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Our June 2021 edition of the JMCL features a diverse selection of scholarly and stimulating articles. In "Muslim Converts and Bigamy in Philippine Penal Law: Exploring the Free Exercise of Religion as a Defense", Norhabib bin Suod S. Barodi analyses whether the defence of free exercise of religion under the Philippine Constitution can be used against a charge of bigamy when a Muslim convert marries again after his conversion while his civil marriage is still subsisting. The author draws upon the Philippine Supreme Court decision of *Estrada v Escritor* to show how this might be possible.

In "The Challenges of Mobile Courts in Environmental Litigation in Nigeria", Joseph Nwazi and Agbowu Ejike Christopher discuss the important role which mobile courts play in improving access to environmental justice in Nigeria. The authors draw attention to the challenges faced by these courts, such as limited jurisdiction and lack of security.

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Dr. Sharifah Suhanah Syed Ahmad
Executive Editor

MUSLIM CONVERTS AND BIGAMY IN PHILIPPINE PENAL LAW: EXPLORING THE FREE EXERCISE OF RELIGION AS A DEFENSE

Norhabib bin Suod S. Barodi*

Abstract

The Islamic approach to polygyny, i.e., the permission to have more than one wife but not more than four at a time, applies to Philippine Muslims, subject to compliance with the requisites and conditions of its practice under Muslim law as articulated in the Code of Muslim Personal Laws of the Philippines. However, Philippine Muslim converts with subsisting civil marriages are at the risk of being prosecuted for the crime of bigamy under Philippine penal law once they contract a second or subsequent marriage under Muslim law after their conversion to Islam. By exploring this specific problem, this article highlights significant lessons emerging from the interface of criminal prosecution for bigamy and the defense of *free exercise of religion*. With the adoption of the *Benevolent Neutrality/ Accommodation* stance using the *Strict Scrutiny-Compelling State Interest* test in the Philippine jurisdiction in the landmark *Religion Clauses* case of *Estrada v Escritor,* the possibility of a mandatory accommodation/exemption from the application of general penal law of bigamy is tested in the specific problem or context of this article. Though mandatory accommodation/exemption from criminal statutes burdening religious liberty is still uncertain in the Philippine jurisdiction, yet this article has demonstrated the extent of the *Religion Clauses* of the Philippine Constitution vis-à-vis the Islamic practice of polygamy by Philippine Muslim converts and its tension with the criminalisation of bigamy under the Revised Penal Code.

Keywords: polygamy, free exercise of religion, Philippines.

I INTRODUCTION

A significant factor that contributes to the increasing number of adherents of Islam is conversion. This is noticeable in many non-Muslim countries, including the Philippines. However, conversion to Islam is a phenomenon that affects not only the demography of countries. There are certain legal implications of conversion to Islam in jurisdictions

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that recognise Muslim personal and family laws. In the Philippines, for instance, the Presidential Decree No. 1083, otherwise known as the *Code of Muslim Personal Laws of the Philippines* ('*Muslim Code*'),[1] deals with the subject of conversion, for there are legal effects of conversion to Islam on the personal laws of the convert. Certain *legal permissions* are recognised for Muslims and are articulated and regulated by the *Muslim Code*. One of these is the permission granted to Muslim males to have more than one wife but not more than four at a time, in accordance with Muslim law. Thus, in the Philippines it is not new that some Muslim converts avail of this permission. The ensuing legal complications may not be immediately apparent as it is common ground that Muslims are allowed in Islam to maintain plurality of wives within the bounds and requisites of Muslim law.

However, in all matters involving the *Muslim Code*, one must consider the scope of its applicability, for generally, it only applies to marriages solemnised under it or Muslim law. On the other hand, marriages solemnised in accordance with civil law or non-Muslim rites are governed by the Civil Code, particularly, the *Family Code of the Philippines 1987* which does not recognise bigamous or polygamous marriages. This is where a grey area emerges. There are existing civil marriages in the Philippines, i.e., they are not governed by the *Muslim Code*, but where the male party contracts a second or subsequent marriage *after* his conversion to Islam. When this occurs, the Muslim converts are at the risk of criminal prosecution for bigamy. Bigamy is a crime defined and penalised under Act No. 3815 as amended, otherwise known as the *Revised Penal Code of the Philippines* (*'RPC'*).[2]

Some defenses – for example, that the first marriage is void *ab initio* or voidable or that there is mistaken belief that the first marriage is void – raised against criminal prosecution for bigamy in the Philippines have been tried in actual cases but failed. However, not one of these defenses have involved an invocation of *religious freedom* to avoid criminal liability. In the Philippines, the question of *mandatory accommodation/ exemption*[3] from general penal laws is still an open question. That is to say, there is no Philippine case yet that has resolved whether an individual, invoking the practice of his religious beliefs, should be exempted from the application of criminal statutes. In the landmark *Religion Clauses* case of *Estrada v Escritor*,[4] the Supreme Court of the Philippines categorically declared that the Court can carve out an exemption even from the application of general penal laws, provided that it is justified by the *Religion Clauses* of the Constitution.

This article explores if the invocation of *Free Exercise of Religion* would be an effective defense against criminal prosecution for bigamy when Philippine Muslim converts contract second or subsequent marriages in violation of the Philippine penal law against bigamy. While this specific problem by itself is also an open question, significant lessons emerge from this study pertaining to the extent of the *Religion Clauses* of the Philippine Constitution vis-à-vis the Islamic practice of polygamy in the Philippines as

1 *Muslim Code* 1977 (Philippines).
2 *RPC 1932* (Philippines).
3 See Part V(B) below.
4 See *Estrada v Escritor* 408 SCRA 1 (2003); *Estrada v Escritor* 492 SCRA 1 (2006).

articulated in the *Muslim Code* and its tension with the criminalisation of bigamy under the *RPC*. These significant lessons deserve attention at the very least. It is a matter of time before an actual case of criminal prosecution for bigamy reaches the Supreme Court involving a *direct* and *head-on* clash between a Philippine Muslim convert's religious belief on the Islamic practice of polygamy and the crime of bigamy under the *RPC*. There are two cases that have been decided by the Supreme Court involving Philippine Muslims and the issue of a bigamous marriage.[5] But these cases did not involve an invocation of the *Free Exercise Clause.*

The reader is advised though that this article revolves around one specific context, i.e., the specific problem of Philippine Muslim *male* converts with subsisting civil marriages who contract second or subsequent marriages *after* their conversion to Islam, in apparent violation of Philippine penal law against bigamy.[6] This analysis does *not* cover in its scope those non-Muslim husbands who convert to Islam as a reason to 'legalise' their *existing* bigamous marriage contracted *before* their conversion. The latter is an entirely different setting that requires a separate occasion for critical analysis.

Part II of this article gives a brief overview of the Islamic approach to polygamy as articulated in the *Muslim Code* and the effect of conversion to Islam on marriage. Part III discusses the brief historical background and the nature of bigamy under Philippine penal law as well as the defenses that have been raised against criminal prosecution for bigamy. Part IV gives an overview of the *Free Exercise Clause* of the Philippine Constitution and describes the specific act of the Philippine Muslim converts of contracting second or subsequent marriages as an *act* in the free exercise of religious belief. Part V examines the applicability of the *Benevolent Neutrality/Accommodation* approach to the second or subsequent marriage of Philippine Muslim converts which is alleged to be bigamous, with reference and reliance on the landmark case of *Estrada v Escritor.* Part VI provides a summative application of the lessons derived from *Estrada v Escritor.* Part VII provides the concluding remarks.

II MUSLIM CONVERSION AND PLURALITY OF MARRIAGE: A BRIEF OVERVIEW UNDER THE *MUSLIM CODE*

A *Polygamy under the Muslim Code*

The polygamous marriage permitted by Islam, i.e. polygyny, is the same kind that is articulated in the *Muslim Code*. Hence, whether polygamous marriages are permitted for Philippine Muslims is an issue that requires no debate. As a feature of Islamic family law, the permissibility of polygamous marriages in Islam has not eluded the Philippines in so far as its Muslim population is concerned. While in general polygamous marriages

5 See Part III(B) below.

6 The author, besides being a regular civil lawyer, is also a Counselor-at-Law or one who can practise before the Philippine Shari'ah courts after passing the Special Shari'ah Bar Examination in the Philippines. Most of the time, this is the specific problem or scenario on which the author is often requested to give a legal opinion, analysis or advice by private parties and other interested parties.

are not permitted in the Philippine law on persons and family relations,[7] an exception is made for the Philippine Muslims through the *Muslim Code*. Therefore, in general, the Philippine Muslims – whether by birth or by conversion – are permitted to have more than one wife but not more than four at a time in accordance with Islamic law.

However, the fact that Muslims are permitted to practice Islamic polygamy is not a blanket permission that requires only the condition of being a Muslim. A Philippine Muslim, whether by birth or by conversion, is subject to the same regulations mentioned above. While the *Muslim Code* expressly recognises polygamous marriages, there are stringent requirements for its practice. This is clear from Article 27 of the *Muslim Code* which focuses on qualifying the right of polygamous marriages with fundamental limitations. The provision reads:

> Notwithstanding the rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time, no Muslim male can have more than one wife unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases.

Under this provision, a Muslim male can have more than one wife only if he can comply with the fundamental requirement of equal companionship and just treatment. This condition on equal and just treatment is the paramount test that must be satisfied by Muslims desiring to have more than one wife. However, justice as mentioned in *Surah* 4:3 'only relates to the humanly possible equitable treatment.'[8] 'It refers to justice in outward matters such as justice in providing maintenance (*nafkah*), justice in conjugal relationships that is, taking turns with the wives and justice in the place of dwelling.'[9]

For Justice Saaduddīn A. Alauya,[10] whether the husband can deal with his wives with equal companionship and just treatment 'can only be wisely determined by properly scrutinising the financial status of the husband and of his peculiarities in life[.]'[11] This view is consistent with the interpretation of the *Shafi'i* school that 'the Qur'an subjected the permission for plurality of wives to the conditions of the husband's financial capacity to provide maintenance to more than one wife.'[12]

There is no case yet from the Philippine Shari'ah Courts which has reached the Supreme Court on the issue of financial means of a Philippine Muslim desiring to have more than one wife. However, in foreign jurisdictions, the proper Shari'ah Courts have rejected applications by the Muslims to have more than one wife on the ground of lack of financial means to support the wives and children. In Malaysia, the case of *Re Ruzaini bin*

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7 Art. 35. The following marriages shall be void from the beginning: […]; (4) Those bigamous or polygamous marriages […]. [*The Family Code of the Philippines 1987* (Philippines) art 35(4)].

8 Nora Abdul Hak, 'Just and Equal Treatment in Polygamous Marriage: The Practice in the Shariah Courts in Malaysia' (2008) 16(1) International Islamic University Malaysia Law Journal 141-155, 143.

9 Ibid.

10 Former Jurisconsult in Islamic Law in the Philippines with the rank of Justice of the Court of Appeals. He was a member of the Presidential Commission that drafted the Code of Muslim Personal Laws of the Philippines.

11 Saaduddīn A. Alauya, *The Quizzer in Muslim Personal Law* (KFCIAS, 1984) 31.

12 Bensaudi I. Arabani, *Commentaries on the Code of Muslim Personal Laws of the Philippines with Jurisprudence and Special Procedures* (Rex Book Store, 1990) 283-4.

Hassan[13] is a good example. In *Just and Equal Treatment in Polygamous Marriage: The Practice in the Shariah Courts in Malaysia*,[14] Abdul Hak summed up the case as follows:

> In *Re Ruzaini bin Hassan*, the applicant had filed the application for polygamy under section 23 of the Islamic Family Law Enactment (Negeri Sembilan). The applicant claimed that his financial condition was stable for him to support two families. However, the first wife has objected to it. The applicant explained in detail to the Syariah Court of his financial capability. The Court after considering the evidence from the applicant decided that the applicant did not have the financial ability to have a second wife. Therefore the application was rejected.

Article 27 of the *Muslim Code* likewise requires that the Muslim male desiring to marry more than one wife must be doing so only in 'exceptional cases'. This requirement means that 'his reason for seeking to contract a subsequent marriage, must be based upon a meritorious, reasonable, and valid ground, or that it is necessary and just.'[15] In particular, the following circumstances may be considered: 'sterility, physical unfitness for conjugal relation, willful avoidance of a decree of restitution of conjugal rights, or insanity on the part of the present wife.'[16] There is no Philippine case yet that has reached the Supreme Court on the issue of '*exceptional cases*'. Nonetheless, the foreign case of *Sharif bin Jamaluddin v Kuning binti Kasman*,[17] summed up by Normi Abdul Malek, demonstrates the satisfaction of this requirement:

> [T]he application of the husband who was capable of practising polygamy was granted. In this case, the wife was suffering from some illness which made her incapable to fulfil her responsibility as a wife. This case is a good example of polygamy becoming a remedy to certain types of difficulty that can happen in a marriage. By practising polygamy, the husband can fulfil his sexual needs and at the same time fulfil his responsibilities to maintain and take care of his sick wife.[18]

A third requisite is imposed by Article 162 of the *Muslim Code*. It is necessary for a Muslim husband who wants to contract a subsequent marriage to show that he is so authorised by an order of the Shari'ah Circuit Court upon consent of the present wife or, her objection (if any) was not sustained by the court. However, the author believes that Article 162 should be treated in a separate study.

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13 *Re Ruzaini bin Hassan* [1990] 3 MLJ lx; (1990) 7 JH 152.

