quota for energy consumption based on

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33 Article 12 of the Provisional Measure on State Asset Management by Executive Entities.

34 Article 12 of the Provisional Measure on State Asset Management by Executive Entities requires that the supply of the state assets by the executive entities shall follow a number of principles, namely, inter alia, being in proportion with the demand for performing its function, thrifty and subject to strict control ,etc. and Article 13 hereof further requires that the assets shall supplied according to the supply standards and where there is no such standards, be supplied reasonably and subject to strict control. If the required assets can be allocated internally, the finance department will in principle allow new procurement.

35 The Provisional Measures on the Management of General Purpose Assets Supply by the Central National Organs (issued by the State Council General Affairs Administration on September 13 2007) , and the Circular on the Equipment Standards of Office Equipment and Furniture by the National Central Organs issued by the State Council General Affairs Administration (SCGAA), SCGAA (2009) No.221.

36 Article 18 of Clean Production Promotion Act.

37 Article 15 of the Energy Conservation Act.

38 Article 20 of the Regulation on Energy Conservation by Public Entities.

the comprehensive level and nature of energy consumption by public entities in relative to different lines and sectors and the financial departments of government formulate the standards for energy consumption expenditure by public entities based on such quotas. [39] The Regulation on Energy Conservation by Public Entities (article 17) requires public entities to use energy within the scope of the allocated energy consumption quota and strengthen the management of energy consumption expenditure; meanwhile, the Regulation on Energy Conservation in Civil Construction(article 21) requires the property owners of government office buildings and large public buildings to test and mark the energy utility efficiency of the buildings and publish the test result according to relevant state regulation and receive social surveillance.[40] Such requirements may be of great impact on the subject matter and technical specification of the new construction contract and alteration contract for existing buildings.[41]

Is there a case to regulate procurement demand through public procurement law?

As is discussed above, to exploit the benefit of sustainable procurement it is crucially important for government to carefully review and control government demand to avoid improper demand and procurement. While the Chinese procurement laws have little impact on demand review and control, other laws and regulations are evolving towards green government demand control. However, it can be observed that the effectiveness of the current system is limited in a number of ways. Firstly, there is less stringent budget control under the current political and administrative system, therefore the effectiveness of budget and demand control through budget rules is limited; secondly, the current rules on demand control is provided for at ministerial or lower level, meaning they have a lower effect and their enforcement may be weak; thirdly, the rules are very general leaving ample discretion to the user departments and taking with it much colors of self regulation. Therefore the formulation and implement of these rules may be easily captured by interest parties including the user departments. Last but not least, the green requirements on demand scattered in different regulations other than the procurement laws may not be easily discernible to the government procurement function at all, which is the case as observed from our site interviews with many procurement officers who are too much possessed with procurement rather than other area of laws. Therefore it is arguable that such requirements are consolidated into a sustainable public procurement code. The benefit of this approach is multitudinal. One, it is easily accessible to the procurement function; two, the procurement function is separate from the user department and thus can serve as a vehicle to put check and balance on government demand; third, the procurement function is supposedly the government procurement experts who is better informed as

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[39] Articles 17 and 49 of the Regulation on Energy Conservation by Public Entities and Article 25 of the Recycled Economy Promotion Act.

[40] Article 21 of the Regulation on Energy Conservation in Civil Building.

[41] Such legal requirements can be comparable to the legal requirement by the EU relevant laws on energy efficiency that member states establish minimum energy efficiency standards for newly constructed building and alteration project for existing buildings. See Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 (OJ L 1, 4.1.2003),

how to satisfy the user demand including the green requirement. Fourth, standardization of demand and economy of scale may be better achieved once the procurement function can play an active part in government's demand assessment and control.

Technical specifications

Technical specifications lay down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities.[42] Technical specifications have at least two important functions to play in government procurement. They describe the subjective matter of the contract to the market so that companies can decide whether it is of interest to them. They also determine the level of competition, provide measurable requirements against which tenders can be evaluated and constitute minimum compliance criteria. If they are not clear and correct, they will inevitably lead to unsuitable offers. Offers not complying with the technical specifications have to be rejected.

Regulation of technical specifications in Chinese laws

The Chinese public procurement laws regulate technical specifications in a number of ways. Firstly, formulation and publish of specification shall conform to the general principles of sound government procurement, in particular the principle of transparency and the principle of non discrimination .where there is a state regulation on technical specification and standards, it shall be provided in the bidding document. [43] The bidding documents may not refer to any particular supplier or contain any other preferential or discriminatory content. [44] State can provide for environment technical specification, safety or health standards provided that they are in line with the principle of transparency.

Types of technical specifications

Technical specification can be classified into two general categories: design-based or descriptive specification, where the focus is on input of the subject matter of the purchase, and performance-based specification, where the focus is on the output of the subject matter of the purchase. A performance-based approach usually allows more scope for market creativity and in some cases will challenge the market into developing innovative technical solutions and international norms on public procurement have a clear preference for performance-based technical specification.[45]

Specification can also be based on well-established technical standards. For example, one of the important measured adopted under the environment and energy laws to achieve the green policy goal is to formulate and enforce environment and energy-

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[42] WTO Government Procurement Agreement, Article 6.

[43] Article 19 of the Bidding Law, which requires that technical specification be provided in the bidding documents.

[44] Article 20 of the Bidding law

[45] Article 6 of WTO GPA and Article 23 of Directive 2004/18/EC and Article 34 of Directive 2004/17/EC.

efficiency standards.[46] Purchasers may integrate these environmental and energy-efficient standards into technical specification when formulating the subject matter of contract. For example, the key objectives of control, reutilization and eco-utilization of the so-called waste promoted by the Recycled Economy Promotion Act can be effectively achieved if reutilized products can be purchased by government. As a matter of fact, such legal foundation is well provided for under the Act.[47]

The Chinese public procurement laws do not provide anything on the choice of performance-based specification and technical standards. However it is submitted that performance-based specification be used as green energy market innovation is crucially important for the development of energy-efficient policy and clearly promoted under the current energy laws. Future reforms of the Chinese public procurement laws will definitely have an important role to play in that it can provide for authorization, clarity and guidance as to the use of performance-based specification and environment/energy-efficient technical standards.

Alternative bid

Purchase may also allow for potential bidders to submit alternative bid if he is not sure whether any green alternatives to the products, services or works he wants to purchase exist, or that he remain unsure about their quality or price. In this case, purchasers firstly establishes a minimum specification, for example a neutral technical specification without requirement for energy-efficiency or the minimum environmental specifications, and then allow bidders to submit alternative bid with green specification or better environment/energy-efficiency performance and compare all bids. The current Chinese procurement acts allows for alternative bids and requires advance provision of such allowance in the tender documents when alternative bid is used.

The issues of use of environment/energy-efficient labels as technical specification

Environmental- or eco-labels criteria are based on studies that analyse the environmental impact of a product or service throughout its life cycle, the 'cradle to grave' approach, based on valid scientific information. Such labels can be used as technical specifications in government procurement; for example, the label of Energy Star[48] is widely used in USA government procurement and Eco-labels are used in EU under the authorization of EU procurement laws.[49] Chinese energy/environment laws establish energy efficiency/environment labels/certification systems, which can be used as technical specifications in government procurement.

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46 Article 13 and 14 of Energy Conservation Act; see also discussion in part 5.1.2.4

47 Article 47 of the Recycled Economy Promotion Act. See discussion in part 2.

48 In 1993 the US Federal Government decided to purchase only 'Energy star'-compliant IT equipment. The federal government is the world's largest single computer purchaser, and it is estimated that this decision played a significant part in the subsequent move to compliance with 'Energy star' standards for the vast majority of IT equipment on the market. For more information see: http://www.energystar.gov.

49 Article 23 of Directive 2004/18/EC and Article 35 of Directive 2004/17/EC.

Energy-conservation/environment labels/certification system

(1) China Energy Label

The Chinese Energy Conservation Act provides, in article 18, that state institutes energy efficiency label management for energy-consumption products which are used widely and consuming large quantity of energy such as household appliance. Energy efficiency label refers to an information label which contains with it the grades of energy efficiency and other performance indexes for energy-consumption products. Energy efficiency label is by nature a product compliance label and products conforming to China energy efficiency standards can use China Energy Label.[50] The manufacturers or importers of the products that fall under the scope of energy efficiency management can test the energy efficiency of their products by using their own testing capacity or otherwise entrusting it to approved testing institutions verified by the state, and establish the grades of the energy efficiency for their products according to national energy efficiency standards.

(2) energy-conservation product verification system

In addition to the energy label system, China also establishes energy-conservation product certification system. Relevant regulation defines Energy-conservation products as the products that can satisfy the relevant quality and safety standards requirement and the energy efficiency or energy consumption index of which are up to internationally-advanced level or domestically-advanced level comparable to internationally-advanced level in relation to the same products or products with similar functions in social use.[51] The energy-conservation product certification by nature is attestation of a particular product as a certified energy-conservation product. A certification must conform to relevant standards and technical requirement, confirmed by certification institution and evidenced by issuing energy-conservation product attestation certificate and energy-conservation label.[52] Manufactures or marketers can voluntarily apply to the qualified certification institution approved by competent authority for energy-conservation product certification and once satisfying test requirements they are awarded the certificates and eligible to use the certification labels on the products or their packages.[53]

Therefore, the Chinese energy-conservation label or product certification system is comparable to a typical label or certification system: firstly, it provides scientific evidence that the labeled or certified products are in conformity with relevant technical norms or the compulsory requirement or standards of relevant technical norms.[54] Thus in case of procurement involving green technical specification, it can be assumed that the labeled

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50 Article 2 of Administrative Measure on Energy Efficiency Label Management.

51 Article 2 of the Chinese Administrative Measure on Certification of Energy Conservation Products(enacted on February 11 ,1999)

52 Article 3 of the Chinese Administrative Measure on Certification of Energy Conservation Products(enacted on February 11 ,1999)

53 Article 3 of the Chinese Energy Conservation Act.

54 According to Article 2 of the Regulation on Certification and Verification of P.R.C, the Certification hereof refers to the compliance evaluation activities where the certification entity certifies that a product, service and management system is in conformity with relevant technical norms or the compulsory requirement or standards of relevant technical norms.

or certified product can satisfy the specification requirement of government. Secondly, while the energy-conservation label for defined categories of products is compulsory, the energy-conservation product certification is voluntary.[55] This is true even for those products that must be certified according to national regulations where manufacturers, marketers or importers can voluntarily entrust one of the institutions for certification.[56]

(3) China environment label system

China began to implement an environmentally-label system in 1993 under which third party verification agencies certify enterprises and their products according to the technical standards and verification rules provided by the competent authorities. Based on a number of international standards, including the ISO 14020 standard, and created according to China-specific standards created by the Standardization Administration of the People's Republic of China (SAC), the list covers products that are verified by state-recognized third party verification agencies as free of hazardous chemicals or organic compounds, energy efficient, containing reusable or recyclable materials, and following all national and local laws governing air and water pollution in their manufacturing, packaging, and transport processes.[57] The Chinese government has also maintained a list of environmentally labeled ('green') products for government procurement since 2006.

The public procurement issues of use of environment/energy-conservation labels as technical specification

As discussed, the Chinese green procurement system enforces a compulsory procurement requirement for energy-conservation products. However the system has too strong an exclusion effect and has a problem of legality under Chinese laws on public procurement and certification. It is therefore submitted that when such green labels are used as technical specification—meaning products with these labels are taken as conforming to the greet technical specification, suppliers are also allowed to supply other forms of evidence other than the labels that their products can satisfy the green technical requirement under the particular contract.

Award criteria

General provisions on award criteria under the Chinese public procurement laws

Award decision is one of the most important procurement decisions where the contracting authority evaluates the quality of the bids (the offers) and compares prices.

Under the Chinese Bidding law (BL), the successful tender shall either be:

(i) The bid with the lowest price subject to satisfying all substantive requirements provided in the solicitation document (hereafter referred to as the *lowest bid*

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55 Article 20 of the Energy Conservation Act.

56 Article 34 of the the Regulation on Certification and Verification of P.R.C

57 http://kjs.mep.gov.cn/zghjbz/rzhcx/200611/t20061106_95664 and http://kjs.mep.gov.cn/zghjbz/rzhcx/200604/t20060411_75656.htm

price). This method should generally be used in the procurement of standard or commoditised goods and common services.

(ii) The bid satisfying all comprehensive evaluation criteria provided in the solicitation document to the greatest degree (hereafter referred to as the *most advantageous method*).

The BL also requires that the award criteria and the evaluation method be specified and published previously in the bid document. It is also required that those criteria be objective and quantifiable and each given relative weighting, or where appropriate be expressed in monetary terms. It is clear that green criterion can well be integrated into the award criteria given the sound legal foundation to promote such policies and discretion that the purchasers enjoy to include criteria they deem to be appropriate. Such green criterion may also be given a weighting relative to other criteria at the discretion of the purchasers. However the effectiveness of integrating green policies into award decision may be limited as purchasers may not be willing to consider such policy or only give less weighting to relative green criterion due to unawareness of such policy or some possible conflict of policies as discussed above. It is also a prevailing fact the price of the bid is based on purchase cost only and not on life-cycle costing (LCC).

Life-cycle costing in award decision

At the award stage of a procurement procedure, the price of a bid is always one of the most influential factors, if not the single decisive factor. Life-cycle costing involves including in the award decision all the costs that will be incurred during the lifetime of the product or service including purchase cost, operating costs and end-of-life costs. Compared with the decision based on purchase price, award decision based on LCC gives green/energy-efficient product real advantage in award decision as for many such products the competitive advantage lies in LLC not on purchase cost.

While the Chinese procurement laws do not further define the price of the bid, it is observed that only purchase price be considered in practice. Therefore it is argued that LCC approach be employed in award decision so that the green policy objective be more effectively achieved, and such move deserves future regulatory initiative for both clarity and guidance.

B Coverage expansion for sustainable public procurement

Works procurement

Given the importance of green policy and the requirement for consistency in applying such policy, and to effectively exploit the potential of sustainable public procurement in China it is submitted that the requirement for procurement of ECPs and ELPs be extended to cover both works and service procurement. However such initiative may be challenged by the existing parallel legal frameworks for the Chinese public procurement and the legal uncertainty that works procurement is governed by the GPL[58], which explains to some

[58] On the contestable issue in general, see Cao Fuguo, China's Government Procurement Policy And Institutional Framework: History, Structure And Operation, Handbook of International Government Procurement, in Khi V. Thai (ed.), *International Handbook of Government Procurement*, Francis and Taylor Group, 2009.

extent why the competent authority puts product procurement as a priority of development. Unlike product procurement, there are no direct provisions on government procurement of works and service under the relevant energy/environment laws.

However works sector is an important area where green policy can be effectively implemented. For example green policy can be effectively achieved if the design of the building can take into consideration of energy/water conservation and the maintenance cost during the whole life-cycle of the building.

The legal uncertainty of applicable laws on government procurement of works can be solved by improved coordination among competent enforcement authorities for both the GPL and BL.[59] Despite the fact that legal basis for government procurement of energy-conservation/environment-friendly works is not provided directly by the relevant energy/environment laws it can be solved to some extent by a broad interpretation of Article 9 of the GPL, an article requiring the promotion of sustainable development policies generally through government procurement. In addition, the general requirement for energy conservation in works under energy/environment laws[60] may have great impact on the definition of the subject matter and technical specification of contract[61]. It is thus submitted that these general requirements provided by other area of laws can be better enforced by incorporating them into a broader concept and framework of green government procurement law.

Services procurement

The development of energy conservation service market is crucially important for the government policy of energy conservation and the Energy Conservation Act establishes a policy to support the development of energy conservation service market and thus provides the potential for government procurement of energy conservation service. Given the fact that the Chinese energy conservation service market is underdeveloped it is crucially important that government play an important role in building up the relevant energy conservation service market. Government procurement of energy conservation service not only provide direct support to the development of the market ,but also promote the setting up of rule of plays in this particular market and thus improve the innovative dynamics and competitiveness of the sector. As green energy service is one of the important parts of the Chinese energy market and an important component for that the Chinese energy laws seek to promote[62] a question is then raised as how to support

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59 For detailed discussion, see, ibid.

60 For example, Energy Conservation Act establishes compulsory energy conservation standards for construction, enforcement mechanism that is oriented on energy conservation design, and requires energy performance labels and their publication for government-owned buildings and other large public buildings The Energy Conservation Act further requires execution of energy-conservation evaluation and review system for fixed-asset investment. In addition, the energy-conservation standards for civil building are compulsory for works procurement. The energy conservation requirement under the Energy conservation Act covers not only new buildings, but energy conservation alteration of existing buildings as well.

61 A comparable provision can be found in Directive 2002/91/EC of the European Parliament and of the Council of 16 December 2002 (OJ L 1, 4.1.2003), to be transposed into national law by 4 January 2006 at the latest.

62 As can be seen from Article 10 of the Clean Production Promotion Act and Article 22 of the Energy Conservation Act.

the development of the energy service market. Government may take such measures as fiscal incentives, tax exemption and financial support to energy conservation service but one more effective measure is for government to procure such energy service.[63] As a matter of fact, the Regulation on Energy Conservation by Public Institutions has already authorized public institutions to purchase some energy conservation services, of typical form of which is the so called *energy management contracting (EMC)*. By nature EMC is no more than a mechanism for government procurement of energy conservation service, albeit a more innovative one with a mechanism of private finance and saving-sharing, and it is thus submitted that the procurement rules shall be followed in contracting for the energy conservation service from the market.

In additional to the a few direct provision of government procurement of service under the energy laws, the legal foundation of government procurement of service is sound under the GPL. However one challenge in relation to the procurement of green service would be the difficulty to define the green services. This difficulty arises from that fact that Chinese service market is underdeveloped in general and many service procurement are not taken as government procurement. It also involves a complex policy issue of in-house provision of service and contracting out. Thus it is submitted that the proposed sustainable government procurement code could provide support to these developments.

V The potential and challenges for sustainable procurement in China and the case for a consolidated green public procurement code

There are great potentials for the development of sustainable public procurement policy in China given the huge size of the Chinese government procurement market[64], and the unprecedented political and legal environment for such developments. However a number of challenges can be observed to exploit the great potential of sustainable government procurement: one, procuring entities are not aware of concept, means and tools of sustainable procurement including those legal requirements provided for under other areas of laws which are actually an integral parts of sustainable procurement; two, parallel legal framework for the Chinese public procurement may present some problems for wider application of the green procurement policy; third, the existing procuring function and its organization is weak and uncertain and may considerably weaken the possibility for the whole procurement links to consider sustainable factors. Finally, the inherent conflicts between sustainable procurement objective and other objectives may also pose challenges for the implementing capability and development of professionalism.

To address these challenges, it is submitted that there is a strong case for the development of a consolidated green public procurement code for China. The proposed

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[63] Those measures are actually provided for in Article 66 of the Energy Conservation Act; Articles 26 and 27 of the Regulation on Energy Conservation by Public Entities.

[64] Figures from the Ministry of Finance (MOF) indicate that China purchased at least RMB 599 billion (US $88 billion) of goods and services in 2008, an increase of RMB 133 billion (US $19 billion) over 2007 and more than triple the amount in 2003. In total, procurement accounted for 9.6 percent of fiscal expenditures and two percent of total GDP in 2008. However, these figures substantially underestimate the size of the market because sub-central level public investment in infrastructure projects is not included.

Code will embrace the concept and framework of sustainable procurement, and confirm, clarify, coordinate and improve the current green procurement systems and thus contributes to the sustainable development goals in general. Specifically the Code will not only attain the features of the "Procedural extension" and "coverage expansion" discussed in this paper, but also incorporate all aspects of the green policy provided for in laws and regulations on energy, environment and resources, and those governing government demand, production, consumption and disposal and the whole supply chain. The Code could be in the form of hard law, in a sense that the law is binding and as such a law reform program must be initiated by the national legislature, or alternatively in the form of a soft law, in a sense that only green procurement guide is provided[65], in which case better policy awareness, coordination, certainty, and consistency can also be achieved.

[65] A good example of such is European Commission (2011), Buying Green! --A Handbook on Environmental Public Procurement (2nd edition).

Libelocracy

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Abstract

"Libelocracy" involves several elements. The first is the deployment of the law of libel by politicians against non-political publishers. Second, the use is tactical in a more directly political sense – in other words, the action is brought against other politicians and is not for the vindication of purely private reputations. Third, the tactic develops into either repeated claims or a single large claim, sufficient to cause significant political damage to a political opponent. Fourth, by combining or repeating these tactics, libelocracy can become a major determinant of political success and failure. The paper will explain how defamation and related litigation, both civil and criminal, has impacted upon recent political life in Malaysia and Singapore in comparison to the United Kingdom. Some corrections, designed to encourage the confinement of political disputes within political forums, are suggested for Malaysia and Singapore, based upon developments in English common law.

I Introduction

Throughout history, governmental officials have striven to repress dissent. In response to Johannes Gutenberg's invention of the printing press in the Fifteenth Century, which gave private individuals the mechanism to mass produce writings for the first time, the English Crown took steps to restrict the public's use of the printing press.[1] In addition to civil law licensing schemes,[2] the Star Chamber created the crime of seditious libel in its 1606 decision in *de Libellis Famosis*.[3] Seditious libel made it a crime to criticise the government or governmental officials and the clergy, and was justified by the notion that criticism of the government "inculcated a disrespect for public authority."[4] Since

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1 See W.T. Mayton, "Seditious libel and the lost guarantee of a freedom of expression" (1984) 84 Columbia Law Review 91 at pp.97-98. See also N.L. Rosenberg, *Protecting the Best Men* (Carolina University Press, 1986); M.L. Kaplan, *The Culture of Slander in Early Modern England* (Cambridge University Press, 1997); R.L. Weaver & A.D. Hellman, *The First Amendment: Cases, Materials and Problems* (LexisNexis, 2002) p. 279.

2 *Ibid.*, at p.104; see also *Talley v. California* (1960) 362 U.S. 60 at p.65 (describing the fact that John Lilburne was "whipped, pilloried and fined" in England for refusing to answer questions regarding the distribution of books, and the fact that Puritan ministers were sentenced to death for publishing books).

3 77 *Eng.Rep.* 250 (Star Chamber 1606).

4 See W.T. Mayton, "Seditious libel and the lost guarantee of a freedom of expression" (1984) 84 Columbia Law Review 91at p.103. See also M.J. O'Laughlin, "Exigent circumstances" (2002) 70 University of Missouri - Kansas City Law Review 707, at pp.720-21 (discussing the prosecutions of John Wilkes).

upholding the reputation of the government was the goal of this offence, it followed that truth was just as reprehensible as falsehood and therefore was not a defence.[5] Indeed, truthful criticisms were punished more severely because true criticisms were potentially more damaging to the government.

In this paper, we explore a new approach to the repression of dissent which we call "libelocracy" with reference to the jurisdictions of England and Wales, Malaysia and Singapore.[6] "Libelocracy" is here coined as a catch-phrase which involves several cumulative elements (including slander as well as libel). The first is when libel law is invoked by politicians against the media for the vindication of private reputation *simpliciter*. The second is when libel is used in a tactical (political) sense in that an action is brought by one politician against other politicians and is not being brought simply to vindicate purely private reputations. Third, libelocracy involves either repeated claims or a single large claim, sufficient to inflict significant political damage on an opponent. Fourth, by combining or repeating these tactics, libelocracy can become a major determinant of political success and failure. Finally, as well examining civil law libel, it will be shown how criminal law is associated in these endeavours and is a powerful added factor which has affected recent political life in the relevant jurisdictions.

Why does it matter if a polity chooses to establish a libelocracy? The first concern is that libelocracy necessarily runs counter to the fundamental value of free speech which is essential to the vitality of democracies[7] and provides a check on the potential misuse of governmental power.[8] Libelocracy also affects the constitutional principle of the separation of powers.[9] First, it strains the ability of the judicial process to handle litigation which has overtly political purposes. Second, a dispute in court will be heard in public, but it is not a forum for public participation which should be a *sine qua non* for a political dispute.

Having set out the reasons why libelocracy is wrong in principle, the paper will next explore some examples of libelocracy and libelocratic tendencies. For the purposes of this paper, the first element of libelocracy will be discussed alone, whereas the last three will be combined. At the end of this article, we suggest some reforms designed to encourage the proper confinement of political disputes within political forums, as well as considering counter-arguments about whether libelocracy should be so deprecated in Malaysia and Singapore.

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5 See W.R. Glendon, "The Trial of John Peter Zenger" (1996) 68 New York State Bar Journal 48, at p.49.

6 See Chia, D., and Mathiavaranam, R., *Evans on Defamation in Singapore and Malaysia* (3rd Ed, LexisNexis, 2008).

7 See A. Meiklejohn, *Free Speech and its Relation to Self-Government* (Harper, 1948); *Political Freedom* (Oxford University Press, 1965); *R v Secretary of State for the Home Department, ex parte Simms* [2000] AC 115 at p.126 per Lord Steyn.

8 See V. Blasi, "The Checking Value in First Amendment Theory" (1977) 2 American Bar Foundation Research Journal 521; F. Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).

9 *Duport Steels v. Sirs* [1980] 1 W.L.R. 142 at p.157 per Lord Diplock.

10 See F. Wilson, *The Courtesan's Revenge* (Faber, 2003).

II Political life (and death) in a libelocracy

A The use of the law of libel by politicians against the media simpliciter

When the courtesan Harriette Wilson threatened to publish memoirs of her liaison with the Duke of Wellington if he did not offer a financial settlement, his famed response was "Publish and be damned".[10] The Duke was exceptionally robust, but many contemporary British politicians have proven themselves to be less thick-skinned.

Even serving UK Prime Ministers have resorted to litigation.[11] The most recent was in 1993, when John Major sued *The New Statesman* and *Scallywag* magazines for allegations of adultery with Clare Latimer.[12] The sting of that libel was somewhat (but not entirely) later drawn by the revelation in 2002 that Major had committed adultery with Edwina Currie, a fellow government minister.[13] Three other contemporary English politicians[14] who have trodden the path to the libel courts may have come to regret more acutely their sensitivities. One is Jeffrey Archer, who, amongst other notable attributes, was a Member of Parliament and Deputy Chairman of the Conservative Party. He was awarded in 1987 the sum of £500,000 against the *Daily Star* over allegations that he had consorted with a prostitute, Monica Coughlan.[15] He was found guilty in 2001 of perjury and perverting the course of justice through the fabrication of an attempted alibi and false diary entries.[16] He agreed to repay more than £1.8m in damages, costs and interest.[17] Another doomed politician-litigant was Jonathan Aitken, Member of Parliament and

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11 Winston Churchill settled out of court after suing the *Daily Mirror* in 1951 over an article which he said implied that he was a warmonger: M. Gilbert, *Winston S. Churchill vol.XIII* (Heinemann, 1988) p.648. Harold Wilson won an apology in the High Court in 1967 from The Move pop group. They published a postcard to promote the group's record, "Flowers in the Rain", which featured a caricature of Wilson in bed with his assistant, Marcia Falkender. He issued two further writs: one was against the *International Herald Tribune* for again alleging adultery and resulted in a settlement; the other was against the BBC which ridiculed various politicians and was settled by an apology: Lord Goodman, "Is John Major right to sue for libel?" *Evening Standard (London)* January 29, 1993 p.9.

12 See *John Major v. The New Statesman* (1993); *John Major v. Scallywag Magazine* (1993), as reported in *The Times* January 29, 1993. The case against the *New Statesman* was settled (*The Times* July 7, 1993 on payment of £1001) and that against *Scallywag* on the basis of an undertaking (*The Glasgow Herald* January 15, 1994 p.6). Other cases of that era include *Neil Hamilton and Gerald Howarth v. B.B.C.* (*The Times* October 22, 1987); *Norman Tebbit v. B.B.C.* (*The Guardian*, December 17, 1987); *Norman Tebbit v. The Guardian* (*The Times* July 29, 1988); *Michael Meacher v. The Observer* (*The Times* July 11, 1988; see further A. Watkins, *A Slight Case of Libel* (Duckworth, 1990)); *Edwina Currie v. The Observer* (*The Times* May 15, 1991); *David Ashby v. The Sunday Times* (*The Times* December 19, 1995); *Peter Bottomley v. Express Newspapers* (*The Times*, December 20, 1995); *Neil Hamilton v. The Guardian* (*The Times* October 1, 1996).

13 The *New Statesman* considered legal action for recovery of its payment and costs but did not pursue it: *The Times* September 30, 2002 p.5. The truth was revealed in Currie's memoirs: *Diaries 1987-1992* (Little Brown, 2003).

14 There is also the case of prominent Scottish politician, Tommy Sheridan. In *Sheridan v News Group Newspapers Ltd* (Unreported, CSOH, 2006; see also *Curran v Scottish Daily Record and Sunday Mail Limited* [2010] CSOH 44), he was awarded £200,000 damages for a libel relating to sexual excesses. However, further witnesses then came forward, and he was convicted of perjury in 2010 and sentenced to three years imprisonment (*HM Advocate v. Sheridan and Sheridan,* Unreported, HCJ, 2010, but see http://sheridantrial.blogspot.com).

15 *The Times* July 25, 1987.

16 *The Times* July 20, 2001.

17 *The Times* August 5, 2002.

government Minister, who sued *The Guardian* for allegations of corruption arising out of his dealings as a government minister with Saudi arms traders. His libel action collapsed when it was shown he had lied about a stay in the Ritz Hotel, Paris.[18] The testimony in that case was later determined to involve perjury, for which he was imprisoned in 1999.[19] Misfortune also befell Neil Hamilton, another Conservative Party MP and former government minister. Following a successful attempt to block the use of parliamentary materials as evidence against him,[20] he lost a libel claim against Mohamed Al Fayed (the owner of Harrods and the Ritz Hotel in Paris). It was sustained before the High Court in 1999 that Hamilton had acted corruptly by accepting money in return for favours such as asking questions in the House of Commons on behalf of his benefactor, but no criminal prosecution followed.[21]

These cases do not transform the United Kingdom into a libelocracy for three reasons. First, the litigation was entirely directed against the media and not against other politicians. The nearest instance to libelocratic tendencies concerned the hounding of *Scallywag* which first appeared in 1989 but was overwhelmed by libel claims (more against its retailers and distributors than directly against it). In 1993, the magazine was sued successfully by the Prime Minister, John Major (as described above). Its end came with litigation by Julian Lewis (who was accused of preparing a dossier on the homosexual activities of Tony Blair and of being himself a secret homosexual transvestite). In 1997, Lewis (who later became a Member of Parliament) succeeded in actions against the printer, six distributors, two retailers and the internet service provider. The editor, Simon Regan, was also convicted in 2000 of an offence under section 106 of the *Representation of the People Act* 1983 relating to false statements about fellow candidates published in the vestigial internet version of the magazine.[22] Were *Scallywag* to have been a leading media outlet of an opposition political party, then an emerging libelocracy could perhaps be alleged. In reality, it assumed no party affiliation and was never more than a very marginal rumour-mill.

The second distinguishing feature of the English litigation is that several of the libels arose from matters of personal rather than political conduct. Of course, there came a point in British politics during the 1990s when it became awkward to separate private and public persona, as when Prime Minister John Major's policy of "Back to Basics" asserted that personal morality was relevant to a swathe of public policies.[23] Equally, some cases did relate to "political" life, such as Aitken and Hamilton.

The third distinguishing feature of the British suits is that the litigation was exclusively of the civil variety. Yet, those who resorted to civil libel often put themselves

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18 *The Guardian* June 21, 1997 p.1. *See also Aitken v Preston* [1997] EMLR 415.

19 *The Guardian* June 9, 1999 p.1. For his account, see *Pride and Perjury* (HarperCollins, 2000).

20 *Hamilton v Al Fayed* [2001] 1 AC 395; *see also Hamilton v Al Fayed, The Independent* December 21, 2000; *Hamilton v Al Fayed (No 2)* [2002] EWCA Civ 665). For a personal account, see C. Hamilton, *For Better, for Worse: Her Own Story* (Robson Books, 2005).

21 *The Times* December 22, 1999.

22 D. Hooper, *Reputations Under Fire* (Little Brown, 2000) p.369. Ejection from office and disqualification for 3 years of a successful candidate under s.106 occurred in *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin).

23 *The Times* October 9, 1993. See R. Brazier, "It is a constitutional issue" [1994] Public Law 431.

at risk of prosecution, as the cases of Aitken and Regan illustrates. At least the potential invocation of criminal libel has now been ruled out because of its abolition in England and Wales by the *Coroners and Justice Act* 2009, s.73.[24]

B The use of the law of libel by politicians against politicians

For more tactical deployments of the libel laws in the political sphere, we must refocus the survey away from England and Wales and towards Malaysia and Singapore, where one can observe significant amounts of politician-on-politician libel litigation. The outcome of such proceedings can affect not only personal reputations but also the financial viability, political careers, public policy,[25] and personal liberty of the implicated individuals.

Turning first to Malaysia, the High Court awarded former deputy Prime Minister, Dato' Seri Anwar bin Ibrahim, RM4.5m in damages for libel arising from the publication of a pamphlet. The pamphlet, *Fifty Reasons Why Anwar Ibrahim Cannot Be Prime Minister*, was published in 1998 and included allegations that Anwar was corrupt and a homosexual.[26] This book carried the by-line, Khalid Jafri, an ex-editor of the newspaper *Utusan Malaysia*, which is often seen as sympathetic to the governing coalition. Anwar was dismissed from government in 1998 and imprisoned in 1999 for corruption and sodomy.[27] The latter conviction was eventually overturned, though not before the Federal Court observed that "we find evidence to confirm the appellants [including Anwar] were involved in homosexual activities, and we are more inclined to believe the alleged incident … did happen."[28] His run of misfortune continued in 2001 when the Federal Court dismissed his defamation claim against the then Prime Minister, Tun Dr. Mahathir bin Mohamad, effectively on grounds of justification.[29] The action concerned remarks made by Mahathir at a news conference, shortly after his deputy's dismissal in 1998. Mahathir asserted that Anwar had breached the sodomy laws and was unfit to hold high political office. However, after Anwar's release from prison in 2004, he prevailed in August 2005 in his claim against Khalid Jafri. Justice Datuk Mohamed Hishamudin Mohamed Yunus set the damages at an extraordinary level (RM4.5M) to reflect the gravity of the allegations, their catastrophic impact on a person who held a high governmental and political office

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24 See *Hansard* HL vol 712 col 843 (July 9, 2009).

25 For an unsuccessful attempt to use defamation in order to enforce 1989 arrangements with the outlawed Communist Party, see *Ong Boon Hua and Chin Peng v Kerajaan Malaysia* [2010] 2 MLJ 794.

26 Homosexuality is unlawful under the Malaysian Penal Code, s.377A.

27 See *Public Prosecutor v Dato' Seri Anwar Ibrahim* [1998] 4 MLJ 481; *Public Prosecutor v Dato' Seri Anwar Bin Ibrahim (No 3)* [1999] 2 MLJ 1; *Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65; *Public Prosecutor v Dato' Seri Anwar Bin Ibrahim & Anor* [2001] 3 MLJ 193; *Dato' Seri Anwar Bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193 (FC), [2004] 1 MLJ 177, [2004] 1 MLJ 497, [2004] 3 MLJ 405, [2004] 3 MLJ 517. See further http://www.freeanwar.net/index.html.

28 *Dato' Seri Anwar Bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 405 at [202] per Abdul Hamid Mohamad FCJ.

29 *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [1999] 4 MLJ 58, H.C.; *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 1 MLJ 305; *Dato' Seri Anwar Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 2 MLJ 65.

and the lack of an apology.[30] In the event, the impact of the award was blunted by the death later in 2005 of Khalid Jafri.[31]

This episode is not directly an illustration of libelocracy. The principal legal issues related to the criminal allegations, treatment during custody, and the trial process of Anwar himself rather than the libel action which he subsequently mounted. Furthermore, his own legal suit did not deliver a telling blow against a political opponent – the potential punch was deflected by the fact that it landed on a token minor journalist. Nevertheless, the litigation was an important tactic in Anwar's political rehabilitation. He also won an apology and undisclosed damages in 2005[32] from the ex-Inspector General of Police, Rahim Noor, who admitted assaults on Anwar when in custody in 1998, in consequence of which he resigned from office in 1999 and was convicted in 2000.[33] Furthermore, Anwar filed another defamation suit, in the sum of RM100m, against Mahathir over renewed allegations of sodomy made in response to press questions in 2005, but the High Court struck out the claim in 2007 on the basis of estoppel, justification and qualified privilege (because of the conviction of two others for homosexual acts with Anwar) and fair comment made in the public interest.[34] Anwar issued further defamation proceedings in 2008 against an aide, Mohammed Saiful Bukhari Azlan, whose accusations of sodomy are the basis of another ongoing prosecution.[35]

A bolder version of libelocracy has been pursued in Singapore, where it is claimed that no leader of the ruling People's Action Party has ever lost a defamation action against an opposition politician.[36] The fate of two politicians will illustrate for present purposes. The first concerns the Singapore Workers' Party's leader and its only Member of Parliament between 1981 and 1986, Joshua Benjamin ("JB") Jeyaretnam, who also was the first ever opposition Member of Parliament to be elected since independence.[37]

Even before his election, Jeyaretnam had crossed legal swords with the Prime Minister, Lee Kuan Yew, who had sued him for defamation because of a speech he made, as the Secretary-General of the Workers' Party, during the general election campaign of 1976.[38] The alleged defamation related to a lack of honesty and integrity in the conduct of the Prime Ministerial office. It was held that there was no special defence of qualified

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30 See *„Anwar Bin Ibrahim v Khalid Jafri Bin Bakar Shah* (No 1) [2005] 4 MLJ 87. The Court of Appeal rejected an appeal on October 30, 2007.

31 See *New Straits Times* August 30, 2005 p.26. He also thereby escaped consequences of convictions in 2005 for writing the leaflet in breach of the offence of giving false information contrary to the *Printing Presses and Publications Act* 1984: *New Straits Times* July 9, 2005 p.24.

32 *New Straits Times*, August 4, 2005 p.14.