14 Abdul Hak (n 8) 147.

15 Arabani (n 12) 284.

16 Ibid. See also *Selangor Islamic Family Law Enactment 1984* (Malaysia) s 23(4)(a).

17 (2002) 15 JH 173.

18 Normi Abdul Malek, 'The Family Institution and Its Governing Laws in Malaysia as a Vanguard in Protecting the Society from Social Ailments: A Shari'ah Perspective' (2016) 24(2) *International Islamic University Malaysia Law Journal* 397-413, 411.

B *Effect of Conversion to Islam on Marriages under the Muslim Code*

In the applicability clause of Article 13 of the *Muslim Code*, it is expressly stated that '[t]he provisions [on marriage and divorce] shall apply to marriage and divorce wherein both parties are Muslims, or wherein only the male party is a Muslim and the marriage is solemnised in accordance with Muslim law or this Code in any part of the Philippines.'[19] 'In case of a marriage between a Muslim and a non-Muslim, solemnised not in accordance with Muslim law or this Code in any part of the Philippines, the Civil Code of the Philippines shall apply.'[20] It is clear from these provisions that marriages between non-Muslims solemnised in accordance with non-Muslim law or the Civil Code are beyond the coverage of the *Muslim Code*. Thus, this is where conversion to Islam becomes a factor to consider as it may alter this conclusion.

Non-Muslim or civil marriages may yet be placed within the scope of application of the *Muslim Code* through the mechanism of conversion to Islam of both non-Muslim spouses under Article 178. The provision states as follows:

> Article 178. *Effect of conversion to Islam on marriage.* The conversion of non-Muslim spouses to Islam shall have the legal effect of ratifying their marriage as if the same had been performed in accordance with the provisions of this Code or Muslim law, if there is no legal impediment to the marriage under Muslim law.

It must be noted that this provision requires the conversion of *both* spouses for the provision's legal effect to apply. About the application of this provision, the author has previously observed that:

> '[Article 178] deals with the 'conversion of non-Muslim spouses'. Thus, for the provision to have complete application on the effect of conversion to Islam on a marriage, the conversion must be on the part of both spouses. If only one of the non-Muslim spouses converts to Islam, then the provision finds no application. In which case, the marriage is not ratified 'as if the same had been performed in accordance with the provisions of this Code or Muslim law'. This situation is prevalent in many existing non-Muslim marriages in that only one of the spouses converts to Islam. Accordingly, the marriage continues to be governed by the non-Muslim law in accordance with which it was originally solemnised.'[21]

When both non-Muslim spouses convert to Islam, their conversion has the legal effect of '*ratifying* their marriage as if the same had been performed in accordance with the provisions of [the Muslim] Code or Muslim law.'[22] Thus, their marriage shall be governed by the *Muslim Code* including the provisions on subsequent marriage by the Muslim husband. However, the complication commences when only one of the non-Muslim

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19 *Muslim Code* (n 1) art 13(1).

20 Ibid art 13(2).

21 Norhabib Bin Suod S. Barodi, 'The Code of Muslim Personal Laws of the Philippines: Beyond the Lenses of *Bondagjy v. Bondagjy*' (2019) 27(2) *International Islamic University Malaysia Law Journal* 367-396, 375.

22 *Muslim Code* (n 1) art 178.

spouses, such as the husband, converts to Islam. In such a case, the legal effect of Article 178 – *ratifying* their marriage as if the same had been performed in accordance with the provisions of the Muslim Code or Muslim law – is not produced. This means that 'the marriage continues to be governed by the non-Muslim law in accordance with which it was originally solemnised',[23] which in this case is Philippine civil law, which does not recognise bigamous or polygamous marriages. From this scenario arises the situation of Philippine Muslim converts – those with subsisting civil marriages who contract a second or subsequent marriage under Muslim law or the Muslim Code – being at risk of facing criminal prosecution for bigamy.

III BIGAMY UNDER PHILIPPINE PENAL LAW

A *Bigamy: From the Spanish Penal Code to the Revised Penal Code*

For a sharper nuance on bigamy under Philippine penal law, it is imperative to trace the history of the *RPC* under which bigamy is included as one of the felonies.

In his treatise on criminal law, the distinguished Justice Florenz D. Regalado traced the history of the *RPC* to the *Spanish Penal Code of 1870*, which incidentally also 'extensively drew upon the provisions of the French Penal Code of 1810[.]'[24] The Revised Penal Code of the Philippines, he wrote, 'is actually a mere revision of the old Penal Code in force in the Philippines from July 14, 1887 and which, in turn, was based on the Spanish Penal Code of 1870.'[25] This historical fact is significant to explain why the prohibition of bigamy is firmly institutionalised in Philippine penal law. This is notwithstanding that the Islamic presence in the Philippines was preceded by two centuries before the onset of Spanish colonialism in the Philippines in 1521.[26] Incidentally, the Spanish colonialism in the Philippines that lasted for centuries included the spread of the Catholic faith through the 'Spanish program of Christianisation of both Muslims and pagan groups.'[27] This Spanish programme was evident in the enforcement of Spanish laws which were characterised to some extent by Catholic traditions. A good example of these laws would be the criminalisation of bigamy under the *Spanish Penal Code of 1870*, which was carried over to Article 349 of the *RPC*. The prohibition of bigamy, without need of further debate, is a standard Catholic tradition. In this regard, it has been stated that '[t]he religious basis for the condemnation [of polygamy] was unmistakable: "It is contrary to the spirit of Christianity and of the civilisation which Christianity has produced in the Western world."'[28]

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23 Barodi, 'Muslim Personal Laws' (n 21) 375.

24 Florenz D. Regalado, *Criminal Law Conspectus* (National Book Store, 2003) 3.

25 Ibid 2.

26 See specially Norhabib Bin Suod S Barodi, *Shari'ah for the Muslim Region in the Philippines: The Essence of Moro Self- Determination* (Ivory Printing and Publishing House, 2017) 78-81, citing Sonia M. Zaide, *The Philippines: A Unique Nation* (All Nations Publishing, 2013) 148, Sukarno D. Tanggol, *Muslim Autonomy in the Philippines: Rhetoric and Reality* (MSU Press and Information Office, 1993) 4-5, and Datumanong Di. A. Sarangani, 'Islamic Penetration in Mindanao and Sulu' (1974) 1(1) *Mindanao Journal* 49-73, 51-4.

27 Mamitua Saber, 'Majority-Minority Situation in the Philippines' (1974) 1(1) *Mindanao Journal* 3-22, 7, 11.

28 John McDermott, 'The Non-Recognition of Islamic Marriage and Divorce' (2010) 18(1) *International Islamic University Malaysia Law Journal* 33-74, 42.

Be that as it may, the phenomenon of polygamous marriages should not be viewed as totally surprising or strange even in the generally conservative Philippine society. Though bigamy is penalised as a felony, yet the reality is that many are into polygamous relationships. This is discernible by simply looking at the numerous cases that reached the Supreme Court of the Philippines involving relations outside lawful wedlock and illegitimate children. In fact, official data suggests that 'illegitimate or non-marital children in the Philippines is now at 53 percent[.]'[29] According to the Philippine Statistics Authority, '[m]ore than half (906,106 or 54.3%) of the total registered live births in 2018 were born out of wedlock.'[30]

Bigamy, being punished under the *RPC*, is a felony belonging to the category of *malum in se*. '[*M*]*alum in se* is a wrong in itself, involving as it does an illegality from its very nature[.]'[31] Hence, the perspective of the *RPC* is that bigamy is *wrong in itself, involving as it does an illegality from its very nature.*

B *Defenses that have been raised*

It appears from Article 349 of the *RPC* that the mere act of contracting a second or subsequent marriage during the subsistence of a previous valid marriage is penalised.[32] Few defenses relevant to this have been raised, *e.g.* that the previous marriage is void *ab initio* or voidable or there is a mistaken belief that the previous marriage is voidable. However, these defenses failed. Even if the previous marriage is void *ab initio,* the offender cannot escape criminal liability for bigamy if he remarries prior to a judicial declaration of nullity of the previous marriage.[33] This is because the previous marriage must be first declared by the court as void *ab initio* before the offender can contract another marriage. The same is true with a voidable marriage. If the offender remarries in the belief that his previous marriage is voidable, he is still liable for bigamy.[34] The reason is that a voidable marriage is valid until annulled. The offender's belief as to a mistake of law does not excuse him from criminal liability for bigamy. The offender cannot also feign ignorance of his subsisting marriage for obvious reasons.

These defenses will also fail in the case of Philippine Muslim converts who contract second or subsequent marriages while their civil marriages are still subsisting. Thus, the defence that the previous civil marriage of the Muslim convert is voidable or void *ab initio* and that he is under a mistaken belief that the said marriage is invalid are, according to jurisprudence, not effective defenses to avoid criminal liability for bigamy. However, a remarkable fact about these defenses so far is that none of them had at its centrality the invocation of *free exercise of religion.*

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29 Tetch Torres-Tupas, 'Expert says more children born out of wedlock in PH', *Philippine Inquirer* (online, 03 September 2019) <https://newsinfo.inquirer.net/1160517/expert-says-more-children-born-out-of-wedlock-in-ph>.

30 Philippine Statistics Authority, 'Births in the Philippines, 2018', *Philippine Statistics Authority* (online, 27 December 2019) <https://psa.gov.ph/vital-statistics/id/144897>.

31 Regalado (n 24) 18, *citing State v Sherdowdy*, 45 N.M. 516, 18 P. 2, 380.

32 Leonor D. Boado, *Compact Reviewer in Criminal Law* (Rex Book Store, 2013) 451.

33 See generally *Wiegel v Sempio-Diy*, 143 SCRA 499, *cited* in Regalado (n 24) 667.

34 See generally *People v Cotas*, CA, 40 O.G. 3154, *cited* in Regalado (n 24) 668.

Parenthetically, two cases have already been decided by the Supreme Court involving Philippine Muslims embroiled in litigation that demonstrated the interplay of the *Muslim Code*'s applicability and the *RPC*'s criminalisation of bigamy. These are the cases of *Estrellita Juliano-Llave v Republic of the Philippines, et. al.* ('*Juliano-Llave v Republic*')[35] and *Atty. Marieta D. Zamoranos v People of the Philippines and Samson R. Pacasum, Sr.* ('*Zamoranos v People*').[36] In *Juliano-Llave v Republic,* the petitioner's second marriage was declared void *ab initio* under civil law for being bigamous as the Muslim male spouse had a subsisting civil law marriage. This case sprung from a civil complaint for declaration of nullity of marriage. It was not about criminal prosecution for bigamy. In *Zamoranos v People,* the petitioner was charged for bigamy, but the case was dismissed because her subsequent marriage was validly solemnised in accordance with the *Muslim Code*, her previous Muslim marriage having been dissolved through divorce under the same law. Therefore, her subsequent marriage was not bigamous.

Neither *Juliano-Llave v Republic* nor *Zamoranos v People* directly involved a deliberate and point-blank invocation of the *Free Exercise Clause* of the Constitution to avoid criminal liability for bigamy. It is for this reason that this article explores the potential of factoring in the *free exercise of religion* in the dynamics of the Muslim converts' second or subsequent marriage and the prohibition of bigamy under the *RPC*. This of course requires a discussion on 'free exercise of religion'.

IV FREE EXERCISE OF RELIGION

When *free exercise of religion* or *freedom of religious profession and worship* is placed at the centrality of the defense against the prosecution for bigamy under Philippine penal law, there are significant lessons that would certainly come out which deserve attention at the very least. This is because the right to religious freedom 'is a fundamental right that enjoys a preferred position in the hierarchy of rights.'[37] The 'religion clauses, like the other fundamental liberties found in the Bill of Rights, is a preferred right and an independent source of right.'[38] It 'is sacred for an invocation of the Free Exercise Clause is an appeal to a higher sovereignty.'[39] In the language of the Supreme Court of the Philippines, '[t]he entire constitutional order of limited government is premised upon an acknowledgment of such higher sovereignty. Thus, the Filipinos implore the "aid of Almighty God in order to build a just and humane society and establish a government."'[40] For these reasons, sometimes state interest alone is not enough to prevail over free exercise of religion. Freedom of religion is articulated in the Constitution of the Philippines as follows:

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession

35 (2011) 646 SCRA 637 ('*Juliano-Llave v Republic*').
36 (2011) 650 SCRA 304 ('*Zamoranos v People*').
37 (2003) 408 SCRA 1 ('*Estrada v Escritor (2003)*') 171.
38 (2006) 492 SCRA 1 ('*Estrada v Escritor (2006)*') 77.
39 *Estrada v Escritor (2003)* (n 37) 171.
40 Ibid.

> and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.[41]

A *Freedom to Act One's Belief*

Freedom of religion consists of two aspects, *namely,* freedom to believe and freedom to act on one's belief. This article will not dwell much on freedom to believe as it is absolute. Individuals can believe or disbelieve in the existence of God. They can subscribe to religion or just consider it as a myth because freedom of religion encompasses rejection of religion. As put by *Cruz* and *Cruz,*

> However absurd his beliefs may be to others, even if they be hostile and heretical to the majority, he has full freedom to believe as he pleases. He may not be required to prove his beliefs. He may not be punished for his inability to do so. Religion, after all, is a matter of faith. "Men may believe what they cannot prove." Everyone has a right to his beliefs and he may not be called to account because he cannot prove what he believes.[42]

An individual is free to reject faith and even the Islamic faith for that matter. This is the context of *Surah* (Chapter) *109* of the Holy Qur'an.[43] According to Yusuf Ali*,* this *surah* 'defines the right attitude to those who reject Faith: in matters of Truth we can make no compromise, but there is no need to prosecute or abuse anyone for his faith or belief.'[44] Belief resides in the mind. And as long as it remains there, not translated into external acts, it is protected as an absolute freedom.