33 See *New Straits Times*, March 15, 2000 p.1. The charges followed a Royal Commission of Inquiry.

34 *Dato' Seri Anwar bin Ibrahim v Tun Dr Mahathir bin Mohamad* [2007] 5 MLJ 406. For the unsuccessful appeals, see [2009] 1 MLJ 668, [2010] 2 MLJ 41, [2011] 1 MLJ 145.

35 'Anwar sues for libel and false report' *New Straits Times* July 1, 2008 p.6.

36 See T.H. Tey, "Singapore's jurisprudence of political defamation and its triple-whammy impact on political speech" [2008] Public Law 452.

37 For accounts of his travails, see J.B. Jeyaretnam, *The Hatchet Man of Singapore* (Jeya Publishers, Singapore, 2003); C. Lydgate, *Lee's Law: How Singapore Crushes Dissent* (Scribe, 2003); M.D. Barr, "J.B. Jeyaretnam: Three decades as Lee Kuan Yew's bete noir" (2003) 33(3) *Journal of Contemporary Asia* 299; International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) p.30.

38 *Lee Kuan Yew v Jeyaretnam JB* [1978 - 1979] 1 SLR 429.

privilege at election time, and the comments were not only unfair but actuated by malice. Damages of SGD130,000 were awarded. Appeals against the judgment and award were rejected, including by the Privy Council.[39]

Jeyaretnam went on the offensive in the next bout of litigation, which arose out of his attendance at the inauguration of the Singapore Democratic Party in 1981.[40] The defendant, a government Minister, made public comments to the effect that Jeyaretnam had staged an impressive exodus of his supporters when he left the hall at the end of his speech so as to demonstrate his leadership of the opposition. The claim was dismissed. The slanderous words imputed to the plaintiff dishonourable or discreditable conduct or motive or a lack of integrity but were not calculated to disparage him in his office as the Secretary-General of the Workers' Party. Furthermore, the defence of fair comment prevailed.

In 1986, Jeyaretnam was barred from Parliament (and as a lawyer) owing to convictions relating to election finance breaches, though these proceedings were condemned by the Privy Council as "a grievous injustice".[41] The right of appeal to the Privy Council was severely restricted by an amendment to Singapore law in the following year.[42] Singapore judges then rejected his appeals, preventing him from standing for office until 1997.[43]

Undaunted, at an election rally in 1988, Jeyaretnam asked whether any investigation had been conducted into how the Minister for National Development, Teh Cheang Wan, had obtained the tablets by which he had committed suicide during an investigation for corruption and whether the Prime Minister had replied to a letter written to him by Teh. The Prime Minister commenced proceedings against Jeyaretnam. Jeyaretnam was ordered to pay to Lee damages of SGD260,000[44] and his appeals failed, and the Court of Appeal rejected the development of any wider legal privilege for speech about public affairs.[45] One further reaction to this episode was an amendment to the *Defamation Act* (by Act 11/1991); section 14 restricts expressions by or on behalf of an election candidate by deeming them not to be published in circumstances giving rise to qualified privilege.

Jeyaretnam was re-elected to Parliament in 1997.[46] Following the election campaign, multiple defamation suits were filed against him for a speech that he delivered at an

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39 [1978 - 1979] 1 SLR 197 (CA); [1982 - 1983] 1 SLR 1 (PC).

40 *Jeyaretnam JB v Goh Chok Tong* [1984 - 1985] 1 SLR 516 (HC), [1986] 1 SLR 106 (CA).

41 *Jeyaretnam v Law Society of Singapore* [1989] A.C. 608 at pp.631-632 per Lord Bridge.

42 Malaysia abolished appeals to the Privy Council in criminal and constitutional matters in 1978 and in civil matters in 1985 (*Constitution (Amendment) Act* 1976 and the *Courts of Judicature (Amendment) Act* 1985). Singapore abolished Privy Council appeals in all cases save those involving the death penalty or in civil cases where the parties had agreed to such a right of appeal by the *Judicial Committee (Amendment) Act* 1989. Remaining rights of appeal were abolished by the *Judicial Committee (Repeal) Act* 1994.

43 See J*eyaretnam JB v Attorney General* [1990] 1 SLR 610.

44 *Lee Kuan Yew v Jeyaretnam JB (No 1)* [1990] 1 SLR 688.

45 *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1990] 1 SLR 38 (CA), [1992] 2 SLR 310 (CA). But see on costs [1993] 1 SLR 185 (CA).

46 In 1998, Jeyaretnam unsuccessfully called for a Commission to examine defamation law: 69 SPR cols.1728-1776, (November 26, 1998).

election meeting in which he stated, "Mr Tang Liang Hong has just placed before me, two reports he has made to the police against, you know, Mr Goh Chok Tong and his people".[47] Alongside other colleagues, the Prime Minister, Goh Chok Tong alleged damage to his reputation but admitted that "it has been a good year" and that his standing as a leader had not been injured.[48] The trial judge, Rajendran J., awarded only "derisory" damages (SGD20,000), but the damages were raised on appeal to SGD100,000.[49]

In 2001, after one of his damages instalment payments became overdue by one day, Jeyaretnam was declared bankrupt, disbarred from office,[50] and prevented from taking part in the elections that year.[51] He resigned from the leadership of the Workers' Party. His application for discharge after three years was rejected.[52]

With Jeyaretnam out of public office, attention can be shifted to his successor as the chief target of libelocracy, namely, Chee Soon Juan, Secretary-General of the Singapore Democratic Party.[53] In 2001, Chee was sued by Prime Minister Goh Chok Tong and Senior Minister Lee Kuan Yew. During the General Election campaign, he had accused both Goh and Lee of not revealing to Parliament an alleged USD17 billion loan to Indonesian President Suharto. The government admitted a USD5 billion loan facility, part of an IMF package of support amounting to USD23 billion. Damages of SGD300,000 were awarded to Goh and SGD200,000 to Lee.[54] In 2006, Chee was declared a bankrupt, after failing to pay these awards. The bankruptcy order meant that Chee became disqualified from elections until 2011.[55] Furthermore, he was also sentenced in 2006 to a day in jail and a fine of SGD6,000 (but he failed to pay the fine and was jailed for an additional seven days) for contempt in the face of the court and scandalising the court arising from scurrilous remarks about the government bias of the Singapore judiciary made in his bankruptcy statement.[56]

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47 See *Lee Kuan Yew v Tang Liang Hong And Other Actions (No 1)* [1997] 2 SLR 233 (HC), [1997] 2 SLR 819 (HC), [1997] 2 SLR 841 (HC), [1997] 3 SLR 91 (HC), [1998] 1 SLR 97 (CA); *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1997] 2 SLR 679 (HC), [1998] 1 SLR 547 (CA).

48 [1998] 1 SLR 547 at [155]. For criticism of the judgment, see the report by Stuart Littlemore QC to the International Commission of Jurists (see http://www.singapore-window.org/icjjbrep.htm).

49 *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337.

50 For the disqualification, see Singapore Constitution, art.45. A fine of more than SGD2000 bars citizens from running in parliamentary elections for five years.

51 *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan* [2001] 2 SLR 286 (HC), [2001] 3 SLR 525 (CA). Defamation actions by the Prime Minister and others rising out of the 1997 defamation were dropped in return for an apology in the High Court: *Jeyaretnam v Lee Kuan Yew* [2001] 4 SLR 1; *Agence France Press* April 2, 2002 (copied at http://www.singapore-window.org/sw02/020402af.htm).

52 *Re Jeyaretnam Joshua Benjamin, ex parte Indra Krishnan (no.2)* [2004] 3 SLR 133 (HC), [2005] 1 SLR 395 (CA). His colleague and Workers' Party parliamentary candidate in 1997, Tang Liang Hong was also bankrupted

53 See International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) p.37; R. Amsterdam and D. Peroff, *White Paper on the Repression of Political Freedoms in Singapore: The Case of Opposition Leader Dr Chee Soon Juan* (Amsterdam and Peroff, 2009).

54 *Lee Kuan Yew v Chee Soon Juan* [2003] 3 SLR 8 (HC), [2005] 1 SLR 552 (HC); *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32 (HC), [2005] 1 SLR 573 (HC).

55 See http://csj.http3.net/CSJ_Bankruptcy_Press_Statement_2.pdf.

56 *Attorney General v Chee Soon Juan* [2006] 2 SLR 650 (HC).

The next bout of libel litigation arose in 2006, when Chee Soon Juan and 12 other defendants were sued for defamation for remarks in the Singapore Democratic Party's newsletter concerning the government's handling of the National Kidney Foundation (NKF) scandal.[57] The claim was maintained by the former Prime Minister, Lee Kuan Yew, and his eldest son, the Prime Minister Lee Hsien Loong. Most of the original accused apologised, so that only Chee Soon Juan and his sister, Chee Siok Chin, were left as defendants, along with the Party.[58] Summary judgment was entered in 2008, and the order to pay SGD610,000 in damages resulted in its bankruptcy.[59]

Serious and persistent as these defamation suits have been, it was eventually criminal charges and not civil libel which resulted in the political exclusion of Chee. In July 2002, Chee was fined for a speech at a public meeting in Hong Lim Park[60] about the school suspension of three Muslim girls who were not allowed to wear headscarves. As a result of this conviction, Chee became ineligible for the 2006 general election.

This prosecution was not an isolated event. On 1 May 2002, Chee staged a rally in front of the President's official residence and was arrested after he ignored a warning by a police officer to leave. Chee, who had earlier been denied a license to hold the rally, was fined for trespassing and for attempting to hold rally without a license but served the default imprisonment term of five weeks for failure to pay. The attitude of the court can be judged from the following remarks:

> "Before me, Chee had the sheer arrogance to purport to speak on behalf of the people of Singapore, in asking for their right to free speech to be returned to them. I found his impertinence remarkable, particularly since he said that he was not a member of Parliament. He clearly had no mandate to speak on behalf of the people of Singapore."[61]

In June 2006, Chee was again charged with eight counts of speaking in public without a licence in 2005 and 2006 contrary to section 19(1)(a) of the *Public Entertainment and Meetings Act*. He was fined and then jailed for five weeks at the end of 2006 for failing to pay the fine. In 2007, he was imprisoned for attempting to leave the country without a permit despite being a bankrupt. In December 2009, he was found guilty under section 5 of the *Miscellaneous Offences (Public Order and Nuisance) Act* of distributing without a police permit pamphlets during the 2006 election that were critical of the ruling People's Action Party.[62] In March 2010, Chee Soon Juan and colleagues were convicted in

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57 T.T. Durai, the chief executive of NKF was later convicted under the *Prevention of Corruption Act* 1960 s.6(c): *The Straits Times* June 22, 2007. The affair arose when the NKF commenced and then abandoned a libel action against the *Straits Times* (Singapore Press Holdings) and journalist Susan Long.

58 *Lee Hsien Loong v The Singapore Democratic Party* [2006] SGHC 220.

59 See further *Chee Siok Chin v Attorney-General* [2006] SGHC 144, [2006] SGHC 153.

60 http://www.nparks.gov.sg/cms/docs/speakers_terms_n_conditions.pdf.

61 *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR 445 at [27] per Yong Pung How CJ.

62 *Public Prosecutor v. Chee Soon Juan* [2010] SGDC 129. See Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules 1989. These Rules and s.5 have been replaced by the *Public Order Act* 2009, which also amends the *Public Entertainments and Meetings Act*.

connection with a demonstration at Parliament House in 2008, involving the wearing of "*Tak Boleh Tahan*" ("I can't take it anymore") T-shirts in support of a campaign against living costs launched by the Singapore Democratic Party. They were convicted under section 5 of the *Miscellaneous Offences (Public and Nuisance) Act* for demonstrating without a police permit.[63] It was sustained in cross examination in *Chong Kai Xiong v. Public Prosecutor*[64] that "there was a policy not to grant any permit for political events to be held outdoors", but the Singapore Democratic Party demonstrators were still convicted.

More directly related to the foregoing NKF libel action were two prosecutions for scandalising the court. In *Lee Hsien Loong v. Singapore Democratic Party*,[65] the conduct of the defendants in their oral submissions and cross examinations in court was condemned as "outrageous behaviour". A further prosecution for scandalising related to the assistant secretary-general of the Singapore Democratic Party for displaying, outside the Supreme Court building during a hearing to assess damages in the defamation case, T-shirts with a palm-sized picture of a kangaroo dressed in a judge's gown, thus representing a "kangaroo court".[66] Custodial sentences of up to 15 days were awarded.

As sequels to these cases, a commentary entitled "Singapore's Martyr, Chee Soon Juan" and published in the *Far Eastern Economic Review*, was held to defame Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew in *Review Publishing Co Ltd v. Lee Hsien Loong*.[67] The publishers were also rebuffed in their efforts to retain foreign counsel. Tim Robertson SC was deemed unsuitable in part because of his "proclivity to make such statements which were ill-founded and disrespectful of the judiciary".[68]

This tactic of objecting to foreign lawyers (and thereby reducing foreign media interest) is not an isolated instance, having already been applied in connection with the litigation in *Lee Kuan Yew and Goh Chok Tong v. Chee Soon Juan* [69]in order to block the briefing of Nicholas William Henric Q.C. and Martin Lee Chu Ming QC (founder of Hong Kong's Democracy Party).[70] The services of Gavin Millar Q.C were also deemed unnecessary to argue for a widening of the defence of privilege in defamation because that task would not be so complex as to require that a foreigner be allowed audience rights under section 21 of the *Legal Profession Act*.[71] According to Tay Yong Kwang, J., in so far as more junior defence counsel might feel daunted by becoming "embroiled in a battle of 'David and Goliath' proportions, perhaps he could take comfort in the fact that the little shepherd boy armed with only a sling and stones emerged the victor against the gigantic seasoned soldier wearing a shield, a sword and a spear."[72] No doubt, inequality of arms

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63 *Public Prosecutor v. Chee Soon Juan* [2010] SGDC 238.
64 [2009] SGDC 380 at [19]. See also [2010] SGDC 175.
65 [2009] 1 SLR 642 at p.723.
66 *Attorney-General v Tan Liang Joo John* [2009] SGHC 41.
67 [2009] SGCA 46.
68 *Lee Hsien Loong v Review Publishing Company Ltd* [2007] SGHC 24 at [10].
69 [2003] 3 SLR 8 (HC), [2005] 1 SLR 552 (HC); *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR 32 (HC), [2005] 1 SLR 573 (HC).
70 [2002] 2 S.L.R. 296; [2002] 4 S.L.R. 929.
71 *Re Gavin Millar Q.C.* [2008] 1 S.L.R 297 (H.C.). See also *Re Millar Gavin James Q.C.* [2007] 3 S.L.R. 349 (H.C.); L-A. Thio, "Reading rights rightly" (2008) 6 Singapore Journal of Legal Studies 264.
72 *Ibid.* at p.315.

might be a spur to ambitious young barristers but hardly represents a fair disposition for a respectable justice system.

Another sequel, and one which illustrates how crime is inextricably linked to civil defamation within a libelocracy, is the case of *Attorney-General v. Hertzberg Daniel*, an action to commit for contempt the editor and others of the *Wall Street Journal Asia* for its publication of articles and also of a letter from Chee Soon Juan, all of which contained "insinuations of bias, lack of impartiality and lack of independence and implied that the judiciary is subservient to Mr Lee and/or the PAP and is a tool for silencing political dissent".[73] This argument is thus akin to the thesis of this paper, save that the fault being contended here is one of law more than personal failings. The court found that the offence of scandalising the court was made out, and a fine of SGD25,000 was imposed.

Singapore's record on the use of defamation for political purposes was the subject of a damning report by Amnesty International in 1997.[74] Its analysis was that "Singapore's leaders are in fact resorting to defamation suits as a politically-motivated tactic to silence critical views and curb opposition activity." In characteristically assertive terms, the Law Ministry of Singapore accused Amnesty International of a "coordinated, partisan propaganda campaign" and being "dishonest and disingenuous" in its report.[75] The report's author, Stuart Littlemore, QC, was later barred from the Singapore courts based on, *inter alia*, his disparagement of the Singapore judiciary.[76]

Criminal libel has not been invoked in the foregoing battles in Malaysia[77] and Singapore.[78] Perhaps it would be too blunt and obvious a weapon even for the robust political protagonists in those jurisdictions. However, there is one important exception, namely the prosecution of the blogger, Raja Petra, who operates the *Malaysia Today* website.[79] He had been detained without trial in 2001 and 2008 under the *Internal Security Act* 1960, and his prosecution for criminal defamation and sedition followed his second release when he was accused of implying that the wife of the then Deputy Prime Minister Najib Razak was involved in the notorious killing of a Mongolian translator, Altantuya Shaariibuu. Before his trial commenced (and believing he would be detained without trial), Raja Petra took up residence in England in 2009, where he remains.

Another major criminal law based threat to free speech in Singapore is the offence of scandalising the court. As well as the instances of its use against members of the Singapore Democratic Party already cited, account might be taken of the case of blogger, Gopalan Nair, a former Workers' Party candidate who, during attendance at some hearings relating to Chee Soon Juan, was convicted and sentenced to three months in 2008 for insulting judges under section 228 of the Penal Code[80] for accusing the judge (Belinda

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73 [2008] SGHC 218 at [55].

74 *JB Jeyaretnam - the use of defamation suits for political purposes* (ASA 36/04/97).

75 See http://www.singapore-window.org/1018st.htm.

76 *Re Littlemore Stuart QC* [2002] 1 SLR 296. He had sought leave to represent Chee Soon Juan.

77 Penal Code, s.499.

78 Penal Code, s.499.

79 See *Raja Petra bin Raja Kamaruddin v Pendakwa Raya* (High Court, 2009).

80 By s.228: "Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding shall be punished with imprisonment for a term which may extend to one year, or with fine which may extend to $5,000, or with both."

Ang) of prostituting herself to the plaintiffs and he was also barred for life in 2011 from practising as a lawyer.[81] A further incidence of this offence affected Alan Shadrake, a British national and author of *Once a Jolly Hangman* in which Singapore's death penalty was criticised. He was convicted in 2010 of scandalizing the courts and was imprisoned for five weeks.[82]

This brief survey should not be interpreted as an endorsement of all the deeds of the government opponents in Malaysia and Singapore. Yet, it highlights the dangers for jurisdictions where libel law becomes a central arbiter of political discourse. The described events also underline the blurred divide between criminal and civil law and the way in which civil action can herald the prosecution of those whose reputations and finances have been degraded.

III Moving party politics from the law courts

The former Prime Minister of Singapore, Lee Kwan Yew, has stated

> "We're not going to allow foreign correspondents or foreign journalists or anybody else to tell us what to do …. There are very few things that I do not know about Singapore politics, and there are very few things that you can tell me, or any foreign correspondent can tell me, about Singapore."[83]

He is quite right. Likewise, it is wholly understandable that, as was stated for Malaysia in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang* by Hashim Yeop A. Sani, C.J., "We cannot just accept the development of the common law in England."[84] The equivalent judicial statement in Singapore "welcomed that English law is no longer accepted blindly."[85] Nevertheless, principled common law and other developments in favour of free speech should not be denigrated just because they originate from England. Rather, they should be considered as not only persuasive[86] but also potentially very worthwhile for fast developing democracies such as Malaysia and Singapore. There are also several reforms beyond the law of defamation and indeed beyond the law which should equally be considered. Arguments against change, along the lines that libelocracy delivers higher standards of truth or political participation than in countries like England, are not supported by the entrenchment of a one-party (or at least coalition) government in

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81 *The Law Society of Singapore v. Gopalan Nair (aka Pallichadath Gopalan Nair)* [2010] SGDT 11.
82 *Shadrake v Attorney-General* [2011] SGCA 26.
83 S. Mydans, "Change Unlikely as Singapore Votes, but the Young Chafe" *New York Times*, May 6, 2006 p.A7.
84 [1990] 1 MLJ 356 at p.362.
85 *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 at [28].
86 See *Application of English Law Act* s.3 (Singapore); *Civil Law Act* 1956 s.3(1)(a) (Malaysia).

both jurisdictions.[87] As plurality of politics develops in these jurisdiction,[88] so should a plurality of voices be heard.

A Defamation law reform

Given the emphasis placed in this paper on common law comity, it is not intended to examine at length the US constitutional development in *New York Times Co. v. Sullivan*.[89] In that case, the US Supreme Court held for the first time that defamatory statements are entitled to First Amendment protection which goes beyond the common law defences of justification or privilege. The cornerstone of the approach was the requirement of proof by the plaintiff of the "actual malice" standard.

Even though the *Sullivan* standard has achieved considerable impact in the United States, where it has largely quelled defamation claims by both public officials and public figures, it has done so at the expense of providing redress for reputational injury even in cases of sloppy and mistaken journalism.[90] It might also be criticised as being overly fixated on speech about public figures rather than the public interest. As a model for reform of the common law of libel, the *Sullivan* defence has therefore not appealed to the United Kingdom government:

> "It would mean, in effect, that newspapers could publish more or less what they liked, provided that they were honest, if their subjects happened to fall within the definition of 'public figure'. … What matters is the subject matter of the publication and how it is treated rather than who happens to be the subject of the allegations."[91]

Equally, the *Sullivan* doctrine has not commended itself to the Prime Minister of Singapore: "If you don't have the law of defamation, you would be like America, where

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87 See L-A Thio, "'Pragmatism and realism do not mean abdication': A critical and empirical inquiry into Singapore's engagement with international human rights law" (2004) 8 Singapore Yearbook of International Law 41; T.T Hang, "Inducing a constructive press in Singapore" (2008) 10 Australian Journal of Asian Law 202. But criticisms of libelocracy based on the perpetuation of corruption or the governmental bias of judges are more difficult to sustain; in the Transparency International Corruption Perceptions Index 2013, the country rankings are Singapore 5, UK, 14, Malaysia 53.

88 In the 2008 Malaysian election, Opposition parties secured 82 seats out of 222 seats in parliament, the first time since the 1969 election that the ruling Barisan Nasional did not win a two-thirds supermajority. In the Singapore 2011 election, the People's Action Party won 81 out of 87 seats, but even six opposition seats was viewed as a watershed since it was the largest total since 1965.

89 376 U.S. 254 (1964). See R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) chaps.3, 9.

90 See R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) pp.183-200, 290.

91 House of Lords Debates vol.570 cols.607-608 March 8, 1996, Lord Inglewood. Compare I. Loveland, *Political Libels* (Hart Publishing, 2000) p.84. But see *Gertz v. Robert Welch* 418 U.S. 323 (1974) and *Dun & Bradstreet v. Greenmoss Builders* 472 U.S. 749 (1985).

people say terrible things about the president and it can't be proved….".[92] His stance echoed the view of the Singapore Court of Appeal in *Jeyaretnam v. Lee Kuan Yew*,[93] which also rejected *Sullivan* because of the additional argument that Article 14(1) of the Constitution recognised defamation as a legitimate restraint on speech. This verdict was backed in *Goh Chok Tong v. Jeyaretnam*: "Whilst there is an undeniable public interest in protecting freedom of speech as a means of exposing wrongdoing or abuse of office by public officials, there is an equal public interest in allowing those officials to execute their duties unfettered by false aspersions."[94]

But the justification for resistance to any change can no longer be based on a view that traditional common law approaches fail to distinguish between public officials and private persons in defamation cases. Even US law no longer focuses only on status and has shifted towards public interest as part of its analysis. This point will be drawn from two out of the three major common law developments in favour of political speech which albeit that they are not wholly able to avert the chilling impact of libel suits, could be readily adopted by the common law jurisdictions of Malaysia and Singapore.

1 Limits on defamation actions by official bodies

The first common law restraint to be considered is the bar on defamation actions by certain public bodies. The line of doctrine commenced with local authorities following the decision of the House of Lords in *Derbyshire County Council v Times Newspapers*.[95] On a preliminary issue, the House of Lords concluded that the plaintiff could not bring the claim for libel based on allegations of corruption. The House of Lords maintained that a democratically elected governmental corporate body should be open in the public interest to uninhibited public criticism.

The *Derbyshire* privilege represents a bold blow in the cause of political expression, but it is also unsatisfactory in several detailed respects. First, being absolute, there appears to be a disregard for the value of truth. It is not even clear whether malice can terminate the privilege, so that the privilege is arguably more absolute in favour of free speech than the *Sullivan* ruling, though a claim for malicious falsehood remains available,[96] provided there is proof of special damage[97] which might be difficult to show for non-trading entities like governmental bodies. Another concern is that the privilege does not go far enough because there is no equivalent bar on individual officials within corporations. Thus, in the *Derbyshire* case, the council leader could proceed with his action and was paid substantial damages.[98] A third aspect of unease arises from uncertainties over the

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92 S. Mydans, "Change Unlikely as Singapore Votes, but the Young Chafe" *New York Times*, May 6, 2006 p.A7.

93 [1992] 2 SLR 310 at p.333.

94 [1998] 1 SLR 547 at [25]. See also *Lee Kuan Yew v. Vinocur* [1995] 3 S.L.R. 477.

95 [1993] AC 534. For the details, see R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) chap.4.

96 [1993] AC 534 at p.551.

97 See P. Milmo and W.V.H. Rogers (eds), *Gatley on Libel and Slander* (11th ed., Sweet & Maxwell, 2008) chap.21.

98 *The Times* October 13, 1991 (a correction to an article was published on November 26, 1989).

boundaries of the doctrine. One cannot be sure that all institutions of government are barred from suit, assuming that the ratio of *Derbyshire* focuses upon "corporations" which hardly applies to much of British government which operates under prerogative powers. Further uncertainty around the territory of the doctrine is cast by its application to a political party in *Goldsmith and Referendum Party v. Bhoyrul*.[99] The High Court formulated the absolute privilege in very wide terms, without reference to elections or whether the party was a corporation,[100] but it was again made clear that the rule applied to the collective alone and that any individual candidate or official connected with the party who was sufficiently identified could still sue.

The *Derbyshire* case was considered in Singapore by Judge Rajendran in *Goh Chok Tong v Jeyaretnam*.[101] While he acknowledged that it was persuasive as a common law development, he felt constrained by precedent not to pronounce further. The Court of Appeal later ignored the point.[102] *Derbyshire* was recognised but distinguished on the facts in *Tang Liang Hong v Lee Kuan Yew*.[103] In *Chee Siok Chin and Others v Minister for Home Affairs*,[104] it was contended by V.K. Rajah J. that "It can be fairly said that this abrupt change of position in England in 1993 is not a development of the common law but rather a change of the law of a legislative rather than a judicial character …".[105] A *Derbyshire* argument was raised in *Lee Hsien Loong v The Singapore Democratic Party*, but the court distinguished the current claims as "brought by two individuals suing not in their official capacity, but as private citizens who were concerned that their individual reputation had been tarnished".[106]

The *Derbyshire* doctrine has been adopted in 2013 in *Kerajaan Negeri Terengganu v Dr Syed Azman Syed Ahmad Nawawi (No 1)* on the basis that it is not in the interest of the public that the state government be allowed to institute or maintain any action for libel or slander against any person.[107]

2 The extension of qualified privilege

The second common law development in favour of freedom of expression was delivered by the 1999 House of Lords decision in *Reynolds v Times Newspapers*.[108] In response

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99 [1998] QB 459. See I. Loveland, "The constitutionalisation of political libels in English common law" [1998] Public Law 633.

100 [1998] QB 459 at pp.462, 463.

101 *Goh Chok Tong v Jeyaretnam JB* [1998] 1 SLR 547 at [26].

102 *Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 3 SLR 337.

103 [1998] 1 SLR 97 at [116].

104 [2006] 1 SLR 582 at [69] per V.K. Rajah J.

105 The case pre-dated the *Application of English Law Act* s.3.

106 [2006] SGHC 220 at [35]. See further *Lee Hsien Loong v Review Publishing Co Ltd* [2008] SGHC 162 at [204] (leaving open the issue).

107 See [2013] 7 MLJ 52, para.29, and see also *(No 2)* [2013] 7 MLJ 145.

108 [2001] 2 AC 127. See I. Loveland, *Political Libels* (Hart Publishing, 2000) chap.7; R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) chaps.4, 8; P. Milmo and W.V.H. Rogers (eds), *Gatley on Libel and Slander* (11th ed., Sweet & Maxwell, 2008) chap.15. Compare the constitutional developments in *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520, 521; *Grant v. Torstar* (2009) 79 C.P.R. (4th) 407 (S.C.C.); *Defamation Act* 2009 (No. 31, Ir.) s. 26; *Lange v. Atkinson* [1997] 2 N.Z.L.R. 22, 27

to a libel suit by Albert Reynolds, the former Taoiseach (Prime Minister) of the Irish Republic, against the *The Sunday Times* in respect of its British edition, the Court of Appeal[109] and House of Lords[110] reformulated qualified privilege as a wide defence which served the public interest. In the leading judgment in the House of Lords, Lord Nicholls listed ten illustrative factors in a balancing operation as to whether a publication fell within qualified privilege.

> "Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. (1) The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. (2) The nature of the information, and the extent to which the subject matter is a matter of public concern. (3) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. (4) The steps taken to verify the information. (5) The status of the information. The allegation may have already been the subject of an investigation which commands respect. (6) The urgency of the matter. News is often a perishable commodity. (7) Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. (8) Whether the article contained the gist of the plaintiff's side of the story. (9) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. (10) The circumstances of the publication, including the timing."[111]

Qualified privilege failed on the facts in *Reynolds* largely because the publisher failed to put Reynolds' side of the story when making serious allegations of misconduct by a political leader.[112] The discrepancy between British and Irish newspaper editions of the story also made it harder to show there was genuine belief in putting facts before the public. Later application also reveals a mixed picture. On the one hand, a wide view has been taken of the "duty" triggered by the public interest,[113] In contrast to the attitude sometimes displayed in Malaysia and Singapore, a further aspect of indulgence is that foreign based publications will potentially not be subject to the same duties of verification and so on as English based publications.[114] On the other hand, the test has sometimes been applied in an overly complex manner and one which takes insufficient account of the realities of journalistic life by imposing unrealistic standards of research, measured tone and regard for subjects.[115]

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[109] [1998] 3 WLR 862.

[110] [2001] 2 AC 127 at p.197.The case was eventually settled: *The Sunday Times* (September 10, 2000).

[111] [2001] 2 AC 127 at p.205.

[112] [2001] 2 AC 127 at p.206 per Lord Nicholls.

[113] See *Al-Fagih v H H Saudi Research & Marketing* [2001] EWCA Civ 1634; *GKR Karate v Yorkshire Post Newspapers (no.2)* [2000] 1 EMLR 410; *Armstrong v Times Newspapers Ltd* [2004] EWHC 2928 (QB).

[114] See *Baldwin v Rusbridger* [2001] EMLR 47; *Lukowiak v United Editorial SA (no.1)* [2001] EMLR 46; *Al-Misnad v Azzaman Ltd.* [2003] EWHC 1783 (QB).

[115] *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2002] UKHL 40; *James Gilbert Ltd. v MGN Ltd*. [2000] EMLR 680; *Loutchansky v Times Newspapers (no.4)* [2001] EMLR 38, *(nos.2-5)* [2002] EWCA Civ 1805 and *(no.6)* [2002] EWHC 2490.

Such vagaries of journalistic life were to the fore in *Galloway v Telegraph Group Ltd (2004)*.[116] George Galloway, a Member of Parliament, sued *The Daily Telegraph*, shortly after the invasion of Iraq by coalition forces in 2003, for articles which it said were based upon documents found in Baghdad and which were alleged to show paid collusion between Galloway and the Iraqi regime. The newspaper described its coverage as "reportage" - "a convenient word to describe the neutral reporting of attributed allegations rather than their adoption by the newspaper"[117]. But the court viewed the newspaper's conduct as being irresponsible and even motivated partisanship by failing to ask Galloway to respond before publication to many of the serious allegations, and in the absence of any urgency to publish ahead of competitors. Further allegations of wrongful conduct were repeated in the privileged setting of hearings before the US Senate, after which both protagonists, George Galloway and Senator Norm Coleman, claimed victory.[118] To ask a newspaper to perform much better may be unduly idealistic.

The House of Lords, in *Jameel v Wall Street Journal Europe SPRL*, took some heed of criticisms that *Reynolds* was being applied in an unduly narrow and technical manner.[119] The *Wall Street Journal Europe* had named the company owned by billionaire Saudi car dealer, Mohammed Jameel, in connection with allegations that bank accounts of several prominent Saudi businessmen were being monitored by Saudi authorities at the request of U.S. authorities so as to ensure that no money was paid to terrorists. The journal had some confirmation of its story through contacts in Riyadh and through a U.S. Treasury source. Furthermore, the claimant had been telephoned in Jeddah, whereupon his assistant had told the journalist that the claimant was asleep and that any publication should be postponed for 24 hours. Their Lordships concluded that the story clearly concerned a matter of public interest and that the measures to gather the information had been responsible and fair in view of the "practical realities" of journalism.[120] Some of their Lordships even signalled a new start, divorced from the old technicalities of the qualified privilege defence, by renaming *Reynolds* the "public interest" defence.[121]

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116 [2004] EWHC 2786 (QB). The appeal of the newspaper was rejected: [2006] EWCA Civ 17.

117 [2004] EWHC 2786 (QB) at [122]. See*Al-Fagih v H H Saudi Research and Marketing (UK) Limited* [2002] EMLR 13 at [6] per Simon Brown LJ.

118 Compare: G. Galloway, *Mr. Galloway Goes to Washington: The Brit Who Set Congress Straight About Iraq* (New Press, 2005); United States Senate Committee on Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations, Report on oil allocations granted to Charles Pasqua & George Galloway prepared by the majority and minority staffs of the permanent subcommittee on investigations released in conjunction with the permanent subcommittee on investigations May 17, 2005, hearing: Oil for influence: how Saddam used oil to reward politicians and terrorist entities under the United Nations oil-for-food program (http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=891f6f42-f3da-4825-8193-91bd9953df98), Report concerning the testimony of George Galloway before the Permanent Subcommittee on Investigations prepared by the majority staff of the Permanent Subcommittee on Investigations for release on October 25, 2005 (http://hsgac.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=37adf64a-1959-4e5f-9cb5-1f758d0697d7).

119 [2006] UKHL 44.

120 *Ibid.*, at [55-56] per Lord Hoffman.

121 *Ibid.*, at [46] per Lord Hoffman and [146] per Baroness Hale.

There is some question about whether *Reynolds*, even as modified by *Jameel*, provides sufficient protection to the media.[122] Regardless, the government's current inclination is not to venture much further, and so its draft Defamation Bill of 2011,[123] including clause 2 ("Responsible journalism on matters of public interest") provides modest clarification rather than major change.

The English Court of Appeal's version of *Reynolds* qualified privilege was rehearsed with some approval by the Federal Court of Malaysia in *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad*, ironically in that case offering protection to the "establishment" in so far as its standards were deemed not to have been fulfilled.[124] Adoption of the House of Lords' version has followed in other cases, though with only occasional protection for the press.[125] The Malaysian version of qualified privilege was discussed in *Dato Seri Anwar Bin Ibrahim v The New Straits Times Press*[126] wherein the High Court preferred *Reynolds* to its Australian and New Zealand counterparts. Since then, *Reynolds* has been applied several cases, but only recently, perhaps after a learning curve on the part of the media, has it availed the defence.

But Reynolds has not been unequivocally invoked as an instrument in favour of press freedom in Malaysia, so it is argued that the legal position "remains open".[127]

As for Singapore, *Reynolds* (along with Commonwealth equivalents) was considered in *Lee Hsien Loong v The Singapore Democratic Party* but was quickly dismissed on the grounds that it does not represent the law in Singapore and also because (without explanation) the facts could not support a *Reynolds* defence.[128] A constitutional argument against *Reynolds* was that the list of restrictions on freedom of expression in Article

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122 See R.L. Weaver, A.T. Kenyon, D.E. Partlett, C.P. Walker, *The Right to Speak Ill: Defamation, Reputation and Free Speech* (Carolina Academic Press, 2006) pp.215-242.

123 Ministry of Justice, *Draft defamation Bill: Consultation* (CP3/11, 2011); A. Mullis, "Tilting at windmills: the Defamation Act 2013" (2014) 77 Modern Law Review 87. For previous steps in this reform history, see House of Commons Select Committee on Culture Media and Sport, *Press Standards Privacy and Libel* (2009-10 HC 362); Ministry of Justice, *Report of the Libel Working Group* (2010); (Lord Lester's) Defamation Bill 2010-11 HL no.3.

124 *Dato' Seri Anwar bin Ibrahim v. Dato' Seri Dr. Mahathir bin Mohamad* [2001] 2 MLJ 65. But the Australian version in *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 was seemingly preferred (at p.69). It was also applied in *Halim Bin Arsyat v Sistem Televisyen Malaysia Bhd & Ors* [2001] 6 MLJ 353.

125 See *Mark Ignatius Uttley [Commat] Mark Ostyn v Wong Kam Hor*[2002] 4 MLJ 371 ; *Chung Chon Kui and Others v Then Juk Chiew* (High Court (Kuching), December 28, 2007); *Fernandez v. Utusan Malaysia* [2008] 2 Current Law Journal 814; *Datuk Harris Mohd Salleh v Datuk Mohd Shafie Hj Apdal* [2009] 7 MLJ 371; *Tan Sri Dato' Tan Kok Ping v The New Straits Times Press* [2010] 2 MLJ 694; *Sivabalan a/l P Asapathy v The New StraitsTimes Press* [2010] 9 MLJ 320.

126 [2010] 2 M.L.J. 492.

127 Defence sustained: *Dato' Seri Mohammad Nizar bin Jamaluddin v Sistem Televisyen (M) Bhd & Anor* [2013] 4 MLJ 448; *Datuk Husam bin Musa v The New Straits Times Press* [2013] MLJU 1169. Compare: *Sivabalan a/l P Asapathy v The New Straits Times Press* [2010] 9 MLJ 320; *Irish International University v New Straits Times Press* [2011] 9 MLJ 40; *Dato Annas bin Khatib Jaafar v Datuk Manja Ismail* [2011] 8 MLJ 747; *YB Hj Khalid bin Abdul Samad v Datuk Aziz bin Isham* [2012] 7 MLJ 301; *Lim Guan Eng v Utusan Melayu* [2012] 2 MLJ 394; *Kesatuan Kebangsaan Pekerja-Pekerja Bank v The New Straits Times Press* [2013] 8 MLJ 199; *Datuk Seri Anwar bin Ibrahim v Utusan Melayu* [2013] 3 MLJ 534; *Mohd Nasir bin Mustafa v Mohd Hanafiah bin Hanafi* [2013] 9 MLJ 811..

128 [2006] SGHC 220 at [74].

10(2) of the European Convention[129] differs from the equivalent list Article 14(2)(a) of the Singaporean Constitution.[130] The Constitution allows restrictions on the guarantee of free speech and expression under Article 14(1)(a) which are not required to be "necessary and expedient" when dealing with "contempt of court, defamation or incitement to any offence", unlike restrictions "in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality".[131] This argument is misconceived on two grounds. One is that *Reynolds* was not expressly grounded in Article 10 jurisprudence but was primarily a common law development.[132] The second is that the interpretation taken of Article 14(2) would render the free speech guarantee in Article 14(1) devoid of value and at the mercy of absolute, and therefore unconstitutional, official discretion.[133] Such a literal approach might also warrant closer consideration of a political party's right to association in Article 14(1)(c) which is subject under Article 14(2)(c) only to restrictions considered necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality - but with no mention of defamation.

The Singapore Court of Appeal confirmed in *Review Publishing Co Ltd v. Lee Hsien Loong*[134] that *Reynolds* is not necessarily declaratory of Singapore law, and the defence would have also failed on the facts since the defendant had not engaged in responsible journalism. More importantly, the Court was again doubtful that the *Reynolds* doctrine could be adopted since "It is clear that the *Reynolds* privilege is not a natural common

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[129] By Art.10(2): "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[130] By Art.14: "(1) Subject to clauses (2) and (3)
(a) every citizen of Singapore has the right to freedom of speech and expression;
(b) all citizens of Singapore have the right to assemble peaceably and without arms; and
(c) all citizens of Singapore have the right to form associations.
(2) Parliament may by law impose
(a) on the rights conferred by clause (1) (a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
(b) on the right conferred by clause (1) (b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order; and
(c) on the right conferred by clause (1) (c), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, public order or morality.
(3) Restrictions on the right to form associations conferred by clause (1) (c) may also be imposed by any law relating to labour or education."

[131] *Ibid.* at [76].

[132] See further A.T Kenyon, and A.H Leng, "Reynolds Privilege, common law defamation and Malaysia" [2010] Singapore Journal of Legal Studies 256 at pp.258, 272.

[133] *Jeyaretnam v Public Prosecutor* [1989] SLR 978 at p.987.

[134] [2009] SGCA 46 at [239, 258]. See further D. Tan, "The Reynolds Privilege in a Neo-Confucianist Communitarian Democracy" 2011 Sing. J. Legal Stud. 456.

law development, but was instead brought about by the European Convention …",[135] thereby repeating the (misconceived) constitutional arguments in *Lee Hsien Loong v The Singapore Democratic Party*. Nevertheless, the Court went on to consider *Reynolds* as a potential basis for future development of the rights to freedom of speech of Singaporean citizens under Art 14(1)(a) of the Singapore Constitution, though this argument could not in event avail the foreign defendants in the instant case.[136] Such a development was not ruled out, but the Court did negatively suggest that the onus would be on future advocates of *Reynolds* to show why a change in Singapore's political, social and cultural values was necessary. The Court also hinted that the English formulation of *Reynolds* could spawn too much irresponsible journalism and that the doctrine might be applied, if at all, in Singapore to the quantum of damages rather than to liability.

3 Limits on the award of large damage sums

A third strand of English common law libel development concerns the increasing willingness of appeal courts to interfere with awards of damages. The courts have allowed appeals against excessive awards on the basis that the common law must give higher weighting to the value of freedom of expression in the determination of an award.

The new disposition was applied first in *Rantzen v. Mirror Group Newspapers*,[137] in which the Court of Appeal concluded that the courts should be readier to reduce awards under section 8 the *Courts and Legal Services Act* 1990[138] because of the requirement of proportionality under Article 10. Accordingly, the £250,000 award to the plaintiff against the defendant, *The People*, was reduced to £110,000. The test expounded by the Court of Appeal has become: "Could a reasonable jury have thought that this award was *necessary* to compensate the plaintiff and to re-establish his reputation?"[139] In *Galloway v Telegraph Group Ltd (2004)*,[140] even in the context of allegations such as "treason", aggravated by the attribution in cross-examination of anti-Semitism, the award was just £150,000.

The trend has been reinforced by the European Court of Human Rights in *Tolstoy Miloslavsky v. U.K.*[141] The size of a libel award (£1.5 million) in favour of Lord Aldington (for the libels accusing him of involvement in war crimes against Cossak and Yugoslav prisoners-of-war and refugees at the end of World War II) could not be viewed as

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135 *Ibid.* at [261].

136 *Ibid.* at [265-297].

137 [1994] Q.B. 670. See also *Gleanor Company Ltd. v. Abrahams* [2003] U.K.P.C. 55; See *C.A. Hopkins,* A terrible (but transient) ordeal (1994) 53 Cambridge Law Journal 9.

138 By section 8:
"(1) In this section 'case' means any case where the Court of Appeal has power to order a new trial on the ground that damages awarded by a jury are excessive or inadequate.
(2) Rules of court may provide for the Court of Appeal, in such classes of case as may be specified in the rules, to have power, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper."

139 *Rantzen v. Mirror Group Newspapers* [1994] Q.B. 670 at 692. See P. Milmo and W.V.H. Rogers, (eds.), *Gatley on Libel and Slander* (11th ed., Sweet & Maxwell, 2008) paras.9.4, 38.25.

140 [2004] EWHC 2786 (QB).

141 App. no. 18139/91, Ser. A, Vol. 316, 323 (1995). An injunction against repetition of the libel was proportionate: para.54. Compare *Independent News & Media and Independent Newspapers Ireland Ltd. v Ireland* App. no.55120/00, June 16, 2005.

proportionate to the legitimate aim of the protection of a reputation and therefore not necessary in a democratic society. A further refinement occurred in *Steel and Morris v United Kingdom (no.2)*.[142] Steel and Morris, who had been the defendants in domestic libel proceedings brought by McDonalds,[143] were held liable for damages of £36,000 and £40,000 respectively. These awards were condemned as disproportionate not just because of proportionality to the injury to reputation suffered but also because of disproportionality to the modest incomes and resources of the two applicants.[144] This latter reason is inconsistent with the English law's compensatory approach to general damages which is based on loss and not means, but it offers a direct check against the tactic of bankrupting of a political opponent through libel awards.[145]

In the light of this case law, which can be depicted as much as a common law as a European Convention development, a contrast may be made with awards in Singapore where the tendency has been in the opposite direction - to favour public officials through enhanced awards of damages to reflect their "high standing" in public life and to encourage their participation.[146] Especially where members of the ruling party are concerned, rulers who are continually re-elected with huge majorities, several awards seem wholly disproportionate to any damage.[147]

In Malaysia, the highest court award in Malaysia was made in 1995 in favour of the leading Malaysian businessman Vincent Tan, who (with six other plaintiffs) was awarded damages totalling RM10 million for libels to the effect that he was an unscrupulous and dishonourable.[148] The appeal court vigorously defended the award.[149] It was stated that injury to a person's reputation may occasion him at least as much, if not greater, harm than physical injury. According to Datuk Gopal Sri Ram JCA:

> "I must record my strong disapproval of any judicial policy that is directed at awarding very low damages for defamation. … injury to a person's reputation may occasion him at least as much, if not greater, harm than injury to his or her physical self. No one, least of all a journalist, should rest in the comfort that a person's reputation may be injured with impunity on the footing that the consequence would be the payment of a few thousand ringgit in damages. Small or insignificant

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142 App. no. 68416/01, February 15, 2005.

143 See J. Vidal, *McLibel* (Nicholson, 1997); M.A. Nicholson, "McLibel: A case study in English defamation law" (2000) 18 Wisconsin International Law Journal 1; http://www.mcspotlight.org/.

144 App. no. 68416/01, February 15, 2005 at [96].

145 The OSCE's *Paris Recommendations on Libel and Insult Laws* (2003) declare that libel laws should not be used to bankrupt the media.

146 *Lee Kuan Yew v. Vinocur* [1995] 3 S.L.R. 477 at pp.485-6; *Goh Chok Tong v. Jeyaretnam Joshua Benjamin* [1998] 3 SLR 337 at [57]; *Goh Chok Tong v Chee Soon Juan* [2005] 1 SLR 573 at [42]; *Lee Kwan Yew v Tang Liang Hong* [1998] 1 SLR 97 at [118]. See T.H Tey, "Singapore's jurisprudence of political defamation and its triple-whammy impact on political speech" [2008] Public Law 452 at p.461.

147 For a survey of awards between 1959 and 1997, see International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) p.60.

148 *Tan Sri Dato Vincent Tan Chee Yioun v Haji Hasan Bin Hamzah & Ors* [1995] 1 MLJ 39. An award of RM16m was made out of court: *New Straits Times* August 19, 2001 p.9.

149 *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other* [1995] 2 MLJ 493.

> awards by courts in libel actions will certainly provide that comfort. As I indicated to counsel in the course of argument, the time has arrived for this court to send a strong and clear signal to all and sundry that libel does not come cheap."[150]

The Malaysian courts have since reacted against this trend. Chief Justice Tun Mohamad Dzaiddin Abdullah, stated in 2001 that "Defamation cases and exorbitant awards sought and obtained by litigants reached dizzying levels recently and this approach seems troubling" and that massive awards were "a blot on the legal landscape".[151] His cue was reflected in *Liew Yew Tiam & Ors v Cheah Cheng Hock & Ors*,[152] where the RM1 million award was reduced to RM100,000. Court of Appeal judge Datuk Gopal Sri Ram stated:

> "The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think the time has come when we should check the trend set by that case. This is to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory."[153]

In 2001, Abdul Hamid Mohamad JCA, in the case of *D.P. Vijandran v Karpal Singh* in 2001 depicted the *Vincent Tan* case as "an isolated pinnacle in an otherwise undulating plain"[154] and reduced the damages from RM500,000 to 100,000. In *Joceline Tan Poh Choo & Ors v V Muthusamy*,[155] the libel in a newspaper affected the plaintiff, who was a practicing lawyer and a state assemblyman. The award of general damages was reduced from RM300,000 to RM100,000, the court noting that the there was no clear evidence that the episode had damaged the political career of the assemblyman, even though he has not been readopted as a candidate at the following election. In *Y.B. Dato' Dr. Hasan bin Mohamed Ali v Y.B. Mulia Tengku Putra bin Tengku Awang*, the plaintiff, a member of a regional legislature and government,[156] was awarded RM20,000,000, but this amount was reduced on appeal to RM50,000. Finally, the case of *Dato Seri Anwar Bin Ibrahim v The New Straits Times Press*[157] concerned an alleged link to a controversial US lobby group for which the plaintiff sought general damages of RM100 million as well as aggravated and exemplary damages. The Court found for the plaintiff but viewed the claim as a "gross exaggeration" and confined the award to RM100,000.

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150 *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun & Other* [1995] 2 MLJ 493 at pp.522-523.

151 C. Hong, "CJ says time judiciary checks size of defamation awards" *New Straits Times* March 18, 2001 p.1 (reporting a speech at the Malaysian Bar annual dinner).

152 [2001] 2 CLJ 385 on appeal from *Cheah Cheng Hock & Ors v Liew Yew Tiam & Ors* [2000] 6 MLJ 204.

153 [2001] 2 CLJ 385 quoted in *Karpal Singh A/L Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at p.184.

154 *Karpal Singh A/L Ram Singh v DP Vijandran* [2001] 4 MLJ 161 at p.185 per Abdul Hamid Mohamad JCA, on appeal from *DP Vijandran v Karpal Singh A/L Ram Singh* [2000] 3 MLJ 22. See also the Federal Court decision on the interest payable on damages: *Karpal Singh A/L Ram Singh v DP Vijandran* [2003] 2 MLJ 385.

155 [2003] 4 MLJ 494

156 [2010] 8 MLJ 269.

157 (High Court, 2009).

These recent trends are welcome, but there remains some danger that, without a clear grounding in principle, the trend could change again. The Chief Justice in 2001 did avert to an equalisation with awards in personal injury cases,[158] but the initial award in *Anwar* shows that the scales are not so fixed.

4 Related criminal offences

The threat of criminal libel (and scandalising) should be removed, as has occurred in England and Wales, or at least confined to grave cases such as speech which incites violence.[159] One further problem in Singapore is that, in *Attorney-General v Hertzberg Daniel*,[160] the test for liability for this offence was held to be an "inherent tendency" rather than a "real risk" of undermining the authority of the judiciary. In *Shadrake v Attorney-General*,[161] the Court of Appeal clarified that the "real risk" test would not be satisfied where the risk to public confidence in the administration of justice was remote or fanciful, but it did not have to amount to a "clear and present danger" nor even betray an "inherent tendency". Arguments that this lower threshold is needed either because of the ease of spread of information in a city state or the fact that judges are triers of fact appear shallow because of the development of widespread electronic communications and the greater need to subject judges to scrutiny when they assume greater public duties such as by acting as triers of fact and not just law.[162]

B Reforms beyond defamation law

As well as directly limiting libel law and related criminal offences, one can conceive of indirect devices beyond libel law which seek to dampen the political threat of libelocracy.

1 Ministerial Code

Cabinet Ministers in the United Kingdom are deterred from litigation by provisions in the Ministerial Code.[163] According to paragraph 7.16:

> "Where Ministers become involved in legal proceedings in a personal capacity, there may be implications for them in their official position. Defamation is an example

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158 C. Hong, "CJ says time judiciary checks size of defamation awards" *New Straits Times* March 18, 2001 p.1.

159 *Raichinov v Bulgaria* App. No.47579/99, April 20, 2006, at [50]. For its confinement in other jurisdictions, including the US, see Walker, C., "Reforming the crime of libel" (2005-2006) 50 New York Law School Law Review 169.

160 [2008] SGHC 218.

161 [2011] SGCA 26.

162 See Lee, J.T., "Freedom of speech and contempt by scandalizing the court in Singapore" (Research Collection School of Law, Singapore Management University, 1-2009) pp.5, 6. The first point may now offer a distinction from the view in *Ahnee v. Director of Public Prosecutions* [1999] 2 AC 294 at pp. 305-306 that "on a small island such as Mauritius the administration of justice is more vulnerable than in the United kingdom. The need for the offence of scandalising the court on a small island is greater ...".

163 Ministerial Code (Cabinet Office, 2010) (http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf). See generally, O. Gay and P. Leopold, (eds.), *Conduct Unbecoming: The Regulation of Parliamentary Behaviour* (Politico's Publishing, 2004).

> of an area where proceedings will invariably raise issues for the Minister's official as well as his or her private position. In all such cases, Ministers should consult the Law Officers in good time and before legal proceedings are initiated so that they may offer guidance on the potential implications and handling of the proceedings."

The extent to which Ministers consult and have been deterred is not disclosed.[164] The fact that the Ministerial Code is only enforceable by the Prime Minister, the chief supporter of the Minister, may diminish its effectiveness.[165] Nevertheless, the Ministerial Code does offer an important warning signal concerning private litigation. The example set by successive Prime Ministers in Singapore provides a sharp contrast.

2 Adjudication Panel for England

The Adjudication Panel for England was established under the *Local Government Act* 2000 to monitor compliance with the Model Code of Conduct for local authorities.[166] Complaints that the Code has been breached could be made to the Standards Board, and there may then follow an investigation by an Ethical Standards Officer (ESO) who can make a reference (under section 59) to the Adjudication Panel for England. The ESO could alternatively refer the complaint to a local Standards Committee, with the possibility of an appeal from it to the Adjudication Panel.[167] Its procedures were not set by law, but in practice it was chaired by a lawyer.

In February 2006, the Adjudication Panel for England suspended from office Ken Livingstone, Mayor of London, for slanderously comparing Oliver Finegold, a Jewish journalist working for the *London Evening Standard*, to "a German war criminal" and "a concentration camp guard".[168] The Panel ruled that Livingstone had brought his office or authority into disrepute when he acted in an "unnecessarily insensitive and offensive" manner contrary to the Greater London Authority Code of Conduct.[169] The High Court has reversed the Panel's ruling.[170] In the view of Mr Justice Collins, the Code must be limited to "activities which are apparently within the performance of a member's functions".[171] Action undertaken in a private, off-duty capacity can only fall within the Code if it involves a misuse of office.[172] At that point, the conduct becomes a matter for the judgment of the official's political party on reselection or of the electorate when

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164 A request for data has been refused under the *Freedom of Information Act 2000* s.35(1)(c).

165 See Committee on Standards and Privileges, Complaint against Mr Keith Vaz (2000-01 HC 314 and 2001-02 HC 605); Committee on Standards in Public Life, Ninth Report: Defining the boundaries within the Executive (Cm.5775, 2003) para.5.7; Government Response (Cm.5963, 2003); Select Committee on Standards and Privileges, Thirteenth Report, Conduct of Mr John Prescott (2005-06 HC 1553) para.17; Public Administration Committee, The Ministerial Code: the case for independent investigation (2005-06 HC 1457).

166 Local Authorities (Model Code of Conduct) (England) Order 2001 SI no.3575.

167 Local Authorities (Code of Conduct)(Local Determination) Regulations 2003 SI no.1483, 2004 SI no.2617.

168 APE0317, 2006, Appendix.

169 Local Authorities (Model Code of Conduct) (England) Order 2001 SI no.3575.

170 *Livingstone v Adjudication Panel for England* [2006] EWHC 2533.

171 *Ibid.* at [27].

172 *Ibid.* at [28].

voting. It followed that the suspension also violated Article 10 since it was not necessary in a democratic society.[173]

Is the Adjudication Panel a worthwhile alternative to libel action or criminal prosecution? The censure of elected politicians has the opposite effect to the general thesis of this paper, which is to encourage unsanctioned robust political speech, even if it is tainted with inaccuracies or asinine qualities. As Livingstone commented:

> "This decision strikes at the heart of democracy. Elected politicians should only be able to be removed by the voters or for breaking the law. Three members of a body that no one has ever elected should not be allowed to overturn the votes of millions of Londoners."[174]

In so far as the Adjudication Panel sought to intercede between voter and elect by divining fitness for office, the system has not proven to be a helpful device in response to libelocracy. Reforms ensued in 2007, when powers were placed in the hands of Standards Committees within local authorities.[175] The Panel was then abolished in 2010 and its functions transferred to the more formal First-tier Tribunal. In addition, the whole of the "Standards Board Regime" (including this new form of adjudication) are being ended by the Localism Bill 2010-11, leaving the regulation of conduct to local authorities and to the criminal law.[176]

3 Press Complaints Commission

Finally, the threat of legal action, civil or criminal, may be averted by the non-legal mode of resolution of complaints against the press offered by the Press Complaints Commission.[177] This body was established in 1991 to provide an independent, relatively rapid and, to the claimant, cost-free way of challenging press coverage which is inaccurate or invades privacy. The PCC can demand the publication of its adjudication but not compensation. A Privacy Commissioner, with special responsibility for handling complaints about alleged intrusion into privacy, was appointed 1993. In 1996, a commitment to observe the Code was written into the employment contracts of relevant newspaper editors.

> Clause 1 of the PCC code of practice states as follows:
> "1. Accuracy:
> i) The Press must take care not to publish inaccurate, misleading or distorted information, including pictures.

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173 *Ibid.* at [38].

174 See *The Times* February 25, 2006 p.4.

175 *Local Government and Public Involvement in Health Act* 2007, Pt.X.

176 See http://www.standardsforengland.gov.uk/news/futureofthelocalstandardsframework/.

177 http://www.pcc.org.uk/. See Report of the Committee on *Privacy and Related Matters* (Cm. 1102, 1990); National Heritage Select Committee, *Privacy and Media Intrusion* (1992-3 H.C. 294) and Government Response (Cm.2918, 1995); Report of the Committee on *Privacy and Related Matters* (Cm. 2135, 1993; Culture, Media and Sport Committee, Media and Press Intrusion (2002-03 HC 458), Government Response (Cm. 5985, 2003); M. Tugendhat and I. Christie, *The Law of Privacy and the Media* (Oxford University Press, 2002) para.13.37.

> ii) A significant inaccuracy, misleading statement or distortion once recognised must be corrected, promptly and with due prominence, and - where appropriate - an apology published.
> iii) The Press, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.
> iv) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published."[178]
>
> Clause 2 goes on to require a fair opportunity to reply when reasonably called for.

Political bodies and politicians all the way up to Prime Minister have become devotees of the Press Complaints Commission.[179] For example, it is revealed in the PCC Annual Review for 2005[180] that 2.7% of the 3,654 complaints were from "people in the national or public eye" and 4.8% were from organisations and public bodies. Significant customers have been the Royal family,[181] as well as national[182] and local[183] politicians and political groups. As a result, there is some danger that the promise of *Derbyshire* and *Reynolds* will be undercut by the Press Complaints Commission which does not directly recognise equivalent doctrines. A particularly disturbing example was the attempt to use the Press Complaints Commission in an overtly political argument by John Prescott, the then Deputy Prime Minister. In his complaint against the *Sunday Express* in 2005, he averred that a series of articles published in the *Sunday Express* on September 12, 2004, headlined "Terror escape fiasco", "Six million will be left behind to die" and "Half-baked plans leave our cities vulnerable to terror", contained inaccuracies in breach of Clause 1 (Accuracy) of the Code of Practice and that he had not received an opportunity to reply in breach of Clause 2 (Opportunity to reply). He also complained that a further article, published in the *Sunday Express* on September 26, 2004 and headlined "Cover-up that risks the safety of us all", was inaccurate in breach of Clause 1 (Accuracy) of the Code.

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178 http://www.pcc.org.uk. In 2010, 87% of complaints were about inaccurate or misleading publication.

179 See Prime Minister and Mrs. Blair v Daily Telegraph and Daily Mail (Report 47, 1999); Prime Minister and Mrs. Blair v Daily Sport (Report 49, 1999).

180 http://www.pcc.org.uk/assets/111/PCC_Annual_Review2005.pdf. In preceding years, the figure was as follows: 2001 = 10%; 2002 = 9%, 2003 = 6%.

181 Miss Penny Russell-Smith on behalf of HRH The Duke of Edinburgh v Express (Report 38, 1997); Prince and Princess Michael of Kent v Daily Mail (Report 60, 2002)

182 For examples of claims during the past 10 years, see Dr Phill Edwards, National Press Officer of the British National Party v The Times (Report 58, 2002); Mishcon de Reya, solicitors on behalf of the Embassy of Israel and Ariel Sharon v The Independent (Report 62, 2003); Tony Baldry MP v The Daily Telegraph (Report 68, 2004); Mr. Tim Bonner, Head of Media for the Countryside Alliance v Western Daily Press (Report 68, 2004); Mr Brian Binley MP v The Daily Telegraph (Report 79, 2009); Dr Tony Wright MP v The Sunday Times (Report 79, 2009); Dr Julian Lewis MP v News of the World (Report 79, 2009); Dr Julian Lewis MP v The Sunday Telegraph and The Daily Telegraph (Report 80, 2009); Mr Alex Salmond MSP v Scottish Mail on Sunday (03/06/2010); Michael McCann MP v East Kilbride News (02/02/2011).

183 Messrs Nicholson Graham and Jones, on behalf of Dame Shirley Porter v Westminster and Pimlico News (Report 39, 1996); Mohan Singh Sihota v Slough Express (Report 40, 1997); Bob Lacey OBE v Eastbourne Gazette; Transport for London v Evening Standard (Report 73, 2006); Forest of Dean District Council v Forest of Dean and Wye Valley Review (08/11/2010).

The articles concerned the evacuation plans for London in the event of a terrorist attack. Though the complaints were rejected on the facts, the PCC concluded that

> "It is not precluded by its rules from dealing with complaints of a political nature – although it does have the discretion to decline to deal with complaints for any reason if it considers it appropriate to do so. It may be that at certain times – during an election campaign, for instance – it would be appropriate to suspend the investigation of complaints of a political nature. In this case, however, there did not seem to be any particular reason why the Commission should not entertain the complaint."

The PCC can perform a useful function of channelling away personal attacks from the libel courts, but its doctrine is underdeveloped and it lacks the legal protections adduced earlier. It also runs the danger of amplifying libelocracy when it goes beyond personal attacks to matters of public debate in which the voice of the ballot box is the only acceptable system for divination of political truths. These criticisms have now been overshadowed by its track-record on responding to allegations of phone hacking by journalists. As a result, the government has indicated that it will provide for a statutory alternative.[184]

Corresponding statutory complaints systems apply to broadcasting.[185] The various review bodies have been consolidated by the *Communications Act* 2003 within the Office of Communications (Ofcom), which must issue a Standards Code (section 319) and complaints procedures (section 325). The Ofcom Broadcasting Code,[186] rule 7, imposes duties to "avoid unjust or unfair treatment of individuals or organisations in programmes" and goes on to elaborate more specific requirements.[187] These include, in terms reminiscent of *Reynolds*:

> "7.9 Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:
> - material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and
> - anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.
>
> 7.11 If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond."

The right to reply is also specified by the European Union Television without Frontiers Directive.[188]

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184 See Leveson Inquiry, *Report into the Culture, Practices and Ethics of the Press* (2012-13 HC 780; https://www.ipso.co.uk/IPSO/. An alternative regulator set up by Royal Charter has not been implemented: P.Ward, *The Leveson Report: implementation* (SN/HA/6535, House of Commons Library, 2014).

185 See M. Tugendhat and I. Christie, *The Law of Privacy and the Media* (Oxford University Press, 2002) para.13.24.

186 See http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/.

187 The BBC Editorial Guidelines 2010 are similar: http://www.bbc.co.uk/guidelines/editorialguidelines/guidelines/, ss.3, 6.

188 89/552 EEC, as amended by 97/36/EC, Art.23.

IV Conclusion

There are two principal reflections to be offered here. The first is that these applications of libelocracy reveal a complex and subtle interplay between criminal and civil law. Whilst most of the action has occurred in the civil courts, that action has frequently interacted with criminal prosecution, with consequential barring of individuals from holding office or even travel. This interplay has even occurred with perjury charges in England and Wales, but the linkage to a variety of crimes is more explicit and common in Malaysia and Singapore.

The second reflection is that the weightings accorded to reputation and speech ultimately reflect the policy and normative choices of legal systems and indeed societies. Each society discussed in this paper faces a choice as to whether criticism should be inhibited by ignorance, by malice, or by falsity. So far as English law is concerned, both are valued, but the worth of reputation has often been seen as a more valuable commodity[189] than the value of political debate. Perhaps this balance reflects, on the one hand, a society where reputation and trust is vital because social networks are relatively closed and have depended on family, friendship and social class to a greater extent than, say, in the U.S. Perhaps it reflects a lesser degree of faith than in the U.S. in the value of political debate and the function of the citizen critic as compared to the trust in authority.

Such a weighting might, it is suggested, be reflected more heavily in Malaysia and Singapore where the absence of a vibrant opposition and the pre-eminence of the collective goods of stability and multi-racial harmony may better accord with communitarian "Asian values"[190] which are to some extent expressed as "soft law" declarations in those jurisdictions.[191] They are also reflected in both countries by their refusal to sign fundamental international legal protections such as the International Covenant on Civil and Political Rights of 1966. It has been claimed that the "Asian values" approach successfully generates "a substantial degree of democracy with a substantial degree of illiberalism."[192] Yet, the evidence of this paper[193] is that the enjoyment of both individual liberal rights and democracy has been diminished by libelocracy: "Absolute political dominance and disregard for political and cultural minority concerns not only alienates,

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189 See R.C. Post, "The social foundations of defamation law" (1986) 74 California Law Review 691.

190 See F. Fukuyama, "The illusion of exceptionalism" (1997) 8.3 Journal of Democracy 146; D.A. Bell, "The East Asian challenge to human rights: Reflections on an East West dialogue" (1996) 18 Human Rights Quarterly 641; A.K. Sen, "Human Rights and Asian Values" (Carnegie Council on Ethics and International Affairs, 1997); J.R. Bauer and D.A. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999); M.R. Thompson, "Whatever happened to 'Asian values'?" (2001) 12.4 Journal of Democracy 154.

191 See Malaysia's Rukunegara ("National Principles") of 1971 and Singapore's White Paper on Shared Values (Cmd 1, 1991): L-A. Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8 International Journal of Constitutional Law 766 at pp.776-780.

192 F. Zakaria, "The Rise of Illiberal Democracies" (1997) 76 Foreign Affairs 22 at p.24, as applied by L-A. Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8 International Journal of Constitutional Law 766 at pp.791-792.

193 See also International Bar Association Human Rights Institute, *Prosperity Versus Individual Rights?* (2008) pp.21-22.

but thwarts constitutionalism."[194] It is no use expressing the ambition of having the maturity to develop, say, in Singapore "a world-class opposition, not this riffraff"[195] if the laws ensure that vituperative and immature political pups cannot learn from their errors but are suppressed at the earliest opportunity.[196] A vibrant democratic system and fundamental respect for individual autonomy necessarily entail the give and take of free expression and intermittent offensiveness to public officials and politicians. Some relatively modest adjustments to the civil laws of defamation and the criminal laws of defamation and scandalising are required if Malaysia and Singapore are to emerge from the shackles of libelocracy.

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[194] L-A. Thio, "The Right to Political Participation in Singapore: Tailor-Making a Westminster-Modelled Constitution to Fit the Imperatives of 'Asian' Democracy" (2002) 6 Singapore Journal of International and Comparative Law 181 at p.243.

[195] *New York Times*, May 6, 2006 p.A7.

[196] It is claimed elsewhere that libelocracy also undermines crucial foreign economic activity (see C. Sim, "The Singapore Chill" (2011) 20 Pacific Rim Law & Policy Journal Association 319), but countries such as China and Vietnam suggest a less dependent relationship between foreign economic investment and democracy.

Analysis on Regional Autonomy associated with the Legislative Process in Perspective of Sociology of Law

DR. Edie Toet Hendratno, SH. MSi

Abstract

The spirit of reform demanded an overhaul of the constitutional system in Indonesia, coloring the utilization of existing state instruments and leading to the integration and execution of duties and functions of the government. Law No. 32 of 2004 on Regional Government is the basis of the implementation of good and clean governance principles (Good and Clean Governance), reflecting the desire of the government to implement good governance in local government administration. After the fourth amendment to the Constitution of the Republic of Indonesia of 1945 (UUD 1945), the concept of a centralized unitary state with political and economic resources under the control of the political elite in the center turned into a decentralized unitary state by giving space to the affected regions to manage their own affairs. Good governance is expressed through the principles of democratization as well as the limitation of power. This principle of separation of power, both horizontally and vertically, is closely related to regional autonomy as expressed through equal relations between the central and regional governments.

I. Introduction

Indonesia is a state of law (*Rechtstaat*)[1]. As a state that is guided by law, all aspects of life, including the communal, national and state governments, should be based on the law, on the principles of Pancasila as well as on the Constitution of the Republic of Indonesia of 1945 (UUD 1945)[2]. The legal system is continental law, a legacy of the Dutch colonial period. The concept of the state of law manifests that it is law that guides all daily life, not politics or economics.

The continental legal system prioritizes written law as the core of the legislation[3] within the legal system. Therefore, Indonesia is trying to formulate the law in written form. However, in practice, it also acknowledges the existence of other legal systems, such as religious law, customary law, while also recognizing jurisprudence as well as the judge's authority to find the law.

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1 Article 1, Paragraph 3, Constitution of the Republic of Indonesia (UUD) of 1945.

2 The state becomes the foundation of hope of society to collectively achieve certain goals that were normatively outlined by *the founding fathers* and generally set forth in the Constitution. See, Samsul Wahidin, ***Dimensi Kekuasaan Negara Indonesia,*** 1st publish, Pustaka Pelajar, Yogyakarta, 2007 page. 6.

3 Regulation is different from legislation; regulation refers to policies as the elaboration of legislation, while legislation is the underlying law made at the will of people. *Ibid,* page 15-16.

To realize the formulation of written law, especially regulation and legislation[4], an orderly arrangement is required. Formation of regulations and legislation is basically a system that includes stages that are interwoven and inseparable from each other. The stages are planning, formulation, discussion, ratification, enactment, and dissemination[5].

The formulation of regulations and legislation has to be based on existing regulations and legislation. This refers to Law No. 12 of 2011 on the Formulation of Regulation and Legislation, the Presidential Regulation No. 61 of 2005 on Procedures for the Preparation and Management of the National Legislation Program, the Presidential Regulation No. 68 of 2005 on Procedures to Prepare Draft Laws, Draft Government Regulations to Revise Laws, Draft Government Regulations, and Draft Presidential Regulations, as well as the Presidential Regulation No. 1 of 2007 on the Ratification, Promulgation, and Dissemination of Regulations and Legislation.

It is undeniable that there is regulations and legislation formulated by the legislative[6] both at central as well as regional government level that are not aligned with the principles of the formulation of regulation and legislation. Consequently, these regulations and legislation are not always implemented by communities. In line with Jimly Asshiddiqie's view[7] that legal norms, which are to be outlined in the draft regulation and legislation, have to be well prepared based on careful thoughts and reflections that are solely in the public's interest, instead of the interest of a person or a class.

The planning stage is the first step to achieve sound regulation and legislation. One of the activities in the planning process of formulating regulation and legislation is the preparation of academic papers. Through study and preparation of academic papers, it is expected that formulated regulation and legislation meets the expected goals and is implemented and enforced properly.

In Law No. 10 of 2004 on the Formulation of Regulation and Legislation, academic research was not part of the process of formulating the Draft Law. The provision of academic papers can be found in article 1, paragraph 7 of the Presidential Regulation No. 68 of 2005 on Procedures to Prepare Draft Laws, Draft Government Regulations to Revise Laws, Draft Government Regulations, and Draft Presidential Regulations stating that: "*The academic paper is a scientifically accountable manuscript regarding the conception which contains background, the goal of the draft, objectives to be achieved and the scope, range, object or direction of the regulation of a draft law"*.

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4 Regulation and Legislation are written rules established by state agencies or the authorities and the general binding. See article 1 angka 2 Undang-Undang No. 10 Tahun 2004 tentang Pembentukan Peraturan Perundang-Undangan.

5 Article 1 Nr 1 of Law No. 10 of 2004 about the Formulation of Regulation and Legislation.

6 The concept of *Latum* is taken from Latin and means to "make or issue". The term *leges* is also taken from Latin and means "law". This law is intended to be formal interpretations, legal forms made by legislatures laws in general is the representative body elected by the mechanism of democratic election in the country concered. Samsul Wahidin, *Dimensi...,* Op. Cit., page. 37-38.

7 Both law and morality regulate human behavior, but law limits itself to outward behavior, whereas morality also covers inner attitudes. This is the difference between law and morality, which was emphasized by the German philosopher Immanuel Kant. See K. Bertens, *Etika,* 9th edition, PT. Gramedia Pustaka Utama, Jakarta, 2005, page. 43

II. Regional Autonomy In the Perspective of the Sociology of Law

From a sociologic perspective, an academic paper is prepared by examining the reality of society, including the needs of the community with respect to legal and socio-economic aspects as well as values engrained in society such a sense of justice. The objective of this sociological study is to avoid creating legislation that is disconnected from its social roots in the community.

Many regulations and legislation that have been enacted were later rejected by society, a reflection of the lack of strong social roots as basis for formulating written laws; specifically regulation and legislation, for which an orderly arrangement is required. The formulation of regulation and legislation is a system with interwoven stages that are inseparable from each other. The stages are planning, preparation, discussion, ratification, enactment and dissemination.

The House of Representatives in its legislative function[8] is central and strategic in the process of developing new legislation to meet the targets of the National Legislation Program (Prolegnas).

Article 18A of UUD 1945 states that the law gives the freedom to regions to develop themselves as their constitutionally guaranteed right of autonomy. The right of autonomy of the regions[9] is given to each region that has been deemed capable by law to manage their own households.

Proliferation of administrative regions occurs in each region as the juridical implication of legal reform in Indonesia[10]; merging or elimination of a region is regulated by the law.

From the point of view of the legal government reforms, decentralization of regionals governments[11] and being granted autonomy is the main agenda of each region. But in fact, there are discrepancies between what is envisioned by the law and the legal facts. There are several reasons for the central government to decentralize[12] power to regional governments, as outlined by Samodra[13]: (1) In political aspects, decentralization is intended to engage citizens in the policy process, both for the regions' own benefit as well as for the benefit of local political support and national policy development through

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8 Article 20 No. 1 of UUD 1945

9 The term autonomy comes from the Greek words *autos*, which means "in itself", and *nomos*, which means "law". Autonomy is related to the division of duties and responsibilities of the authorities to regulate and manage the affairs of the central and local governments. One manifest of this division is that regions will be responsible for several government affairs, through submission, recognition or as transfer to their disposal. See Ni'matul Huda, Hukum Pemerintahan Daerah, Ctk. Pertama, Nusa Media, Bandung, 2009, page 83-84.

10 Reform is a systematic process of integrated and comprehensive effort aimed at the realization of good governance. See *Sedarmayanti, Reformasi Administrasi Publik, Reformasi Birokrasi, dan Kepemimpinan Masa depan,* 1st edition, Refika Aditama, Bandung, 2009, page. 67.

11 Decentralization is defined as the transfer of power by the government to the autonomous regional governments to regulate and administrate the affairs of government in the Unitary State System of Indonesia (NKRI). Article 1, Local Government Law No. 32 of 2004.

12 Authority is a condition that includes two parts: those who hold power and those who are subject to the power. Power is defined as the ability to influence others. Samsul Wahidin, Dimensi, Op. Cit., page. 1.