However, it is a different story when religious belief is translated into external acts. While freedom of religion includes freedom to act on one's belief, yet external acts in the exercise of religion may invite the power of the state to regulate acts that affect the public welfare. In other words, while freedom to believe is absolute, freedom to act on one's belief is not. For this, we affirm the following observation:

> But where the individual externalises his beliefs in acts or omissions that affect the public, his freedom to do so becomes subject to the authority of the State. As great as this liberty may be, religious freedom, like all the other rights guaranteed in the Constitution, can be enjoyed only with a proper regard for the rights of others. It is error to think that the mere invocation of religious freedom will stalemate the State and render it impotent in protecting the general welfare. The inherent police power can be exercised to prevent religious practices inimical to the society.[45]

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41 *Constitution of the Philippines 1987* (Philippines) art 3, s 5.

42 Isagani A. Cruz and Carlo L. Cruz, *Constitutional Law* (Central Book Supply, 2015) 447.

43 'Say: O ye That reject Faith! I worship not that Which ye worship, Nor will ye worship That which I worship. And I will not worship That which ye have been Wont to worship, Nor will ye worship That which I worship.' [Surah 109, Holy Qur'an].

44 *The Holy Qur'an, English translation of the meanings and Commentary*, tr *Mushaf Al-Madinah An-Nabawiyah*, adopting with refinements the translation of the late Ustadh Abdullah Yusuf Ali (King Fahd Holy Qur'an Printing Complex) 2020.

45 Cruz and Cruz (n 42) 447.

Thus, for instance, the practice of human sacrifice, in the name of religious belief can be punished as murder. One cannot burn down another's house as a religious act, for that constitutes arson. A person who forcibly or without consent of the owner takes private property not belonging to him as an offering to please his *deity* would be liable for robbery or theft. This does not mean however that the State's authority always prevails over the freedom to act on one's belief. As succinctly put by the Supreme Court of the Philippines –

> However, not any interest of the state would suffice to prevail over the right to religious freedom as this is a fundamental right that enjoys a preferred position in the hierarchy of rights - "the most inalienable and sacred of all human rights", in the words of Jefferson.[46]

There are many instances where the interference of the state on religious acts or matters, were declared unconstitutional for violating the Religion Clauses of the Philippine Constitution. In *Islamic Da'wah Council of the Philippines v Office of the Executive Secretary* ('*Islamic Da'wah Council of the Philippines*'),[47] granting the Office on Muslim Affairs under Executive No. 46, s. 2001, the exclusive authority to issue *halal* certifications was declared unconstitutional. According to the Supreme Court, this exclusive authority effectively allowed the state to compel Philippine Muslims to accept the state's own interpretation of the Qur'an and Sunnah, thereby encroaching on the religious freedom of Muslim organisations to interpret for Philippine Muslims what food products are fit for their consumption.

In *Ang Ladlad LGBT Party v Commission on Elections* ('*Ang Ladlad*'),[48] basing on religious standards in the Qur'an and the Bible, the Commission on Elections refused to register a group from the LGBT community, i.e*., Ang Ladlad LGBT Party*, as a party-list organisation under the Party-List System Act (Republic Act No. 7941) for purposes of the party-list elections. Such refusal according to the Supreme Court is in violation of the non-establishment clause of the Constitution, specifically, that no law shall be made respecting an establishment of religion.

In *Ebralinag v The Division Superintendent of Schools of Cebu* ('*Ebralinag*'),[49] the Supreme Court sustained as exercise of religious freedom the refusal of the petitioners to salute the Philippine flag, sing the national anthem and recite the patriotic pledge, considering that the petitioners, as members of the Jehovah's Witnesses, believed that the flag is an image which they should not worship according to their religious belief.

B *Second or Subsequent Marriage: A Religious Act?*

To contend on the basis of religious freedom, it is necessary to establish in the first place that the Philippine Muslim converts' act of contracting second or subsequent marriage is in the exercise of the Islamic religion. This is decisive as any act sought to be justified

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46 *Estrada v Escritor (2003)* (n 37) 171.
47 (2003) 405 SCRA 497 ('*Islamic Da'wah Council of the Philippines*').
48 (2010) 618 SCRA 32 ('*Ang Ladlad*').
49 (1993) 219 SCRA 256 ('*Ebralinag*').

under the *Free Exercise Clause* must be shown to be performed out of one's religious belief. If the Philippine Muslim convert's act of contracting polygamous marriage does not arise from his religious belief, then the *Free Exercise Clause* becomes entirely irrelevant.

Marriage, whether first or subsequent, has a special standing in Islam. This is deducible from the Qur'anic verse (*Surah 30:21*) that among the signs or miracles of Allah is the creation of spouses which together with the series of *Signs* or *Miracles* mentioned in *Surah 30:20-25,* according to Yusuf Ali, 'should awaken our souls and lead us to true Reality if we try to understand Allah.'[50] The translation of the verse is follows:

> And among His signs is this: that He created for you spouses from among yourselves, that you may dwell with them in tranquility, and He engendered love and mercy between your hearts. Indeed, in that are signs for those who reflect.[51]

According to Hamid Aminoddin Barra, '[t]he wisdom behind entering a conjugal life in an Islamic perspective is clearly set forth in this *ayah,* that is to create an atmosphere of peace and tranquility, of concern and compassion, of love and affection, of care and understanding, between the spouses.'[52] '[M]arriage is regarded first and foremost as a righteous act, an act of responsible devotion.'[53]

While marriage is characterised by several values and purposes, *e.g.,* sexual control, reproduction, sound health, peace and tranquility, compassion, love and affection, care and understanding between spouses, 'yet, these values and purposes of marriage,' says *Abdalati,* 'would take on a special meaning and be reinforced if they are intertwined with the idea of God, conceived also as religious commitments, and internalised as divine blessings.'[54] 'And [indeed] this seems to be the focal point of marriage in Islam.'[55]

Based on the historical background and context of the Islamic view on polygamy, this author submits that the act of contracting a second or subsequent marriage is within the scope of freedom to act on one's belief. It is an act whose performance is regulated by Islamic rules and regulations embodied in the Qur'an. Thus, whether a Philippine Muslim convert is qualified to have more than one wife is an issue addressed by Qur'anic injunctions directly dealing with that question. Therefore, overlooking momentarily the crime of bigamy, when a Philippine Muslim convert contracts a second or subsequent marriage in accordance with Muslim law, that act is within the sphere of *free exercise of religion.*

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50 *The Holy Qur'an, English translation* (n 44) footnote 3529, 1183.

51 Ibid 1182.

52 Hamid Aminoddin Barra, *The Code of Muslim Personal Laws: A Study of Islamic Law in the Philippines* (MSU College of Law, and KFCIAS, 1988) 70.

53 Hammudah Abdalati, *Islam in Focus* (Damascus, 1977) 114.

54 Ibid 115.

55 Ibid.

V BIGAMOUS MARRIAGES AND BENEVOLENT NEUTRALITY/ACCOMMODATION

After establishing that the act of contracting a second or subsequent marriage by a Philippine Muslim convert is in the exercise of religion, the next issue is whether that religious act should be upheld, even if it contravenes the general penal law of bigamy in the Philippines. Thus, it behoves an inquiry on how far accommodation has been stretched in the Philippines in the name of religious freedom. This is where the landmark Philippine case of *Estrada v Escritor* (2003) – followed up by *Estrada v Escritor* (2006) – becomes the north star of this article in exploring the potential of free exercise of religion as a defense by the Philippine Muslim converts against prosecution – or threat thereof – for the crime of bigamy once they contract a second or subsequent marriage while their civil marriages are subsisting. The case of *Estrada v Escritor* (2003) – together with *Estrada v Escritor* (2006) – is the landmark case in the Philippine jurisprudence, that adopted the Benevolent Neutrality/Accommodation approach in dealing with Religion Clauses cases in the Philippine jurisdiction.

A *Brief Background of* Estrada v Escritor (2003) *and* Estrada v Escritor (2006)

To appreciate the relevance of the *Estrada v Escritor* doctrine to this article, a brief factual background of the case is in order.

Estrada lodged a complaint against Soledad Escritor, a court employee for living with a man (Luciano Quilapio, Jr.), who is not her husband and who himself had a subsisting marriage with another woman. Out of this live-in arrangement she gave birth to a son. Escritor did not deny these allegations. In fact, she admitted to have cohabited with that man for more than twenty years without the benefit of marriage. Her own legal husband was still alive but also living with another woman. The complainant Estrada believed that Escritor's conduct tarnished the image of the court for her "disgraceful and immoral conduct", a ground for disciplinary action under Book V, Title I, Chapter VI, Sec. 46(b) (5) of the Revised Administrative Code. Therefore, Estrada prayed that Escritor should be dismissed from service as it might appear that the court tolerates her disgraceful and immoral conduct.

However, Escritor was a member of the Jehovah's Witness religion and the Watch Tower and Bible Tract Society. Escritor's conjugal arrangement conforms with the religious beliefs of their congregation. In fact, after ten years of cohabitation, Escritor executed a "Declaration of Pledging Faithfulness", which allows members of the Jehovah's Witness religion, who were abandoned by their spouses, to enter into marital relations. Thus, Escritor's conjugal union with a married man who is not her legal husband is moral and binding within their congregation all over the world except in countries that allow divorce.

Escritor pleaded for exemption, based on the *Free Exercise Clause*, from administrative liability for "disgraceful and immoral conduct". In its *Estrada v Escritor* (2003) ruling, the Supreme Court of the Philippines subjected Escritor's invocation of

religious freedom to the "*compelling state interest"* test from a *benevolent neutrality stance.* This is equivalent to –

> entertaining the possibility that [Escritor's] claim to religious freedom would warrant carving out an exception from the Civil Service Law; necessarily, her defense of religious freedom will be unavailing should the government succeed in demonstrating a more compelling state interest.[56]

'*In applying the test, the first inquiry is whether respondent's right to religious freedom has been burdened.*'[57] For the first inquiry, the Supreme Court held that Escritor's religious freedom has been burdened. '[C]hoosing between her keeping her employment and abandoning her religious belief and practice and family on the one hand, and giving up her employment and keeping her religious practice and family on the other hand, puts a burden on her free exercise of religion.'[58]

'The second step is to ascertain respondent's sincerity in her religious belief.'[59] For the second inquiry, the Supreme Court was convinced that Escritor 'appears to be sincere in her religious belief and practice and is not merely using the "Declaration of Pledging Faithfulness" to avoid punishment for immorality.'[60]

However, the *Estrada v Escritor* (2003) could not be decided using the *compelling state interest* test as of yet because, as the case is 'of first impression […], the parties were not aware of the burdens of proof they should discharge in the Court's use of the "compelling state interest" test.'[61] 'To properly settle the issue,' said the Court, 'the government [through the Office of the Solicitor General] should be given the opportunity to demonstrate the compelling state interest it seeks to uphold in opposing [Escritor's] stance that her conjugal arrangement is not immoral and punishable as it comes within the scope of free exercise protection.'[62] Thus, the case was remanded over to the Office of Court Administrator on August 4, 2003.

After almost three years later, the case came back from the Office of Court Administrator to the Supreme Court and was finally decided in its entirety in *Estrada v Escritor* (2006). In this later ruling, the Supreme Court affirmed its findings in the earlier *Estrada v Escritor* (2003) ruling that Escritor's right to religious freedom had been burdened and that her sincerity in her religious belief was established. However, this time the Supreme Court also ruled that the government, represented by the Office of the Solicitor General, had failed to satisfy the *compelling state interest* test.

Thus, applying the *Benevolent Neutrality/Accommodation* and the *strict scrutiny-compelling state interest* test*,* Escritor's plea for exemption was granted and the

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56 *Estrada v Escritor (2003)* (n 37) 188.
57 Ibid.
58 Ibid 188, 189.
59 Ibid 189.
60 Ibid.
61 Ibid 190.
62 Ibid 190, 191.

administrative complaint against her was dismissed. The Supreme Court concluded as follows:

> Thus, we find that in this particular case and under these distinct circumstances, respondent Escritor's conjugal arrangement cannot be penalised as she has made out a case for exemption from the law based on her fundamental right to freedom of religion. The Court recognises that state interests must be upheld in order that freedoms - including religious freedom - may be enjoyed. In the area of religious exercise as a preferred freedom, however, man stands accountable to an authority higher than the state, and so the state interest sought to be upheld must be so compelling that its violation will erode the very fabric of the state that will also protect the freedom. In the absence of a showing that such state interest exists, man must be allowed to subscribe to the Infinite.[63]

B *Benevolent Neutrality/Accommodation*

Confronted with what theory to choose for the Philippines in resolving *Religion Clauses* cases – between *Strict Neutrality/Separation* and *Benevolent Neutrality/Accommodation* – the Supreme Court spoke with conviction as follows:

> We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits […], but more importantly, because our constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion clause cases. The ideal towards which this approach is directed is the protection of religious liberty "not only for a minority, however small- not only for a majority, however large but for each of us" to the greatest extent possible within flexible constitutional limits.[64]

Parenthetically, even though the *Benevolent Neutrality/Accommodation* is a result of American experiment on religion clauses, there is no necessity to elaborate exhaustively on the American jurisprudence relating to this matter prior to the Philippine case of *Estrada v Escritor* (2003). The Supreme Court of the Philippines stated:

> While the U.S. and Philippine religion clauses are similar in form and origin, Philippine constitutional law has departed from the U.S. jurisprudence of employing a separationist or strict neutrality approach. The Philippine religion clauses have taken a life of their own, breathing the air of benevolent neutrality and accommodation. […] While the religion clauses are a unique American experiment which understandably came about as a result of America's English background and colonisation, the life that these clauses have taken in this jurisdiction is the

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63 *Estrada v Escritor (2006)* (n 38) 91.

64 *Estrada v Escritor (2003)* (n 37) 168.

> Philippines' own experiment, reflective of the Filipino's own national soul, history and tradition.[65]

This Philippine constitutional law's departure from a separationist or strict neutrality approach of U.S. jurisprudence was confirmed by the Supreme Court in *Estrada v Escritor* (2006). The Court held:

> There is no ambiguity with regard to the Philippine Constitution's departure from the U.S. Constitution, insofar as religious accommodations are concerned. It is indubitable that benevolent neutrality-accommodation, whether mandatory or permissive, is the spirit, intent and framework underlying the Philippine Constitution.[66]

In *benevolent neutrality*, religion is 'looked upon with benevolence and not hostility'[67] thereby 'allow[ing] *accommodation* of religion under certain circumstances.'[68] The Court held that '[a]ccommodations are government policies that take religion specifically into account[.]'[69] Further, '[t]he benevolent neutrality theory believes that with respect to these governmental actions, accommodation of religion may be allowed, not to promote the government's favoured form of religion, but to allow individuals and groups to exercise their religion without hindrance.'[70] The Supreme Court also stated that the purpose of accommodations is to remove a burden on, or facilitate the exercise of, a person's or institution's religion.[71]

Parenthetically, *accommodation* has been referred to in *Re: Letter of Tony Valenciano, Holding of Religious Rituals at the Hall of Justice Building in Quezon City* ('*Re: Letter of Tony Valenciano*')[72] as a recognition of the reality that some governmental measures may not be imposed on a certain portion of the population for the reason that these measures are contrary to their religious beliefs.[73] Indeed, for the state to be realistic, it has to afford a degree of accommodation by giving consideration to people who merely want to exercise their religion without hindrance.

The *Estrada v Escritor* rulings effectively established that all cases involving the interpretation of the *Religion Clauses* of the Constitution must be resolved with the *benevolent neutrality/accommodation* as the framework or approach. Therefore, the act of contracting a second or subsequent marriage by Philippine Muslim converts – under the specific context presented in this article – involving as it does an interpretation of the *Free Exercise* clause of the Constitution, must be resolved through the same framework.

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65 Ibid, 169.
66 *Estrada v Escritor (2006)* (n 38) 66.
67 *Estrada v Escritor (2003)* (n 37) 121.
68 Ibid.
69 Ibid.
70 *Estrada v Escritor (2006)* (n 38) 42.
71 Ibid.
72 (2017) 819 SCRA 313 ('*Re: Letter of Tony Valenciano*').
73 See ibid, 350.

C *Strict Scrutiny-Compelling State Interest Test*

After establishing that the *Benevolent Neutrality-Accommodation* is the framework by which *Free Exercises* cases should be resolved, the Supreme Court in *Estrada v Escritor* then proceeded to determine the test to ascertain the limits of free exercise of religion. There are several tests used in the Philippine jurisprudence to determine these limits: the "clear and present danger" test, the "immediate and grave danger" test, and the "compelling state interest" test.[74]

The "clear and present danger" and "grave and immediate danger" tests are often used and are appropriate in cases on freedom of expression as speech has easily discernible or immediate effects.[75] On the other hand, '[t]he "compelling state interest" test is proper where conduct involved for the whole gamut of human conduct has different effects on the state's interests: some effects may be immediate and short-term while others delayed and far-reaching.'[76] Considering that the *Escritor's* case involved purely conduct arising from religious belief, the *compelling state interest* test is proper according to the Supreme Court. This is because 'only a compelling interest of the state can prevail over the fundamental right to religious liberty.'[77] The Court elaborated in part, as follows:

> The test requires the state to carry a heavy burden, a compelling one, for to do otherwise would allow the state to batter religion, especially the less powerful ones until they are destroyed. In determining which shall prevail between the state's interest and religious liberty, reasonableness shall be the guide. The "compelling state interest" serves the purpose of revering religious liberty while at the same time affording protection to the paramount interests of the state.[78]

Elsewhere in the *Estrada v Escritor* (2006) ruling, the Supreme Court said that what underlies the *compelling state interest* test is the notion that free exercise is a fundamental right and that laws burdening it should be subject to strict scrutiny.[79] In the earlier *Estrada v Escritor* (2003) case, the Court summarised the three-step process of the application of the test, thus:

> If the plaintiff can show that a law or government practice inhibits the free exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or 'compelling') secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets this burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue. In order to be protected, the claimant's beliefs must be 'sincere', but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's

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74 See generally *Estrada v Escritor (2003)* (n 37); *Estrada v Escritor (2006)* (n 38).

75 See *Estrada v Escritor (2003)* (n 37) 170.

76 Ibid.

77 Ibid 171.

78 Ibid.

79 *Estrada v Escritor (2006)* (n 38) 63.

> religious denomination. 'Only beliefs rooted in religion are protected by the Free Exercise Clause'; secular belief, however sincere and conscientious, do not suffice.[80]

The Court likewise declared that it is the *strict scrutiny-compelling state interest* test which is most in line with the benevolent neutrality-accommodation approach.[81] Considering that it is the latter approach that applies in the specific problem that this article presents, namely – a Philippine Muslim convert's act of contracting a second or subsequent marriage in contravention of Article 349 (Bigamy) of the *RPC* – then it follows that it is the *strict scrutiny-compelling state interest* test which must likewise apply.

Applying this test, the Supreme Court declared in *Estrada v Escritor* (2006) that the state through the Solicitor General failed to establish that *Escritor* was not entitled to exemption from the law with which she was administratively charged for her conjugal cohabitation with a man who himself is married to another woman, an act which the *dissent*[82] believed has violated Article 334 of the *Revised Penal Code* penalising concubinage. The Supreme Court clarified though that:

> There has never been any question that the state has an interest in protecting the institutions of marriage and the family, or even in the sound administration of justice. Indeed, the provisions by which respondent's relationship is said to have impinged, e.g., Book V, Title I, Chapter VI, Sec. 46(b)(5) of the Revised Administrative Code, Articles 334 and 349 of the Revised Penal Code, and even the provisions on marriage and family in the Civil Code and Family Code, all clearly demonstrate the State's need to protect these secular interests.[83]

Be that as it may, the Supreme Court rejoined on this in that 'it is not enough to contend that the state's interest is important, because our Constitution itself holds the right to religious freedom sacred.'[84] The Court emphasised that '[t]he State must articulate in specific terms the state interest involved in preventing the exemption, which must be compelling, for only the gravest abuses, endangering paramount interests can limit the fundamental right to religious freedom.'[85] 'To rule otherwise would be to emasculate the Free Exercise Clause as a source of right by itself.'[86]

VI SUMMATIVE APPLICATION

Thus far, this article has put forward that the Philippine Muslim converts' act of contracting a second or subsequent marriage is an act in the exercise of religious belief, thus inviting the application of the *benevolent neutrality-accommodation* approach using the *strict*

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80 *Estrada v Escritor (2003)* (n 37) 126, *citing* McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion,' *Harvard Law Review* Vol. 103 (1990) 1410, 1416-7.

81 *Estrada v Escritor (2006)* (n 38) 62.

82 *Estrada v Escritor (2003)* (n 37) 234.

83 *Estrada v Escritor (2006)* (n 38) 84.

84 Ibid.

85 Ibid.

86 Ibid.

scrutiny-compelling state interest test to determine if that act has exceeded the limits of religious freedom.

Therefore, it is now an opportune moment to clarify as to what kind of accommodation under which the said *religious act* may be scrutinised. Reiterating *Estrada v Escritor* (2003), the Supreme Court mentioned three kinds of accommodation in *Estrada v Escritor* (2006):

> A free exercise claim could result to three kinds of accommodation: (a) those which are found to be constitutionally compelled, i.e., required by the Free Exercise Clause; (b) those which are discretionary or legislative, i.e., not required by the Free Exercise Clause but nonetheless permitted by the Establishment Clause; and (c) those which the religion clauses prohibit.[87]

The first kind of accommodation refers to mandatory accommodation which 'results when the Court finds that the accommodation is required by the Free Exercise Clause, i.e., when the Court itself carves out an exemption.'[88] The second kind refers to permissive accommodation in which 'the Court finds that the State may, but is not required to accommodate religious interests.'[89] And finally, the third kind refers to prohibited accommodation which results 'when the Court finds no basis for a mandatory accommodation, or it determines that the legislative accommodation runs afoul of the establishment or the free exercise clause.'[90]

There is no question as to the third kind of accommodation as it is prohibited by the Constitution, upholding the non-establishment clause in that no law shall be passed respecting the establishment of religion. Thus, we are left with only two options to choose from, i.e., mandatory and permissive accommodations. This requires careful attention, for the Supreme Court in *Estrada v Escritor* cited Article 180 of the *Muslim Code* as an instance of permissive accommodation.[91] The provision states as follows:

> Art. 180. *Law applicable.* – The provisions of the Revised Penal Code relative to the crime of bigamy shall not apply to a person married in accordance with the provisions of this Code or, before its effectivity, under Muslim law.

It is submitted that this provision does not apply to the specific problem raised in this paper. It must be recalled that the Philippine Muslim converts which the author refers to are those who have subsisting **civil marriages**. This means that their subsisting marriages were not solemnised in accordance with Muslim law or the *Muslim Code*. To be specific, they were married **not** in accordance with the *Muslim Code* or Muslim law prior to their conversion to Islam. Article 180 cited above is clear in that the exemption from bigamy applies only to a person married **in accordance** with the provisions of the *Muslim Code*

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87 Ibid 60.
88 Ibid 61.
89 Ibid.
90 Ibid 62.
91 See ibid 76.

or, before its effectivity, under Muslim law**.** Therefore, it is submitted that the Philippine Muslim converts' act – in contracting a second or subsequent marriage while they have subsisting civil marriages – is not within the scope of the permissive accommodation in Article 180 of the *Muslim Code*. Consequently, this analysis, as in *Estrada v Escritor*, must focus on mandatory accommodation.

To recall, a mandatory accommodation results when the Court finds that accommodation is required by the Free Exercise Clause, i.e., when the Court itself carves out an exemption.[92] *Escritor*'s case was not anchored on permissive accommodation as there was no legislative exemption granted for her under the Revised Administrative Code on administrative liability for *disgraceful and immoral conduct* and Article 334 (Concubinage) of the *RPC*. Nonetheless, the Supreme Court granted her plea for exemption on the basis of her religious freedom as a member of the Jehovah's Witnesses, a religious sect that approves as moral her cohabitation with a married man.

Lest it be inaccurately taken that *disgraceful and immoral conduct* is allowed in the Philippine civil service, 'the [Supreme] Court,' in a number of cases, 'has ruled that government employees engaged in illicit relations are guilty of disgraceful and immoral conduct for which he/she may be held administratively liable.'[93] In fact, '[i]n these cases there was not one dissent to the majority's ruling that their conduct was immoral.'[94] Furthermore, '[t]he respondents themselves did not foist the defense that their conduct was not immoral, but instead sought to prove that they did not commit the alleged act or have abated from committing the act.'[95] 'However, there is a distinguishing factor that sets [*Escritor's* case] apart from the cited precedents, i.e.*,* as a defense, the respondent invoked religious freedom since her religion, the Jehovah's Witnesses, has, after thorough investigation, allowed her conjugal arrangement with Quilapio based on the church's religious beliefs and practices.'[96] Thus, the Supreme Court said '[t]his distinguishing factor compels the Court to apply the religious clauses to the case at bar [i.e*., Escritor's* case].'[97]

This is actually the cue that signals the potential of placing the *free exercise of religion* at the centrality of the defense of Philippine Muslim converts against prosecution, or threat thereof, for the crime of bigamy once they contract a second or subsequent marriage while they have subsisting civil marriages. By granting Escritor *a mandatory accommodation/exemption* from the law sanctioning *disgraceful and immoral conduct*, the Supreme Court effectively confirmed that in the Philippines, accommodation of religious freedom is possible even in the absence of legislative exemption in the law which collides with a religious act. The Court stated, '[T]his precisely is the protection afforded by the religion clauses of the Constitution, i.e., that in the absence of legislation granting

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92 Ibid 61.

93 *Estrada v Escritor (2003)* (n 37) 171, 172. [These cases are the following: (2002) 387 SCRA 1 (*Liguid v Camano*); (2000) 323 SCRA 578 (*Bucatcat v Bucatcat*); (2000) 339 SCRA 709 (*Navarro v Navarro*); (1997) 273 SCRA 320 (*Ecube-Badel v Badel*); (1993) 220 SCRA 505 (*Nalupta v Tapec*); (1985) 135 SCRA 361 (*Aquino v Navarro*)].