13 Samodra, W, Good Governance Dan Otonomi Daerah Dalam Mewujudkan Good Governance Melalui Pelayanan Publik, Gadjah Mada University Press, Yogyakarta, 2005, page17.

democratic processes in bottom layers. (2) In terms of management of government, decentralization can improve the effectiveness, efficiency, and accountability, especially in the provision of public services. (3) In cultural aspects, decentralization helps to pay attention to exclusivity and privileges of a region, such as geography, demographics, economic, cultural, or historical backgrounds. (4) In terms of the interests of the central government, decentralization can overcome the weakness of the central government in monitoring programs. (5) In terms of accelerated development, decentralization can increase positive competition between regions in providing services to the public, such as encouraging local governments to innovate in order to improve the quality of services to the community.

III. Formulation of the Problems

1. What is the mechanism and legislative process to form a region in Indonesia?

IV. Research Purposes

How is the mechanism and legislative process linked to the duties and authority of the House of Representatives based on formal juridical?

1. Law No. 27 of 2009 on MD3 (MPR DPR DPD and DPRD);

Duties and Powers of the House of Representatives of the Republic of Indonesia

Article 71
Parliament has the duty and authority to:
a. establish laws that are discussed with the President for approval together;
b. approving or not approving the replacement government regulation legislation proposed by the president to become law;
c. receive a bill proposed by the Council relating with local autonomy, central and local relations, the establishment and expansion and merging of regions, management of natural resources and other economic resources, as well as relating to the financial balance between central and local;
d. discuss the draft law referred to in letter c with the President and the Council before taken a joint agreement between the House and the President;
e. discuss a draft law proposed by the President or the House of Representatives relating to regional autonomy, central and local relations, the establishment and expansion and merging of regions, management of natural resources and other economic resources,
and financial balance between central and local, by including taken DPD before a joint agreement between the House and the President;
f. DPD taking into consideration the draft law on the state budget and draft laws relating to taxes, education, and
g. discussed along with the consideration of the President and the Council approved the draft bill on the state budget proposed by the President,

and i. discuss and act on the results delivered by DPD supervision of the implementation of Law on regional autonomy, the establishment, expansion, and merger of regional, national and local relationships, management of natural resources and other economic resources, the implementation of the state budget, taxes, education, and religion;

2. On the Formulation of Regions and Special Areas; Law No. 12 of 2008 on the revision of Law No. 32 of 2004.

FORMATION OF REGIONS AND SPECIAL AREAS:

Part One
Establishment of Regions

Article 4
(1) The establishment of the area as referred to in Article 2 paragraph (1) shall be determined by law
(2) the establishment of regional legislation referred to in paragraph (1) include the name, area coverage, the limits of the capital, the authority held government affairs, the appointment of the acting head of the region, charging membership of Parliament, the transfer of personnel, funding, equipment, and documents, as well as the region.
(3) The establishment of the area may be merging some regions or areas bersandingan part or division of a region into two or more regions.
(4) Expansion of the region into two (2) or more regions as referred to in paragraph (3) can be done after reaching the minimum age of governance.

Article 5
(1) The establishment of the area as referred to in Article 4 should be qualified administrative, technical, and physical territorial.
(2) administrative terms referred to in paragraph (1) for the province include the approval of regency / city and Regent / Mayor who will be coverage of the provinces, provincial parliament approval of the parent and the Governor, as well as the recommendation of the Minister of the Interior.
(3) administrative terms referred to in paragraph (1) for the district / city include the approval of regency / city and Regent / Mayor is concerned, the approval of Parliament
and the provincial governor and the recommendation of the Minister of the Interior.
(4) technical terms referred to in paragraph (1) includes the factors that form the basis of factors that include the establishment of regional economic capacity, potential regions, socio-cultural, socio-political, demographic, wide area, defense, security, and other factors that enable the autonomous areas.
(5) physical terms as referred to in paragraph (1) shall include at least five (5) county / province and city for the establishment of at least 5 (five) districts for the establishment of the district,

and 4 (four) districts for the establishment of the city, the capital of candidate sites, facilities, infrastructure and governance.

Article 6
(1) The area can be removed and merged with other areas if the area in question was not able to hold the regional autonomy.
(2) Removal and autonomous regions after merging through the process of evaluation of the regional administration.
(3) Guidelines for the evaluation referred to in paragraph (2) Government Regulation.

Article 7
(1) Elimination and merging of regions referred to in Article 6 paragraph (2) and its consequences are set by law.
(2) Changes in limits of the area, change the name of the region, naming parts of the earth, and such a change of name, or transfer of capital that does not result in the removal of an area
Government Regulation.
(3) The change referred to in paragraph (2) shall be upon the recommendation and approval of the relevant region.

Article 8
Procedures for the establishment, abolition, and the incorporation of the area referred to in Article 4, Section 5, and Section 6 is regulated by the Government.

Special Areas
Article 9
(1) To carry out certain governmental functions that are specific to the national interest, the government can set a special area inside. provincial and / or district / city.
(2) certain governmental functions referred to in paragraph (1) for free trade and / or free port established by law.
(3) certain governmental functions other than those referred to in paragraph (2) shall be regulated by a Government Regulation.
(4) To establish special areas referred to in paragraph (2) and paragraph (3), the Government shall involve the relevant region.
(5) Regions may propose the formation of a special area as referred to in paragraph (1) to the Government.
(6) The procedure for determining specific areas as referred to in paragraph (1), paragraph (2), subsection (3), subsection (4), and paragraph (5) Government Regulation.

V. Conclusion

The idea of regional autonomy is closely linked to the democratization of political life and governance in the region. For regional autonomy to function as intended, regions

have to have the authority to manage and regulate their own households as a unitary state system. In this context, the democracy applied in Indonesia applies the principles of *Pancasila*[14], instead of the principles of liberal democracy. In countries with liberal democracy, the market has a greater role than the government, even though in practice the government also uses its power to regulate the market. The implementation of regional autonomy based on decentralization does not mean regions are free to determine what they need. Their needs can only be realized in accordance with central government policies – policies included in regulation and legislation. However, it is undeniable that there are market-friendly policies. Democracy in Indonesia is not unfree democracy but meant to uphold justice and social welfare.

1. *Good governance* has become a benchmark in governance. The implementation of good governance is a prerequisite in realizing the aspirations of society to reach the goals and ideals of the nation. Goals and ideals should at least not be contrary to the principles of good governance as implementation of government policies. The principles of good governance are:
   a. Participation
   b. Enforcement of the law
   c. Transparency
   d. Equality
   e. Responsiveness
   f. Insight into the future
   g. Accountability
   h. Supervision
   i. Efficiency and effectiveness
   j. Professionalism

2. Good Governance in Regional Autonomy
   The enforcement of autonomy in regional government systems has been implemented since 2001 (as per Law No. 22 of 1999 on Regional Government) and in was adjusted in 2004 using Law No. 32 of 2004 as a revision of the previous law. In both laws, the Government has introduced decentralization within regional government systems as a consequence of the previous centralized system. With the change in the policy system, regional governments have the authority to plan, formulate, and implement development policies and programs in accordance with aspirations of the communities. The system of regional autonomy should be combined with good and clean governance, free from corruption. Through this shift of power, communities' aspirations and needs in the regions can be realized in accordance with the law.

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[14] Five Principles of Republic of Indonesia; 1. Belief in the one and only God, 2. Justice and civilized humanity, 3. The unity of Indonesia, 4. Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives, 5. Social justice for all of the people of Indonesia. Wikipedia, *Pancasila (politics)*, http://en.wikipedia.org/wiki/Pancasila_politics , access 22 September 2014, 11.00 am.

Administration of Islamic Law in Kadhis' Court in Zanzibar: A Comparative Study with the Syariah Courts in Malaysia

Dr. Moh'd Makame Haji[1]

Abstract

Protection and application of Muslim Personal Laws (MPL) is one of the fundamental problems presently faced by many Muslims. The practices that regulate social life of Muslims, particularly at State level, do not appear to be fully in accord with Islamic law, may be because the same are politically controlled and statutorily limited. As a consequence, the functioning of the courts elsewhere and that of Kadhi's Courts in Zanzibar in particular has become both complicated and difficult. The same in view an attempt is made, hereunder to study and examine the legal framework of administration of MPL in Zanzibar its problems and prospects while juxtaposing it with the practice of the courts in Malaysia without losing the sight of historical developments of the both in this regard. Finally suggestions shall be made as how to strengthen the application of MPL in Zanzibar.

I Introduction

Many Muslim countries which guarantee freedom of religion also permit the application and administration of the Islamic law at different levels of their social reality. But the majority of such countries, with exclusion of those which fully follow Islamic law, allow only the matters of personal status to be governed by Islamic law. The states of Zanzibar and Malaysia respectively are among the countries that fall within the latter category. Though unlike Zanzibar, Malaysia allows some criminal offences to be dealt with and adjudicated by the *Syariah* Courts,[2] yet the significant portion of Islamic law dealing with the matters of personal status are mainly administered by the same courts.

There is agreement among Muslim jurists that subjects like marriage, divorce, maintenance, custody, inheritance and the matters *ejusdom* generis have clearly been dealt with by the *Qur'ān* and *Hadith*. The Islamic Schools of thought invariably subscribe to this view, yet the state legislations are passed only with an aim to smoothen and facilitate

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[2] See The Administration of Islamic Law (Federal Territories) Act 1993, Act N0. 505. Part V, Sections 58—59. For details of the offences covered see: Syariah Criminal Offences(Federal Territories)Act 1997, Act 559, the offences liable prosecution under this Act relate to *'aqidah,* offences relating to the sanctity of the Religion of Islam and its institution, offences relating to decency, and other miscellaneous offences. In all the States of Peninsular Malaysia, The Syariah Courts (Criminal Jurisdiction) Act 1965, Act 355 regulate such offences. See also List II of the State List of the Ninth Schedule to the Federal Constitution. This paper, however, does not intend to discuss criminal jurisdiction of *Syariah* Courts.

the admiration of Islamic law by the courts in Muslim countries. The legislations made by these states are certainly based on Islamic principles, expected the least to contravene the basic sources of *Sharī'ah* because it being the settled principle of Islamic law and jurisprudence that the issues that are expressly dealt with by the *Qur'ān* or *Hadith* cannot be re-opened and/or decided under any other law. This in view, it may be timely to examine and analyze the contours of legislation, its application and its administration in the courts of Zanzibar with its genuine comparison with Malaysian Federal Territories Law.[3] It is so desired because it was around 10th century A.D that winds of Islamic faith blew over coasts of Zanzibar and Malaysia. Apart from that the things can be understood better by comparison and contrast.

II Introduction of the Islamic Law

It is believed that prior to advent of Islam in Zanzibar there was no system of law, worth the name operative, until the vacuum was filled by *Sharī'ah* or say Islamic law which consequently assumed the significance of being the fundamental law of the land over the period of time. The latter has over the period of time gradually absorbed the customs of the people and successfully created both the order and peace society.[4] Zanzibar people, appear to have embraced Islam back in 10th century, as may be ascertained from the records preserved at the Friday mosques at Kizimkazi that was built in 500 HD/1107 AD, which in turn attest to the fact that Islam may have spread in Zanzibar during that period. Around the same period it is reported that Islam had reached coastal territories of Malaysian may be because both the territories had assumed importance of trading centers en-route to South of Asia and Africa respectively.[5] Ibn Battuta seems to have pointed at the same when he asserts in his chronicle that around 1331 A.D the whole of the coast of East Africa followed Sunni Muslim faith of Shafi'i creed.[6]

However, it being significant enough that the advent of Islam in Zanzibar in 10th Century A.D was followed by the introduction of Islamic law. As a natural consequence Islamic law thereafter continued to shape the lives of people until the advent of the

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3 The Federal Territory is a collectively combination of three territories: Kuala Lumpur, Putrajaya and Labuan, governed directly by the federal government of Malaysia. Kuala Lumpur is the national capital of Malaysia, Putrajaya is the administrative capital, and Labuan is an offshore international financial centre. Both Kuala Lumpur and Putrajaya are enclaves in the state of Selangor, while Labuan is an island off coast of the state of Sabah. For further details see: Wikipedia, The Free Encyclopedia, Federal Territory (Malaysia), <http://en.wikipedia.org/wiki/Federal_Territory_(Malaysia) (accessed on 6 September, 2013).

4 W. H. Ingrams, *Zanzibar Its History and Its People*, London: Taylor & Francis Ltd, 1967, at 267. See also. B. Martin, *Zanzibar: Tradition and Revolution*, (London: Hamish Hamilton, 1978), at 40.

5 The recognition of Islam in Peninsular Malaysia has been a fact since C.E. 674(forty-two years after the death of Prophet Muhammad, SAW) when the Umayyad ruler Muawiyah was in power at Damascus. Two hundred years later in C.E. 878 Islam was embraced by people along the coast of Peninsular Malaysia including the port of *Kelang* which was a well-known trading centre. See, Hj. A. Kamar, Islam in Peninsular Malaysia, Books and E-Books on Muslim History and Civilization, <http://www.cyberistan.org/islamic/mmalay.htm> (accessed on 5 September, 2013). See also http://www.islamawareness.net/Asia/Malaysia/ismy.html.

6 M. Hariton, *Shanga: The Archeology Muslim trading Community on the Coast of East Africa,* (British Institute in East Africa, 1996), at pages 419 and 427. Also see Wikipedia, <http://en.wikipedia.org/wiki/Islam_in_Zanzibar> (accessed on 15 of March, 2013).

British in the early 18th century. But during the intervening period, it should be admitted that the Islamic system of law was by and large bereft of semblance of system of law as was true of it when compared with other territories inhabited by Muslim people. In the case of Zanzibar it was finally the British who introduced an organized system of courts, based on their model wherein the judges and lawyers were trained in the common law practices of England.[7]

Notwithstanding this, it has to be admitted that the courts were charged with administration of justice and till the year 1908 the only law that covered both civil and criminal matters and thus enforced in the Courts of His Highness the Sultan was Islamic Law.[8] The British were slow but definite in their resolve to replace Islamic law so the latter survived for some time the onslaught and remained in operation along with introduction and application of the Common law in Zanzibar by British.[9] But the Decree of 1923 in effect ousted the Criminal jurisdiction of Sultan's Courts consequently both the Islamic Criminal law and Islamic Law of Evidence were wound up leaving only the civil matters to be heard by the Sultan's Court.[10]

The period that followed was marked by the conflict between the local law *i.e*., Islamic law and the Common law principles. This phenomenon was observable in all those territories that had fallen to British occupation and domination. Malaysia and Zanzibar were never an exception to this. We call it phenomenon because control over administration of justice by the colonial powers in effect speeded up intellectual both physical impoverishments. This had to be achieved systematically and intelligently. For the same reason the colonial laws and the judges for some time acknowledged viability of local laws and customs in the administration of justice and treated it in application at par with Common law until they gradually and tactfully ignored the former and preferred the newly imported laws and new legislations over it.[11]

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7 A. H. Bin Haji Mohamad, 'Civil and Syariah Courts In Malaysia: Conflict of Jurisdictions' [2002] 1 *MLJA* 130. See also A. H. Yadudu, 'Impact of Colonialism on Islamic Law and Its Administration in Nigeria' [1993] ICLR XIII: 2, at pages 144 – 153. Also see N. Haider, 'Islamic Legal Reform: The Case of Pakistan and Family Law' [2000] 12 *Yale J.L. & Feminism* at pages 287 – 341.

8 The Muslim Courts were under the authority of the Sultan of Zanzibar prior to the arrival of the British Colonialists. See Hussein Abbas (Muslim), Kadhi Courts and the Clamor for a New Constitution, 02 May, 2010, <http://kenyapolitical.blogspot.com/2010/05/kadhi-courts-and-clamor-for-new.html> (accessed on 11March, 2011).

9 As was provided, by section 7 of the Zanzibar Court Decree in 1923, under which the Courts of His Highness the Sultan for the time being constituted, that "in civil matters the Law of Islam is and hereby declared to be fundamental law of our Dominion. "After the independence of Zanzibar and major reorganization of the court system in 1985, Islamic law was again declared to be applicable law but only before Kadhis Courts and for the matters pertaining to Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. See Section 6 (1) of Kadhis' Court Act, 1985 (Act No.3 of 1985). Moreover, the commentators defined law of Zanzibar to mean fundamental law of Islam as interpreted according to the rules of the Ibadhi and Shafi'i schools. See J. H. Vaughan, *The Dual Jurisdiction in Zanzibar*, (London: Watmoughs United, 1935) at 46.

10 Vaughan, *The Dual Jurisdiction in Zanzibar*, at pages 27 - 38.

11 F. S. Shuaib, 'Constitutional Restatement of Parallel Jurisdiction between Civil Courts and Syariah Courts in Malaysia: Twenty Years on (1988 – 2008), [2008] 5 *MLJA* 35.
See also: W. Menski, *Comparative Law in a Global Context: The Legal System of Asia and Africa*, second edition (Cambridge: Cambridge University Press, 2006), at 6.

The consequences that followed were adverse on the socio-political life of Muslims because the role of Islamic law that is itself stated to be the complete code of conduct was limited to private sphere *i.e.*, left to regulate only the matters of personal status. This was followed making a resort to selective codification of laws of personal status. Although it resulted in transformation of Islamic law and unification of Muslim Personal Law (MPL) thereby facilitated the speedy dispensation of justice but this legislation was based only on the translation of certain religious texts. Apart from that the colonial authorities prioritised certain sources of Islamic law while downplaying others thereby limited the confines of MPL, either directly or through selected intermediaries. The main purpose was only to ensure that the jurisdiction of over zealous was not encroached beyond the defined limits.

A Zanzibar: The Reception of Foreign Law

The grafting of Common law on the soil of Zanzibar in late 1800's substantially changed the content of laws and the style of administration of justice. It was by virtue of 1887 Order in Council that established His Highness British Court in Zanzibar, which entirely applied common law. Notwithstanding this the *Sharī'ah*, for some time, continued to enjoy significance as being the fundamental law of the land.[12] However, the position changed when the English Statutory Law of the Crime and the Law of Evidence displaced the principles of Islamic law.[13] It so happened that around 1917 the Evidence Decree replaced the *Sharī'ah* law of evidence in favor of English Law of Evidence.[14] This should be understood in the background that around 1908 the courts in Zanzibar eagerly applied the statutory law and the principles of Common law and equity in matters that would otherwise call for application of Islamic law.

Around this time, judiciary had reasons to assert and hold to its views because the status of Zanzibar had changed from an independent State to mere a British protectorate that consequently changed the entire power structure. The Sultan stood as an administrative head of the State and on the other hand the British King in Council enjoying the sovereignty and both had the mandate to pass the laws that would regulate the affairs of the people in Zanzibar, with the former having preferential power to legislate for British subjects in Zanzibar and to impose any Act of Parliament, declared by Imperial Enactment (Application) Decree, 1939, to be applicable to subjects of the Sultan.[15]

Thus, the Zanzibar Order in Council, 1897, introduced His Majesty's criminal and civil jurisdiction in Zanzibar. As such most of the law enacted by the Indian legislature under the supervision of the Governor-General of India or enacted by the Governor of Bombay in Council whether with respect to substantive law or the procedure, and practice to be observed by or to be followed before, the Court in the Presidency of Bombay or any

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12 Section 7 of Zanzibar Courts Decree, 1908.

13 See section 5(1) of The Jurisdiction Decree, 1908.

14 Section 2 of Evidence Decree.

15 For more elaboration on the complexity of dual application of law in Zanzibar during this period see S. Abrahams, 'The Conflict of Laws in Zanzibar' [1941] 3rd Series, 23 Journal of Comparative Legislation and International Law, 4, at pages 169 – 215.

other jurisdiction which were in accordance with the common law and statute of law of England were to be applicable to Zanzibar under the afore stated order.[16]

On the other hand, the Sultan himself retained the legislative power over his own subjects and it was exercised by virtue of a Decree passed by the Legislative Council. Therefore, Islamic law was applied by his courts *i.e*., (Kadhis' Courts – exclusively Muslim Courts), though with number of limitations. However, as stated above, *Sharī'ah* law was partially replaced by the 1917 Evidence Decree, which was the replica of Indian Evidence Act. Same was true about criminal and civil procedure which were adopted by virtue of Decrees passed by the Legislative Council and assented to by the Sultan. For the reason to bind British Courts in Zanzibar with the same procedure the British Resident also counter signed it along with the Sultan. As such the same laws of procedure were made applicable under both the jurisdictions namely Kadhis Courts and British Courts respectively.[17] This formula has withstood the vicissitudes of the times, so it binds the Courts in Zanzibar until present times.

B Malaysia: The Reception of English Law

Significantly, the mode and manner of introduction of foreign law in Malaysia has been similar to that of Zanzibar. In this regard, it is observed that before the coming of the colonial powers, the Islamic law, which had successfully absorbed customs of the peoples, assumed significance of law of the land in the Malay States.[18] Even in some States like Malacca, the Islamic law had reached to the level of compilation and codification. However, with the downfall of the Malacca Empire the version of the Malaccan Laws were adopted and followed by the courts of the neighboring States[19] like Pahang, Johore and Kedah.[20] However in Trengganu the Islamic Law was applied particularly in the times of Sultan Zainalabidin III.[21] Likewise, in *Johore the Turkish Civil Code namely Majallat al-Ahkam* and the Hanafite Code of Qadri Pasha of Egypt were translated into Malay, and together formed the *Ahkam Shariyyah* of the Johore state.[22]

The advent of British the Islamic law in Malaysia was influenced by the English law and its instant effect was remarkably noticeable in most of the Malay States.[23] For

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16 Among the law introduced by this order are India Lunacy Act; so much of the India Post Office Acts relates to offence against the Post Office; the India Divorce Act except so much as relate to Divorce and nullity of marriage; Bombay Civil Court Act; the Indian Evidence Act; The Indian Contract Act; The India Limitation Act 603, Penal Decree, Criminal Procedure Decree, Evidence Decree and others.

17 J. E. R. Stephens, 'The Laws of Zanzibar," Journal of the Society of Comparative Legislation New Series, [1913] Vol. 13, No. 3 at pages 603 – 611. Contributed by J. E.R. Stephens Magistrate of the Court of His Britannic Majesty and His Highness The Sultan of Zanzibar. Article 14 of 1914 Zanzibar Order in Council.

18 A. Ibrahim and A. Joned, *The Malaysian Legal System*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1987) Chapters 1 – 3 and *Shaykh Abdul Latif and Other v. Shaikh Elias Bux* [1915] 1 *FMSLR* 204 at p. 214.

19 L. Y. Fang (Editor) *Undang-Undang Melaka*, (The Hague, 1976).

20 J. E. Kempe and R. O. Winstedt, 'A Malay Legal Digest of Pahang' [1948] *JMBRAS* 21 Part I at pages pp. 1 - 67.

21 *ibid*

22 *Majallah Ahkam Johore* 1331 AH and *Ahkam Shariyyah Johore*, 1949.

23 Historically, there were at least four colonial powers in Malay before it finally achieved independence. Despite that, British influence on the legal system is the most evident. English law had the greatest influence on the local system.

example, the English law that had by now taken both the form and shape of the codes promulgated in India was earnestly introduced by the British in Malaysia and the Malay Sultans had been left with no choice but to graft it on their soil. As a result of this, the Indian Penal Code, the Contract Act, the Evidence Act, the Civil Procedure Code, the Criminal Procedure Code and the like had become applicable. Pursuant to this, the land law legislation based on the Torrens System was introduced. However the British were deliberate to exempt the application of this law to the matters of personal status. For example, under the Strait's Settlement of 1878 that introduced the Charters of Justice it was stated that English law was not to be applied if it caused hardship or injustice to the inhabitants; in that case the inhabitants were allowed to apply their personal laws as the English law it was observed sometimes came into sharp conflict with the morals and values of the local people.[24]

This gesture apparently prepared the ground to import the Common law of England and its rules of equity to Malaysia that mixed it with the local system of Malay law and finally clothed as the Civil Law Ordinance in 1956.[25] This Ordinance has remained in vogue until this date except it being known as Civil law Act 1956 Act 67 and being revised in 1972.[26] The Act enabled British to import the principles of Common law and its rules of equity as the Act declares the same "shall be applied in so far as the circumstances of the States of Malaysia and their respective local inhabitants permit and subject to such qualifications as local circumstances render necessary."[27] This in fact diminished the significance of Islamic law and its area of application was quarantined.

From the above, it becomes clear that in both the territories of Zanzibar and Malaysia the British allowed application of Islamic law only in matters of personal status that too subjected to the condition that Islamic law should not be repugnant to constitution or any law for the time being in force nor should it be immoral or against principles of natural justice. The permission to allow limited application of Islamic law was in fact looked at by the British as a means to an end, but not the end in itself. They intended to enhance colonial rule over local communities, and sanctioned limited legal autonomy to these communities as a matter of strategy only to tighten the noose around the Muslim populace without injuring their religious sensibility.

III DILUTION OF THE SHARĪ'AH JURISDICTION

The administration of Islamic law for obvious reasons could not grow and develop in Kadhis' Courts any more after the reception of Common law in Zanzibar. The Common

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24 M. Rutter, *The Applicable Law in Singapore and Malaysia, Singapore ,* (Malayan Law Journal Pte Ltd, 1989), at pages 117 – 118. See also S. Aziz, 'The Malaysian Legal System: The Roots, The Influence And The Future' [2009] 3 MLJA 92 at 93

25 *Ibid*.

26 Before that there were Civil Law enactments of the Federated Malay States of 1937, which was later extended to the Unfederated Malay States by the Civil Lam, (Extension) Ordinance, 1951. The Civil Law Ordinance, 1956, Federation of Malaya Ordinance No. 5 of 1956, was again modified and extended to Sabah and Sarawak by PU (A) 424/1971.

27 Section 3 of the Civil Law Act 1956.

law practices adversely affected both the and the jurisdiction of the Kadhi's Courts no sooner the Zanzibar Order in Council of 1914 was passed which introduced the Evidence Decree, 1917. [28] This affected the abrogation of Muslim law of evidence and the Kadhi's Courts would not apply the Islamic principles of evidence any more as section 2 of the Decree clearly stated "the Muslim Law of evidence shall not apply in any of the court in Zanzibar."[29] The instant effect of the same may be gathered from the case of *Rashid Bin Said El-Hanoi v. Abdulah Bin Ali El-Hinawi*[30] before His Highness the Sultan's Court for Zanzibar. Knight Bruce, Acting J., granted the appeal of the applicant against the order of the Kadhi demanding the respondent to take an oath of satisfaction or precautionary oath. The Judge while referring to section 2 of the Evidence Decree, 1917 quashed the order of the Kadhi on the ground that the Muhammadan law of evidence did not apply in any court in Zanzibar.[31]

It was latter emphasized that the intention of the legislature was that no court should order an oath to be taken for the purpose of deciding an issue.[32] The colonial influence is hitherto noticeable as may be gathered from the case of *Idrisa Hussein Mrisho v. Sihaba Soud Waziri*[33] which emanated from *Kadhis'* Court, that was challenged by the Appellant and the appellate court invoked section 118 of the Evidence Decree and turned the decision around.[34]

IV POST-COLONIAL PERIOD AND THE ISLAMIC LAW

Notwithstanding the truncated application of Islamic law in the territories of Muslims the *Sharī'ah* has ostensibly been recognized as supreme everywhere in these lands. In Zanzibar, it is *de facto* recognized since it being the sacred and thus had been proclaimed as the supreme law of the land that regulated all aspects of social reality. However, with the advent of the British in 18th century changed the very notion of civil law. The philosophical foundations of law changed as result Zanzibar was influenced and guided by western theories of governance apart from experiencing the inevitable pressure of modernization. As a result Zanzibar adopted British model and proclaimed democratic[35]

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28 Evidence Decree, 1917 (Cap. 5 of 1917).

29 *ibid*.

30 *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi* [1934] Civil Appeal No. 16 ZLR 85.

31 *Ibid*.

32 *Aley Bin Saleh Abdisalami v. Muhamed Bin Saleh Abdusalami* (4 ZLR 63).

33 [2009] Civil Appeal No. 30 High Court, Vuga, (Unreported).

34 Section 118 of Evidence Decree, 1917.The section provides that "all people shall be competent to testify unless the court considered that they are prevented from understanding the question put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind or any other course of the same mind."

35 The preamble of the Zanzibar Constitution, 1984 provides: "AND WHEREAS, those principles can only be realized in a democratic society in which the Executive is accountable to a House of Representatives composed of elected members and representatives of the people and also a judiciary which is independent and dispenses justice without fear or favour thereby ensuring that all human rights are preserved and protected and that the duties of every person are faithfully discharged." See also section 5 of the Constitution which provides Zanzibar shall be a state of multiparty democracy which shalluphold the rule of law, human rights, equality, peace, justice and equity.

and took the secular out look that dominated the intellectual and political sight of the people.[36] In turn, the Common law inspired legislations did comfortably over ride *Sharī'ah* and significantly reduced personal status. This was caused by many reasons but not limited to radical nature of the traditions, pressing demand of Western modernization, the less regard of colonial rulers to develop Islamic law. [37] Only they did was to pay lip service to *Sharī'ah* so as to avoid avoided an open confrontation with its guardians.

A Sharī'ah and the Constitutional Ambivalence

Although Zanzibar is not an Islamic state nor does it proclaim Islam as being the official religion yet the Islamic law is both *de facto* and *de jure* recognized. The same is not true of Malaysia where Islam is declared under Article 3 of its Constitution to be the official religion, despite the fact that the state is practically a secular entity.[38] The Constitution of Zanzibar on the contrary provides distinct treatment to religion. Though the constitution avoids any reference to its Islamic or secular but the fact is to the contrary. The importance and of Islam and its exalted position is discernible from the Constitutional postulates. Its application is impliedly recognized since the same is subjected to no legal restriction. Furthermore, it receives special attention in all official and non-official activities.

The Constitution of Zanzibar proclaims in Article 9 (2) that "without prejudice to the relevant laws the profession of religion, worship and propagation of religion shall be free and a private affair of an individual…; To clear the doubt as to what religion refer to in this section, subsection 3 of the same section provides that the word "religion" shall be construed as including any reference to religious denominations and cognate expressions shall be construed accordingly. Thus, the dominion religion in Zanzibar is Islam where over 98 percent of the population is Muslim.[39]

In addition, the Zanzibar Constitution empowers the legislature to establish courts subordinate to the High Court and without prejudice to the provisions of this Constitution, those courts so established are vested with power and jurisdiction as provided by law.[40]

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[36] See, A. Najmabadi "Hazards of Modernity and Morality: Women, State and Ideology in Contemporary Iran," in D. Kandoyoti (ed.) *Women, Islam and the State*, (London: Macmillan, 1991).

[37] See Z. Mir-Hosseni, *Marriage on Trial, A Study of Islamic Family Law in Iran and Morocco Compared,* (London: I. B. Tauris & Co Ltd Publishers, 1993), at 10.

[38] According to the Article 3 (1) of the Federal Constitution In Malaysia, *Incorporating all amendments up to P.U.(A) 164/2009, First introduced as the Constitution of the Federation of Malaya on Merdeka Day: 31st August 1957 Subsequently introduced as the Constitution of Malaysia on Malaysia Day: 16th September 1963* "Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation." But despite of the political testament of the Alliance dated 25 September 1956 which stated "the religion of Malaysia shall be Islam." The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply that the state is not a secular state. Furthermore, other religions may be practised in peace and harmony in any part of the Federation. For more clarification on Status of Islam in Malaysia see Dato FaizaTamby Chik, "Malay and Islam in the Malaysian Constitution" [2009] 1 *MLJA* 129 at pages 137 – 138.

[39] And though the section guarantees for freedom of religion, in the Islamic context, freedom of religion does not mean freedom from religion. See *Kamariahbte Ali dan lain-lain lwn Kerajaan Negeri Kelantan, Malaysia dansatulagi* [2002] 3 MLJ 657 (CA), at 665.

[40] Article 100 of the Zanzibar Constitution [R.E. 2006] as amended by section 32 of Act No. 2 of 2002.

In regard with this Article existing Kadhis' Courts were created by the legislature. The Kadhis' Courts so created have, therefore, been empowered to exercise jurisdiction with regard to matters involving the determination of questions of Muslim law relating to personal status.[41] More significantly the law to be applied in these courts is Islamic law. For the same reason section 6(1) of the Constitution provides that "A Kadhis Court shall have and exercise jurisdiction in the determination questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion." This section does not provide the details regarding the kind and nature of matters which powers have to be exercised by Kadhis' Court. As a sequel to it cases and claims of diverse nature are presented to the Kadhis for adjudication which apparently do not fall court under the Kadhis' jurisdiction.[42]

On the contrary, same is not the position under Malaysian laws. All matters which are under the jurisdiction of Syariah Courts have been mentioned and enumerated in the Malaysian federal constitution under List I para.(1) states:

> Except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List…

Apart from this the Federal Constitution has made it straight and clear that the civil courts shall have no jurisdiction in respect of any matter that falls within the jurisdiction of the Syariah courts.[43]

In Malaysia, Syariah courts, which are lexically similar to Kadhis' Courts of Zanzibar, were established by virtue of a specific provision of the Federal Constitution. The list II Para (1) (state list) of Malaysia Federal Constitution provides, inter alia:

> ... The constitution, organization and procedure of Syariah Courts, which shall have jurisdiction only over persons professing the religion of Islam and in respect only

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41 Section 6 (1) of Kadhis Court.

42 See the case of *Suleiman Ali Haji and Ngwali Suleiman Ali v. Moh'd Ali Haji and Kidawa Ali Haji* [2009] Civil Case No. 462, District Kadhis' Court, Mwanakwerekwe, (unreported). The plaintiff filed a case of selling a house fraudulently which is typical a case within a jurisdiction of civil courts. Kadhis' Court however, entertained the case and convicted the defendant. It is shown here that the Kadhis' Court exercised its power out of jurisdiction but neither party appealed.

43 Article 121 (1A) of the Malaysian Federal Constitution.

> of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by Federal Law, the control of propagating doctrines and beliefs among persons professing the religion of Islam, the determination of matters of Islamic Law and doctrine and Malay customs.

It was under this paragraph that state legislatures made laws (called Enactments) thereby created the Syariah Courts in their respective states.[44] The administration of Islamic law in all of States identified in Constitution, therefore, depends upon the said enactments. On the contrary in Federal Territories of Malaysia, the constitution, jurisdiction and powers of Syariah Courts is enumerated under part IV of the Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505.[45]

B Protection of Islamic Law by other Laws

Apart from the above mentioned legislations that deal with the administration of Islamic law in Zanzibar there are some statutory Institutions like Wakf and Trust Commission created under the Wakf and Trust Act, 2007 (Act No. 2 of2007),[46] which is vested with powers to administrator Wakf properties, Trust properties and estate of deceased Muslims.[47] The other functions of the Commission are to coordinate Hajj (pilgrimage) activities in relation to pilgrims from Zanzibar and to regulate individuals, firms or associations providing travel and other services to pilgrims;[48] to coordinate and regulate the provision, collection and distribution of Zakkah and other charitable gifts, provisions and offerings for religious purposes or cause;[49] and to coordinate national 'Idd prayers and "*Idd Baraza*" (the council of *'eid*).[50]

Another important government Institution namely Office of the Mufti is established to deal with the personal matters of Muslims that may be bearing mundane or divine nature.[51] This Office was introduced in 2001 by the Office of Mufti Act.[52] As a guardian of Muslims in Zanzibar, the Office of Mufti is assigned number of functions that involve the application and interpretation of Islamic law on the basis of opinion of '*ulamā*. The functions of the Mufti *inter alia* include issuing of a "*fatwa*" or ruling on any issue whether secular or religious nature brought before him for his opinion. The office of the

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44 M. Mokhtar, 'Administration of Family Law in the Syariah Court' [2001] 3 *MLJA* at 82.

45 See section 40 – 56.

46 This law was made to repeal The Wakf Property Decree, 1980 (Chapter 103 of 1980), the Wakf Validating Decree, 1980 (Chapter 104 of 1980) and the Wakf and Trust Decree, 1980 (No.5 of 1980). See section 68 of the Act.

47 Section 4 (1) (a) (i) – (iii) of the Wakf and Trust Commission Act.

48 Section 4 (1) (b) *ibid*.

49 Section 4 (1) (c) *ibid*.

50 Section 4 (1) (d) *ibid*.

51 Mufti in this regard is appointed by President from Zanzibari who, in the opinion of the President, is qualified and has adequate knowledge in Islamic "*Sharī'ah*" and other religious matters and that he commands respect among Islamic scholars and Muslim community in general, see Section 4 (2) of the Office of Mufti Act, 2001 (Act No.9 of 2001) [R.E. 2006].

52 See section 3(1) of the Office of Mufti Act, 2001 (Act No.9 of 2001) [R.E. 2006].

Mufti may, on occasions, perform adjudicatory functions as well. As he may be asked to settle any religious dispute arising between Muslims; and or arising between Muslims and other with the consultation with leaders of that other religion.

The office of Mufti is also assigned some academic functions as well. It has to supervise Islamic research activities and organize lectures, workshops, seminars and other Islamic activities within the country.[53] It is the responsibility of the Office of Mufti to coordinate, supervise and keep record of the activities of all mosques. Besides, it coordinates and announces the sighting of a new moon. To approve the registration of Islamic Societies in accordance with the provisions of Societies Act, 1995 (No. 6 of 1995) and to do all such acts as may be incidental or conducive to the attainment of the objectives of this Act for the benefit of Muslim community.[54]

In keeping the collaboration of other Islamic institutions, the Mufti of Zanzibar is required to work hand in hand with the Office of Chief Kadhi and Executive Secretary of the Wakf and Trust Commission.[55] This shows that except the office of Mufti has no powers to take *suo moto* notice of the social conduct that violates the principles of Islamic law otherwise the social life in Zanzibar is per se controlled the office of Mufti in Zanzibar.

In Malaysia, process of administration of MPL has been incorporated into The Administration of Islamic Law (Federal Territories) Act 1993. The main objective of this Act being to provide for the enforcement and administration of Islamic Law, the organization and Constitution of the Syariah Courts, and other matter related thereto. It established *majilis*, bodies, and other committees to regulate the affairs of Muslims in accordance with the principles of Islamic law.[56] The Act also defines constitution and the jurisdiction of *Syariah* Courts along with matters relating to appeals.

All matters with regard to the religion of Islam are governed by the body known as the "*Majlis Agama Islam Wilayah Persekutuan*" which is constituted by 22 members[57] empowered to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.[58] The *Majlis* is a body corporate having perpetual succession and a corporate seal. Apart from giving advice to the Yang di-Pertuan Agong, it is powered to act as an executor of a will or as an administrator of the estate of a deceased person or as a trustee of any trust.[59] It is a duty of the *Majlis* to promote, stimulate, facilitate and undertake

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53 See section 9 (1) (a) – (h) of the Office of Mufti Act.

54 See section 9 (1) (i) – (p) *ibid*.

55 Section 9 (2) *ibid*.

56 Apart from matters mentioned in List II of the Federal Constitution, Act No. 505 also clarifies other matters which fall under the scope of Islamic law within a jurisdiction of Syariah Court. These include issues of marriage and family, charitable trust (*Baitulmal*), *Wakaf* and *nazr*, mosques, charitable collections, and matters relating to convertion to Islam.

57 According to section 10 (1) of Act No. 505, The Majlis shall consist of the following members: (a) a Chairman; (b) a Deputy Chairman; (c) the Chief Secretary to the Government or his representative; (d) the Attorney General or his representative; (e) the Inspector-General of Police or his representative; (f) the Mufti; (g) the Commissioner of the City of Kuala Lumpur; and (h) fifteen other members, at least five of whom shall be persons learned in Islamic studies.

58 Section 4 (1) of the Administration of Islamic Law (Federal Territories) Act 1993, Act No. 505.

59 See Section 5 (1) – (4) *ibid*.

the economic and social development and well-being of the Muslim community in the Federal Territories consistent with Islamic Law.[60]

Also that the Act No. 505 stands for establishing the institution of Iftah for the administration of Islamic law in Malaysia (Federal Territories). It empowers the Yang di-Pertuan Agong to appoint fit persons as Mufti and Deputy Mufti under section 32(1) on the advice of the Minister, and only after consulting the Majlis for the Federal Territories. The main function of Mufti is to issue *fatwa*, either upon the direction of Yang di-Pertuan Agong or on his own initiative or on the request of any person after formally making a representation addressed to him.[61] Once *fatwa* is issued, it is published in the *Gazette*, which thereafter becomes binding on every Muslim resident in the Federal Territories and it becomes his religious duty to abide by and uphold the *fatwa*, unless he is permitted by Islamic Law to depart from the *fatwa* in matters of personal observance, belief, or opinion.

From the above it is discernible that there are the areas wherein English law leaves Sharia alone and in some areas it trenches on Sharia were as some other areas have been tolerated by it. The same may need some elaboration.

V ISLAMIC LAW V/S CIVIL LAW: COMPROMISES AND CONFLICTS

It may not be strange to argue that Modern civilization does not belong to any particular nation or people because all the peoples of the world have contributed towards its growth and development. As a sequel to it is not illogical to argue that the legal systems share common foundation except that emphasis on the significance of their components varies from system to system. It is why these components found in Common law and its philosophy is traceable in Islamic legal system and its legal thinking as well.[62] Some may argue that the development of Common law has been on account of being based more on human liberty not exclusively on their intelligence. It is undeniable that the components like custom, legal precedent and analogy (*qiyas*) used by *Sharī'ah* are equally the heart throb of the Common law.[63] As such is it safe to assert that the Common law has borrowed number of the legal principles such as equity and justice, from Islamic law? [64] It may

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[60] For details see duty of the Majlis for socio-economic development of Muslims section 7 (1) – 7 (2) (g).

[61] Section 34 (1) *ibid*. However, according to subsection (2) "No statement made by the Mufti shall be taken to be a *fatwa* unless and until it is published in the *Gazette* pursuant to subsection (1)." In exercising the process of issuing any *fatwa*, or certifying any opinion, the Mufti is statutorily bound to follow the accepted views *(qaulmuktamad)* of the *Mazhab Syafie.* However, if the he considers that following that will lead to a situation which is repugnant to public interest, the Mufti is allowed to the *qaulmuktamad* of the *Mazhab Hanafi, Maliki* or *Hanbali.* And if the Mufti considers that none of the *qaulmuktamad* of the four *Mazhabs* may be followed without leading to a situation which is repugnant to public interest, the Mufti may then resolve the question according to his own judgment without being bound by the *qaulmuktamad* of any of the four *Mazhib*. See section 39 of the Act. Moreover, before it is published the Islamic Legal Consultative Committee, established under section 37 of the same Act, would have to be called by Mufti for discussion of the proposed *fatwa.*

[62] C. Roederer and D. Moellendorf, *Jurisprudence*, (Lansdowne: Juta & Company Ltd., 2001), at 495.

[63] A. Akgnduz, *Islamic Law in Theory and Practice: Introduction to Islamic Law*, (Rotterdem: IUR Press, 2010), at pages 28 – 30.

[64] A. Haydar, *Durar al-Hukkâm Sharhu Majalla a-Ahkâm*, (Translated into Arabic by Fahami Al-Husayni), Vol. 1, Beirut: Publisher, n.d) at 17 – 20 (in Arabic), in Ahmed Akgnduz *ibid*.

not be fair because the two systems of law are practically different and share different historical background. As a result these systems can not be put together in one basket.

It is true that academia have been attempting to show impact of influences of one legal system on another legal system as some debate the influence of foreign laws like Roman law on Islamic law and conclude that the former has profoundly influenced the latter but the debate remains till date inconclusive.[65] This is possible only where philosophies espoused by the two were similar that not being the case the conclusion is bound to be different. It is why Islamic law did not and would not absorb the influence of existing Common law system like the case has been of the Roman law because it being different from Islamic law both in philosophy and ramification. The major difference being that Islamic law is based on divine revelation whereas Common law is the product the human intelligence. This being the core issue hence the rules that contradict the Islamic teachings cannot percolate into broader framework and such rules that contradict the fundamentals of *Sharī'*ah exist in abundance in Common law.

However, on account geo-political reasons the Islamic world has preferably sought to protect to Muslim personal laws than reclaiming the whole of the Islamic legal system. This necessitated reclaiming Islamic values at gross root level which could be possible only with reorientation of the family. The method per se appears to have sociological roots because family is the nucleus of the nation. It begins with marriage, which includes divorce, child custody, and other issues pertaining to family, to be governed by Islamic law while other laws, like criminal codes or commercial codes, are imported from Western countries are left untouched. Needless to mention that personal laws currently in operation in the Muslim countries is available in the form of codes promulgated by the states. These codes are the product of the people and their deliberations therefore plays their role towards nation/state building. This explains the significant variation in particular laws and their application in different Muslim countries, notwithstanding the claim that they are *Sharī'ah* rules.[66]

It may be interesting to note that the legal history of Zanzibar is almost similar to the legal history of Malaysia particularly from the time of introduction of the British rule in 18th century down to their time of independence. But contrary to Malaysian situation soon after the independence, the speed of reformation of legal system in Zanzibar was very slow that resulted in long time legal problems which still need special attention. With respect to the administration of Islamic law, which is the core of this article, Malaysia unlike Zanzibar has taken many positive steps. The Federal Constitution of Malaysia has reiterated under Article 121 (1A) that the *Syariah* Courts, have the power to administer Islamic law hence enjoy exclusive jurisdiction over Muslim personal matters under their jurisdiction.

On the contrary there being ambiguity in Zanzibar with respect to jurisdiction of the Kadhis' Courts on the matters of personal status which almost is similar to one that existed in Malaysia for more than two decades ago this is now only a part of Malaysian

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65 H. J. Liebesny, *The Law of Near & Meddle East: Readings, Cases &Materials*, (New York: SUNY Press, 1975), at 33 – 8.

66 A. Sonbol, 'Shari'ah and State Formation: Historical Perspective' 8 *Chi. J. Int'l L*, at 60.

history. Now the Constitutional amendment in 1988 helped to correct the problem. As a result it has helped to straighten the jurisdiction of the Common law and the Islamic law courts. In this regard it may not be out of place to refer to Tun Mahathir Mohamad, as the then Prime Minister, who referred to the problem of interference by Civil Courts in the administration of justice of the *Syariah* Courts, at the time of tabling the constitutional amendment and is reported to have observed: [67]

> At that time the civil courts had reviewed and interfered with proceedings of Syariah courts. There were instances where civil courts entertained applications that sought to re-adjudicate matters that Syariah courts had determined.[68] There was also a case where the civil court had applied laws of general application which are contrary to Islamic law with regard to the legitimacy of a child born during a marriage between Muslims.[69] As the Syariah Court system predates the civil court system, this should not have happened. Furthermore, civil courts also prescribe to the principle of abuse of process of courts where parties are not allowed to use the courts to unjustifiably frustrate proceedings in other forums.

Professor Ahmad Ibrahim while expressing his feelings on the subject expressed his satisfaction and did not only appreciate the perspective of the change but highlighted also the objective of the amendment which he found was consistent with the speech of the Prime Minister. For him, the amendment was to ensure that Syariah Courts exercise their jurisdiction.[70]

This is a kind of movement within the system for correcting the shortcomings which should rejuvenate with the progress and development of the people and the same kind of movement is also required to be initiated in Zanzibar system so as to make Kadhis' Court independent and exercising exclusive jurisdiction over the Muslims personal matters. The existing structure does not ensure that independence and apparently does not seem to manifest any activity like the administration of Islamic justice. This apart, the law applied by the Kadhis' Courts should be purely Islamic be it matter of procedure or evidence. This would call for reform and improvement so that the environment of contradiction and confrontation between Islamic and Common law in Kadhis' Courts that virtually obstruct the administration of Islamic law comes to an end.

It may not be out of place to mention that in Malaysia, which has almost same legal system like that Zanzibar; the *Syariah* Courts are independent and administer Islamic law independent from encroachment of the Civil Courts. In practice, *Syariah* Courts have their own evidence Act and procedural rules which are made according to the precepts of Islamic law. Kadhis' Courts in Zanzibar are not independent in the sense the courts lack full powers as unlike Common Law Courts and are under the hierarchical supervision of

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67 F. Shuaib, *Powers and Jurisdiction of Syariah Courts in Malaysia,* second edition, (Petaling Jaya: LexisNexis, 2008), at pages 36 – 37.

68 *Myriam v. Mohamed Ariff* [1971] 1 *MLJ* 265.

69 *Ainan bin Mahmud v. Syed Abubakar* [1939] *MLJ* 209.

70 A. Ibrahim, 'The Amendment to Article 121 of the Federal Constitution: Its Effect on Administration of Islamic Law' [1989] 2 *MLJ* xvii at 17.

the non-*Sharī'ah* courts.[71] Even the final appeals are heard by the Common Law Courts without any regard to the sensitivity of the Islamic law requirements. It is not unusual to find non-Muslim judges deciding Islamic law cases that bring to forth the instances of constant conflict between Islamic and Common law principles in the matters of administration of justice.

A Islamic Courts and the Procedural Law

The intermixing of Islamic law with Common law in Zanzibar is discernible from the fact that the procedural law followed in the Common law courts is equally followed by the Kadhis Court. This tendency practically vitiates the purpose of the establishment of these courts. The same can be evaluated in the light of decided cases and court rulings. The same Decree which is applied in Common law is referred to the cases that are heard by the Kadhis' Court. This has been a practice since the introduction of the Civil Procedure Decree in 1917. In *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi*[72] Knight Bruce, Acting J., rejected the opinion of Sheikh Tahir, which was attached to his judgment, on demanding the oath of satisfaction from plaintiff and observed that:

> Such an oath is obligatory according to the *Sharī'ah*, But according to the Zanzibar Court Decree, 1823, section 28 (1) "all courts hereby constituted shall follow as far as circumstances will admit the procedure set out in Civil Procedure Decree." And the procedure adopted in hearing ex-parte case is laid down in O.IX r. 6 of the first schedule of the Decree with the exceptions that it be demanded this oath from the plaintiff. The learned Kadhi has in fact followed the procedure. I must admit that. I found it difficult to support the demand for this oath to be taken.

Recently, in the case of *Pili Pongwa Khamis v. Ishau Abdallah Kahmis*,[73] in trial court the appellant requested dissolution of marriage through *fasakh* but the District Court found no grounds for *fasakh*. In her appeal to Chief Kadhi's Court, she demanded a divorce on *khulu'* but did not succeed. The appellant petitioned for a review of her judgment to the High Court and claimed that she can no longer able to live with her husband by insisting her right of *khulu'*. On the ruling of her application, the High Court held that it cannot proceed with the application since the conditions for applying review mentioned under O. L of Civil Procedure Decree, 1917 (Cap. 8 of 1917) were not met. Hence, in this case the petition was dropped since it did not meet the requirement of civil law postulate incorporated in Cap. 8.

Similarly, in the case of *Idrisa Hussein Mrisho v. SihabaSoud Waziri* several provisions of Civil Procedure Decree were mentioned. These include s. 83 (1) (c), O. XVI r. 1 and O. XXVIII rule 4 and 3. For civil matrimonial case Order XI rule 3 of Civil

71 Structurally, Kadhis' Courts in Zanzibar are subordinates courts of the High Court which is technically common law Court.

72 *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi* [1934] Civil Appeal No. 16

73 *Pili Pongwa Khamis v. Ishau Abdallah Khamis* [2005] Civil Appeal No. 19 High Court, Vuga, (Unreported).

Procedure Decree was applied in *Jackson Bulezi Musiki v. Zaina Iddi Ramadhan*[74] which is typical civil case.

The main problem is that, Kadhis' Court Act, which seems to empower Kadhi Courts to administer Islamic law, does not specifically provide for the application of Muslim procedural laws in such Courts rather it directs only for the enactment of those laws. Section 9 provides:

(1) The Chief Justice in consultation with the Chief Kadhi may make rules of court providing for the procedure and practice to be followed in Kadhis' Courts.
(2) Until rules of court are made under subsection (1) of this section, and so far as such rules do not extend, procedure and practice in a Kadhis' Court shall be in accordance with those prescribed for subordinate courts by and under the Civil Procedure Decree.

Since 1985 when this law was passed no attempts have ever been made to pass those rules of procedure and practice for Kadhis' Courts. The wording of this section indicates that, the use of Islamic rules of procedure and practice are allowed in Kadhis' Courts in Zanzibar but failure of its enactment the legislatures, the Civil Procedure Decree is applied.

On the contrary in Malaysia, all civil proceedings commencing in any Syariah Court, except as otherwise provided under any other written law or ordered by the Court, has to be regulated by the *Sharī'ah* based procedures, in particular the *Syariah* Court Civil Procedure (Federal Territories) Act 1998, Act No. 585.[75] Accordingly, the proceedings before Syariah Courts are required to be made in conformity with this Act. The Act ordains in this regard that, "Any provisions or interpretation of the provisions under this Act which is inconsistent with *Hukum Syarah* shall, to the extent of the inconsistency, be void. (2) In the event of a *lacuna* or where any matter is not expressly provided for in this Act, the Court shall apply *Hukum Syarak.*[76]

This Act therefore signifies the fact that no civil or common law procedures are to be applied in Syariah Courts. Thus the non-compliance with any provisions of this Act or any rules made thereunder shall not render any proceedings void unless the Court shall so order, But the Court may, of its own motion or on the application of any party, set aside any proceeding wholly or in part as irregular, or order such amendments to be made on such terms as it thinks just.[77]

B Islamic Courts and the Principles of Evidence

Another instance that testifies an intermixing of the Islamic and Common law practices in Zanzibar is manifested from the application of rules of evidence in Kadhis' Courts. As the above analysis indicates that apart from the substantive laws, which are said to be

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74 *Jackson Bulezi Musiki v. Zaina Iddi Ramadhan* [2005] Matrimonial Case No. 36 High Court, Vuga (Unreported).
75 Section 2.
76 Section 245 of the Syariah Court Civil Procedure (Federal Territories) Act.
77 See section 5 *ibid*.

different but the matters relating to personal status heard by Kadhis Courts in Zanzibar are procedurally controlled by the law generally applicable to the Common law court. .

Contrary to what is practice the Kadhis' Court Act specifically mentions that Muslim law of evidence shall be applicable in Kadhis' Courts including that of Chief Kadhi. The Act as revised in 2006 provides under Section 7 that "The law and rules of evidence to be applied in Kadhis Courts including that of a Chief Kadhi shall be those applicable under Muslim law." But no legislation of Islamic law of procedure is passed. Consequently, the proceedings before Kadhis' Courts are conducted and regulated by a hybrid procedure of traditional Islamic law and Common law. The decisions of the Kadhi show that there are only few Judgments refer to the provisions of *Qur'ān*, *Hadith*, and or juristic writings, and much more, only a few cases refer Civil Procedure Decree and Evidence Decree respectively.[78] The observation from District Kadhis' Courts reveals that only Common law practice is applied without due regard whether it is given by particular provision from Civil Procedure Decree.

Contrary to the practice in Malaysia, the *Syariah* Court Evidence (Federal Territories) Act 1997, Act No. 561 is the law applied for the evidence matters in Syariah Courts. As according to section 2 of this Act, it applies to all judicial proceedings in or before any Syariah Court. The Act covers all essential issues of evidence in Islamic law, that includes *qarinah, iqrar,* oral evidence, documentary evidence, burden to produce, witnesses – capacity, number, relation,- examination of witnesses, and special provisions relating to testimony of witnesses. To assure the compatibility of the Islamic principles, the Syariah Court Evidence Act provides that "Any provision or interpretation of the provision of this Act which is inconsistent with *"Hukum Syarak"* shall, to the extent of the inconsistency, be void. Moreover, it express that in the event of a *lacuna* or where any matter is not expressly provided for in this Act, the Court shall apply *Hukum Syarak*.[79]

VI CONCLUSION

Although Zanzibar has a good modernized legal system, which gives opportunity to the application of both Islamic and Common Law. This article reveals that the present system collides between the two in application. The said mixing of the systems is more appearing in laws and court structures. The most noticeable uniqueness of Zanzibar legal system is the existing of the coherent relationship between these two systems. The impact of the Evidence Decree, 1917,[80] in abrogation of Muslim law of evidence is still unattainable. Despite of the fact that section 7 provides for the application of Muslim law of Evidence in Kadhis' Court, in practice the application the Common Law of evidence is applied instead.

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78 *Idrisa Hussein Mrisho v. Sihaba Soud Waziri* [2009] Civil Appeal No. 30 High Court, Vuga, (Unreported).

79 Section 130 of the Syariah Court Evidence (Federal Territories) Act 1997 at 130.

80 Evidence Decree, 1917 (Cap. 5 of 1917), as given under section 2 of the Decree "the Muslim Law of evidence shall not apply in any of the court in Zanzibar." This was also shown in the case of *Rashid Bin Said El-Hinawi v. Abdulah Bin Ali El-Hinawi op cit*. Moreover, in recent case of *Idrisa Hussein Mrisho v. Sihaba Soud Waziri op cit*, section 118 of the Evidence Decree was applied, in a case emanated from *Kadhis'* court, to accept the evidence of the respondent's witness which was questioned by the appellant.

Contradiction of laws was also shown in the scope of court procedures. Thus the study reveals that the procedures followed in Kadhis' court are the same as applied in common law courts.[81]Though the Kadhis' Court Act gives permission for the formation of the rules in accordance with the Islamic precepts these permission had never been exercised and in turn an alternate of using common law procedure is opted.

The analysis above explores position of the legal framework in administration of Islamic law in Zanzibar as it is compared with Malaysian experience. It inspires the advanced modification which would bring about a positive change in framework of administration of Islamic law in Zanzibar. The Government may ensure that non-Muslims and communal organizations should refrain from hearing and deciding any case relating to Muslim personal matters. People should profess their respective religions in the true spirit of religious coexistence and should avoid any undesirable criticism. The Government should ensure it, by own actions and necessary directions. Improving and strengthening the administration of MPL in Zanzibar by imposing a separate system which will work on the merits of each system would easy the administration of Islamic law. It is the legitimate expectation of Muslims to be governed by Islamic law before Kadhis' Courts.

[81] See section 9 (1) of Kadhis' Court Act, 1985 also *Pili Pongwa Khamis v. Ishau Abdallah Kahmis op cit*.

Legislative Action for Protection of Juvenile Offenders in Malaysia and Bangladesh: An Overview

Dr. Nahid Ferdousi*

Abstract

Delinquent children have the right to legal protection and fair treatment in a justice system that respects their human rights. Separate legislation along with child-friendly justice is very important in changing the life of offenders. The main objectives of the separate legal measures are protection, rehabilitation and reintegration to restore the delinquent children to normal living condition and to develop their personality as a law abiding and responsible citizen. But the law and policy for child protection is developed in different countries in conformity with Convention on the Rights of the Child (CRC) 1989 and other international guidelines. The many differences and complexities of juvenile justice and the variations in practice have not been always easy to capture and reflect in these guidelines. Comprehensive juvenile justice systems do not exist in every country. This article assesses the legal mechanisms for protection of juvenile delinquents in Malaysia and Bangladesh.

I. Introduction

In line with the development of human civilization, the separate legislation for child offenders has grown in different courtiers in this world. [1] Significant reform initiatives are underway in many countries of the Asian countries. In fact, the justice system does not only cover the treatment of the delinquent children but also address the root causes of the offences as well as implement appropriate measures to prevent unusual behaviour. It is a core dimension of the rights of the child and a vital area where a State's commitment to children's rights can be best expressed. [2]

In 1899, juvenile justice concept was first introduced in Chicago, United States of America. Afterwards, juvenile justice system has been introduced in almost all the countries of the civilized world.[3] However, juvenile deviation from societal norms has existed throughout the world which greatly affects law and order situation of the society and the country at large.[4] The global approach for prevention and protection of juvenile

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1 Alice Mcgrath, *A Voice for the Future of Juvenile Justice In Asia-Pacific, the Asia Pacific Council For Juvenile Justice*, Bangkok, March 2013, Published by the International Juvenile Justice Observatory (IJJO), p. 13.

2 M. Imman Ali, *Towards A Justice Delivery System for Children in Bangladesh*, A guide and Case Law on Children in conflict with the Law, UNICEF Bangladesh 2010, p. 13.

offenders through administration of justice has undergone vast transformations under the auspices of the United Nations with various international rules, conventions and guidelines. But there are different views about the concept of juvenile separate treatment and their justice system also. Every country has a different approach towards the protective measures for juveniles under their own legal systems.[5] The control of juvenile delinquency and their justice system in line with the international instruments have slight differences in the South and South-East Asia like Bangladesh and Malaysia.

Since independence of Bangladesh in 1971, the first expression of concern about the protection of children came through the Children Act 1974,[6] the unique principle for children in relating to trial, custody, protection, punishment, treatment and reformation. But there were many loopholes in the existing laws itself regarding the definition of a child as well as the age limit and different legislations provide different age limits of juveniles. Consequently, children are not tried in separate juvenile courts; confidentiality is not maintained and the social enquiry reports of probation officers and alternative measures are seldom considered fairly.

However, there is no special juvenile justice policy with welfare, rehabilitation and reintegration yet.[7] Even the legal measures related to the treatment of offender children were not unified and they were treated under scattered penal laws[8] until 2013. Thereafter, the government enacted the National Children Policy 2011[9] and the Children Act 2013[10] on the basis of the CRC which is a positive step and will gradually pave the way for the protection of the rights of the child in all sphere of life. The main purpose of the Act is to protect the children through various measures for the prevention of delinquency including diversions; restorative justice; guarantees of a fair trial; support for social re-integration and to develop a child-freindly juvenile court in the country. Thus, all dealing authorities should bring about a change in the mindset to provide a child-friendly justice system. [11]

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3 McShane Marilyn D. and Williams Frank P., (eds.), *Encyclopedia of Juvenile Justice*, Sage Publication, London, 2003, pp. 119, 216.

4 UNICEF, *Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law*, UNICEF, Dhaka, 2006, p. 39.

5 Abul Hakim Sarker, *Juvenile Delinquency: Dhaka City Experience*, Human Nursery for Development, Dhaka, 2001, p.45.

6 Now repealed by the Children Act 2013. The Act was made effective from 21 August 2013.

7 Afsan Chowdhury, *et al.* (eds.), *Our Daughters in Safe Custody*, A Year Book on Juvenile Justice and Violence against Children in Bangladesh, Save the Children UK and Services Plus, Bangladesh, 2002, p. 3.

8 The most commonly applied penal laws against children are the Special Powers Act, 1974, for gang, rape and murder etc. the Anti-Terrorist Act, 1992 for teasing girl, snatching, hijacking and the Arms Act, 1878 for illegal possession of arms. These penal laws do not lead the best interest of the juveniles in a uniform way.

9 The government of Bangladesh also adopted the National Children Policy 2011 which contains specific provisions, Articles 4.2, 4.3 and 6.7 concerning protection of children from all kinds of violence, abuse and discrimination.

10 Cabinet gives final approval to Children Act, 2013', Bangladesh Sangbad Sangstha, 25 February, 2013. Available at: http://www1.bssnews.net/newsDetails.php?cat=0&id=315573&date=2012-12-13.

11 "Child-friendly Justice" refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.

In Malaysia, like Bangladesh significant progress has been achieved when it ratified the CRC.[12] Significant progress has been achieved in the establishment of legal frameworks for child protection services with the introduction of the Child Act 2001[13] and other relevant laws. This framework has further been strengthened with the introduction of the National Policy for Children and the National Child Protection Policy. This framework has further been strengthened with the National Policy on Children and the National Child Protection Policy as well as Action Plans in 2009. Supporting the implementation of these two policies is the government's initiative to propose a Social Worker Act due to be tabled in Parliament in 2011. The Act will propose to regulate the profession of social work in Malaysia and strengthen the provision of welfare services towards the care, safety and protection of all citizens in Malaysia. It brings Malaysia closer to achieving a comprehensive child protection system with a clear continuum of prevention, early and rehabilitative interventions. Thus, as a signatory country of CRC, Bangladesh and Malaysia, it is fully committed to improve the status of children of the country. In accordance with the CRC and the Constitution of this country, the government has committed itself in adopting a rights-based approach to prevent and protect from all forms of discrimination of children.[14]

II. State Laws and Policies in Bangladesh

A. Domestic Legislation

Bangladesh is one of the most densely populated countries in the world. Children under the age of 18 years account for 64 million in Bangladesh.[15] But the protective legislations on juvenile justice are not comprehensive yet in Bangladesh. Bangladesh formally focused its attention on children protection in the Constitution of Bangladesh.[16] The major legislations related to juveniles were the Probation of Offenders Ordinance,

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12 Malaysia began its creation of such an environment when it ratified the Convention on the Rights of the Child (CRC) in 1995 with an initial 12 reservations. In 1998, Malaysia withdrew 5 reservations i.e. Article 22, 28 (1) (b), (c), (d) and (e), 40(3) and (4), 44 dan 45. Subsequently, in July 2010, Malaysia withdrew 3 more reservations i.e. Article 1, 13 and 15 leaving 5 remaining reservations (articles 2, 7, 14, 28(1)(a) and 37) and it indicates the Government's commitment towards strengthening the child protection system. The first country report on the implementation of the CRC was presented to the United Nations Committee on the Rights of the Child in January 2007 and the second report is due to be submitted to the Committee in 2012. Subsequently, the country enacted various legislations contributing to the evolving child protection environment that included the Child Care Centre Act of 1984, Care Centre Act 1993 and lead to the most significant enactment of the Child Act in 2001.

13 The Child Act 2011(Act no. 611)

14 Child Protection and Child Welfare Services in Malaysia, Beijing High Level Meeting November 4-6, 2010, Ministry of Women, Family and Community Development, p. 3.

15 Available at: http://www.unicef.org/bangladesh/cbg_(18.10.08).pdf, accessed 28 March 2014.

16 The Constitution of the People's Republic of Bangladesh 1972 provides some provisions for children rights which are directive principles of state policy in Articles 15, 17, 25 (1), fundamental rights in Articles 27, 28, 31, 32, 39 and power of judicial review in article 26. In particular, Article 27, 28 and 31 of the Constitution lays down the general principle regarding the protection of children and others from all forms of discrimination. Article 31 also guarantees everyone the right to life, liberty and freedom from arbitrary detention. This provision specifically entitles a citizen to the right of protection by law and freedom from inhumane treatment.

1960 (Amended in 1964), the Children Act, 1974; [17] and the Children Rules, 1976.[18] The Children Act, 1974 provided a wide scope to the custody, protection and treatment of the juvenile delinquents under 16 years[19] in almost all spheres of their lives. It also provided separate juvenile courts, and forbids joint trial of child offenders with adults, even where the offence has been committed jointly.[20] But the Act was not consistent with regard to age as identified by the CRC. According to CRC persons below 18 years of age are regarded as child but the Children Act defines a child is any person who is under the age of 16 years. The Act did not prescribe a full-proof method of age determination, i.e., who is going to ascertain/identify the age of the child.

Apart from the Act and Rules, there are some provisions of other laws[21] dealing with juveniles in particular which is not updated and non child-friendly nature. As a result, juveniles suffered for a long period of time under criminal justice system. Most of these laws are not child-friendly and allow punishment of juvenile delinquents.[22] Age of juveniles in different laws was a serious problem in Bangladesh. Different legislations provided dissimilar age limits of juveniles. The age limits of children provided under various legislations are as follows:

Table 1: Age of Children in Various Legislations in Bangladesh

Law	Section	Age Specified (in Year)
The Christian Divorce Act, 1869	Section 3 (v)	Boy: below 16; Girl: 13
The Contract Act, 1872	Section 11	Before attaining 18
The Majority Act, 1875	Section 3	Before attaining 18
The Guardian & Wards Act, 1890	Section 4 (i)	Below 18
The Railway Act, 1890	Section 130	Below 12
The Bengal Jail Code, 1894	Rule 963	Under the age of 15
The Code of Criminal Procedure, 1898	Section 497	Below 16
The Juvenile Smoking Act, 1919	Section 3(1)	Below 16
The Child Marriage Restraint Act, 1929	Section 2(a)	Male: Under 21 Female : Under 18
The Suppression of Immoral Traffic Act, 1933	Section 11, 12	Female under 18

17 The Children Act1974 (Act No. XXXIX of 1974).

18 The Children Rules, 1976 (Rules No. S.R.0.103-L76).

19 According to the Children Act 1974; person who is below the age of 16 years is considered as a child which was not consistency with international instruments. As per the CRC, a person who is below the age of 18 years is regarded as a child.

20 The Children Act, 1974, sections 6, 8.

21 Other laws such as the Special Powers Act 1974, the Arms Act 1887, the Nari O Shishu Nirjaton Domon Ain, 2000 etc. were passed which empowered the police to arrest delinquent on suspicion of anti-state activities as well as take measures to stop heinous offences against women and children. These penal laws do not lead the best interest of the juveniles in a uniform way.

22 Afsan Chowdhury, *et al.*, (eds.), *Our Children in Jail*, Year Book on the State of Juvenile Justice and Violence against Children in Bangladesh, Save the Children UK and Odhikar, Dhaka, 2001, p. 6.

Law	Section	Age Specified (in Year)
The Vagrancy Act, 1943	Section 2(iii)	Under 14
The Orphanages and Widows Homes Act, 1944	Section 2(2)	Below 18
The Children Act, 1974	Section 2(f)	Below 16
The Bangladesh Shishu Academy Ordinance, 1976	Section	Below 16
National Children Policy, 1994	Chapter 2	Below 14
The Women and Children Repression Prevention Act, 2000	Section 2(xi)	A person not over 16 years
Bangladesh Labour Code, 2006	Section 2 (f)	Below 14
National Children Policy, 2011	Section 2	Below 18
The Children Act, 2013	Section 2(u)	Below 18

However, age of penal responsibility is most important factor to treat the children as a juvenile delinquent. The Penal Code states in section 82 that nothing is an offence that is done by a child below the age of 9 years. Section 83 provides that criminal responsibility between the ages of 9 and 12 is subject to judicial assessment of their capacity to understand the nature and consequences of their actions at the time of the occurrence.[23] So, children under 9 years of age, has no criminal responsibility. 9 to 12 years of age has criminal responsibility on maturity and 12 to 18 years of age has full criminal responsibility as a juvenile in Bangladesh's context.

Since there are some significant loopholes in the Children Act 1974, the government has taken initiatives to amend and make it up to date. In 2013, the new Children Act has been enacted and it is a great initiative to provide separate treatment by the special units. Due to the differences in ages of children, they were denied fair justice. This discrepancy has been addressed in the Act. The age of the child has been increased from 16 to 18 years[24] which a delinquent will be treated as juvenile.

The Children Act 2013 guaranteed that the dignity and privacy of the child would be respected whilst investigations, inquiries and searches are conducted. The Act specifically provides that no child below the age of 9 years may be arrested under any circumstances and also no child shall be handcuffed or tied with a rope around his waist and specifically designated juvenile officer in charge of all issues and inquiries pertaining to juveniles to create a system of child-friendly policing. [25] In this context, new initiative has been introduced by the Act of 2013 that mandates the Child Affairs Desk[26] in every police station and the main responsibilities of this desk include maintaining separate files and registers for the cases involving children. where any child is brought to the police station,

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[23] The Penal Code 1860 as amended in 2004; Also see M. Imman Ali, *Towards a Justice Delivery System for Children in Bangladesh*, UNICEF, 2010.

[24] The Children Act 2013(Act No. 26 of 2013), section 4. As per section a child is defined by the Act and includes anyone up to the age of 18 years.

[25] The Children Act 2013, section 44 (1).

[26] *Ibid.*, section 13.

the police officer shall inform the child's parents or in their absence, foster care or legal guardian or members of his extended family and to notify them of the date for producing the child before the court along with other details of the case.[27]

Similarly, the Act prescribed the separate charge sheet for the child offenders; even when they have committed an offence together there will be separate charge sheets- one for the adult and one for the child,[28] which indicates that, there will be separate trials. In addition, the most important provision of the Act is the concept of diversion and alternative care[29] which depends upon both the police officer and probation officer to take diversionary measures and assess the possibility of bail.

Emphasis has been given on the alternative measures for delinquent children in the new Act. It states that the police officer or juvenile court can look for alternative preventive measures during any stages of the formal judicial system. The specialized approach adopted towards delinquent children such as appointment, responsibilities and duties of probation officers[30] approved, to provide probation service and rehabilitation the child offenders by the prescribed authorities and to observe the conditions relating to after care service considering the child's best interest.[31] The responsibility to monitor, coordinate, review and evaluate the activities of the Child Development Centre's (CDCs)[32] has delegated on the district and sub-district Child Welfare Boards.[33]

In the court proceedings order of punishment and detention is restricted by the Act and introduces the provision for settlement of dispute by probation officer where any child has committed any offence of lesser gravity. On the other hand, the concept of restorative justice has been introduced which provides for compensation to the child who is a victim of crimes. However, many aspects of separate treatment of juvenile delinquency could be covered by the Act of 2013.

The Act provides that at least one children court is to be established in every district head quarter and in every metropolitan area as the case may be.[34] The children's court has the powers of a court of sessions under the code of criminal procedure and powers of a civil court in respect of service of summons, summoning witness and ensuring their attendance, production of documents or materials and receiving evidence on oath.[35] The court has been given the responsibility for assessment and determination of age of the child[36] and offender children at all stages of the trial shall be considered as a right of the child.[37] Keeping the child in safe custody during the pendency of any trail shall be considered as a last resort and for the shortest possible period of time, and any child kept in safe custody shall be dealt with by way of diversion within the shortest possible time.[38]

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27 *Ibid.*, section 45.
28 *Ibid.*, section 15.
29 *Ibid.*, section 48.
30 *Ibid.*, section 5.
31 The Children Act 2013, section 84.
32 CDC as correctional institute is responsible to ensure care and development of delinquent child.
33 The Children Act 2013, sections 7-9.
34 *Ibid.*, section 16.
35 *Ibid.*, section 18.
36 *Ibid.*, section 21.
37 *Ibid.*, section 22.
38 *Ibid.*, section 26.

The court shall prefer bail practice and social enquiry report for the best interest of the offender children and complete the trial within 360 days from the day of the child's first appearance before the court.[39] In doing so, the Act also provides that in any case where a child in conflict with the law or a child in contact with law is involved under any law whatsoever, the children court shall have the exclusive jurisdiction to try that case.[40] As of today no children court has been set-up in district level.

The Children Act 2013 mandated to establish and maintain necessary number of CDCs based on gender disaggregation for the accommodation, reformation and development of children who are ordered to be detained and those who are undergoing trial.[41] Accordingly, additional CDCs are not yet establish at district levels. The Act reiterates that no child below the age of 9 years shall be kept in a certified institute and also it provided that different aged shall not be kept in the same room and on the same floor.[42]

But the Act is not implemented by the setting with appointment child affairs police officers, probation officers, national welfare boards, establishing sufficient numbers of CDCs and juvenile courts. The State is committed to ensuring care and protection to all children by the new Act but there is no separate policy related to children in especially difficult circumstances or to the juvenile justice. There are only three correctional institutions[43] in Bangladesh for rectification and rehabilitation of juveniles which were renamed as Child Development Centre (CDC) under the Department of Social Services in the Ministry of Social Welfare in 2006.[44] Until 1995, there was only one correctional institute for male children at Tongi, Gazipur which was established in 1978. In 1995, the government established another correctional institute for male children in Jessore. But, until 2002, there was no such institute for girl child in Bangladesh.[45] But the conditions in the three CDCs are far from satisfactory.

B. International Standards and Norms of Juvenile Justice

All ratified states to the CRC has the obligation to undertake all necessary steps, including legislative, administrative and other measures to implement the rights contained in this instrument.[46] Bangladesh is one of the first signatories to the CRC and is bound to take steps for implementing the provisions thereof. After signing the CRC[47] in 1990, child development issue has been focused in Bangladesh. The Committee on the Rights of the Child in its concluding observations on Bangladesh has repeatedly raised concerns about the administration of the juvenile justice system and the Committee has made specific

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39 *Ibid.*, sections 31, 32.

40 *Ibid.*, section 17.