94 Ibid 172.

95 Ibid.

96 Ibid.

97 Ibid.

exemption from a law of general applicability, the Court can carve out an exception when the religion clauses justify it.'[98]

This is interesting because the issue of mandatory accommodation to a religious act from the application of general penal laws is still an open question in the Philippines. The reason is that there is no Philippine case yet granting a religious act mandatory accommodation/exemption from the application of general penal laws like Article 349 (Bigamy) of the *RPC*.[99] Incidentally, this is not the case in the United States of America (U.S.) where such a question had already been settled in *Reynolds v United States*[100] where the U.S. Supreme Court held that the Mormons' religious duty to practise polygamy is not a valid defense or exemption from the general federal law criminalising polygamy.[101] Thus, McDermott's predicament – the road to the full recognition of Islamic [polygamous] marriages will not be an easy one as it will require the U.S. Supreme Court to overrule or somehow distinguish *Reynolds v. United States*, something it has shown no interest in doing[102] – is understandable.

A *Applying the Mandatory Accommodation/Exemption*

There is no question that two cases *(Juliano-Llave v Republic and Zamoranos v People)*[103] have already been decided by the Supreme Court involving Philippines Muslims embroiled in litigation that demonstrated the interplay of the *Muslim Code*'s applicability and the *RPC*'s criminalisation of bigamy. However, as in other cases on *disgraceful and immoral conduct* preceding *Estrada v Escritor* that did not involve the defense of religious freedom, *Juliano-Llave v Republic* and *Zamoranos v People* also did not directly involve a deliberate and point-blank invocation of the *Free Exercise Clause* of the Constitution to avoid criminal liability for bigamy.

In other words, this article has the liberty to vet the Philippine Muslim converts' second or subsequent marriages (considered to be bigamous under Article 349 of the *RPC*) through the process of mandatory accommodation/exemption. This process was summarised by the Supreme Court as follows:

> Mandatory accommodation results when the Court finds that accommodation is required by the Free Exercise Clause, i.e, when the Court itself carves out an exemption. This accommodation occurs when all three conditions of the compelling interest test are met, i.e, a statute or government action has burdened claimant's free exercise of religion, and there is no doubt as to the sincerity of the religious belief; the state has failed to demonstrate a particularly important or compelling governmental goal in preventing an exemption; and that the state has failed to demonstrate that it used the least restrictive means. In these cases, the Court finds that the injury to religious conscience is so great and the advancement of public

98 Ibid 167.
99 *Estrada v Escritor (2006)* (n 38) 75.
100 98 U.S. 145 (1878).
101 Ibid.
102 McDermott (n 28) 74.
103 See Part III(B) above.

> purposes is incomparable that only indifference or hostility could explain a refusal to make exemptions. Thus, if the state's objective could be served as well or almost as well by granting an exemption to those whose religious beliefs are burdened by the regulation, the Court must grant the exemption.[104]

To determine if the Philippine Muslim converts can be granted mandatory accommodation/exemption under Article 349 (Bigamy) of the *RPC*, all the conditions of *compelling state interest* test mentioned above must be met, with the *benevolent neutrality/accommodation* as the framework or approach.

1 *Burden on free exercise of religion and sincerity of religious belief*

The first condition that shall be met is the existence of a statutory or government action that burdens the claimant's free exercise of religion together with the presence of sincerity of his/her religious belief. It is submitted that Article 349 of the *RPC* burdens those Philippine Muslim converts who want to marry subsequently. Once a person has entered the folds of Islam, there is no distinction between a Muslim by birth and a Muslim by conversion. Both are subject to the same rights, privileges and obligations arising from the fact and status of being a Muslim. Overlooking in the meantime the subsisting civil marriage, a Muslim convert who can prove that he can give equal and just treatment to his wives and the proposed second marriage is only in exceptional cases may be permitted to have more than one wife. However, because of Article 349, he is under the threat of criminal prosecution if he pursues that option. Therefore, Article 349 burdens the free exercise of his religious belief.

An incidental issue that arises here is the issue of non-applicability of the *Muslim Code* to the Muslim convert's subsisting civil marriage. Article 13 of the *Muslim Code*,[105] as discussed in Part II (B) above, is clear that marriages solemnised not in accordance with Muslim law or the *Muslim Code* are governed by the Civil Code (or the *Family Code of the Philippines*).[106] Thus, the subsisting civil marriages of Muslim converts are governed not by the *Muslim Code* but the Civil Code or, to be accurate, by the *Family Code of the Philippines* after the latter's enactment. Neither had their conversion to Islam brought their civil marriages under the scope of the *Muslim Code*. As discussed in Part II (B) above, the conversion to Islam under Article 178 of the *Muslim Code*[107] must be on the part of both non-Muslim spouses to produce the provision's legal effect of ratification

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104 *Estrada v Escritor (2006)* (n 38) 61.

105 Art. 13. *Application.* – (1) The provisions of this Title [Marriage and Divorce] shall apply to marriage and divorce wherein both parties are Muslims, or wherein only the male party is a Muslim and the marriage is solemnized in accordance with Muslim law or this Code in any part of the Philippines. (2) In case of marriage between a Muslim and a non-Muslim, solemnized **not** in accordance with Muslim law or this Code, the **Civil Code of the Philippines shall apply**. (*Muslim Code* (n 1) art 13). [emphasis added].

106 The provisions of the Civil Code on marriage, legal separation, rights and obligations between husband and wife, the family, paternity and filiation, and support were all repealed by the Family Code of the Philippines (E.O. No. 209).

107 Art. 178. *Effect of conversion to Islam on marriage.* – The conversion of non-Muslim spouses to Islam shall have the legal effect of ratifying their marriage as if the same had been performed in accordance with the provisions of this Code or Muslim law, provided that there is no legal impediment to marry under Muslim law. (*Muslim Code* (n 1) art 178).

of the non-Muslim marriage as if the same had been performed in accordance with the *Muslim Code* or Muslim law. If the conversion is only on the part of the non-Muslim spouse – in our specific problem, the husband – Article 178 does not apply.

This calls for a classification of the accommodation of the religious belief of Muslims upon the Qur'anic permission of having more than one wife but not more than four at a time. For Philippine Muslims who are married under the *Muslim Code*, there is permissive accommodation/exemption from bigamy when they contract a second or subsequent marriage in accordance with Article 180 of the *Muslim Code*. But Philippine Muslim converts who have subsisting civil marriages are not granted the same permissive accommodation/exemption. Consequently, the only option left is mandatory accommodation/exemption upon an invocation of religious freedom in a proper case. The author believes that the court is not precluded from granting mandatory accommodation/exemption if it could be justified under the *Free Exercise Clause,* notwithstanding that there is permissive accommodation already granted to Muslims whose subsisting marriages are governed by the *Muslim Code*. As pointed out by the Supreme Court, 'a "permissive accommodation-only" stance is the antithesis to the notion that religion clauses, like the other fundamental liberties found in the Bill of Rights, is a preferred right and an independent source of right.'[108]

Back to the first step of the process of accommodation, it is not enough that the free exercise of religion is burdened by a statute or government action. There must also be sincerity of religious belief on the part of the claimant. In democratic countries where separation of the church and the state is observed like in the Philippines, laws of general application are religion neutral. Following *Estrada v Escritor,* sincerity of religious belief must be demonstrated, otherwise such a belief becomes an easy and accessible excuse for exemption even if the burden to free exercise of religion is superficial. In *Estrada v Escritor* (2006)*,* the Solicitor General no less conceded that Escritor's claim of sincerity of her religious belief was 'beyond serious doubt.'[109]

In the case of a Muslim, this article submits that the sincerity of his religious belief vis-à-vis the Qur'anic permission to have more than one wife, can be demonstrated by his compliance with the conditions of such permission. The Qur'an demands of him to give justice to his wives in the form of equal and just treatment. If he insists to have more than one wife despite utter lack of financial means – along the lines of Justice Saaduddīn A. Alauya – to give equal and just treatment to his wives, then his sincerity is in doubt. Being desirous to contract a second or subsequent marriage just for the sake of having more than one wife at the expense of justice to the wives, which the Qur'an enjoins, can hardly make out a case of adequate sincerity. In Malaysia, for instance, in the case of *Re Ruzaini bin Hassan*,[110] the application for polygamy was rejected by the court because the financial condition of the applicant did not substantiate his claim that he can support two families.

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[108] *Estrada v Escritor (2006)* (n 38) 76-7.

[109] Ibid 81.

[110] See Part II(A) above.

However, if the Philippine Muslim convert can prove that he has the financial means to give equal and just treatment to his wives (wife in his civil marriage and wife in the proposed second Muslim marriage) and that he is only seeking the second or subsequent marriage in an exceptional case, then a claim for exemption from bigamy should not be dismissed outright for he has shown sincerity in his religious belief. Hence, the *compelling state interest* test shall be applied.

2 *Finding out if there is compelling state interest*

When the claimant is able to prove the existence of a burdening of the free exercise of religious beliefs and his sincerity in that religious beliefs, 'the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or 'compelling') secular objective and that it is the least restrictive means of achieving that objective.'[111] If the plaintiff meets this burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.[112]

Thus, if the Philippine Muslim converts can prove that there is a burden on their religious belief on the Qur'anic permission to have more than one wife and the sincerity in that belief as discussed in Part VI(A)(1) above, the burden then shifts to the government that not granting them permissive accommodation – like those granted to Philippine Muslims married under the *Muslim Code* – is *necessary* to the accomplishment of compelling secular objectives. One of the *dissents* in *Estrada v Escritor* (2006) asserted that 'the State has a compelling interest in the preservation of marriage and the family as basic social institutions, which is ultimately the public policy underlying the criminal sanctions against concubinage and bigamy.'[113] This dissent also argued that 'the majority opinion effectively condones and accords a semblance of legitimacy to [*Escritor's*] patently unlawful cohabitation…' and 'facilitates the circumvention of the Revised Penal Code.'[114] In addition, the dissent stated that the majority '[chose] to turn a blind eye to respondent's criminal conduct, the majority is in fact recognising a practice, custom or agreement that subverts marriage.'[115]

The *ponencia* brushed these aside by invoking that the free exercise of religion 'is a fundamental right that enjoys a preferred position in the hierarchy of rights – "the most inalienable and sacred of human rights," in the words of Jefferson.'[116] Hence, according to the majority opinion –

> [I]t is not enough to contend that the state's interest is important, because our Constitution itself holds the right to religious freedom sacred. The State must articulate in specific terms the state interest involved in preventing the exemption, which must be *compelling*, for only the gravest abuses, endangering paramount

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111 *Estrada v Escritor (2003)* (n 37) 126, *citing* McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion,' Harvard Law Review, vol. 103 (1990), pp. 1410, 1416-7.

112 Ibid.

113 *Estrada v Escritor (2006)* (n 38) 83.

114 Ibid 83.

115 Ibid.

116 Ibid 84.

> interests can limit the fundamental right to religious freedom. To rule otherwise would be to emasculate the Free Exercise Clause as a source of right by itself.[117]

It is correct for the dissent to say that the *State has a compelling interest in the preservation of marriage and the family as basic social institutions*. However, based on the discussions on the Islamic point of view of polygamy in Part II above, it would be hasty to conclude that the preservation of marriage and the family, in every case, would be compromised if the court grants mandatory accommodation/exemption to a religious act – for instance, the Philippine Muslim convert's act of contracting a second or subsequent marriage under Muslim law – that collides with penal laws designed to protect marriage and the family. The benefits of allowing polygyny, when the specific context is present and the Qur'anic requisites are complied with, may outweigh the reasons for outlawing it. The available statistics in the Philippines on the ratio of legitimate and illegitimate children speaks for itself. Besides, the preservation of every marriage and family, i.e., wife and children, will be achieved by the Qur'anic injunction that they will all receive equal and just treatment as enjoined by Islamic law.

Since Article 349 (Bigamy) of the *RPC* burdens the fundamental right to the free exercise of religion of Philippine Muslim converts, 'the government must do more than assert the objectives at risk if exemption is given; it must precisely show how and to what extent those objectives will be undermined if exemptions are granted.'[118] However, whether the government would be able to prove this is ultimately an issue for the courts to resolve in an appropriate case. On one hand, there is no assurance that in an appropriate case before the Supreme Court, Philippine Muslim converts vis-à-vis the crime of bigamy will receive the same degree of mandatory accommodation/exemption accorded in *Escritor*. On the other hand, since only the question of mandatory accommodation/exemption from the application of general penal laws is uncertain,[119] it is still possible that the Supreme Court can carve out a mandatory accommodation/exemption for the Philippine Muslim converts.

VII CONCLUSION

The Islamic approach to polygamy is a realistic approach to eradicating polygamy's traditional evils and ensuring its benefits, by regulating it instead of totally prohibiting its practice. Islam did not invent polygamy as it was already a pre-existing social phenomenon before the Qur'anic injunctions to regulate its practice were imposed.

The permission to have more than one wife but not more than four at a time is applicable generally to the Philippine Muslims provided that the requirements and conditions imposed by the *Muslim Code* for its practice are satisfied. However, Philippine Muslim converts with subsisting civil marriages are at the risk of prosecution for bigamy in Philippine penal law once they contract a second or subsequent marriage under Muslim law after their conversion to Islam. By exploring this specific problem, this article was

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117 Ibid.

118 Ibid 84-5.

119 Ibid 77.

able to highlight significant lessons on the extent of the *Religion Clauses* of the Philippine Constitution. This was useful in analysing the tension of the Islamic practice of polygamy of Philippine Muslim converts and bigamy under the *RPC*.