41 The Children Act, 2013, section 59(1).

42 *Ibid.*, sections 84, 85.

43 At present, there are three correctional institutions in Tongi and Jessore (for male child) and Konabari (for girl child) in Bangladesh for rehabilitation of juveniles.

44 Ministry of Social Welfare, Citizen Charter, Department of Social Services, Dhaka, 2012, p. 20.

45 Borhan Uddin Khan and Muhammad Mahbubur Rahman, *Protection of Children in Conflict with the Law in Bangladesh*, Save the Children UK, Dhaka, 2008, p. 25.

46 The Convention on the Rights of the Child 1989, Article 4.

47 The Convention on the Rights of the Child (CRC) adopted by the United Nations, General Assembly, 20 November, 1989, The Convention came into force on 2 September, 1990 in Bangladesh.

recommendations aimed to bring juvenile justice in line with the Convention, including raising the minimum age of criminal responsibility to 12 years from 9 years, considering the establishment of specialised juvenile courts, setting legal limits on the length of pre-trial detention of children, continuing efforts to ensure that children are placed in detention separately from adults, adopting policies to promote alternative measures to detention, providing children with adequate legal assistance and establishing an independent body for the monitoring of detention conditions.[48]

However, the Act was created prior to the coming into force of many international standards and did not reflect the principles of the CRC[49] and other international instruments.[50] Most of Bangladesh's existing legislation on juvenile justice predates current international standards on juvenile justice such as the CRC, the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (the Beijing Rules),[51] the UN Guidelines for the Prevention of Juvenile Delinquency 1990 (the Riyadh Guidelines),[52] the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (the Havana Rules)[53] and thus does not reflect and comply with these principles.[54]

Bangladesh has not yet incorporated all the provisions of the CRC into its domestic laws. Recently the development of the children laws, international treaties, covenants and conventions have been considered in the case of State vs. Md Roushan Mondal in Bangladesh.[55] In State vs. The Metropolitan Police Commissioner, Khulna and others, Justice M. Imman Ali issued an important Suo Moto Rule No. 04 of 2008, the applicability by courts of international instruments was also considered.[56] Thereafter the child rights based Children Act enacted in 2013.

III. Laws and Policies of Juvenile Justice in Malaysia

A. National Legislation on Juvenile Justice

In 2010, the population of Malaysia was estimated at 28.25 million, including an estimated 3 million indigenous people and 2 million non-Malaysian citizens. Meanwhile, there are

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48 Committee on the Rights of the Child, Concluding Observations: Bangladesh's Second Periodic Report and Concluding Observations, 27 October 2003.

49 According to the Article 40 of the CRC, Children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects their rights. Governments are required to set a minimum age below which children cannot be held criminally responsible and to provide minimum guarantees for the fairness and quick resolution of judicial or alternative proceedings.

50 K.M. Subhan, *Juvenile Justice Administration in Bangladesh: Laws and their Implementation*, Judicial Training in the New Millennium: An Anatomy of BILIA Judicial Training with Difference, Bangladesh Institute of Law and International Affairs, BILIA, Dhaka, 2005, p. 215.

51 The Beijing Rules provide guidelines on how juveniles should be treated while part of the justice system addressing issues such as privacy, special training for the police and due process guarantees. In addition, the Rules set out guidelines for the diversion of juveniles from judicial proceedings.

52 The Riyadh Guidelines set standards aimed at preventing juvenile delinquency.

53 The Havana Rules provide detailed minimum standards for the care and treatment of juveniles deprived of their liberty.

54 UNICEF, Bangladesh: Justice for Children Factsheet, 2010, Available at http://www.crin.org/docs/UNICEF_JusticeForChildrenBangladesh_2010_EN.pdf

55 59 DLR 2007 72.

56 60 DLR 2008 660.

an estimated 11 million children under 18 with 3.2 million under the age of five.[57] With a significant portion of almost one third of the total population is children, Malaysia recognizes the importance of investing in children and places a huge emphasis on the survival, protection, development and participation of children, as underlined in the Convention on the Rights of the Child (CRC), 1989.[58]

Malaysia has a dual system of secular and Islamic law. The main laws governing juvenile justice are the Child Act 2001, the Penal Code, and the Criminal Procedure Code 1976. For Muslim children, Islamic laws are also applicable – the Syariah Courts (Criminal Jurisdiction) Act 1965, the Syariah Criminal Offences (Federal Territories) Act 1997 and the Syariah Criminal Procedure (Federal Territories) Act 1997. Malaysia started its child protection and welfare when it ratified the Convention on the Rights of the Child (CRC) in 1995. This was a major step for the country, in particular the Government's attempts to comply with the CRC especially through the enactment of the Child Act in 2001.

The principal law governing protection of children is the Child Act 2001,[59] which came into force on 1 August 2002. In the preamble, it is stated that children should be accorded special care and their welfare given paramount importance.[60] This Act consolidated three former Acts, namely, the Juvenile Courts Act 1947[61], Women and Young Girls Protection Act 1973[62] and Child Protection Act 1991[63]. The Child Act 2001 affords protection for children and tackles the problems of juvenile delinquency, child prostitutions and children out of control. It imposes severe punishments for child trafficking, abuse, molestation, neglect, and abandonment. It also mandates the formation of children's courts. In the Child Act 2001 there is a protective feature concerning assistance by probation officer in the event of arrest. It provides that upon arrest, a copy of the charge and related documents are to be transmitted to the probation officer so to assist him in preparing an informative probation report. [64] The Act provides comprehensive trial procedure in respect to children. It is submitted that by conforming to both the letter and spirit of these provisions would be adequate in safeguarding the interests of children in court.[65]

Malaysia, in following the CRC defines a child to be any person below 18 and by the time the Child Act 2001 was passed, there should no longer be any reference to the word 'juvenile' or 'young offender', both implying negative connotations. Nonetheless, such terminologies still exist in corresponding statute, namely the Criminal Procedure Code, which is applicable to children in the event of any lacuna in the Child Act 2001. From the legal point of view there are various definitions of juveniles depending on their group and age in Malaysia which are as follows:

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57 Social Statistics Bulletin Malaysia 2010 (Government of Malaysia, Department of Statistics).

58 Child Protection and Child Welfare Services in Malaysia, Beijing High Level Meeting, Ministry of Women, Family and Community Development, November 4-6, 2010, P. 2.

59 The Child Act 2001 (Act 611). Children accordingly, regardless whether they are victims or offenders are all governed by a single Act.

60 Preamble of the Child Act, 2001.

61 The Act to establish the Juvenile Court and deal with child offenders.

62 Act to provide care and protection to children.

63 Act to protect women and children exposed and involved in immoral vices.

64 The Child Act, 2001, section 87.

65 *Ibid*, section 90 (1-18).

Table 2: Age of Children in Various Legislations in Malaysia

Law	Age Specified (in Year)
The Child Protection Act 1991	A person under the age of 18 years and below
The Prison Act 1995	A prisoner who is under the age of 21 years and detains juveniles aged between 14 and 21 years in prison
The Children and Young Persons Employment Act 1996	Child as a person aged between 10 and 14 years, and a young person as one aged between 14 and 16 years
The Child Act 2001	A person under the age of 18 years and below

In case of age of criminal responsibility in Malaysia, the Penal Code stipulates 10 to be the age of attainment of criminal responsibility[66] but children between 10 and below 12 who have not shown sufficient maturity may be absolved from criminality as well.[67] So the Penal Code and the Child Act sets the minimum age of criminal responsibility at 10,[68] but the Syariah Criminal Offences (Federal Territories) Act 1997 refers to the attainment of puberty,[69] and the Syariah Criminal Procedure (Federal Territories) Act 1997 defines a "youthful offender" as between 10 and 16.[70] Apart from this, the Evidence Act 1950 provides an additional protection for boys below 13 where they are presumed to be incapable of committing the offence of rape.[71] In conclusion, children from 10 to 18 may be liable for any criminal charges in the court for children unless the offence is punishable with death[72] whereupon the trial will then be conducted in the High Court.[73]

In case of sentence of children, the death penalty is lawful for persons under 18 at the time of the offence for certain offences.[74] Section 2(1) of the Child Act 2001 defines a child as under 18 years.[75] But a child may be sentenced to capital punishment under the Essential (Security Cases) Regulations 1975 though it has been repealed.[76] The Child Act states: "A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child."[77]

In case of corporal punishment, the Child Act and the other laws allow the whipping which is contradicted with internal conventions. Section 91(g) of the Child Act authorises the court for children to "order the child, if a male, to be whipped with not more than ten strokes of a light cane- (i) within the Court premises; and (ii) in the presence, if he desires to be present, of the parent or guardian of the child".[78] Section 92 specifies how the

66 The Penal Code (Act 574), section 82.
67 *Ibid*, section 83.
68 *Ibid*, section 82 and also the Child Act, section 2.
69 Syariah Criminal Offences (Federal Territories) Act 1997, Articles 2 and 51
70 The Syariah Criminal Procedure (Federal Territories) Act 1997, Article 2
71 The Evidence Act 1950, section 113.
72 Offences such as murder, drug trafficking and possession of firearms.
73 The Evidence Act 1950, section 11(5).
74 Report prepared for the Child Rights Information Network (www.crin.org), July 2010.
75 The Child Act 2001, section 2(1)
76 Essential (Security Cases) Regulations 1975 has been repealed in 2012.
77 The Child Act 2001, section 97.
78 *Ibid*, sections 91(g), 92.

whipping should be carried out: the child should first be certified fit for the punishment by a medical officer; the whipping should be with a light cane "with average force without lifting his hand over his head so that the child's skin is not cut"; and it should be inflicted on any part of the child's clothed body "except the face, head, stomach, chest or private parts".[79] The Criminal Procedure Code provides for whipping of a youthful offender up to 10 strokes with a light rattan, "in the way of school discipline",[80] and this may be ordered in cases normally punished by fine or imprisonment.[81] No sentence of whipping shall be passed on women or on males sentenced to death.[82] Many offences in the Penal Code and other laws are punishable by whipping. Corporal punishment is also lawful as a sentence under Islamic law, and there is no exemption for females.[83]

In Malaysia, the National Policy on Children[84] and the National Child Protection Policy as well as Action Plans[85] 2009 formulated by the Ministry of Women Family and Community Development (MWFCD). Objectives of the policies highlight the rights of children to survival, protection, development and participation, all of which are in-line with the CRC. The two Policies intend to mobilize intra and inter ministerial involvement to address the needs of children and community. They also intend to maximize the efforts and leverage the roles of the private sector, media, civil society and the community. The policies additionally encourage a systematic approach to advocacy and building evidence to help make in-depth analysis related to children and propose interventions that would promote child well-being. In fact, these two policies were based on the 1991-2000 National Plan of Action for Children that were linked to objectives and strategic visions of the National Mission of Wawasan 2020 (Vision 2020).

Apart from these, the government approved Social Work Competency Standards in April 2010 for the child protection though the Act 2010 is still in bill form but the competency standards is used as a key tool for the government and the Malaysian Association of Social Workers (MASW) to set up systems to generate professional, competent and accountable social workers and deliver quality timely welfare services. This includes building capacity to efficiently prevent, intervene and respond to incidences of abuse, neglect and violence among women, children and other vulnerable groups. This will include building capacity to efficiently prevent, intervene and respond to incidences of abuse, neglect and violence among women, children and other vulnerable groups.[86]

B. International Instruments on Juvenile Justice

Malaysia ratified the Convention on the Rights of the Child (CRC) in 1995 with an initial 12 reservations. In 1998, Malaysia withdrew 5 reservations i.e. Article 22, 28 (1) (b), (c),

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79 The Child Act 2001, section 92.
80 The Criminal Procedure Code. section 288.
81 *Ibid*., section 293.
82 The Criminal Procedure Code. section 289.
83 25 June 2007, CRC/C/MYS/CO/1, Concluding observations on initial report to the Committee on the Rights of the Child, Para. 38.
84 The National Policy on Children and Action Plan 2009.
85 The National Policy on Child Protection and Action Plan 2009.
86 Child Protection and Child Welfare Services In Malaysia, Beijing High Level Meeting November 4-6, 2010, Ministry Of Women, Family And Community Development, pp. 7-8.

(d) and (e), 40(3) and (4), 44 and 45. Subsequently, in July 2010, Malaysia withdrew 3 more reservations i.e. Article 1, 13 and 15 leaving 5 remaining reservations (articles 2, 7, 14, 28(1) (a) and 37) and it indicates the Government's commitment towards strengthening the child protection system. The first country report on the implementation of the CRC was presented to the United Nations Committee on the Rights of the Child in January 2007 and the second report is due to be submitted to the Committee in 2012.

As per the Committee on the CRC, General Comment 10, 2007 Malaysia is under an obligation to implement the provisions in the CRC in order to protect the legal rights of the children.[87] In particular, with regards to the children in conflict with the law, CRC obliges State Parties to undertake in giving protection to offender children at every stage of the juvenile justice system, in line with the requirements of Articles 37 and 40 of the CRC in order to uphold the principle of the best interest of the child.[88] While the former obligates States Parties to uphold the leading principles for the use of deprivation of liberty, the procedural rights, treatment and conditions afforded to delinquent children when deprived of liberty, the latter safeguards the legal rights of the children in conflict with the law by ensuring that they receive treatment and guarantees of fair trial which could afford protection on them.[89]

As part of its commitment to the protection and well-being of its children, the Malaysian Government has ratified and signed the following Conventions.[90]

Table 3: Signed and Ratified International Instruments in Malaysia

International Instruments	**Date of Signature/ Ratification**
Convention on the Rights of the Child, 1989	1995
Convention on the Elimination of All Forms of Discrimination against Women, 1979	1995
International Labour Organisation Convention 138 (minimum age for admission to employment) 1997	2000
International Labour Organisation Convention 182 (worst form of child labour)	2000
Convention against Transnational Organised Crime	2002
Convention on the Rights of Persons with Disabilities	2010

After adopting the CRC, major improvement was made for child protection in Malaysia. The formation of the Ministry of Women Family and Community Development (MWFCD) in 2004 laid the foundation for an effective and operational child protection

87 General Comment No. 10 (2007): Children's Rights in Juvenile Justice, CRC/C/GC/10 available at http://www2.ohchr.org/english/bodies/crc/comments.htm.

88 *Ibid*.

89 *Ibid*.

90 UNICEF, Malaysia, 2010.

system in the country. With the ever increasing necessity to address issues and challenges of children, a special Child Division was created in 2005 at the Department of Social Welfare, an agency under the Ministry. This move allowed the Government to handle and administer matters pertaining to children more effectively. Part of this process included the creation and deployment of child protectors who are gazetted under the Child Act 2001 and are placed at the community grass-root level.

IV. Major Findings

From the study in both countries, it is highly important to recognize the new approach in relation with CRC for child-friendly justice system. The weakness of the present system may be summarized as follows:

A. In Bangladesh

Due to delay in appointing sufficient number probation officers, establishment of child help desk in police station, adequate juvenile courts and child correctional institutions, separate treatment of juvenile offenders has a long way to go before it attains the desired goal. Since there are only three juvenile courts in the three correctional institutes, juveniles are tried in ordinary courts along with adult criminals due to lack of capacity of the correctional centres. Child-friendly specialized justice policy has not been achieved properly yet. For example, there is no special juvenile justice policy nor any mechanism in the legal system of Bangladesh to incorporate directly the principles of international conventions and rules at national levels. Furthermore, there are no time limits as to the period during which children may be kept in pre-trial detention in Bangladesh. The probation service is not yet the part of the court structure and neglected.

B. In Malaysia

In Malaysia, the legal system is based on English common law. Treaties become part of domestic law only when they have been expressly incorporated by legislation.[91] They typically cannot be invoked directly in the courts. Some features are that there is no prohibition in the Federal Constitution (1957) of cruel, inhuman or degrading treatment or punishment. The existing legal provisions allowed punishment for the child offenders which is fully prohibits by the international conventions. On a further note, Malaysia has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty, the International Convention on the Elimination of All Forms of Racial Discrimination, or the International Covenant on Economic, Social and Cultural Rights. In 2009, Malaysia was examined under the Universal Periodic Review process. During the review the government stated that abolition of judicial caning and capital punishment for persons

[91] UNICEF (2007), Law Reform and Implementation of the Convention on the Rights of the Child, Florence: UNICEF Innocent Research Centre.

under 18 at the time of the offence was an "immediate concern".[92] The government did not support recommendations to abolish all capital punishment.[93]

V. New Directions

A. Bangladesh

The following suggestions are made to improve the child-friendly justice system in Bangladesh:

1. As the supplementary of the Children Act 2013, a comprehensive juvenile welfare Rules with special protection, rehabilitation and reintegration planning and independent mechanisms to monitor authorities should be enacted.
2. Child certified institutes in every district should be established.
3. Separate children court should be established in different building away from criminal courts in each divisional city. The jurisdiction of the children courts should be widened to handle all types of cases similar to session courts.
4. For fair treatment of delinquency, there should be established child help desk affairs and national welfare boards that maintain special provision of arrest, prosecution, trial procedure and alternative measures.
5. Permanent probation officers should be appointed in local level for speeding up of the probation system. The responsibility of the probation officers and social case workers as a counselor must be ensured.
6. For competent monitoring system, a special cell should be created in the Department of Social Service (DSS) under the Ministry of Social Welfare to ensure after care services. Branch offices may be opened at least in the Divisional Headquarters.
7. By virtue of the Children Act 2013 the government should improved child care and protection within the field of development planning that child will be ensured developmental opportunities without alienating them from society.
8. The government should be allocated the necessary financial resources to fulfil its obligation under the new Act.
9. Orientation training and in-service refresher courses must be arranged for the various categories of personnel (police personnel, prosecution staffs, lawyers, judicial officers, probation officers, social caseworkers, personnel involved in the administration of CDCs and DSS) functioning under juvenile justice system for implementing the spirit behind the various services and programme under the system.
10. Birth registration practice must be ensured. It is most effective mechanism for age verification of a child.

B. Malaysia

In Malaysia, it may be that the following suggestions be made to improve the child-friendly justice system in Malaysia:

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92 A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, para. 56.

93 A/HRC/11/30, 5 October 2009, Report of the Working Group on the Universal Periodic Review: Malaysia, paras. 105, 106(10) and 106(15).

1. State and local governments should review their legislation, policies and practices to ensure that children who are accused or convicted of violating the law are not deprived of their liberty except as a last resort.
2. Amend the Child Act to include detailed provisions to protect the rights of the child during arrest, investigation and police custody.
3. All legal provisions authorising judicial corporal punishment (whipping) for such persons should be repealed, including under Islamic law, and life imprisonment should be explicitly prohibited.
4. There should be amend the minimum age of criminal responsibility which at least to the age of 12 and continue to increase it to a higher age level and carry out a study on the discrepancies between the minimum age standards in the Penal Code, the interpretation of the Muslim jurists in the Syariah Court and the Syariah Criminal Procedure (Federal Territories) Act 1984 to prevent different standards being imposed on children upon entering the criminal justice system.
5. Prohibit by law the detention of children for immigration purposes and legislate and develop policies and practices designed to avoid the detention of children. While such legislation and polices are being developed, conditions in immigration detention should be improved to meet, at least, the minimum standards of detention as set out in human rights law.
6. Develop and implement a comprehensive system of alternative measures to deprivation of liberty, such as probation, community service orders and suspended sentences, in order to ensure that deprivation of liberty is used only as a measure of last resort.
7. Detention should only be used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing.
8. Children should be treated with compassion and respect for their dignity. They should not also be subjected to extended or drawn out cross-examination or other legal process. If it is in their best interests, children should be accompanied by a trusted adult throughout their involvement in the justice process.
9. Create an independent body to carry out periodic monitoring and evaluation of private and state- run alternative care institutions to ensure institutions meet minimum standards of care.
10. Implement a free-at-all-stages birth registration system that covers all territories in Malaysia, including through the use of mobile birth registration centres. All children, regardless of legal status must be able to access birth registration.

VI. Conclusion

Juvenile delinquency and the victimisation of children are issues that have a direct impact on the wellbeing of society and the nation. In this perspective, both countries should establish a child-oriented justice system which recognises the child's access to fundamental rights and freedoms and ensures that all actions concerning the child are undertaken for her/his best interest. It intends to cover an environment in the judicial system where a child offender would be treated as a child and his or her offence would be

justified in light of her/his age and level of maturity. In addition, trial of offenders would be in separate court and rehabilitation of these offenders would be in the society instead of being punished. States should enact juvenile justice laws and policies implementing the provisions of the CRC. This should cover treatment of the child from the moment the child is apprehended or detained by the police right through to post-sentencing after-care. The law should state clearly that all children over the age of criminal responsibility but under the age of 18 should fall within the juvenile justice system regardless of the nature of the offence. Everybody should treat the children as children and make the world a place where every child grows up as competent and responsible human beings and not be involved in any kind of delinquent acts and every parents, community, states will ensure their rights. By motivating the community and with the help of the government in setting up the necessary infrastructure for the community-based alternatives and the informal methods of disposition should be commenced for the offender children where they can build a safe and secure society.

Appraisal of What Constitutes Legal Gaps and How They Are Filled in Different Jurisdictions

by
Ogwezzy Michael. C*

Abstract

Legal gaps are gaps in law that results from the legislator's mistake, short-sightedness, carelessness or tardiness. In Nigeria and other jurisdictions, the following types of legal gaps are distinguished: insufficiency, that is where the law fails to make rules when it should do so, inconsistency meaning that the law contains contradicting rules, indeterminacy: the rules of law are unclear, axiology legal gap: the rules of law contradict moral order. Legal gaps can be resolved by the following tools: analogy: resolving the case in question based on a similar case to which there is an applicable rule; broad interpretation: interpreting the rule applicable to the similar case in such a way as expanding it to the present case as well; exercising discretionary power when determining the facts of the case. In another perspective and even much broader definition implies that a legal gap exists when the norms in force issued by the bodies with legislative power do not contain any provision by which the judge could resolve the case in question and under this circumstance the weight of evidence adduced by the parties will be placed on the scale of justice to see where the weight will tilt to. Gaps in a legal system such as "logic legal gaps" can be filled when the judge can deduce the applicable norm by way of pure logics. In the case of "alternative legal gap" which implies where the law provides more than one applicable norms without specifying which one is to be used in resolving a particular legal dispute and "judgement legal gap", in these situations, the judge is to complete the law on the basis of moral judgement. From the above propositions, this paper will do an "appraisal what constitutes legal gaps and how they can be filled under different jurisdictions" This paper is therefore intended to further study the meaning of gaps in a legal system, how these gaps could be recognized and whether their existence is a precondition for equitable activity. Thereafter the author examine the processes involved in filling the gaps by considering established procedures and hierarchical sources to be referred to in the process of filling the gaps that exists in law.

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I Introduction

Legal systems are not randomly distributed around the world. Most jurisdictions inherit their legal system from an invader, an occupier, or a colonial power.[1] Few countries have actually chosen their legal system as the outcome of a conscious debate over the existing possibilities, hence in all legal jurisdictions whether single or mixed legal system, they experience one form of gap or the other in their jurisprudence or legal context.[2] In a broad sense, a legal gap exists when it is impossible to establish beyond doubt which rule is applicable to the case in question. Under such circumstances, the law fails to make rules for a certain situation although it should have done (original legal gap) or should do so (derivative legal gap).[3]

In England, during the 17th, 18th and first half of the 19th centuries, there was an explosion of legislation, much of it complex and badly drafted. Public law statutes were drafted by Committees of the House of Commons that met in Middle Temple Hall. They at least had the benefit of the expertise of lawyers. Private bills were drafted by their promoters without the benefit of the same expertise. As Holdsworth has described in his *History of English Law*:[4] "Thus the style in which the statutes were drawn became more and more variegated. The result was increased difficulty in interpreting them, and sometimes in ascertaining their relations to one another. And since, during this period, the style of legal draftsmanship, which was used in the drawing of pleadings, conveyances, and other documents, was tending to become more verbose, the statutes which these lawyers drew exhibited the same quality: and so the difficulties of understanding and applying the growing body of statute law were increased."[5] By the 19th century, the prevailing state of affairs led Jeremy Bentham to observe characteristically: "The English lawyer, more

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1 As diverse as all classical mixed jurisdictions are, their founding tends to follow three similar historical tales. The first is intercolonial transfer between a civil law and a common law colonial power, as was demonstrated in Puerto Rico, the Philippines, Louisiana, and South Africa. Second is a merger of sovereignties, as was the case in Scotland. Finally, the jurisdiction is founded "in reverse," which includes Israel. Intercolonial transfer often led to mixed jurisdictions because the colonial power typically faced great cultural and logistical resistance when attempting to apply its own legal system while administering the country. Due to a fear of an uprising or resistance to attempts to change infrastructure and legal systems in the conquered territory, the colonial power chose to retain aspects of original law, which typically was civil law. (Stella Cziment, "Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon's Legal System Through the Perspective of the Nine Interim Conclusions of *Worldwide Mixed Jurisdictions*, Civil Law Commentaries Vol. 2, Issue 2. Winter 2009, at p.2).

2 Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 *Eur. Econ. Rev*. 165, 168–69 (2003). See, Nuno Garoupa and Carlos Gómez Ligüerre, "The Efficiency of The Common Law: The Puzzle of Mixed Legal Families", *Wisconsin International Law Journal,* Vol. 29, No. 4, 2012, at p.673.

3 Lóránt Csink, and Péter Paczolay, "Problems of Legislative Ommission in Constitutional Jurisprudence", Hungarian National Report for the 14th Conference of Constitutional Courts, available online at *www.lrkt.lt/conference/Pranesimai/omissionHUN_en.doc. or http://www.confeuconstco.org/reports/rep-xiv/report_Hungary_en.pdf accessed 15 October, 2013*.

4 (1924, XI 370).

5 John Dyson, "The Shifting Sands of Statutory Interpretation", at 7-8, Available online at *www.statutelawsociety.org/__data/assets/pdf.../Sir_John_Dyson.pdf, accessed 28 October, 2013.*

especially in his character of Parliamentary composer, would, if he were not the most crafty (sic), be the most inept and unintelligent, as well as unintelligible of scribblers".[6]

II The Nature of Legal Gaps

First of all the gaps of law and gaps of legislation must be distinguished. There is a gap of law when a sphere which has to be decided upon has not at all been legislatively regulated (this amounts either to legal vacuum or to the legislator's conscious choice not to regulate a sphere of life). In the light of the issues to be considered under this subsection, one of the subtypes of legal gap as a general concept is namely the legal vacuum. The gap of legislation, on the other hand, means a lack of a rule that should be there proceeding from the intent behind the regulation of an Act or statute (there is a lack of a rule the existence of which can be presupposed on the basis of the teleology of a statute).[7]

"Legal gap" therefore is defined in general as the fact that "any necessary and obligatory regulation that has not been fulfilled by the lawmaker". The concept is analysed by making it subject to several variations within itself. These variations are named in this context as *intra legem* gap (legal gap); conscious gap, unconscious gap; explicit gap implicit gap. Reasons for those variations of legal gap and their consequences are certainly made subject in the scientific legal doctrine and, questions on how and in which circumstances the judge can fill in the legal gap by means of his power to "create law".[8] Having considered the nature of legal gaps, the next sub-issue to be considered is the concept of mixed jurisdiction.

III Concept of Mixed Jurisdiction

The classic definition of a mixed jurisdiction of nearly one hundred years ago was given by F.P. Walton:[9] he claimed that "Mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree by Anglo-American law".[10] This is not too different from the modern definition of mixed legal system given

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6 The Works of Jeremy Bentham, Bowring (ed) v 3 (1843), at 242. (*The Works of Jeremy Bentham,* published under the Superintendence of his Executor, John Bowring (Edinburgh: William Tait, 1838-1843)., 11 Vols. Vol. 3).

7 "Problems of Legislative Omission In Constitutional Jurisprudence", Replies to the Questionnaire for the XIVth Congress of the Conference of European Constitutional Courts drawn up by the Constitutional Court of the Republic of Lithuania, at pp.1-2, available online at *www.confeuconstco.org/reports/rep-xiv/report_Estonia_en.pdf., accessed 28 October, 2013.*

8 "Questionnarie on Problems of Legislative Omission In Constitutional Jurisprudence For the XIVth Congress of the Conference of European Constitutional Courts", XIVth Congress of the Conference on European Constitutional Courts, Turkish National Report, at p.2 Available online at, *www.lrkt.lt/conference/Pranesimai/QUESTIONNARIE-English.doc accessed 19 November, 2013.*

9 William Tetley, "Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)", (published in (1999-3) *Unif. L. Rev*. (N.S.) 591-619 (Part I) and (1999-4) *Unif. L. Rev*. (N.S.) 877-907 (Part II); and later reprinted with permission in (2000) 60 La. L. Rev. 677-738, and reprinted again in Chinese translation by Peking University Press (2003) 3 Private Law Review 99-175), at pp.1-2.

10 F.P. Walton, *The Scope and Interpretation of the Civil Code*, Wilson & Lafleur Ltée, Montreal, 1907, reprinted by Butterworths, Toronto, 1980, with an introduction by Maurice Tancelin, at p. 1.

by Robin Evans-Jones: he said "What I describe by the use of this term in relation to modern Scotland is a legal system which, to an extensive degree, exhibits characteristics of both the civilian and the English common law traditions".[11] Both Walton and Evans-Jones are referring to common law/civil law mixed legal systems which stem from two or more legal traditions. Mixed jurisdictions are really political units (countries or their political subdivisions) which have mixed legal systems. Common law and civil law mixed jurisdictions include for example,[12] Louisiana, Québec, St. Lucia, Puerto Rico, South Africa, Zimbabwe,[13] Botswana, Lesotho, Swaziland,[14] Namibia,[15] the Philippines, Sri Lanka (formerly Ceylon),[16] and Scotland. It goes without saying that some mixed jurisdictions are also derived partly from non-occidental legal traditions like North African countries, Iran, Egypt, Syria, Iraq and Indonesia, for instance.[17]

A mixed jurisdiction is a country or a political subdivision of a country in which a mixed legal system prevails. For example, Scotland may be said to be a mixed jurisdiction, because it has a mixed legal system, derived in part from the civil law tradition and in part from the common law tradition. This definition of "mixed jurisdiction" is very similar to those of Walton and Evans-Jones cited earlier, except that the term as used here describes only the territory in which a mixed legal system exists, rather than the mixed legal system itself.[18] While a mixed legal system is one in which the law in force is derived from more than one legal tradition or legal family. For example, in the Québec legal system, the basic private law is derived partly from the civil law tradition and partly from the common law tradition. Another example is the Egyptian legal system, in which the basic private law is derived partly from the civil law tradition and partly from Moslem or other religiously-based legal traditions. Again in Nigeria, the legal system is derived from common law, Islamic and customary law.

According to Stella Cziment, mixed jurisdiction exist all over the world, though they can be overlooked and mistakenly categorized as a common law state with civil law transplants or vice versa. This mistaken categorization occurs because the terminology

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11 Robin Evans-Jones, "Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law" (1998) 114 L.Q.R. 228 at p. 228.

12 René David and J.E.C. Brierley, *Major Legal Systems in the World Today*, 3rd edn., London: Stevens & Sons, 1985, paras. 56-58 at pp. 75-79.

13 Reinhard Zimmermann, "*Das römisches-holländisches Recht in Zimbabwe*" (1991) 55 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 505.

14 J. H Pain, "The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland" (1978) 11 *Comp. and Int'l. L. J*. of Southern Africa 137.

15 Reinhard Zimmermann and Daniel Visser, "South African Law as a Mixed Legal System", being the Introduction to R. Zimmermann and D. Visser, eds., *Southern Cross. Civil Law and Common Law in South Africa*, Clarendon Press, Oxford, 1996 at p. 3. See also See also David Carey Miller, "South Africa: A Mixed System Subject to Transcending Forces" in Esin Örücü, Elspeth Attwooll & Sean Coyle, eds., *Studies in Legal Systems: Mixed and Mixing*, Kluwer Law International, The Hague, London, Boston, 1996 at pp. 165-191

16 M.H.J. van den Horst, *The Roman-Dutch Law in Sri Lanka*, 1985; Anton Cooray, "Sri Lanka: Oriental and Occidental Laws in Harmony" at pp.71-88.

17 William Tetley, *op. cit*.

18 *Ibid*, at pp.6-7.

"mixed jurisdiction" is relatively new.[19] While Vernon Valentine Palmer believes that many states may in fact fall into the third legal family of mixed jurisdictions, there are fifteen states both independent and non-independent systems that are classical mixed jurisdictions.[20] Mixed jurisdictions share three main characteristics. First, the legal system of a mixed jurisdiction is built on a dual foundation of both common and civil law. Second, this dual foundation will be noticeable to outside observers and it will be present in the culture and identity of the society. Third, there is a common structure between the divisions of civil and common law and the private law tends to be continental civil law while the public law tends to be Anglo-American common law.

IV The Emergence and Operation of Common Law and Civil Law Systems

Common law is that legal tradition which evolved in England from the 12th century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes, upon which courts have adjudicated. The common law is usually much more detailed in its prescriptions than the civil law. Common law is the foundation of private law, not only for England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most countries which first received that law as colonies of the British Empire and which, in many cases, have preserved it as independent States of the British Commonwealth. While civil law is "concise", the common law is "precise" and detailed.[21]

Another source has it that the development of the common law is derived in part from the French local customs imported from Normandy into England by William the Conqueror in 1066.[22] Moreover, common law, being more vulnerable than civil law to foreign intrusions because of its less systematic structure and less coherent nature, was "civilised" at various points throughout history, particularly in recent years.[23] In 1832,

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19 Stella Cziment, "Cameroon: A Mixed Jurisdiction? A Critical Examination of Cameroon's Legal System Through the Perspective of the Nine Interim Conclusions of *Worldwide Mixed Jurisdictions*, Civil Law Commentaries Vol.2, Issue 2. Winter 2009, at p.2.

20 Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* 5 Cambridge: Cambridge University Press, 2006, at p.4.

21 William Tetley, "Nationalism in a Mixed Jurisdiction and the Importance of Language." (South Africa, Israel and Québec/Canada) see Louis-Philippe Pigeon, Rédaction et interprétation des lois, 3rd edn., Gouvernement du Québec, Québec 1986 at, pp.7-8. published in (2003) 78 *Tul. L. Rev*. pp.175-218**.**

22 *Ibid*., Common law legal regimes those rooted in the English legal system are characterized by a host of institutional characteristics that distinguish them from the institutional constellations associated with "civil code" regimes rooted in the French, German and Scandinavian traditions. modern common-law regimes are heavily infused with codes (statutes). Indeed, common law *per se*. meaning areas of law in which judge-made precedent is the only source of law. governs an increasingly small proportion of litigation in the United States and other "common law" countries. (See., Gillian K. Had.eld, The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law, University of Southern California Law School March 2006 at p.7. Available online at http://www.law.yale.edu/documents/pdf/the_quality_of_law_in_civil_code.pdf, accessed 31 October, 2013).

23 *Ibid*., at pp.7-8. H.P. Glenn, "*La Civilisation de la* Common Law", *Mélanges Germain Brière*, E. Caparros, (dir.) Collection Bleue, Wilson & Lafleur Ltée, Montreal, 1993 at pp. 596-616.

the Chancellor's permission to take suit was eliminated.[24] In 1852, forms of action were abolished.[25] In 1873, the Courts were unified.[26] In 1875, a Court of Appeal was established.[27] New substantive law of a civilian flavour was introduced and recently, case management rules have been added. Continental Europe received civil law from ancient Rome and then retained it by codification, imposed for the most part by victories of Napoleon and later on by the example and great influence of the French Civil Code of 1804.[28] Other jurisdictions, particularly the countries of Latin America, as well as Egypt, imitated the French Code (or other codes based upon it) in enacting their own codifications. Civil law jurisdictions often have a statute law that is heavily influenced by the common law.[29]

English common law emerged from the changing and centralizing powers of the king during the Middle Ages. After the Norman Conquest in 1066, medieval kings began to consolidate power and establish new institutions of royal authority and justice. New forms of legal action established by the crown functioned through a system of writs, or royal orders, each of which provided a specific remedy for a specific wrong. The system of writs became so highly formalized that the laws, the courts could apply based on this system often were too rigid to adequately achieve justice. In these cases, a further appeal to justice would have to be made directly to the king. This difficulty gave birth to a new kind of court, the court of *equity*, also known as the court of Chancery because it was the court of the king's chancellor. Courts of equity were authorized to apply principles of

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24 See generally J.H. Baker, *An Introduction to English Legal History,* 3rd edn., London :Butterworths, 1990 at pp.79-81.

25 Common Law Procedure Act, 1852, 15 & 16 Victoria., c. 76 (the form of action no longer needed to be stated in the new uniform writ and different causes of action could be joined in the same writ). The forms of action had been largely abolished by the Uniformity of Process Act, 1832, and by the *Real Property Limitation Act*, 1833, 3 & 4 Will. IV, c. 27, section 36.

26 *The Judicature Act*, 1873, 36 & 37 Vict., c. 66

27 The *Judicature Act,* 1873*,* Section 4 had established the Court of Appeal and the High Court, as divisions of the Supreme Court of Judicature established by sect. 3. This Act came into force at the same time as the *Judicature Act*, 1875, 38 & 39 Vict., c. 77, which made some other modifications as well.

28 The French Civil Code of 1804 was enacted on March 21, 1804 as the "*Code civil des Français*". The title was changed to the "*Code Napoléon*" in 1807, because of the Emperor's personal interest in the drafting of the Code while he was first consul of the Republic. The original title was revived in 1816 after the fall of the Napoleonic Empire, but was reinstated in 1852 by decree of Louis Napoleon (Napoleon III), then President of the Republic. Since 4 September, 1870, however, the Code has been referred to as the "Code Civil".