The significant lessons that emerge from this article paves the way for the Muslim converts (affected by the specific problem presented) the option to invoke *free exercise of religion* to claim a mandatory accommodation/exemption from the application of the general penal law of bigamy. This is an open question, which may be decided by the court in *two ways*, namely under the *Benevolent Neutrality/Accommodation* approach and using the *Strict Scrutiny-Compelling State Interest* test laid down by the Supreme Court in the landmark *Religion Clauses* case of *Estrada v Escritor*. First, there is no assurance that the court would carve out a mandatory accommodation/exemption for them. Secondly, a mandatory accommodation/exemption is possible, especially so that once it is established that religious liberty is burdened by a statute or government action and there is sincerity of religious belief, the burden then shifts to the government to prove compelling state interest to override the free exercise of religion. However, the resolution of this question – of which of the two ways the Court would take to resolve the specific problem of this article – will perhaps unfold in an appropriate case that may possibly reach the Court in a matter of time.

THE CHALLENGES OF MOBILE COURTS IN ENVIRONMENTAL LITIGATION IN NIGERIA

Joseph Nwazi* and Agbowu Ejike Christopher**

Abstract

As the world approaches the 50th anniversary of the United Nations Conference on the Human Environment (also known as Stockholm Conference) 1972, attention is focused on developing new frameworks to inspire and guide the people of the world in the preservation and enhancement of the environment. An indispensable component of these frameworks is the mechanisms to ensure the consistent enforcement of environmental laws and policies at the grassroots level. In this context, one significant development in recent decades is the emergence of mobile courts that specialise in the adjudication of environmental disputes. These courts prosecute both environmental crimes and civil cases fairly, efficiently and effectively with powerful transformative effect on the society. In Nigeria today, these courts have become an indispensable aspect of the administration of justice. However, they are bewildered with a lot of challenges which include narrow jurisdiction and inadequate security. In this article, we explore the central role these courts play in enforcing environmental laws and in promoting sustainable development at the grassroots level. This article reviews the challenges inhibiting these courts from accomplishing these objectives and suggests ways in which they can actively participate in realising a sustainable future especially by creating more efficient access to justice for those living in remote areas in Nigeria.

Keywords: mobile court, environmental court, Nigeria.

I INTRODUCTION

The greatest dividend of democracy and civilisation is access to justice.[1] People who seek justice should obtain a remedy through formal or informal institutions of justice in compliance with human rights standards. There is no access to justice where citizens, especially the downtrodden, fear the system, see it as alien, and do not access it. Lack of access to environmental justice in Nigeria,[2] especially, is among the greatest causes

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1 RK Salman and OO Ayankogbe, 'Denial of Access to Justice in Public Interest Litigation in Nigeria: Need to Learn from Indian Judiciary' (2011) 53(4) *Journal of Indian Law Institute*, 594.

2 Nigeria, being a common law country by virtue of its colonial heritage, has numerous sources of environmental law, which include the *Constitution of the Federal Republic of Nigeria, 1999*, international treaties, state laws, local government laws and the common law.

of self-help and violence, especially in the Niger Delta region, where oil exploration activities take place with the attendant environmental pollution. Principle 10 of the Rio Declaration 1992[3] seeks, among others, to ensure that every person has access to justice in environmental matters with the aim of safeguarding the right to a healthy and sustainable environment for the present and future generations. The implementation of this Principle at the national and grassroots levels is a crucial component of its fulfilment without which the efficacy of the principle is undermined. George Spring and Catherine Spring[4] noted that sound governance and the enforcement of environmental rule of law are crucial to delivering the 2030 agenda for sustainable development and the Paris agreement on climate change, whereas some countries face judicial backlog of up to ten years. Against this backdrop, the United Nations Environment Programme commissioned the Environmental Courts and Tribunals to provide access to justice for all and to build effective, accountable and inclusive institutions at all levels.[5] Again, the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, otherwise known as the Aarhus Convention,[6] was drafted to enhance people's access to environmental justice through public participation in governmental decision-making processes on matters concerning the environment.

Worries about the capacity of the traditional courts to resolve the magnitude of environmental problems have gained some momentum in the past few decades. There is evidence that the solutions developed by the traditional courts are not all-inclusive.[7] Justice hardly gets to the remote and rural areas. There is therefore the need for mobile courts as a necessary option. Mobile courts have contributed to improving formal justice service delivery in most regions of the world. The main goal is to bring judicial services closer to the people and provide timely justice to the remote communities, especially where traditional justice system is non-existent.[8]

In Nigeria, the introduction of mobile courts is in tandem with the national policy on environment and sustainable development formulated by the Federal Government of

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3 United Nations Conference on Environment and Development also known as the 'Earth Summit' was held in Rio De Janeiro in June 1992. See Avi Brisman, 'Rio Declaration' in Chatterjee D.K. (eds) *Encyclopedia of Global Justice* (Springer, Dordrecht, 2011) 27.

4 George Spring and Catherine Spring, 'Environmental Courts and Tribunals: A Guide for Policy Makers' (United Nations Environment Programme, 2016) September 2016 <https://wedocs.unep.org/bitstream/handle/20> ('George Pring & Catherine Pring').

5 Ved Nanda and George Pring, *International Environmental Law and Policy for the 21st Century* (Brill Nijhoff, 2nd rev ed, 2013) ('Nanda and Pring').

6 The Aarhus Convention was adopted on 25 June 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference on the Environment for Europe. The parties to the Convention are to ensure that public authorities at the national, regional or local level facilitate the enforcement of these rights. *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, signed 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2012). See the United Nations Economic Commission for Europe (UNECE) Sustainable Development Goals <https://www.unece.org/env/pp/introduction.html.>.

7 Ibid.

8 Jordan Lesser, 'The Future of Conservation in Namibia: Making the Case for an Environmental Court and Legislative Reforms to Improve Enforcement of Wildlife' (2018) 32(1) *Tulane Environmental Law Journal* 66.

Nigeria in 1989.[9] The policy provides, amongst others, the concepts and strategies which will lead to the procedures and other concrete actions required for launching Nigeria into an era of social justice, self-reliance and sustainable development.[10] Unfortunately, the impact of these courts on the population has not been felt as it could have been, the reason being the various challenges confronting these courts. This paper is however drawing attention to the necessity of mobile courts in improving access to environmental justice in Nigeria. This is imperative today as the global attention is focused on the global environmental crisis brought about by climate change. Adequate attention should also be given to the sources of greenhouse gas emissions that exacerbate this climate crisis. This cannot be complete without global binoculars into the environmental activities in the rural communities. The importance of mobile courts in this regard cannot be overlooked because infraction of environmental laws and human rights abuses with impunity are a constant re-occurrence in the remote and rural areas outside of the world's attention. An instance is the creeks in the Niger Delta region of Nigeria which is not even accessible by the courts. Consequently, the remote populations do not ventilate their grievances as and when due. Therefore, this article recommends ways of checkmating the barriers to the operation of the mobile courts in these areas for maximum efficiency.

II THE MOBILE COURTS

A Meaning of Mobile Court

According to the Cambridge Dictionary, mobile means 'able to be moved from one place to another', while court by the same dictionary refers to 'a place where trials and other legal cases happen, or the people present in such a place, especially the officials and those deciding if someone is guilty'.[11] In this context, a mobile court means a court that can easily move from place to place for the determination of cases. They are courts on wheels as they travel to places especially remote and rural areas, where no traditional courts exist, to carry out their judicial functions to the people which are not easily available in other courts.[12] In some cases, vehicles are converted into 'mobile courtrooms', each staffed by a Magistrate, a Commissioner for Oaths and an interpreter, complete with their mobile ICT[13] apparatus and recording system. These vehicles traverse the tough terrain

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9 The Nigerian government in collaboration with the United Nations Environment Program (UNEP) organised the workshop from September 12-16, 1988 but came into effect in 1989. See Ubleble Benjamin and Gbenemene Kpae, 'A Critique of Nigerian National Policy on Environment: Reasons for Policy Review' (2018) 32(1) *International Journal of Geography and Environmental Management* 22. See also Gozie S. Ogbodo, 'Environmental Protection in Nigeria: Two Decades after the Koko Incident' (2009) 15(1) *Annual Survey of International and Comparative Law* 2 ('Gozie S. Ogbodo').

10 Aliyu Ibrahim Kankara, 'Examining Environmental Policies and Laws in Nigeria' (2013) 4(3) *International Journal of Environmental Engineering and Management* 170.

11 See *Cambridge Advanced Learner's Dictionary* (4th ed, 2008).

12 Gazi D Hosen and Syed R Ferdous, 'The Role of Mobile Courts in the Enforcement of Laws in Bangladesh' (2010) 1 *The Northern University Journal of Law* 83.

13 Information and Communication Technology.

in the interiors where court officials dispense legal aid and justice to those in need.[14] All the parties, their witnesses and counsel who are expected to be present in court, must be there. They provide speedy and inexpensive justice at the doorsteps of these citizens, especially the downtrodden. In the words of H.A.S. Azcuna;

> Mobile court system has been working in different countries, Guatemala (started in 2003), Philippine (started in 2004), India (started in 2007) and Bangladesh (started in 2009), providing inexpensive justice. Pakistan got inspired from Philippine's Justice on Wheels (Mobile Court) and established it in 2013. …Mobile court is extremely useful innovation as it supplements formal court system.[15]

In 2018, for instance, the mobile court established by the Lagos State government in Nigeria to try essentially environmental offences was vested with powers to sit in any convenient place close to the scene of the incident.[16] The sense behind mobile courts is that the terrain of a case is better understood when the court officials see where the crimes were committed than the testimonies from parties and witnesses in the conventional court premises. These courts have successfully concluded a good number of cases pending in the rural areas.[17] Ordinarily, people go to courts to get justice, but mobile courts move to the people to give them justice. An instance is the recent trial of warlord, Masudi Alimasi (a.k.a Kokodikoko) in the Eastern Democratic Republic of Congo (DRC) where he, with his men, persecuted the population of more than 15 villages in two remote areas of the province of South Kivu, which was hitherto inaccessible by the traditional courts. When the mobile court moved there, it symbolised the presence of the state with unquantifiable confidence in the people that justice was guaranteed. The mobile courts provided better access to justice and expedited actions. These extraordinary hearings did not take place in the courthouse of a large city, but in the areas where the crimes were perpetrated.[18] In other words, the entire Court, with its prosecutors, clerks, lawyers and defendants, moved closer to the victims.

This upholds human rights and equality as it ensures equal protection of the law, especially in circumstances where the cases are between two unequal parties as we have in the Niger Delta Region of Nigeria. Most often, the cases are between large multinational oil companies and poor inhabitants of communities whose means of survival has been

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[14] Judge Zainun Ali, 'Malaysia's Mobile Court: Judging in the Still of the Forest' *United Nations Office of Drugs and Crime* (Article) <https://www.unodc.org/dohadeclaration/en/news/2019/12/malaysias-mobile-court---judging-in-the-still-of-the-forest.html>.

[15] Azcuna H.A.S. 'The Justice on Wheels of the Philippines' (International Conference and Showcase on Judicial Reforms, Makati City, Philippines, 28 November 2008).

[16] See Bilikis Bakare, 'Lagos Mobile Courts and the Quest for Justice', *PM News,* (online, 19 February 2019) <https://www.pmnewsnigeria.com/2016/02/19/lagos-mobile-courts-and-the-quest-for-justice/>.

[17] For instance, in the year 2013, a Mobile Court in Bomali, Delta State, Nigeria, convicted 55 out of 79 persons for flouting Sanitation Orders during the monthly environmental sanitation exercise in the State. See Daniel Gumm, 'Mobile Court Prosecute 79 Persons for Sanitation Offences in Bomali' (2013) *The Vanguard* 19.

[18] See 'Mobile Courts in the Democratic Republic of Congo: Why and How?' *TRIAL International*, (Web page, 28 October 2019) <https://trialinternational.org/latest-post/mobile-courts-in-the-drc-why-and-how/>.

spoilt by pollution.[19] Such people may feel cheated as they do not possess adequate social and material resources to withstand the rich companies. In *George Ngbor v. Compagnie Generale De Geopyhsique (Nig.) Ltd. & Anor*,[20] the plaintiff claimed that his sound factory was damaged by the defendant's seismic activities. The plaintiff could not afford the cost of an expert witness in the industrial noise and vibration control in and outside Nigeria at the cost of one million naira (USD$2,610) to testify that the dynamite shot which allegedly caused the damage was fired at a distance which was not safe. The defendant, on the other hand, was able to call a witness who testified that the dynamite was shot at a distance which was considered safe by seismic standard. This evidence was not contradicted. So, the court relied on it and the plaintiff lost the case. This was unfortunate because there was no doubt that the plaintiff's sound factory, the only source of sustenance to the plaintiff and his family, as alleged, was destroyed by the seismic survey of the defendant. Due to the plaintiff's inability to procure an expert, he lost. It is surprising how a victim, whose means of livelihood was destroyed, could be expected to raise one million naira (USD$2,610). No doubt, about 90% of the Nigerian population today cannot afford one million naira. It means that the poor in Nigeria are invariably deprived of access to the legal and administrative institutions to vindicate their rights.

The mobile court is the best option to address this problem. However, because of their non-permanent nature, some countries often choose to limit the jurisdiction of these courts to more simple cases that can be treated in relatively short court sessions.[21] Due to the distance and remoteness, the dates of sittings of the mobile courts are published in advance by way of radio announcements and publications in the local newspapers or by the primitive town crying system or other community-based formal and informal networks.