29 William Tetley, *op. cit*. 7-9. Civil law is the kind of law that evolved from Roman law, based on a written "civil code". This was adopted in France after the French Revolution in 1789. Called the Code Napoléon, it covered only matters of private law: The legal attributes of a person (e.g.: name, age of majority). The relationship between individuals (e.g.: marriage, adoption, parentage), Property (e.g.: possession, land boundaries), the legal institutions governing or administering these relationships (e.g.: wills, sales, leases, partnerships). Through plain language and the specific nature of each regulation, civil codes are intended to be easy to understand and apply. It does not rely on precedent to the same extent as common law. (Canadian Encyclopedia: "common law", "law", "civil procedure" and "constitutional law". Available online at link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A, accessed 30 March, 2013. See also Beaudoin, Gérald-A.. Constitution., The Canadian Encyclopedia., Historical Foundation of Canada, 2000. (Available online at http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A, accessed 30 October, 2013).

equity based on many sources (such as Roman law and natural law) rather than to apply only the common law, to achieve a just outcome. [30]

In the Middle Ages, common law in England coexisted, as civil law did in other countries, with other systems of law. Church courts applied canon law, urban and rural courts applied local customary law, Chancery and maritime courts applied Roman law. Only in the seventeenth century did common law triumph over the other laws, when Parliament established a permanent check on the power of the English king and claimed the right to define the common law and declare other laws subsidiary to it. This evolution of a national legal culture in England was contemporaneous with the development of national legal systems in civil law countries during the early modern period. But where legal humanists and Enlightenment scholars on the continent looked to shared civil law tradition as well as national legislation and custom, English jurists of this era took great pride in the uniqueness of English legal customs and institutions. That pride, perhaps mixed with envy inspired by the contemporary European movement toward codification, resulted in the first systematic, analytic treatise on English common law: William Blackstone's (1723-1780) *Commentaries on the Laws of England*. In American law, Blackstone's work now functions as the definitive source for common law precedents prior to the existence of the United States.

Common law is generally *uncodified*, by implication; there is no comprehensive compilation of legal rules and statutes. While common law does rely on some scattered statutes, which are legislative decisions, it is largely based on *precedent*, meaning the judicial decisions that have already been made in similar cases. These precedents are maintained over time through the records of the courts as well as historically documented in collections of case law known as yearbooks and reports. The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping the law. Common law functions as an adversarial system, a contest between two opposing parties before a judge who moderates. A jury of ordinary people without legal training decides on the facts of the case. The judge then determines the appropriate sentence based on the jury's verdict.[31]

According to Gillian Hadeld, Common law means areas of law in which judge-made precedent is the only source of law that governs an increasingly small proportion of litigation in the United States and other "common law" countries. Even in the traditional common law areas of contract, tort, and property, there are numerous general application statutes such as the Uniform Commercial Code and state civil codes, together with

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[30] Anthony Robbins, "The Common Law and Civil Law Traditions", The Robbins Collection 2010.Available online at http://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf, accessed 29 October, 2013.

[31] *Ibid*., See J.H. Baker, An Introduction to English Legal History (London, 2002). See also Manlio Bellomo, The Common Legal Past of Europe 1000-1800 (Washington DC, 1995). Alan Cromartie, The Constitutionalist Revolution: An Essay on the History of England, 1450-1642 (Cambridge, 2006). See, Joseph Dainow, "The Civil Law and the Common Law: Some Points of Comparison," American Journal of Comparative Law, volume 15, number 3 (1966-7), p.419-35. See also, S.F.C. Milsom, Historical Foundations of the Common Law (London, 1981). See also, Peter Stein, Roman Law in European History (Cambridge, 1999)., See also R.C. Van Caenegem, The Birth of the English Common Law (Cambridge, 1988).

regulatory statutes for specie areas such as bankruptcy, corporate governance, securities, insurance, product safety, landlord-tenant relations, and so on.[32]

Civil Law, on the contrary is *codified* legal order of a country.[33] Countries with civil law systems have comprehensive, continuously updated legal codes that specify all matters capable of being brought before a court, the applicable procedure, and the appropriate punishment for each offense. Such codes distinguish between different categories of law: substantive law establishes which acts are subject to criminal or civil prosecution, procedural law establishes how to determine whether a particular action constitutes a criminal act, and penal law establishes the appropriate penalty.[34] In a civil law system, the judge's role is to establish the facts of the case and to apply the provisions of the applicable code. Though the judge often brings the formal charges, investigates the matter, and decides on the case, he or she works within a framework established by a comprehensive, codified set of laws. The judge's decision is consequently less crucial in shaping civil law than the decisions of legislators and legal scholars who draft and interpret the codes.[35] The next subheading discuses what constitutes legal system and a legal order in any legal jurisdiction?

V What Constitutes Legal Systems and Order

There are various definitions of the term "legal system": "A legal system, is an operating set of legal institutions, procedures, and rules. In this sense there are one federal and 36 states legal system in Nigeria, and still other distinct legal systems in such organizations as the Economic Community of West African States (ECOWAS), the African Union (AU), European Economic Community and the United Nations."[36] While a "legal order is the body of rules and institutions regulating a given society. Some hold to the view that a legal order may be as forming or striving to form a coherent body of law, juridical system, legal system, and a system of law."[37] "Each law in fact constitutes a *system*: it has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social

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32 Gillian K. Hadeld, "The Quality of Law in Civil Code and Common Law Regimes: Judicial Incentives, Legal Human Capital and the Evolution of Law", University of Southern Carlifornia, Law School, March 2006 at 1. Available online at http://www.law.yale.edu/documents/pdf/The_Quality_of_Law_in_Civil_Code.pdf, accessed 02 May, 2014.

33 Civil law may be defined as that legal tradition which has its origin in Roman law, as codified in the Corpus Juris Civilis of Justinian (528-534 A.D.), and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators - Continental Europe, Québec and Louisiana being examples); and uncodified Roman law (as seen in Scotland and South Africa). Civil law is highly systematised and structured and relies on declarations of broad, general principles, often ignoring the details. Civil law has its own style, in fact its major distinction is its style, in particular its "conciseness".

34 *Ibid*.

35 *Ibid*.

36 J.H. Merryman, *The Civil Law Tradition*: *An Introduction to the Legal Systems of Western Europe and Latin America*, 2 Ed., Stanford University Press, Stanford, California, 1985 at p.1.

37 Quebec Research Centre of Private and Comparative Law, *Private Law Dictionary and Bilingual Lexicons*, 2nd edn. Revised and Enlarged, Les Éditions Yvon Blais, Cowansville, Québec 1991 at p. 243 .

order itself which determines the way in which the law is applied and shapes the very function of the law in that society."[38] William Tetley is of the view that the term "legal system" refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered, within a given jurisdiction.[39] Having underscored what is meant by legal system and order, it is pertinent to examine the theoretical framework of legal gaps in a legal system.

VI Theoretical Frameworks of Legal Gaps in Legal Systems

According to Pierluigi Chiassoni, after World War II, theoretical investigations on gaps improved greatly in the Civil Law countries, as a consequence of the use and refinement, by a few legal theorists, of some conceptual tools worked out by analytical philosophers.[40] The several analytical theories of gaps so far set forth share a few, basic, tenets. On the whole, these tenets make up the backbone of what is considered the standard civil law view on gaps. They are as follows: (a) the existence of gaps is neither a necessary, nor an impossible, feature of positive legal orders. It is, on the contrary, a mere possibility for every given legal order, or any section thereof which is the contingent existence thesis.[41] (b) There is no necessary, universal, way of filling-up gaps in the western legal tradition on the contrary, whenever a judge thinks there is a gap in the law, he or she may usually choose among a set of alternative gap-filling techniques, that are likely to lead to different outcomes and this represents that optional filling-up thesis. (c). The optional identification thesis regards the identification of a gap in the law, by a judge or a jurist, as not the outcome of a purely mechanical, or logical, job. On the contrary, it depends directly or at least indirectly on empirical and/or interpretive activities. These activities, in turn, are or may be in at least some cases value-laden and decision dependent. (d) From the perspective of a conceptual pluralism thesis or practice-sensible and practice-oriented theory, it is worthwhile distinguishing several different concepts of a gap, so as to casting light on, and put an order to, the fuzzy, everyday, intuitions legal practitioners entertain on the matter.

The major differences among the several analytical theories of gaps within the civil law tradition concern the optional identification thesis and the conceptual pluralism thesis,

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38 William Tetley, "Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)", (published in (1999-3) *Uniform Law Review* (N.S.) 591-619 (Part I) and (1999-4) *Uniform Law Review* (N.S.) 877-907 (Part II); and later reprinted with permission in (2000) 60 *Los Angeles Law Review*. 677-738, and reprinted again in Chinese translation by Peking University Press (2003) 3 *Private Law Review* 99-175), at pp.3-4.

39 *Ibid*.

40 (like Ludwig Wittgenstein, Rudolf Carnap, Gilbert Ryle, John Langshaw Austin, and Georg Henrik von Wright, to mention the most prominent representatives). Norberto Bobbio's 1963 entry *Lacune del diritto*, on the one hand, and Carlos E. Alchourrón's and Eugenio Bulygin's 1971 book *Normative Systems*, on the other hand, represent two of the most thoughtful contributions within the (new) analytical perspective. (See Pierluigi Chiassoni, A Tale from Two Traditions: Civil Law, Common Law, and Legal Gaps, Paper presented at "American-Italian Seminar on Relations Between the ius commune Inglese and Law ", Faculty of Law, Geneva, 18-19 September 2006, Analysis and Law 2006, edited by P. Comanducci and R. Guastini at p.54, available online at http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2007/03chiassoni.pdf accessed 13 November, 2013).

41 See Pierluigi Chiassoni, above note 40.

respectively. As to the *optional identification thesis*, a basic distinction may be drawn between three kinds of theories. First of all, there are theories that simply *presuppose* the optional identification thesis, without giving it any due, express, consideration. Secondly, there are theories that regard the identification of gaps as being, *directly*, the outcome of a *logical process* consisting in the determination of the solutions provided by previously identified, limited, sets of norms for previously identified, limited, sets of cases. These theories consider interpretation as an empirical (not-logical) activity, which affects the identification of gaps only in an indirect way and, furthermore, involves decision-making in hard cases only (*e.g.*, Alchourrón's and Bulygin's theory).[42] Thirdly, and finally, there are theories that, on the contrary, emphasize the interpretive dependence of gaps' identification and, furthermore, regard interpretation as a necessarily value-laden, decision-involving, activity (*e.g.*, the theories developed by representatives of the Genoese Realistic School).

A What Constitutes Legal Gaps in a Juridical System?

A legal system is said to be legally complete if there is a complete answer to all the legal questions over which the courts have jurisdiction to determine. It contains a legal gap if some legal questions subject to jurisdiction have no complete answer hence this paper is

[42] Alchourrón and Bulygin start their discussion of whether the principle of prohibition excludes gaps with a distinction between *norms* and *normative propositions*. Norms are prescriptive sentences, which are used to give obligations, prohibitions or permissions. Normative propositions are descriptive sentences that convey information about norms or about the obligations, prohibitions or permissions issued by the norms. The *principle of prohibition* pertains, they argue, to norms, not to normative propositions. It is perfectly possible that both the normative proposition that p is prohibited and the normative proposition that p is permitted (in some system) are false: the system may be silent. Likewise, it is possible that both normative propositions are true: the system may be inconsistent: "There is nothing paradoxical about a consistent description of an inconsistent normative system". There is, however, some ambiguity in this approach. Normative propositions are taken to say something about norms (i.e. normative sentences) *or* about obligations, prohibitions and permissions. It is clear that normative sentences may be silent or inconsistent concerning some act p. But it does not necessarily follow that the normative system is silent or inconsistent. It is possible to attempt to explain the legal validity of some norm in terms of its being issued by a generally recognized legal source. According to such an explanation, the occurrence of inconsistent normative sentences in the legal sources of a system renders the system inconsistent if in some case q the act p is, according to the system, both prohibited and permitted. According to Dworkin such a definition would be too narrow (as it cannot account for legal principles), but it certainly is too broad. Legal systems quite often formulate exceptions to norms. These exceptions sometimes are to be found in very different parts of the system's statutes and precedents. Legal systems also usually make use of priority rules, e.g. *lex posterior derogat legi priori*. It is, therefore, unacceptable to hold that every norm which can be found in a legal source is necessarily valid. If we still follow the positivist approach, we should explain legal validity of norms in terms of being issued by the normative legal system. To know whether some norm is legally valid, we then have to interpret the legal system and to determine whether the norm exists in an acceptable interpretation of that system. It may be argued that some interpretation which allows for inconsistent norms within the same system does not present an acceptable interpretation. In that case, the normative propositions describing both contradictory norms cannot both be true. In the same way, if the normative sentences of some system are silent about some act, it does not follow that the system itself is silent. The *principle of prohibition* seems to say that according to the system such an act is permitted. In his *Rechtsphilosophie*, the German legal philosopher Gustav Radbruch argued that in a strict sense absence of law ("*ein rechtsleerer Raum*") is impossible: when a legal system is silent it regulates in a negative way, by denying legal consequences. (See also C.E. Alchourrón, and E. Bulygin, "Normative Systems", Wien, 1971, at pp.121-123 see also G. Radbruch, *Legal Philosophy*, 6th edn., Stuttgart, 1963, at. 298) Arend Soeteman Legal Gaps available online at http://ivr-enc.info/index.php?title=Legal_gaps accessed 12 November, 2013.

centred in most part on what constitutes legal gaps and how these gaps has been addressed by different theorists and legal philosophers are expressed in sub-titles (a) to (j) as follows:

(a) Genuine and Non-Genuine Legal Gaps

An important distinction is made between genuine and non-genuine (actual and alleged) legal gaps. There is a non-genuine gap when, from the formal point of view, the positive law can be applied without the need to supplement it, yet the legal cognition requires the supplementation (the norm cannot be implemented when "taking into account all the circumstances" the solution suggested by a statute cannot be regarded as the right one, because it is considered to be "wrong").[43] The genuine gaps embrace such instances where a statute completely lacks a rule concerning the sphere that the statute regulates (the statute is so to say silent). Thus, a genuine gap is a legislative gap or the legislative omission where legislating is required by the Constitution (it is expected that there be a legal rule concerning an existing norm).[44]

(b) Obvious and Covert Gaps in Law

Sometimes a differentiation is made between obvious and covert gaps. There is an obvious gap when the implementer of law notices it at the first glance, and there is a covert gap when the existence thereof becomes apparent only as a result of interpretative effort of a judge or magistrate. As a rule, the determination of legal regulation is not treated as a gap in some legal doctrine the ambiguity and abstract character of norms is overcome through interpreting, *inter alia* with the help of constitutional values. There is a gap only when a norm is so unclear that it is impossible to ascertain the applicable rule on the basis of none of the generally recognised interpretation methods. Also, there is no gap when a rule is not established in the text of statute *expressis verbis*, yet it can be deducted from the general teleology of the statute. Neither is there a gap when a necessary rule is not included in the statute regulating a given sphere, but it has become by a mistake an object of regulation of some other statute or when it can be deducted from several statutes in their conjunction. A relationship under examination need not be regulated explicitly; it is sufficient if the guidelines for the resolution of a case derive from the legal order implicitly.

(c) Jurisdictional Gaps

Joseph Raz regards gaps, as something which has to be accounted for carefully in a well-built theory of law.[45] Raz deals with two of the four basic issues concerning gaps: namely, the conceptual issues and the existence issues.[46] (i) As to the concept of a gap, Raz distinguishes, to begin with, between *jurisdictional gaps* and *legal gaps* proper.

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[43] See e.g. M. Sillaots. *Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras* (The Possibility and Necessity of Judge-Made Law in the Legal Order of Continental Europe). Tartu, 1997, at pp.39-40.

[44] See A. Taska., Õigusteaduse metodoloogia (*The Methodology of Law*). Lund, 1978, at p.61.

[45] Pierluigi Chiassoni, above note 40

[46] *Ibid*, See also, J. Raz, "*Legal Reasons, Sources and Gaps"*, in The *Authority of Law. Essays on Law and Morality*, Oxford: Clarendon Press, 1979, at pp.33-77.

Under *Jurisdictional Gaps*, a legal system is jurisdictionally complete if its courts have jurisdiction over all legal questions. It has a jurisdictional gap if its courts lack jurisdiction over certain legal questions.[47] The notion of a jurisdictional gap is a useful conceptual device to determine, on the contingent basis of positive law criteria, the scope of what, in Schauer's fuzzier perspective, was the claim of a legal system to completeness.

(d) Simple Indeterminacy Gaps

The notion of a legal gap is more in tune with lawyers' common sense. It is meant to be a more precise and rigorous notion, though as Raz makes it clear, there are two kinds of situations where the law is gappy for not providing "a complete answer" to a question "subject to jurisdiction". On the one hand, there are *simple indeterminacy gaps*. They occur either *(a)* when a rule-formulation contains vague or ambiguous terms (*linguistic indeterminacy*), or *(b)* when legislative intent, being assumed as a relevant interpretive resource, proves indeterminate (*indeterminacy of intent*). On the other hand, there are *unresolved conflict gaps*. They occur whenever the law provides no criteria for settling a conflict between two norms or "reasons". In Raz's terms, a situation of unresolved conflict will arises when conflicting reasons fail to override each other, not because they are equally matched, but because they are not matched at all: for whatever reason, the conflicting reasons are incommensurate in strength.[48] (ii) As to the existence of gaps, Raz makes clear his position in the following terms: legal gaps ... arise ... where the law *speaks with an uncertain voice* (simple indeterminacy) or where it *speaks with many voices* (unresolved conflicts). Contrary to much popular imagining, there are no gaps where the law is silent. In such cases closure rules, which are *analytic truths* rather than positive legal rules, come into operation and prevent the occurrence of gaps.[49]

(e) Visible, Ontological and Deontological Gaps in Law

Legal gap exists when a certain relation is not regulated by any legal rule. There are categorized two types of gaps in legislation: visible and invisible. The visible gap is not deliberately filled in. Such a gap is often called "intentional imperfection of law". In this case, no analogy may be applied. Those who apply law are not entitled to act against the will of law-maker.[50] Another classification of legal gap is ontological gap and the deontological one. The ontological gap implies the unconformity of a legal rule with what exists. The deontological gap implies the inconsistency of a legal rule with what should be.[51]

(f) Original and Derivative Legal Gaps

Legal gaps arise from an imperfect unity of the legal system, a legal gap exists when it is impossible to establish beyond doubt which rule is applicable to the case in question.

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47 *Ibid.*
48 *Ibid*.
49 *Ibid*.
50 *Ibid*.
51 Problems of Legislative Omission in Constitutional Jurisprudence, For XIVth Congress of the Conference of European Constitutional Courts, Response of the Constitutional Court of Georgia, Available online at http://www.confcoconsteu.org/reports/rep-xiv/report_Georgia_en.pdf, accessed 18 November, 2013.

Under such circumstances, the law fails to make rules for a certain situation although it should have done (*original legal gap*) or should do so (*derivative legal gap*). Legal gaps result from the legislator's mistake, carelessness or tardiness.[52] According to another even broader definition, a legal gap exists when the norms (in force) issued by the bodies with legislative power do not contain any provision by which the judge could resolve the case in question.[53]

(g) Applicable and Correctional Legal Gaps

Bódog Somló in his book entitled *Jogbölcsészet (Philosophy of Law)*, is of the view that: "Gaps in the law mean that the law needs to be completed".[54] Completion may be necessary for various reasons. When it is required to make the law applicable, it is an *applicability legal gap* and when it is needed to make the law correct, it is a *correctness legal gap*.[55]

(h) Inconsistency, Insufficiency, Indeterminacy and Axiological Legal Gaps

Peczenik identified and distinguished between inconsistency, insufficiency, indeterminacy and axiological legal gaps.[56] According to him, inconsistency in law means when the law fails to make rules when it should ordinarily do so. Insufficiency refers to a situations where the law contains contradicting rules while, indeterminacy in the parlance of legal gap refers to where the rules of law are unclear, while axiology legal gap is referred to when the rules of law contradict moral order.[57]

(i) Logical, Alternative, Judgement and Absolute Legal Gaps

According to Somló, quoting the works of Lóránt Csink, and Péter Paczolay, applicability legal gaps can be of the following types: "When the judge can deduce the applicable norm by way of pure logics", it is a *logic legal gap*. An *alternative legal gap* is one where the law provides more than one applicable norms without specifying which one is to be used in resolving the particular case. The third type is termed as *judgement legal gap*, when the judge is to complete the law on the basis of moral judgement. It may happen that a legal gap does exist but there is no legislative body empowered to fill the gap in contrast with the previous cases where the judge may act, and therefore the gap remains in the legal rule. Such norms are typically the ones regulating the obligation of the supreme power. As the law excludes a legitimate resolution of the question, the legal gap may only be eliminated by a breach of law, i.e. in an illegitimate way. This is called an *absolute legal gap*.[58]

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52 Miklós Szabó: *A jogdogmatika előkérdéseiről (On the Preliminary Questions of Legal Dogmatics)*. Prudentia Iuris, Miskolc, 1996, p. 204.

53 Lóránt Csink, and Péter Paczolay, above, note 3 at p.1

54 Bódog Somló: *Jogbölcsészet (Philosophy of Law)*. Prudentia Iuris 1, Miskolc, 1995, at pp.123–125.

55 Lóránt Csink, and Péter Paczolay, above note 3 at p.2.

56 Aleksander Peczenik: *On Law and Reason*. Kluwer, Dordrecht, 1989, at p.24.

57 Lóránt Csink, and Péter Paczolay, above, note 3 at p.1.

58 *Ibid*, at p.3.

(j) Theoretical and Practical Legal Gaps

Referring to Lóránt and Péter, both stated that Barna Horváth, in 1937, distinguished two types of legal gaps.[59] A *theoretical legal gap* is "the logical path between the legal norm and the legal case", existing in every case. As a result, both "creating a legal norm applicable to all cases" and "applying the legal norm to a specific legal case by purely logical means" are impossible. A *practical legal gap* is "when the bridge built by conventional judgement and experience over a theoretical legal gap collapses from time to time". The latter category is an occasional but serious disturbance in legal practice. The existence of legal gaps was proven by Horváth by the tool of syllogism. In his opinion, the legal norm contains a (first) premise (*propositio maior*), and the legal case contains a second premise (*propositio minor*). Logically, the second premise is missing from the legal norm, creating a legal gap.

According to Otilia Micloşină, the South-American conception of lacuna implies, the lack of any regulation for a concrete case".[60] It is also a fact that a hypothetical case, not legally regulated, represents a lacuna.... From the definition formally presented, one could understand that there is lacuna only when a case is not explicitly regulated by a norm. Does it result that the magistrate fills a lacuna, when he adopts a decision, whether that case has no explicitly legal regulation and this one on the basis of analogy, legally qualifies it? In the law of Roman Catholic origin, the magistrate is not allowed to create law. In the situation presented previously, the magistrate invokes the implicit norms to resolve a cause and uses analogy in this respect. In Pintore's definition where gaps exist, the lacuna does not appear only in case of the absence of explicit norm, but also the moment of the absence of legal norm, either explicit or implicit. Norberto Bobbio estimates that there is lacuna of law when in a given legal system there is a missing rule which the judge may invoke in case he has to solve a controversy deduced to his judgment."[61]

According to Otilia Micloşină[62] the phrase "lacuna of law", the term of law signifies legal system, and it is translated by the system of norms which the judge has to apply in order to decide a concrete case. Any social group has a patrimony of legal norms gathered over times. These norms may come from traditions, from the will of the dominant class, from jurisprudence and/or doctrine. The amplitude of this patrimony varies depending on the complexity of considered society. But, even in the most high-level society, there are concrete situations when the magistrate does not find in that system of law the legal norm which may be applied. It is about the cases which appear as a result of the new or original social situations and in front of which, the judge, in spite of the important number

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[59] *Ibid*, See also, Barna Horváth: *A jogelmélet vázlata (Draft of the Theory of Law)*. Szeged, 1937.

[60] Mario Jori-Anna Pintore, "Manual of the General Theory of Law", G. Giappichelli (ed.), Torino, 1995, at p.222.

[61] Norberto Bobbio, "Contributions to a Legal Dictionary", G. Giappichelli (ed.), Torino, 1994, at p.89.

[62] Otilia Micloşină, "Defining Gap in Law", Available online at *www.upm.ro/proiecte/EEE/Conferences/papers/S1A12.pdf accessed 11 November, 2013.* Kelsen considers that there are only valid norms, and, therefore, there are no norms, unless valid; analogically, it was considered that the lacuna can be filled, and therefore, it does not exist. Still, to say that there are no lacunas because there is an integrative technique which appealing to an implicit norm of the system succeeds in filling them, it means that we turn back at the situation in which there are no diseases because there are medicines that cures them.

of existing legal norms, does not identify legal alternatives. Under these circumstances, it may be used the notion of "lacuna of law".

According to other conception it is considered that the notion of lacuna of law can have two different meanings:[63] (a). A field of law which is not stipulated under any legal provision. (b). The lack of specific legal provisions for a concrete case which appears as a result of the fact that the law-maker cannot anticipate any detail, but the judge can fulfil the application of a general provision of a concrete case.[64]

These definitions delimit the lacuna of law, starting from and applying the principles of natural law. Robert Kolb takes into consideration a gradation of the concept of lacuna which results from the general conception of the legal order. He made a distinction between lacuna of law which is like any form of indeterminacy of law and lacuna which means the absence of applicable legal norm from the system of sources of law.[65] Kolb concludes that one cannot approach lacuna from the isolated point of view, but that this represents a legal category which implies the entire theory of law.[66]

B Distinction between the Lacuna of Law and the Pure Silence of Legal Texts

In situations where legal gaps exist, there is need for a distinction between the lacuna of law and the pure silence of legal texts. Silence is not synonymous with lacuna. Legal silence can be deliberate. Under certain circumstances, it may be imposed from the legal point of view. Life is full of original and various situations, that it is impossible for them to be all integrated in legal sources. The author thinks that lacuna is not the silence of law, an objective fact, but it represents an incompleteness of law, therefore, a subjective fact. Lacuna appears only as a result of an interpretation which took in consideration the inherent values of legal policy. Behind any technical concept there is an axiological evaluation. Moreover, lacuna is not only the lack of an applicable rule of law, but any incompleteness of law. The law maker should have anticipated a legal norm which should be applicable, but it appeared a failure. Law is silent when it should ordinarily act.[67]

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63 Michel Troper, *Statutory Interpretation in France*, in *Interpreting Statutes. A Comparative Study*, Neil MacCormick and Robert Summers, Darmouth Publishing Company, Hants, 1991, at p.175.

64 In German law, the following definition for lacuna in law was proposed as follows: "there is lacuna when a normative system has a deficiency in the conditions in which the objective law as a whole, including the supra-legislative principles and legal ideas extracted from the nature of things, does not offer a norm of regulation". See C. W. Canaris, *How to find and fill loopholes in German law in Leproblème the Gap in Right*, Chaïm Perelman, Bruylant, Bruxelles, 1968, at p.167.

65 Robert Kolb, Interpretation and Creation of International L aw, Bruxelles: Bruylant, 2006, at p.780.

66 *Ibid*.

67 Csaba Varga, Doctrine and Technique in Law; A presentation at Internationales Rechtsinformatiks, Symposiom/ IRIS/2004, Kolloquium Philipps (Rechtstheorie), Salzburg 26-28 February, 2004 at 2-3. Available online at *www.univie.ac.at/ri/iris2004/arbeitspapierln/.../csaba_phil.doc, accessed 10 November, 2013.*
What is identifiable of law when no implementation or judicial actualisation is priory made is a *dynamei¸* at the most, that can exclusively become anything more through an instrumental operation by legal technique. Accordingly, law is made up of (1) a homogenised formal concentrate (2) operated by being referred to a practical action, the result of which will posteriorly be presented to the public as law converted into reality.

VII Methods of Filling the Gaps in Legislation

Legal gaps can be resolved through the following approaches discussed under sub-sections (a) to (d) hereunder:

(a) Analogy and Broad Interpretation

This involves resolving the case in question based on a similar case to which there is an applicable rule; while the concept of broad interpretation involves interpreting the rule applicable to the similar case in a way expanding it to the present case as well; exercising discretionary power when determining the facts of the case.[68]

(b) Filling the Gaps by Way of Subsumption

The gap in law can be filled by way of subsumption, i.e. by relating the legal case to the legal norm. This is to be done by the judge. According to Horváth, the law "can only be regarded as complete after filling the gap created by the theoretical legal gap, and the law thus completed becomes continuous as its gaps are all filled". By that, he has practically resolved the antagonism between the two categories.[69] The formalistic normative approach automatically denies the existence of legal gaps, saying that the legislator has done its work (i.e. the non-existence of a rule logically means that the conduct in question bears a legally neutral normative status).[70] This positivistic theory of law was followed by Gyula Moór. He held that "*not regulating a certain detail by the law does not mean a gap*". Accordingly, if the legislator failed to make rules for some situation in life when codifying an Act, this must have been done intentionally. However, when there is some change occurring after the promulgation of the statutory regulation which requires a different judgement as compared with the former cases, this can only be done in Moór's opinion by amending the relevant Act of Parliament rather than by judicial practice.[71]

(c) Filling the Gaps by Way of Legislation and Analogy of the Judge

According to Peter Mezei[72] in his study of Hungarian legal literatures dealing with the problem of legal gaps, he made following classifications: by their origin, legal gaps can be "original" or "posterior". In case of an original legal gap, "despite its existence, a certain fact is not included in the statutory regulation". When such a case is found by the judge, the tool of interpretation is to be used in order to verify whether the omission of legislative duty was intentional or incidental. If it is established that codification of the given case was omitted intentionally, then the judge is not empowered to fill the gap as this can only be done by way of legislation. Incidental omission may happen when

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68 *Ibid*, See also, Miklós Szabó: *Jogi alapfogalmak (Basic Concepts of Law). Prudentia Iuris*, Miskolc, at, pp. 49-52.

69 *Ibid*.

70 *Ibid*, See also, Vanda Lamm-Vilmos Peschka (ed.): *Jogi lexikon (Encyclopaedia of Law)*. KJK-Kerszöv, Budapest, 1999, at p.301.

71 *Ibid*.

72 *Ibid*, See also, Péter Mezei: A joghézag kérdése régen és ma (The Question of Loopholes Historically and Today). *Jogelméleti Szemle* (on-line journal), Budapest, 2002/2, http://jesz.ajk.elte.hu/mezei10.html.

an existing case is, by chance, not taken into account during legislation. In that case, the judge may employ analogy to deduce from an existing similar norm the rule necessary for resolving the case[73].

(d) Filling the Gaps by Amending the Statutory Regulations or by Adopting New Norms

A posterior legal gap results from a situation where the phenomenon concerned did not exist at the time of legislation, but its subsequent occurrence has led to lawsuits requiring regulation of the phenomenon. Such changes may, on the one hand, result from the amendment of national law and international (or the European Union's) norms, treaties, and, on the other hand, they may be caused by everyday events. The gap should be filled first of all by amending the statutory regulations or by adopting new norms, but in exceptional cases judges may also act. This is only possible in case of partial legal gaps. [74] By their scope, legal gaps can be "complete" or "partial". In case of a complete legal gap, there is no provision at all pertaining to the case to be judged upon. A partial legal gap is one where an existing provision is incomplete. The judges and the legislators are empowered to fill the gaps. Legislation may be used to eliminate any kind of legal gaps. The role of the judge is much more debated. Those who deny the very existence of legal gaps contest the judges' role as well. However, lawyers who insist on the contrary consider the judiciary to be the primary body designated to eliminate legal gaps.[75]

A Examining the Theoretical Basis of Filling the Gaps in Law

According to Greenawalt, one of the main exponent or theorists of filling the gaps in legislation while relying on Benjamin Cardozo's third lecture on *The Nature of the Judicial Process,* entitled *The Judge as a Legislator.*[76] He stated that "comparing the task of the judge with that of the legislator, Cardozo found that each of them is: legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open space in the law.... His action is creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom".[77] But perhaps the most significant and controversial theory in present-day analytical jurisprudence is the "rights thesis" of Professors Ronald Dworkin and Rolf Sartorius.[78] The theory holds that "that there is always one correct outcome for any legal dispute, that the litigants have a "right" to this outcome, and that the outcome may be determined by the discretion or creativity of a judge on the basis of existing legal materials including statutes, precedents, rules, principles, and perhaps

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73 *Ibid*, p.4-5.
74 *Ibid*.
75 *Ibid*.
76 Greenawalt, Discretion *and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 *Columbia Law Review,* 359 (1975)
77 B. Cardozo, "The Nature of the Judicial Process", Yale: Yale University Press, 1921 at 113-115
78 Dworkin, *Hard Cases,* 88 *Harvard Law Review* 1057 (1975), *reprinted in* R. Dworkin, *Taking Rights Seriously*, Cambridge, MA: Harvard University Press, 1977 at pp.81, 82-90.

but Professor Kent Greenawalt, argues that discretion is a vague term having differing meanings in different contexts and thus hardly points to a clear conceptual alternative to the rights thesis. Though, Cardozo's position seems to be the logical alternative to the rights thesis, inasmuch as Dworkin claims that a judge must find the existing law whereas Cardozo holds that in close cases a judge may create new law as does a legislator.[79] He believes that although a judge is obviously not a legislator in general, the judge does legislate new law in close cases to fill gaps between existing rules. Cardozo offered his theory as a departure from the traditional Blackstonian theory of "pre-existing rules of law which judges found, but did not make".[80]

Just as Professor Greenawalt's theory of filling the gap is devoted to criticizing the rights thesis of Dworkin and Sartorius, Greenawalt's own position in favour of judicial legislation is presented indirectly as a contrast to the rights thesis by Anthony D'Amato, as follows ... "The judge should determine whether existing rules and principles are "clear" in favouring one side or the other. (a) If clear, the judge is bound by them to give the decision to the side favoured by the rules and principles. (b) If unclear, the judge may engage in judicial legislation.[81] Anthony D'Amato concluded by stating "that If a judge is indeed a legislator, even if only in hard cases, our idea of "law" and what we study when we study "law" undergoes a significant change. We begin to look at the judge rather than at his decisions; we study his opinions rather than the results in the cases; we treat what he says off the bench in the way that medieval subjects paid attention to the remarks of lords and princes.[82]

It has been advocated that Judges should tolerate some moral deficiencies in the law that they should not have tolerated had they not undertaken, as part of the job, to uphold the law. But they should not by that same token tolerate just any moral deficiency in the law. Invariably, they should strive to improve the law, at the very least by filling in its gaps in a morally decent way. Sometimes they should also improve it by reversing or containing immoralities introduced by other officials, inasmuch as they retain the legal power to do so.[83]

In many legal systems the moral commitment to uphold the law that the judge undertakes on taking the job is formalized in an oath of office. The content of such oaths is worth noting. In most legal systems judges take an oath to do 'justice according to law', or something like that. This is not an oath to apply the law. On the contrary, it is an oath to do justice, to decide cases in a morally meritorious way. To do so is not to usurp the role of the legislature. For the oath does not authorize judicial legislation. It authorizes judicial changes in the law, to make the law more just, but only when these changes are

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79 D'Amato, Anthony, "Judicial Legislation" (2010), *Faculty Working Papers.*, Paper 107., at 1. Available online at http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/107 accessed 18 November, 2013. See also Anthony D'Amato, "Judicial Legislation", 1 *Cardozo Law Review*, at pp.63-97 (1979).

80 *Ibid*, at p.2.

81 Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 *Columbia Law Review* 368, 378 (1975).

82 D'Amato Anthony, above, note 79, at p.19.

83 John Gardner, "Law and Morality", pp.8-9. Available online at http://users.ox.ac.uk/~lawf0081/pdfs/lawmoralityedited.pdf, accessed 19 November, 2013.

brought about by legal reasoning, i.e. by reasoning with (or according to) law. That is the 'according to law' part of the oath.[84]

Legal officials, such as judges, play an indispensable role in securing the rule of law as when they apply 'the necessary abstract rule of law to the concrete case, they create the legal rule for the individual case before them. The object of law to secure order must be defeated if a controversial rule of conduct may remain permanently a matter of dispute.[85]

B Filling Gaps or Lacuna in Law by Judges through Normative Reasoning

This approach has emerged in more recent times. Here the court is not just looking to see what the gap was in the old law, it is making a decision as to what they felt Parliament meant to achieve and is referred to as the purposive approach.[86] In *Magor and St Mellons Rural District Council v. Newport Corporation*,[87] Lord Denning attempted to justify why judges should fill existing gaps in legislation using a purposive approach[88]reaffirm that: "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis". But this did not receive the approval of the House of Lords on appeal. Lord Simonds, a strict constructionist, scotched this new approach and castigated it "as a naked usurpation of the legislative function under the thin guise of interpretation".

It is a fiction to think that law is not made by judges. The creative role of the judges arises when there is a gap in legislation and this analogy has been accepted in almost all jurisdictions of the world. In *S. P. Gupta v. President of India and ors,*[89] the court observed: The interpretation of every statutory provision must keep pace with changing concept's and values and it must, to the extent to which its language permits or rather does not prohibit, suffer adjustments through judicial interpretation so as to

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84 *Ibid*.

85 Iain G.M. Scobbie , "The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function", 2 *European Journal of International Law* (1997) 264-298 at 270, Available online at http://ejil.org/pdfs/8/2/1429.pdf, accessed 19 December, 2013.

86 "Judges and the law", Available online at http://labspace.open.ac.uk/mod/resource/view.php?id=415855, 19 November, 2013.

87 (1951) 2 All E.R.839.

88 The purposive approach (sometimes referred to as "purposivism", purposive construction, purposive interpretation, or the "modern principle in construction" is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (that is, a statute, a part of a statute, or a clause of a constitution) in light of the purpose for which it was enacted. The historical source of purposive interpretation is the mischief rule established in *Heydon's Case*. (1584) EWHC Exch J36. Purposive interpretation was introduced as a form of replacement for the mischief rule, the plain meaning rule and the golden rule to determine cases. Purposive interpretation is exercised when the courts utilize extraneous materials from the pre-enactment phase of legislation, including early drafts, hansards, committee reports, white papers, etc. The purposive interpretation involves a rejection of the exclusionary rule. See, "Purposive Approach", Wordvia http://www.wordvia.com/dictionary/Purposive%20approachaccessed 02 May, 2014.