Mobile courts operate like any other court in the regular justice system. They are governed by the same rules of evidence and the principles of natural justice. Nevertheless, the type of cases they can handle is determined by the type of mobile court and the country's legal framework. The World Bank funded mobile courts in Tanzania which conducts all cases triable by primary courts, such as marital disputes, civil litigation, inheritance and criminal matters, including cases arising from the operation of various government agencies and entities.[22] The courts helped not only to ease timely dispensation of justice but also enabled people to get access to justice irrespective of their distance from urban centres. In 2018 alone, the mobile courts in Tanzania received 177,614 criminal and civil cases, equivalent to 64 percent of all cases filed in the country's judicial system.[23] To date, the United Nations (UN) has supported different forms of mobile courts in many

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19 Joseph Nwazi, 'A Critique of Courts' Insistence on the Operation of the Regular Standard of Proof in Oil Related Litigations between Two Unequal Parties' (2007) 2(1) *Ikeja Bar Review*, 86.

20 (2018) LPELR - 46 185 (Court of Appeal of Nigeria).

21 M.S. Siddiqui, 'Mobile Courts and Independence of the Judiciary' (2011) 18(301) *The Financial Express*.

22 'Mobile Court System Triggered into Motion' *All Africa Press*, (Web page, 11 January 2020) < https://www.africa-press.net/tanzania/community/mobile-court-system-triggered-into-motion> ('Mobile Court Triggered').

23 Louis Kolumbia, 'Judiciary Launches Mobile Courts' *The Citizen*, (Web page, 7 February 2019) <https://allafrica.com/stories/201902070749.html>.

different conflict settings, including in Côte d'Ivoire, Haiti, Liberia, Mali and Somalia.[24] Their scope and mode of operation may also vary.

The most popular area of functioning for mobile courts is in the area of the protection of the environment. The lowest levels of courts that deal with sanitation-related offences are magistrate courts, and sometimes area and customary courts, depending on the country and its legal framework.[25] They often help resolve disputes between the victims of pollution and the polluters. Many countries of the world today have established such courts to help improve access to environmental justice in their respective jurisdictions[26] Some of these countries precisely provide for mobile courts in their respective flagship statutes,[27] and holding them to international standards. In several remarkable ways, the mobile court is positioned in the vanguard of change, helping to empower a broader group of stakeholders to participate in the process of achieving environmental justice, and using informal networks to collaborate and exchange information.

B *Is the Mobile Court a Special Court?*

Special courts refer to courts with a specific subject-matter jurisdiction, for example, bankruptcy, tax, domestic violence, mental health, family law etc. Specialised environmental courts and court-like tribunals first appeared over a century ago. Denmark's Nature Protection Board, created in 1917, focused on the preservation of the natural environment, and Sweden's Water Court focused only on water right issues.[28] Interest in Environmental Courts and Tribunals (ECTs) is spreading globally, and several jurisdictions are currently considering the creation of an ECTs or the reforming of their existing court structures for more environmental focus. For example, the UN Environmental Program (UNEP) Experts Group on Access to Environmental Justice in the Caribbean noted in 2007 that 'consensus has emerged in the region on the need for the establishment of specialised and independent courts or specialised environmental divisions of the High Court Judicial System'.[29] The same Experts Group recommends expanding ECTs' jurisdiction beyond traditional environmental issues to include 'the built environment,

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[24] See 'Bringing Justice to the People: How the UN is Helping Communities Deal with Disputes in Remote and Dangerous Areas', *United Nations News,* (Web page, 29 April 2019) < https://news.un.org/en/story/2019/04/1037411>. See also Nanda and Pring (n 5).

[25] Sanitation is concerned with the improvement of the basic environmental condition affecting the health and wellbeing of the people. See 'Meaning of Environmental Sanitation', *Dictionary University* (Web page) <https://dictionary.university/environmental%20sanitation#:~:text=%22Environmental%20sanitation%22%20means%20the%20art,and%20factors%20therein%20%5B..%5D>. Because these courts are low in hierarchy and closer to the people, they shoulder these responsibilities to the remote rural communities more than other courts as High Court, Court of Appeal and Supreme Court.

[26] Instances include Bangladesh, Australia, and India, though some refer to it as Environmental Courts and Tribunals (ECTS). See Michael Ukponu, 'Environmental Law and Access to Justice in Nigeria: A Case for a Specialised National Environment and Planning Tribunal (NEPT)' (2019) 1(1) *Nnamdi Azikiwe University Law Review* 26.

[27] See the *Mobile Act* 1975 of Bangladesh.

[28] George Pring & Catherine Pring (n 4).

[29] George Pring and Catherine Pring, 'Specialised Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment' (2009) 11 *Oregon Review of International Law* 301, 311 ('Specialised Courts').

indigenous peoples' rights, development planning issues and land tenure'. UNEP has been a leader in promoting ECTs through recommendations, publications and judicial training.[30] Other jurisdictions that have followed suit and their respective environmental courts and tribunals include:

- Australia – Land and Environmental Court of New South Wales, Planning and Environmental Court of Queensland;
- New Zealand – Environmental Court (established by *Resources Management Act*, 1991);
- Thailand – Green Bench in the Supreme Court;
- India – Environmental Tribunals (established by *National Environmental Tribunal Act*, 1995);
- Pakistan – Environmental Tribunals; and
- Japan – Environmental Dispute Coordination Commission.[31]

These are specialised courts and are exclusively reserved for environmental cases. They are special courts because they are constituted by judges or magistrates exclusively trained in environmental matters. This is not the case in Nigeria where any Judge or Magistrate can sit in the mobile courts to adjudicate on environmental cases without the requisite knowledge in environmental law.

III THE LEGAL FRAMEWORK

Nigeria's national policy on environment formulated by the Federal Government of Nigeria in 1989[32] strongly encapsulates sound environmental principles intended to bring about environmental sustainability, equity and justice. The policy states that effective enforcement of environmental laws and policies at the grassroots level requires collaboration between the federal, states and local governments.[33] As a federation, there are numerous sources of environmental law including the Constitution.[34] Section 20 of the 1999 Constitution of Nigeria (the 1999 Constitution) provides that 'the State shall protect and improve the environment and safeguard the water, air and land, forest and wildlife of Nigeria'. In line with this provision, the Federal Government in 2007, through the National Assembly, enacted the *National Environmental Standards and Regulations Enforcement Agency Act* (NESREA)[35] to facilitate the achievement of the environmental objectives of the government. Section 8(f) of the NESREA provides that the Agency shall

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30 George Pring and Catherine Pring (n 4).

31 Wanhua Yang, 'Emerging Trends in the Judiciary and Environmental Enforcement in the Asia –Pacific Region' (Third ASEAN Chief Justices' Roundtable on Environment, 17 November 2013).

32 See n 9 above. See also Gozie S. Ogbodo (n 9).

33 M.K.C. Sridhar, et al, 'Waste Management Policy and Implementation in Nigeria' (2017) 3(3) *National Journal of Advanced Research* 31.

34 Constitution of the Federal Republic of Nigeria, 1999, s. 2(2) ('1999 Constitution'). Today, there are 36 States and a Federal Capital Territory (FCT), Abuja, as well as 768 local governments. See the First Schedule, Parts 1 and 2 to the Constitution.

35 No. 25 of 2007. The Act was enacted in 2007 and by s. 36, it repealed the *Federal Environmental Protection Agency (FEPA) Act* promulgated in 1988 by the then Federal Military Government of Nigeria as the flagship environmental statute (then Decree) in Nigeria.

'subject to the provisions of the Constitution of the Federal Republic of Nigeria, 1999, and in collaboration with relevant judicial authorities establish mobile courts to expeditiously dispense cases of violation of environmental regulations'. Each state of the federation is empowered to make laws to protect the environment within its jurisdiction. Therefore, all the 36 States of the Federation, including the Federal Capital Territory Abuja, have their respective environmental agencies and State laws on environmental protection. The mobile courts are manned by the Magistrates of the state judiciary. That is why mobile courts are referred to as 'Magistrate courts on wheels'.

Section 6(4)(a) of the 1999 Constitution provides that no provision in the whole of s. 6 shall be construed as precluding the National Assembly or any House of Assembly from establishing courts, other than those enlisted in the said section,[36] with subordinate jurisdiction to that of the High Court. By the Federal High Court (Judicial Divisions) Notice of 2003, there are 24 Judicial Divisions of the Federal High Court in Nigeria.[37] In some states, there is only one Federal High Court while in some other states, none exists. For instance, there is no Federal High Court in Gombe and Yobe States, and only one in the whole of Rivers State.

By s. 6(5)(k), the judicial powers of a state shall also vest in 'such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matters with respect to which a House of Assembly may make laws'. In *Gadi v. Male*,[38] the court held that 'such far-reaching and fundamental powers as conferred upon the courts are traceable to the constitution and laws as may be enacted by the legislature, Federal and/or state'. It is implied from the foregoing that it is the Constitution that created the Magistrate Courts. Therefore, the legitimacy of the various Magistrate Courts of the states in Nigeria is traceable to these provisions. The Magistrate Court in a state is created by the state House of Assembly while that of the Federal Capital Territory, Abuja is created by the National Assembly acting as a state House of Assembly under s. 299 of the Constitution. The jurisdiction of every Magistrate Court in a state is delineated by the Magistrate Court Law enacted by the state's legislature and the Magistrate Court Rules made by the Chief

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[36] The courts listed in that section are the Supreme Court, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, a High Court of a State, the Sharia Court of Appeal of the Federal capital Territory, Abuja, a Sharia Court of Appeal of a State, the Customary Court of Appeal of the Federal Capital Territory, Abuja, a Customary Court of Appeal of a State, and such other courts as may be authorised by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws. See s 6(5)(a) – (j) of the 1999 Constitution (n 34). A Sharia Court is the court of Islam administering the explicit texts of the Quran and the legal binding Sunnah. It is not only exclusive to religious rules but also administers other aspects of the day-to-day life in Islam which may encompass environmental cases. See Omar A. Bakhashab, 'Islamic Law and the Environment: Some Basic Principles' (1988) 3(3) *Arab Law Quarterly* 291-295. Sharia used to be categorised as customary law in Nigeria until the decision in *Alkamawa v. Bello* (1998) 8 NWLR pt. 561, 173, where the Supreme Court stated explicitly that Sharia Law is not a customary law in Nigeria as it does not belong to any particular tribe. Outside the Sharia Courts, other courts in Nigeria can handle any other cases involving Christian and traditional religions.

[37] Abeokuta, Abuja, et al, *Introduction to the Nigerian Legal System* (Ababa Press Ltd, 2nd ed, 2005) 185 ('Abeokuta').

[38] (2010) 7 NWLR pt. 1193, 225 at 266.

Judge of the respective states.[39] In the Edo State, the Environmental Sanitation Edict of 1994[40] vests jurisdiction over environmental sanitation[41] in the Magistrate courts.

Each of the 36 States has its own Mobile Court Laws empowering it to set up mobile courts for expeditious handling of environmental cases within the states. An instance is the Mobile Courts (Establishment) Law No. 4 of 1984 of the Rivers State of Nigeria. Similar provisions are also contained in some of the Bye-laws of the Local governments. Section 15 of the Abuja Municipal Area Council Bye-Law, for instance, provides that the Chairman may constitute a mobile court whose functions shall include to carry out on the spot trial and sentence of persons contravening any provision of the environmental protection laws,[42] and the courts shall operate only on days of environmental sanitation, which is the last Saturday in every month.[43]

IV WHY MOBILE COURTS IN ENVIRONMENTAL CASES?

As stated earlier, environmental law is rapidly changing on a global and national scale, perhaps on account of the abuse of the environment with impunity and especially the injustices of natural resources exploitation. Mobile courts today are considered a more potent tool in environmental cases than the conventional traditional courts, especially in the remote villages. Advocates of mobile courts are unanimous in their passion and support for the expansion of the scope of operation of these courts, especially in the context of environmental litigation, for the following reasons as discussed below.

A *Cost Effective*

No doubt, mobile courts are less expensive than the traditional courts. This is an invaluable advantage, especially today, where the cost of litigation in Nigeria has soared to the extent that many litigants can no longer pursue their cases.[44] Animashaun and Odeku rightly observed:

> Many poor people cannot access the formal legal system because they cannot afford to pay the registration and representation fees necessary to prosecute cases in the courts. This is because payment of legal fees is probably the largest barrier

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39 Yusuf O. Ali, 'Delay in the Administration of Justice at the Magistrate Court: Factors Responsible and Solution' (2016) 18, referred to in Marshal Umukoro, 'Access to Justice in the Lower Courts: Re-Examining the Civil and Criminal Jurisdiction of Magistrate Court in Nigeria' (Conference Paper, Conference of All Nigeria Judges of the Lower Courts, 21 – 25 November 2016) 19 ('Umukoro').

40 Now the Edo State Sanitation and Pollution Management Law, No. 5 of 2010.

41 Mobile Court Triggered (n 22).

42 See s. 15(1)(b).

43 Ibid para (d).

44 Chukwudifu Oputa, 'Human Rights in the Political & Legal Culture of Nigeria' (1989) *Nigerian Law Publications* 75 referred to in Ifedayo Akomolode, 'An Overview of ADR in the Dispensation of Justice in Nigeria' (2005) 2(1) *Ife Juris Review* 35.