89 IR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365.

accord with the requirements of the fast changing society which is undergoing rapid social and economic transformation. The court also went on to say that: "....law does not operate in a vacuum. It is therefore intended to serve a social purpose and it cannot be interpreted without taking into account the social, economic and political setting in which it is intended to operate. It is here that the Judge is called upon to perform a creative function. He has to inject flesh and blood in the dry skeleton provided by the legislature and by a process of dynamic interpretation, invest, it with a meaning which will harmonise the law with the prevailing concepts and values and make it an effective instrument for delivery of justice." It is clear from the above statements that, not only constitutional interpretation, but also statutes have to be interpreted with the changing times and it is here that the creative role of the judge appears, thus the judge clearly contributes to the process of legal development. The courts do not always follow the precedent blindly and do not always consider themselves bound by the given principles. The court does evolve new principles. However, the courts do always have to follow within the limits of the constitution and they cannot exceed the constitutional limits. "When new societal conditions and factual situations demand the Judges to speak, they, without professing the tradition of judicial lock-jaw, must speak out." Also, in *M.C. Mehta v. Union of India (Shriram - Oleum Gas)*[90] the court held that with the development and fast changing society the law cannot remain static and that the law has to develop its own new principles. Sabyasachi Mukharji, C.J., in *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee*,[91] the court held that the role of the judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and a reality. The society demands active judicial roles which formerly were considered exceptional but now a routine. The above decision reflects that the courts do make laws, they frame new principles; interpret the statutes and the constitution with the changing times in a bid to fill gaps in law that were not foreseen by the legislators due to emerging socio-economic situations.[92]

C Filling the Legal Gaps in a Civil Law Jurisdiction

The Civil Law tradition from the ages of the great Roman jurists and emperor Justinian, up to the 19th Century codification processes was well aware of gaps. They represented, however, what, at present, would be regarded as a political and/or a methodological issue. Indeed, both the Roman jurists and their *ius commune* followers (Glossators, Commentators, etc.) took for granted that gaps were, so to speak, a fatal side effect of any piece of written law: something naturally going along with it, like a shadow. Accordingly, they were concerned with either, or both, of the two following problems: first, *who* should be regarded as entitled to fill them up (that is whether the sole emperor or, in any case, the

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90 1987 AIR 965, 1986 SCR (1) 312, 1986 SCC (2) 176 1986 SCALE (1)199.

91 1995 SCC (5) 457, JT 1995 (6) 339.

92 *Ibid*. See the decision of Sabyasachi Mukharji, C.J., in the case of *C. Ravichandran Iyer v. Justice A.M. Bhattacharjee.*

sole legislative authority, on the one hand, or even the judge and the jurist, according to their respective roles, on the other); secondly, *how* to fill them up (*i.e.*, by which techniques proceeding to the so-called *extensio legis*).[93] By the mid-nineteenth century, however, as an outcome of the working of several factors (codification; Enlightenment ideologies about legislators' omnipotence, separation of powers, rule of law, and judges' passivity; the holistic conception of positive law advocated by the Historical School and Legal Dogmatics; etc.) the Civil Law world was apparently stung by the "positivistic" dogma asserting that legal systems are, by their very nature, *gapless* sets of norms, providing for any possible case whatsoever.[94]

According to Roberto MacLean, contradiction is inherent in the law. The moment that a statute is enacted, it begins to age and become inadequate for unanticipated future circumstances.[95] Life never stops. And perhaps some of the characteristics of the Civil Law system, such as the belief that reason can do too much, have helped to accentuate the contradiction between law and reality. What can a judge do? As Ehrlich has said, "There is no excuse, as it were, for squeezing decisions out of a statute with a hydraulic press."[96] There is no easy way out. Even at the height of post-revolutionary France, Article 4 of the French Civil Code provided that the judge who refused to render a decision under the pretext of the silence, obscurity, or insufficiency of the law was liable to prosecution for a refusal of justice. Professor Roger Perrot has observed that: The judge has the immense power to transform a readymade garment into a tailor-made suit at the price of alterations that may be considerable and sometimes rather unexpected. From this it has often been deduced that the judicial authority is thus able to perform a work of rejuvenation.[97] No legal system can survive in any society without an acceptable degree of judicial discretion. In the Civil Law, one finds discretion at the following levels: discretion in the Civil Law as a system, discretion within the civil codes, and discretion within the particular rules of those codes. Discretion within the system itself is a technique which gives ample leeway to the judge in his characterization or interpretation of the facts. When a judge is faced with a particular set of facts, he has the choice of placing those facts under one legal category or another he has a choice in characterizing the facts according to law.[98]

Roberto MacLean, second technique for exercising discretion within a Civil Law system is through the interpretation of the law. There are some codes which attempt to be as precise and exact as possible concerning the methods of interpretation to be used, such as literal interpretation, logical interpretation, and exegetical interpretation. But, always it is the judge who must choose among the many methods available. According to Judge

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93 P. Chiassoni The Interpretation of Normative Documents: Justinian and Glossatori, in L. Gianformaggio, M. Jori (eds.), Written by Uberto Scarpelli, Milan, Giuffrè, 1998, at. 208-209, 221-222, Utopia of Analytical Reason. Origins, Objects and Methods of Philosophy of Positive Law, Turin, Giappichelli, 2005, ch. IV.

94 Pierluigi Chiassoni, above note 40.

95 Roberto G. MacLean., "Judicial Discretion in the Civil Law", 43 *Los Angeles Law Review* (1982) at p.49.

96 *Ibid*., See also Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects,* in Science of Legal Method: Selected Essays 76 (1969).

97 *Ibid*, See also Perrot, "The Judge: The Extent and Limit of His Role in Civil Matters"*,* 50 *Tulane Law Review* 496 (1976).

98 *Ibid*, at p.50.

Albert Tate, in certain occasion the legal problem is not always simple; the meaning of the law may not be clear, hence it must admit of judicial discretion in interpretation in order to produce a just result. Thus, the choice of methods of interpretation to produce a just result is always an exercise of judicial discretion.[99]

Thus, the choice of methods of interpretation to produce a just result is always an exercise of judicial discretion. Professor Julio Cueto-Rua, has very aptly stated that: "In choosing the method to which he will turn when a grammatical-logical approach is unsuccessful, the judge will choose that method of interpretation which will yield the most fruitful result in the case. By most fruitful result is meant that result most consistent with justice.[100]

Apart from these general techniques present within the codes themselves, Roberto MacLean, posits that the judge in the Civil Law tradition has sufficient discretion.[101] to achieve justice beyond that granted by the mere words of the law. Professor Merryman, for instance, states: that the dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence.... The books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes. Although the text of a statute remains unchanged, its meaning and applications often change in response to social pressures, and new problems arise that are not even touched on by any existing legislation. However complete a code might seem, there will always be gaps and interstices which require the judge's exercise of discretion. The gaps in statutes or codes are a reality that must be recognized. How can those gaps be filled? There are several solutions provided in the legislation itself. First, for example, the Civil Code of Switzerland, which dates from 1912, establishes in Article 1 that all gaps left by the code are to be filled in by the judge, who acts as a legislator.[102] Professor Alfred E. von Overbeck has noted in this regard that "the Swiss legislator was the first modern legislator to recognize that it needs the judge to achieve his own tasks..." . Even though the Austrian code dates from 1811 and its text does not seem to permit expressly the use of the same technique allowed under the Swiss code, more than one commentator

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99 *Ibid*, See also A. Tate, *Techniques of Judicial Interpretation in Louisiana,* 22 *Los Angeles Law Review* 727, 754 (1962).

100 *Ibid*. at 51. See also, J**.** Cueto-Rua, "Judicial Methods of Interpretation of the Law", 276 (1981).

101 "The law may have run out in hard case situations, but only partly so for the rules still maintain their settled core of meaning even if they cannot resolve a particular case. Thus the judge who is faithful to his role furthers the determinacy of a general law, 'filling in the gaps by exercising a limited law-creating discretion'. He neither sets aside his law books entirely, nor tries blindly to follow the law. Instead, he: 'both makes new law and applies the established law which both confers and constrains his law-making powers'."(See, Peter Parten, "How Should Judicial Decisions be justified? An Investigation into the Role of the Judiciary from a Political Perspective". Unpublished MA Thesis in Political Philosophy Submitted to the Department of Politics, University of York, September 2008 at 17. See also Ralph Miliband, *The State in Capitalist Society* London: Weidenfeld and Nicolson, 1969 at p.272).

102 Article 1 provides: the law applies according to its wording or interpretation to all legal questions for which it contains a provision. In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator. In doing so, the court shall follow established doctrine and case law. Swiss Civil Code adopted on 10 December, 1907 (and is thus formally known as the "Swiss Civil Code of 10 December 1907"), and in force since 1912. (Status as of 1 January 2013) available online at http://www.admin.ch/ch/e/rs/2/210.en.pdf accessed 12 November, 2013.

has interpreted Article 7 of the Austrian Civil Code[103] as allowing the judge to act as a legislator in such cases.

Other code technique used for filling gaps is legislation that requires the judge to resort to general principles of law are the solutions opted for in the Argentine Civil Code of 1869;'[104] the 1932 Civil Code of Mexico;[105] the Peruvian Civil Code of 1936;"[106] the 1942 Civil Code of Brazil;[107] the French Civil Code[108] and the Italian Civil Code of 1942."[109] The use of such general principles of law allows the judge ample resources from which to draw in deciding cases involving gaps in the law, and some of those codes are even more precise. The doctrine of abuse of right is a doctrine of long standing in many Civil Law countries. The doctrine of abuse of right condemns not only the exercise of a right but the abusive use of it in such a way as to damage another person. In Louisiana State, this doctrine appears only tangentially in article 623 of the Civil Code, which establishes the rule that a "usufruct may be terminated by the naked owner if the usufructuary commits waste, alienates things without authority, neglects to make ordinary repairs, or abuses his enjoyment in any other manner."....[110]

Under the New Zealand Bill of Rights Act 1990, for example, Parliament has also mandated that judges interpret statutes in a manner that is consistent with the Bill of Rights Act if possible. This means that gap-filling is required by reference to a statute that is already expressed in general terms and requires gap-filling in its own right.[111] However,

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[103] Austrian Civil Code of June 1, 1811, No. 946. See Article 7. It provides that in cases which cannot be decided by the usual means of interpretation (grammatical, natural construction of law or analogy), the case must be decided with regards to the carefully collected and well considered circumstances, according to the precepts of natural law. Similarly Article 1 of the Swiss Code, empower the Judge, in the case of a gap in the law, to apply customary law, and in its absence to decide the case according to rules which he would establish, if he were the legislator. (See Leo Gross., *Essays on International Law and Organization*, Vol. 1, New York: Transnational Publishers 1984, at p.230).

[104] Civil Code of the Republic Argentina Article 16 (1869).

[105] Civil Code for the Federal District and Territories Article 19 (1932).

[106] Peruvian Civil Code, Article 23 (1936).

[107] Brazilian Civil Code, 1942, Article 4

[108] France, have a provision that makes it an offence not to decide a case. Article 4 of the French Code Civil (1804) provides that: *Le juge qui refusera de juger, sous pretext du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice* . (This means that: the judge who refuses to judge, under pretext of the silence, obscurity or insufficiency of the law may be prosecuted as guilty of denial of justice).

[109] Civil Code of the Kingdom of Italy or *Codice Civile del Regno D'Italia* Article 12 (1942).

[110] Roberto G. MacLean, above note 71 at p.93.

[111] New Zealand has no written constitution and so the boundaries of judicial review cannot be defined by any words in a constitution. Moreover, the appropriate scope of judicial review is not defined by any other statute. While there is legislation related to judicial review, the better view, is that this legislation is procedural only. Even if that is not the case, the statute in question does not set out the grounds of review and it is quite clear that the common law and inherent jurisdiction of our High Court survives. Accordingly, the setting of limits or boundaries to the grounds of judicial review is a task that falls squarely on the courts. (See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2007) at 121-145 and 815-884., See also Matthew Groves and H P Lee " Australian Administrative Law: The Constitutional and Legal Matrix" in *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007) at pp.1-33. New Zealand Judicature Amendment Act 1972) See generally Justice Susan Glazebrook, "Immigration and Judicial Review" Oral presentation to Australian Supreme and Federal Court Judges at a Conference held in Hobart from 24-28 January 2009. Available online at http://www.courtsofnz.govt.nz/speechpapers/Supreme%20%20Federal%20Judges%20Paper.pdf, accessed 12 November, 2013.

that many of the common law values used to interpret legislation (for example rights of access to the courts) were designed to protect individual rights.[112]

A third widely recognized general principle of law relied upon by judges in filling gaps in the law are that of equity.[113] As it is understood within the meaning of Articles 21, 1903, 1964, and 1965 of the Louisiana Civil Code, equity is based on natural law, on reason, and on the idea that one should not do unto others that which he would not wish others to do unto him.[114]

Finally, the judge exercises discretion with regard to particular rules of law. In the first place, the judge in some cases must determine whether an agreement or obligation is or is not against the public order or the public good. For example, Article 11 of Louisiana Civil Code of 1965, provides: Individuals can not by their conventions derogate from the force of laws made for the preservation of *public order* or *good morals.* But in all cases in which it is not expressly or impliedly prohibited they can renounce what the law has established in their favor, when the renunciation does not affect the rights of others, and is not contrary to the *public good.* [115] Likewise, under articles 217, 1892, and 2031, in cases closely connected with the notion of public good, the judge must decide what constitutes good morals or *bonos mores* (bonus dwell)". In other cases, the judge must decide when someone has acted in good faith or with good intention.[116]

D Filling the Legal Gaps in Common Law Jurisdictions

Michael Sinclair wrote that the Constitution is authoritative, constitutive wisdom from the past; so too are statutes properly made pursuant to it. These are the texts provided to us by the ancients, but they do not come with ready-made interpretations. Nor do they cover all domains of human behaviour, or all sources of conflict. Judicial decisions fill the gaps. They have to, as conflicts cannot be left unresolved if society is to survive as such. It follows that judicial decisions should be normatively adaptive to "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men" as Holmes famously put it. But times change, and those decisions join the authority of the past,

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[112] Justice Susan Glazebrook, "Filling the Gaps" Available online at http://www.courtsofnz.govt.nz/speechpapers/Speech05-05-2003.pdf, accessed 12 November, 2013.

[113] *Ibid*. Note that the use of equity, however, is not a matter of pure legal technique. It also has great ethical significance. Consider the situation in the New Testament when Jesus Christ was asked, by someone who wanted to put him in a difficult situation, whether it was legal for a man whose lamb had fallen into a pit to work on Sunday in order to get the lamb out. Jesus replied: It is lawful to do good on the Sabbath. (See the Holy Bible: New International Version, Grand Rapids-Michigan: Zondervan, 1990, *Matthew* 12:11-12.).

[114] *Ibid*.

[115] "That is considered as morally impossible, which is forbidden by law, or *contrary to morals.* All contracts having such an object are void." LA. Civ. CODE art. 1892.

[116] See also, Roberto G. MacLean, above note 93 at 54. *See, e.g.,* L A. Civil Code, Articles 1901, 3006 & 3033. Article 1901 provides: "Agreements legally entered into have the effect of laws on those who have formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith".

texts in tension with new, adaptive rationality. *Stare decisis*, the doctrine of precedent, mediates that tension, giving the edge to prior decisions, be they purely common law, or interpretations of statutes or constitutions.[117]

Common law and its principle of *stare decisis* could not have survived through so many social upheavals and radical technological and economic changes without being flexible and adaptive. Lord Mansfield saw the common law's adaptability to change in the requirements of justice as its principal advantage over statutes: "A statute very seldom can take in all cases, therefore the common law that works itself pure by rules drawn from the fountain of justice, is for this reason superior to an act of parliament.[118] The reference is to Judge Cardozo's 1920 Storrs Lectures, "Judicial Process," which gave the benchmark quotable: "The labour of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of courses laid by others who had gone before him." There are two reasons here. Were all cases to be decided afresh at all levels (a) there would be a burden of numerosity constrained only by the litigants' willingness and budget, and (b) it would create an insecure base of decisions previously made. From a societal point of view *stare decisis* can be seen as promoting efficiency in dispute resolution resource allocation.[119]

As a corollary to the above ideas of Michael Sinclair, on constitution and the role of judges in the use of precedents in gap-filling and shaping of the law, Pierluigi Chiassoni, asserts that in different jurisdictions, gaps feature among the sources of concern, for legal practitioners (judges, jurists, barristers, attorneys at law, etc.) and legal theorists alike. On the one hand, gaps challenge the practitioner's skills in coping with cases that as lawyers like to say are somehow "unprovided for" by the law. On the other hand, gaps are a powerful test for legal theorists' ability to provide careful, practice-sensible, and practice-oriented accounts of a tangled phenomenon. For indeed, as soon as one leaves the apparently sound lands of practitioners' common sense, as soon as one departs from lawyers' apparently smooth "intuitions" (*i.e.*, fuzzy and unreflective everyday notions), a host of overwhelming questions suddenly pops up: and it's conceptual quick-sands everywhere. *What* a gap in the law *really is*? *Really* are there *gaps* in the law? What is it, for a judge, to *find* a gap in the law, if any? Assuming there is a gap in the law how is it to be filled up properly by the law-applying agencies? And so forth. This question has been answered earlier under the sub-head "methods of filling the gaps in legislation".[120]

A most common way of resolving disputes under the rule of law is by reference to, and application of, the language of applicable multilateral or bilateral treaties or statutes, or some other writing which provides evidence of the relationship and past positions of the

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117 Michael Sinclair, "Precedent, Super-Precedent", *GEO. MASON L. REV. VOL*. 14:2, 2007, at p.366.

118 *Ibid*., at 371. See the case of *Omychund v. Barker*, (1744) 26 Eng. Rep. 15, 22-23 (Ch.).

119 Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 *Cornell Law Review*, 423 (1988). See also Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 *Vanderbilt Law Review* 654 (1999).

120 Pierluigi Chiassoni, above note 40, at pp.51-52.

parties to a dispute.[121] Another method is by reference to custom, the practice of nations in a particular area (customary international law) and principles of law derived from such. But what happens when there is no such guiding authority for the benefit of those involved in resolving the dispute? Such gaps are inevitable in any legal system, including the international one, because treaties (contracts), statutes, and rules derived from custom cannot be designed to cover all situations which give rise to disputes. International law provides an answer to that question for the resolution of international disputes: general principles of law may used to fill the void or "gap." These may be referred to, as one authority did, as "nonconsensual" sources of international law.[122]

In the municipal law systems of countries with a common law tradition, judges very often look to the decisions from outside sources to fill in the "gaps" of the law to be applied in the resolution of a particular case. As an example, state courts in the United States very often cite the decisions of other state courts in the course of an opinion in a case, where a needed legal rule of the deciding state is absent or unclear. As a corollary, some justices of the Supreme Court of the United States have adopted the practice of using the decisions of courts of other countries and international courts for their persuasive value in clarifying unclear rules to be applied in a case. In civil law countries, as Professor Mark Janis of the University of Connecticut Law School noted that, "lawyers and judges in the civil law tradition are familiar with the problem of lacunae, gaps in the law, a concept based on the premise that only formal legislative institutions are empowered to make legal rules".[123]

Thus, judges in civil law countries need statutory authority to "fill in the gaps" of the legislatively created legal rules. Must the civil law judge merely look at the statutes or decisions of courts in foreign jurisdictions for a "fill in the gaps" principle, or must the judge find explicit statutory authority for such practice, i.e. to find "explicit authorization permitting courts to fill the legislative vacuum?" The existence of a body of legal principles and rules that are common to all, or almost all legal systems, is supported by some observations made by a British barrister, C. Wilfred Jenks, in his book titled "the Common Law of Mankind".[124]

> Jenks observes that virtually all of the legal systems of the world, including those in Latin America, Islamic countries, African countries, countries within the former Soviet bloc, India, China, and Japan have been profoundly influenced in the course of their development by either the civil law or the common law. The result is that many principles of law are common to these legal systems. One only has to examine, for example, the law of contracts or torts or the criminal law relating to murder in these legal systems to understand the truth of this assertion. Thus the common law and the civil law, which by themselves share common principles of law, provide

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[121] James G. Apple, Veronica Onorevole and Andrew Solomon (eds), "The American Society of International Law and International Judicial Academy", Volume 2, Issue 2, Jul/Aug 2007 , available online at http://www.judicialmonitor.org/archive_0707/generalprinciples.html or http://www.jura.uni-augsburg.de/en/curriculum/summer_program/materials/Materials2012/Augsburg_Comp_Law_Readings_Week_3_-_Brown_2012.pdf, accessed 20 November, 2013.

[122] *Ibid*.

[123] *Ibid*.

[124] C. Wilfred Jenks, *The Common Law of Mankind*, New York: Frederick A. Praeger, Inc., 1958, at pp. xxvi, 456.

> the basic framework that many general principles of law can be derived and used to "fill the gap" when there is no general principle of international law available for application in the resolution of a particular case.

The traditional civilian approach to the role of statutes, which is reflected in a citation by French jurist Jean Etienne Marie Portalis:[125] "The function of the law is to fix, in broad outline, the general maxims of justice, to establish principles rich in suggestiveness (consequences), and not to descend into details."[126] French jurists distinguish between those situations in which the facts do not fall within the scope of a statutory provision or code and those in which they only partly fall within the scope of that code or statutory provision ("*insufficiency of the law")*. In the former cases, French judges attempt to find a link by means of deductive reasoning or analogy. In the latter cases, they try to overcome the insufficiency of the law by a "creative interpretation" of the code provisions concerned, which may include resorting to factors such as the "intent of the legislature" or the "interest of the parties".[127] Civil law jurists in fact distinguish between two methods of analogy: statutory analogy and analogy of law. If the judge follows the method of statutory analogy, he or she fills a gap in the code by deriving a rule from a provision contained in the code and applies it to the case at hand, because he or she finds that the two cases are similar. In the case of analogy of law, the starting point is not one single provision but several provisions. Again, a rule is derived from the codified law and applied to the case before the court. In light of these observations, American scholar Grant Gilmore described a civilian code as ... a legislative enactment which entirely pre-empts the field ... thus, when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law."[128] Common Law judges, on the other hand, traditionally did not need to fill gaps at all.,[129] therefore for a Common Law judge,[130] case law has represented the classic source of law and statutes were an exceptional intrusion into the body of Common Law.[131] Thus, whenever a statute did not specifically address the facts, the Common Law was the default rule and courts in Common Law countries have usually refused to fill gaps in statutes by

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125 Katja Funken, "The Best of Both Worlds: - The Trend Towards Convergence of the Civil Law and the Common Law System", LA732 Comparative Legal Essay, S 804151001, at 7-9. Available online at http://www.jurawelt.com/sunrise/media/mediafiles/13598/convergence.pdf, accessed 22 November, 2013.

126 JEM. Portalis, *et al*. , 'Discours Preliminaire Prononce Lors de la Presentation du Project (de Code Civil) de la Commission du Governement, in: Fenet PA, *Recueil Complet des Travaux Preparatoires du Code Civil* T.I. 470, 1827.

127 G. Mousourakis, "LA 431/LA 631 Lecture in Comparative Law", The University of Queensland, TC Beirne School of Law, 20 April 2000. The French example illustrates how Civil Law judges usually attempt to find a solution coherent with the "spirit" and "system" of the code. Furthermore, Section 7 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* or *ABGB*) states that *"... where a case cannot be decided either according to the literal text or the plain meaning of a statute, regard shall be had to the statutory provisions concerning similar cases and to the principles which underlie other laws regarding similar matters."*

128 G. Gilmore, "Legal Realism: Its Cause and Cure" (1961) 70 *Yale Law Journal* 1037 at p.1043.

129 E.A Farnsworth, "A Common Lawyer's View of His Civilian Colleagues" (1996) 57 *Los Angeles Law Review* 227 at pp.231.

130 Katja Funken., above note 125.

131 J.M. Landis, "A Note on "Statutory Interpretation", (1930) 43 *Harvard Law Review* 886.

statutory analogy.[132] This approach, however, evolved from an age where statutes were of marginal importance. Today it is, to a large extent, no longer tenable. This is due to the abovementioned increase in codification in countries such as Australia, the United Kingdom and the United States. This development of statutes as a source of law in Common Law jurisdictions justifies and in some areas even requires the use of statutory analogies in order to fill gaps. For instance in the United States, entire areas of business law are regulated by federal statutes, but at the same time, as Justice Brandeis noted in the famous US Supreme Court case of *Erie Railroad Co. v.Tompkins*,[133] *"there is no federal general Common Law"* in America. The increase in statutes in Common Law jurisdictions is likely to require Common Law judges to fill gaps in those codes by statutory analogies, just as Civil Law judges do. Thus, the filling of gaps is likely to be an area of future convergence.

Common Law relied on few, if any, statutes while Civil Law starts from a large body of statutes rooted in Roman law dating back to the sixth century.[134] In both Common and Civil Law the body of statutes has expanded dramatically through time,[135] which makes the parallel problematic, and pure" forms of either system hard to identify.[136] This is because the gaps left open by the Statute Book are filled by the Courts according to different criteria in the two systems. In a Common Law regime the gaps are filled utilizing the body of applicable precedents, which is what we model below. In a Civil Law system the gaps are filled by interpretation of the code. At least in the world we model here, the use of precedents stands out as a more (economically) efficient way to fill the gaps. Common Law adapts via the use of precedents, while Civil Law changes little unless the Statute Book itself is changed. If one were designing Civil Law and Common Law from scratch, then it would be efficient to strive for more detailed legislation in the Civil Law than in the Common Law world. If this were the case, in this re-designed world, the distinction we make between Statute and Case Law would broadly correspond to the distinction between Civil and Common Law.

VIII Filling the Gaps in Legislation through the Purposive Approach in Nigeria

Filling the gaps that exists in legislation in Nigeria requires the adoption of purposive approach.[137] The approach takes account of the words of the legislation according to their

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132 R.S. Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1 at p.12.

133 304 US 64, 78 (1938).

134 Luca Anderlini, Leonardo Felli and Alessandro Riboni, "Statute Law or Case Law?" (1 July, 2008), at pp.2-3. Available online at www.hss.caltech.edu/*~miaryc/PEW/Leonardo_Felli_PEWCaltech.pdf,* accessed 20 November, 2013.

135 G.A. Calabresi, *A Common Law for the Age of Statutes*, Cambridge: Harvard University Press, 1982 at p.8

136 A.T. Von Mehren, *The Civil Law System*. Englewood Cliffs: Prentice Hall, 1957, Ch. 16.

137 P.E., Oshio, "Towards A Purposive Approach to the Interpretation of the 1999 Constitution" at pp.20-21. Available online at *www.nigerianlawguru.com/.../TOWARDS%20A%20PURPOSIVE%20A...*accessed 25 November, 2013. This approach has many advantages for justice. First, it allows recourse by the courts to extrinsic materials like parliamentary history, official reports or records of proceedings in parliament etc. in order to properly access legislative intention.

ordinary meaning and also the context in which they are used, the subject matter, the scope, the background, the purpose of the legislation in order to give effect to the true intent of the legislation and not just the intention of parliament only. According to Professor P.E Oshio, the purposive approach is the modern approach to the mischief rule, but it is wider in scope than the mischief rule as the approach extends to applying an imputed intention of parliament.[138] It is the approach adopted in the interpretation of European Community legislation which merely states broad principles in the continental style and leaves the details (gaps) to be filled in by the courts. It enables the court to consider not only the letter but also the spirit of the legislation for "everything which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter and the intent also."[139]

In Nigeria, the Supreme Court stated the position as follows:

> My Lords, in my opinion, it is the duty of this court to bear constantly in mind the fact that the present Constitution has been proclaimed the Supreme Law of the Land, that it is a written organic instrument meant to serve not only the present generation, but also several generations yet unborn … that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society, and therefore, mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitution. And where the question is whether the Constitution has used an expression in the wider or in the narrow sense, in my view, this court should whenever possible, and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carry out the objects and purposes of the Constitution. My Lords, it is my view that the approach of this court to the construction of the Constitution should be, and so it has been, one of liberalism, probably a variation on the theme of the general maxim *utres magis valeat quam pereat*. I do not conceive it to be the duty of this court so to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another construction equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends.[140]

Oshio further asserted that despite the advantages of the purposive approach some writers express the fear that such liberal approach would encourage judicial activism or creativity and this may lead to a floodgate of judicial legislation which will offend the doctrine of separation of powers. Sometimes, judicial legislation is no more than a court extending or adapting an old rule to a new situation in order to do substantial justice. Since society is not static but dynamic our legal process should not be static but must change from time

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[138] *Ibid*., at pp.23-24.
[139] *Stowell v. Lord Zouch* (1569) 1 PLOWD 369.
[140] See the comment of Udo Udoma JSC in *Nafiu Rabiu v. The State* (1981) 2 N.C.L.R. 293, 326.

to time in response to societal values and aspiration. This can only be achieved through judicial creativity in the interpretation of statutes and the Constitution.[141]

Hence Lord Denning one of the greatest protagonist of judicial law making in appropriate situations, exposed the predicament of the judge in the judicial process in the case of *Packer v. Packer*,[142] where he said that: "what is the argument on the other side? Only this, that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both"[143] He also stated that, "My root belief is that the proper role of a Judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule-or even to change it-so as to do justice in the instance case before him".[144] Furthermore the great strength of the common law is that the judges are free to develop it on a case by case basis as new factual situations arise. Hence, in *Ellerman Lines Ltd. v. Read*,[145] Scrutton, L.J held that: "if there is no authority for this it is time that we made (sic) one".[146]

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[141] See P.E., Oshio, above note 137.

[142] (1953) 2 All E.R. 127, at 129 (C.A). See also P. Robinson and P. Watchman (eds), *Justice, Lord Denning and the Constitution*, England: Glover Publishing Co. Ltd, 1981, at, 253. See also, Allan C. Hutchinson, *Supreme Courts Law Review*, Vol, 3:565, (1982) at 566-567, Available online at https://apps.osgoode.yorku.ca/osgmedia.nsf/0/759FE8203C594C0F852571C4006391A7/$FILE/Review%20-%20Robson&Watchman.pdf, accessed 25 November, 2013). In *Packer* v. *Packer* is one of those unsatisfactory cases in which an appeal court of even numbers is equally divided, and the judgment of the court below therefore stands as the decision, in this instance, of the Court of Appeal, not only in the case under litigation but as a precedent binding upon the Full Court of Appeal in the future. Judgement: The question at issue was one of statutory interpretation. Are illegitimate children included in the wording of the Matrimonial Causes Act, 1950, Section 26, which gives the court power, in any proceedings for divorce, nullity or judicial separation, to provide for the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings"? Denning L.J. thought that they were, Morris L.J. the only other member of the court, that they were not, so the ruling at first instance that an illegitimate child was not included prevailed. The Canon Law rule that a bastard child is legitimated by the subsequent marriage of his parents has been part of the law of most of Christendom since the 12th century, except in England, where it was rejected at the Council of Merton in 1285, when " *omnes cmites et Barms una voce responxkrunt, q w d nolunt leges Angliae mutari, que usitate sunt, et approbate."* From January 1, 1927, however, legitimation *per subseqwns matrimonium* has become part of the law of England by reason of the Legitimacy Act, 1926, with the unique exception that no child, either of whose parents was married to a third party at the time of his birth, can be legitimated should they subsequently marry. (See also O.M, Stone, "Case Note on Children Without the Law",: *The Modern Law* Review, Volume 16, Issue 4, at 515-517, Article first published online: 18 January, 2011. Available online at http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1953.tb02139.x/pdf accessed 27 November, 2013).

[143] *Ibid*., (1953) 2 All E.R. 127, at 129 (C.A). See also, *Ostime v. Australian Mutual Provident Society* [*1960*] *AC 459* (HL). 56.

[144] See, Allan C. Hutchinson, above note 142.

[145] (1928) 2 K.B, 144.

[146] See Niki Tobi, *Sources of Nigerian Law*, Lagos: MIJ Professional Publishers Limited, 1996, at 79-80. In *Ellerman Lines Ltd v. Read* (1928) 2 KB 144, 152, the question that arose was that: on what basis do the judges decide to make authority where there was none before? Or to modify or adapt such authority as there is? There is no easy answer to this. Whatever we do must be consistent with the underlying principles and policy of the law. It must not overstep that indefinable line between the development and elaboration of existing principles and the making of brand new law which is unquestionably the province of Parliament. It must work with, rather than against, the grain of legal policy. It must go forward when the law is going forward and draw back when the law is drawing back. (See also http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070502/obg-8.htm accessed 29 November, 2013).

Thus in the case of *Attorney General of the Federation v. Abubakar*,[147] the Supreme Court observed per Aderemi, J.S.C. that:

> It has been said in one of the briefs before us that the case at hand is, by every standard, a novel one. I entirely agree; given the facts of this case and the little research I have carried out I have not come across any judicial decision relating to the peculiar facts of this case. But, no legal problem or issue must defy legal solution. Were this not to be so, the society, as usual, will continue to move ahead, law, God forbid, will then remain stagnant and consequently become useless to mankind. With this unfortunate consequence at the back of his mind, a Judge, whenever faced with a new situation which has not been considered before, by his ingenuity regulated by law, must say what the law is on that new situation; after all, law has a very wide tentacle and must find solution to all man-made problems. In so doing, let no Judge regard himself as making law or even changing law. He (the judex) only declares it (law) he considers the new situation, on principle and then pronounces upon it. To me, that is, the practical form of the saying that the law lies in the breast of the Judges." In some cases where the words used in the statute are ambiguous, the courts have discretion to choose the meaning which they consider most appropriate having regard to the context and other surrounding circumstances. If this amounts to law-making in the general sense, then judges make law....In the present state of things therefore, judicial creativity or activism[148] in statutory/constitutional interpretation becomes inevitable to keep pace with the fast growing and changing needs of the society. Accordingly, it is a natural response to the challenge posed by the dynamic nature of the society.

The Supreme Court explained the same principle in *Amaechi v. INEC*,[149] as follows:

> …the primary duty of the court is to do justice to all manner of men who are in all matters before it. It then seems to me clear, that when the court sets out to do justice so as to cover new conditions or situations placed before it, there is always that temptation, a compelling one, to have recourse to equitable principles. A court, in the exercise of its equitable jurisdiction must be seen as a court of conscience. And Judges who dispense justice in this court of law and equity must always be ready to address new problems and even create new doctrines where the justice of the matter so requires.

Indeed in Nigeria, judicial creativity through the use of discretion in constitutional interpretation is motivated by the desire to do justice, and fill the gaps in law when judges

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147 (2007) 10 N.W.L.R. (Pt. 1041) p.1 at 171-172 (per Aderemi, J.S.C.).

148 Judicial philosophy which motivates judges to depart from strict adherence to judicial precedents in favour of progressive and new social policies, which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusion into legislative and executive matters. (See M. Kirby, *Judicial Activism*, London: Thompson, Sweet & Maxwell, 2004, Chapter 1.) See also Bryan A. Garner (ed), *Black's Law Dictionary*, 7th edn, St Paul Minn: West Publishing, 1999.

149 (2008) 5 N.W.L.R. (pt. 1080) 227 at p.451 (per Aderemi, J.S.C.).

are called to decide on a case were no legal precedent or legal rule exist.[150] Also in another perspective and even where much broader definition implies that a legal gap exists when the norms in force issued by the legislative bodies do not contain any provision by which the judge could resolve the case in question, under such circumstance the weight of evidence adduced by the parties will be placed on the scale of justice by the judge to see where the weight will tilt to and he will decide in favour of the party with overwhelming evidence in support of the case under consideration.

Finally Niki Tobi posits that: "certain instances when there exist neither statutes nor case law on a matter before the judge in such instances, the judge is initially helpless, but the case before him must be decided on way or the other. He cannot adjourn the case and ask the legislator to pass a statute on the point before him. He cannot fold his arms and tell the litigants that he is helpless on the ground that there is no a relevant statute or case law governing the issue before him. He must do something and quickly too for that matter. He therefore, propounds a principle suitable to the case before him. The principle is novel. The principle is an innovation, and so the judge is said to have made the law", and to have also filled an existing gap in legislation where no statutory rule of law or judicial precedent exit.[151]

IX Conclusion

This paper examined "what constitutes legal gaps and how there are filled in different jurisdiction". The context showed that different types of gaps do exist in legislation that is enacted in different jurisdictions of the world. Legal gaps result from the legislator's mistake, short-sightedness, carelessness or tardiness and are meant to be filled by judges because no legal problem or issue must defy legal solution. In a Common Law regime the gaps are filled utilizing the body of applicable precedents while a Civil Law system the gaps are filled by interpretation of the code. In circumstances where such cases has not been adjudicated upon in the past and therefore no precedent exist to be followed by the judge, the gap can only be filled through judicial creativity in the interpretation of statutes. The role of the judges in any judicial system is not just to interpret the law by to lay new norms where non exist to meet a particular legal situation. This research further reveals that gaps are inevitable in any legal system, including the international one, because treaties (contracts), statutes, and rules derived from custom cannot be designed to cover all situations which give rise to disputes.

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[150] Oputa JSC once counselled judges on this thus: "The judge should appreciate that in the final analysis the end of law is justice. He should therefore endeavour to see that the law and the justice of the individual case he is trying go hand in hand… To this end he should be advised that the spirit of justice does not reside in formalities, not in words, nor is the triumph of the administration of justice to be found in successfully picking a way between pitfalls of technicalities. He should know that all said and done, the law is, or ought to be, but a handmaid of justice, and inflexibility which is the most becoming robe of law often serves to render justice grotesque. In any 'fight' between law and justice, the judge should ensure that justice prevails that was the very reason for the emergence of equity in the administration of justice. The judge should always ask himself if his decision, though legally impeccable in the end achieved a fair result. 'That may be law but definitely not justice' is a sad commentary on any decision." (See Azinge, E. "Living Oracles of the Law and the Fallacy of Human Divination" 6th Justice Idigbe Memorial Lecture, Faculty of Law, University of Benin, p.8).

[151] See Niki Tobi, above note 146.