> to formal dispute resolutions for many people in developing countries and in particular by the poor in Nigeria.[45]

It is worse in the third world countries such as Nigeria where many of the litigants live in abject poverty. The victims of pollution in the remote villages are very wretched. In some cases, everything they have, food and water, are lost to pollution. Many can hardly afford adequate legal representation. Rather, they go hat in hand asking for paltry sums from the polluters. Unfortunately, their requests are turned down in most cases. The polluters prefer litigation because of its frustrating attributes, especially in view of the astronomical increase in the filing fees in the courts in Nigeria. Order 53(1) and Appendix 2 of the Federal High Court Civil Procedure Rules, 2000 provides that for a claim of N10 million (USD26,109) and above, the litigant must pay a filing fee of over N50,000 (USD130) which is a pre-condition for the filing of the suit.[46] The filing fees in the Magistrates and High Courts in Nigeria range from N3,000 to N10,000, equivalent to USD7 and USD26 respectively whereas the minimum wage in Nigeria is N30,000 (USD 78). It is submitted that this is exorbitant. The payment of the filing fees or lawyer's fees is not a guarantee of the successful outcome their cases. Again, the importance of a right to a legal practitioner of one's choice as a root of fair hearing is recognised under s. 36(6) (c) of the 1999 Constitution. Therefore, when a court system is backlogged, for instance, it can take months or years before a case is heard, and the cost of paying a lawyer for so long is borne by the poor litigant. Nlerum Okogbule observed that:

> Legal practitioners in Nigeria have devised method of collecting not only their professional fees but also transportation fees each time they go to court, thus invariably adding to the financial burden of the litigants. When this is considered against the background that a particular case could last up to four or five years, then the enormity of the financial burden on litigants can be better appreciated.[47]

The cost of environmental litigation through the traditional courts is worse when the services of experts are required as a prerequisite for the establishment of a case because the fees of the experts are exorbitant. Some cost millions of naira to procure and the poor victims of pollution have no option than to concede their rights. It gives the polluters an edge over the victims. In *Seismograph Services (Nig.) Ltd. v. Ogbeni,*[48] for instance, the plaintiff/respondent was frustrated out of the court for want of an expert witness to prove that the vibration radiating from the seismic explosions caused damage to his buildings. Therefore, in a situation where one of the parties to a litigation belongs to a poor and deprived section of the community, and does not possess adequate social and material resources, they are bound to be at a disadvantage as against a stronger and more powerful

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45 Oyesola Animashaun and Kola O. Odeku, 'Industrial Conflict Resolution Using Court-Connected Alternative Dispute Resolution' (2014) 5(16) *Mediterranean Journal of Social Sciences* 686.

46 Nlerum Okogbule, 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' (2005) 3 *Benin Journal of Public Law* 43.

47 Ibid 39.

48 (1976) 4 SC 85.

opponent. The after-effect is the exclusion of large sectors of the society from accessible justice. Ese Malemi postulates that no society can survive or prosper where justice is available only to those who can afford it, rather it breeds violence and resort to self-help.[49]

In contrast, the mobile courts' process promotes the settlement of disputes in a manner that avoids many of the transactional costs associated with the conventional courts. The introduction of mobile courts in most countries of the world is in recognition of the equal status of all people before the law and their right to legal representation. The mobile court litigation can be conducted effectively without much delay and the money which would have ordinarily been spent on the lawyers in a protracted litigation is saved. In other words, they have the potential to provide inexpensive justice at the doorsteps of the poor litigants.[50] The rationale here is that there should be no social or economic hindrance whatsoever restricting litigants from approaching the courts in their quest for justice. Inexpensive and accessible justice to the people brings about confidence in the government to care for the people, irrespective of their status. This upholds human rights and equality, a component of the rule of law for any society. It is not a charity, but a civil right of the citizens.[51] It ensures equal protection of law.

B *Inordinate Delay in Litigation*

Litigation in Nigeria today is extremely time consuming. It has become a culture that cases must last several years in the courts before they are determined. Even when a case has lasted up to 10 years in the courts and the judge handling the matter is transferred or retired, the case has to start *de novo*. Professor M.O. Ogungbe rightly noted that:

> Some cases have been pending in our courts for more than ten years as a result of certain constraints like retirement or transfer of judges handling the cases which have been opened and evidence had been taken. Such cases have to start *de novo*. The devastation, frustration, and economic stress which litigants undergo are better imagined than experienced.[52]

The celebrated case of *Ariori and others v. Elemo and others*,[53] for instance, took 23 years to reach the Supreme Court, which nevertheless remitted it to the trial court for a retrial *de novo*. Other cases like *Atanda v. Ajani*[54] took 10 years to reach the apex court,

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49 Ese Malemi, 'The Challenges in Providing Legal Aid in Nigeria' (2005) 3 *Benin Journal of Public Law* 112.

50 See Mohammad Shahjahan Siddiqui, 'Mobile Court and Independence of the Judiciary' *The Financial Express* (Dhaka, 3 September 2011) ('Mohammad Shahjahan').

51 Jordan Lesser, 'The Future of Conservation in Namibia: Making the Case for an Environmental Court and Legislative Reforms to Improve Enforcement of Wildlife Crimes' (2018) 32(1) *Tulane Environmental Law Journal* 66.

52 Ogungbe MO, 'Arbitration & Mediation: When Is Either Best Suited for Dispute Resolution?' in *Nigerian Law*: *Contemporary Issues*: *Essays in honour of Sir. G.O. Igbinedion* (College of Law, Igbinedion University, 2003) 2003 319.

53 (1983)1 SC NLR 1.

54 (1989) 3 NWLR pt. 511, 103.

which ordered a trial *de novo*, and *Ugo v. Chukwu Obikwe*[55] took 18 years to get to the Supreme Court, which also ordered a trial *de novo*.[56]

The problem of delay in environmental litigation, just like any other judicial process in this country, also assumes an enormous proportion. No doubt, victims of pollution rush to courts for rescue either because their health is put at risk or their means of survival such as creeks and farms have been spoilt by pollution. Nevertheless, such cases still linger in the courts for decades that some of the litigants may even die in the process. For instance, an annual report of the Civil Liberties Organisation (CLO) Lagos revealed a case which involved four Ijaw communities and the Shell Petroleum Development Company. The case lasted for 14 years in the High Court, and before its conclusion, six out of the eight representatives of the communities had died.[57] One can hardly give an account of any environmental case in this country that has been determined within a space of three years and the victims got their reliefs. That is why the polluters expectedly prefer litigation to any other means of settlement.

This author in an earlier article[58] noted that sometimes, the victims of environmental damage are discouraged from litigation due to unnecessary delays and the consequent overstay of their cases in the courts. Sometimes, for undisclosed reasons, case files are alleged to be missing, while transfer of officers handling certain cases may result in the cases being overlooked or even neglected. The problems of delay are consequent upon certain factors such as the lawyer's inordinate frequent requests and letters for adjournment of cases[59] coupled with administrative incapacities, including lack of modern facilities.[60] Sometimes, the oil companies which cause almost 90% of the environmental damage in Nigeria employ delay tactics deliberately to frustrate the victims of pollution when a court action is pending, especially now that the reputation of the judiciary in Nigeria has been tainted with corruption. The case of *Ambah v. SPDC,*[61] for instance, lasted for 19 years in the courts that before its final determination, two-thirds of the litigants had died. Other instances abound. According to R.T. Ako,

> The case of *SPDC v. Tiebo VII and four others*,[62] a matter of oil spill that occurred in Peremabiri, Bayelsa State, Nigeria in January 1987, got to the High Court in 1992, and to the Court of Appeal in 1996. The case of *SPDC v. Chief George Uzoaru and*

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55 (1989) 1 NWLR pt.566, 144.

56 See Oyesola Animashaun and Kola O. Odeku, 'Industrial Conflict Resolution Using Court-Connected Alternative Dispute Resolution' (2014) 5(16) *Mediterranean Journal of Social Sciences* 684.

57 Civil Liberties Organisation, *Annual Report* (Report, 1997) 205-206. See also *The Guardian*, 8 July 1997, 5 cited in Kaniye Ebeku, 'Compensation for Damage Arising from Oil Pollution: *Shell Petroleum Dev. Coy Nig. v. Ambah* Revisited' (2002) 6(1) *Nigerian Law and Practice Journal* 19.

58 Joseph Nwazi, 'The Remedies Available to Victims of Oil Spillage in Nigeria' (2006) 1(1&2) *International Journal of Law and Contemporary Studies* 267.

59 The case of *Wakino v. Ade John* (1999)9 NWLR pt.619, for instance, took 11 years in the High Court alone due to series of adjournments.

60 Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities* (Report, 1999) 15.

61 (1999) 3 NWLR pt.593 SC 1.

62 (2005) 4 FWLR pt. 283 674.

> *three others*[63] was heard in the High Court in 1985 in relation to damage suffered on a continuous basis since 1972 was heard in the Court of Appeal in 1979, while *Elf Nig. Ltd. v. Opere Sillo and Daniel Etsemi*[64] was heard in the High Court in 1987 in relation to damage suffered in 1967, was heard in the Court of Appeal in 1990, and in the Supreme Court in 1994. The case of *John Eboigbe v. NNPC*[65] involved a damage caused in 1979 and was first heard in 1987, appealed against in 1989 and heard in the Supreme Court in 1994.[66]

The after-effect is that sometimes, the citizens abandon their rights or resort to self-help. This not only undermines the very existence of the courts but is also inconsistent with the constitutional provisions on speedy trials. Section 36(1) of the 1999 Constitution (as amended) provides that 'in the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time….' 'A prompt and speedy trial is a first condition of fair trial which involves the element of time'.[67] In contrast, justice delayed is justice denied, which can lead to unimaginable problems in the society.

Environmental conflicts require quick action or response which is incompatible with the slow pace of our traditional court system today. Expeditious determination of cases remains one of the attributes of mobile courts which is unlikely to be available in the traditional courtroom. In the quest to decongest the courts, re-invent the judicial system and ease disputes settlement, the Government of Nigeria has opened its doors and encouraged the use of mobile courts in environmental litigation. The idea of mobile courts is that it offers a quicker resolution of conflicts by speeding up the dispute resolution process with a minimum disruption. Mobile courts have been recognised as an efficient mechanism to assist the government in re-establishing the formal justice system and responding to shortage of judges and magistrates. Congestion of cases which bores the judges and remoteness of venue common with our traditional courts are not attributes of mobile courts. The courts can sit in regions that are too remote such as the creeks in the Niger Delta regions of Nigeria. They not only deliver summary judgments but also see to the fact that hearings are not unnecessarily postponed. With this, they have been an effective tool in reducing the backlog of cases in such areas. In the words of Faustine Kapama:

> The system enables people get access to justice regardless of the distance of their locations from urban centers. The court is aimed at reducing costs for citizens following judicial services away from the areas in which they live, since mobile court has the capacity of reaching different groups of people and communities.[68]

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63 (1994) 9 NWLR pt. 366 51.

64 (1994) 6 NWLR pt.350 258.

65 (1994) 5 NWLR pt.347 649.

66 Ako RT, 'Mediation as a Conflict Settlement Mechanism in the Niger Delta Region of Nigeria' (2006) 3(1) *Ife Juris Review* 65.

67 Akande JO, *Introduction to the Nigerian Constitution* (1999) s. 36.

68 Faustine Kapama, 'Tanzania: Mobile Courts Introduced to Expedite Legal Services' *Tanzania Daily News (Dar es Salaam)* (online, 13 December 2019) <https://allafrica.com/stories/201912130398.html> ('Kapama').

The availability of the mobile courts means that access to justice is possible for ordinary citizens. An aggrieved person can easily channel his grievances to court irrespective of financial status as the financial burden of traveling far distances to assert a right or ventilate grievances is reduced. The mobile courts, instead, come to the villages. Again, the compelling need for time consciousness is obvious because environmental issues are sensitive and delicate and a good number of them concern survival of species and properties that may be permanently destroyed with the lapse of time, as pollution is intrinsically linked with adverse impacts on human and natural environment. In some instances, the order may be too late – the harm may have already occurred and irreversible. Therefore, the importance of prompt dispensations of environmental justice especially in the remote rural areas devastated by poverty cannot be overemphasised.

C *Jurisdictional Convenience*

With the mobile courts, the jurisdictional problems of litigation which especially frustrates environmental litigants are tackled. Access to justice is impaired where the courts are located far from the homes of those who need them. Today, about 80% of environmental cases in the Nigerian courts are lost particularly on appeal for want of the courts' jurisdiction, the reason being that only the Federal High Courts, as against the State High Courts, have the exclusive jurisdiction to try almost all the environmental cases,[69] whereas the Federal High Courts are not enough to contain the number of environmental litigants vying for their attention. As stated earlier by the Federal High Court (Judicial Divisions) Notice of 2003, there are 24 Judicial Divisions of the Federal High Court in Nigeria.[70] In some states, there is only one Federal High Court, while in some other states, none exists. For instance, there is no Federal High Court in the Gombe and Yobe States, and only one in the whole of Rivers State. The after-effect is the accumulation of cases, which last for years in those courts without being determined. Cases like *Shell Pet. Dev. Co. v. Isaiah,*[71] *C.G.G. (Nig) Ltd v. Asaagbara*,[72] *C.G.G. (Nig) Ltd v. Amaewhile*,[73] and *C.G.G. (Nig.) Ltd v. Ogu*[74] are a few of those cases frustrated for want of jurisdiction after many years of litigation.

One advantage of mobile courts is the ability to serve rural populations and geographically dispersed locations. For instance, a lot of victims of environmental degradation in Nigeria live in remote corners. By and large, they are vulnerable by reason of their poverty and intellectual disadvantage. The geographical and physical impediment means that access to justice for them is extremely challenging. Their physical exclusion from the dignified space of a courtroom impels the court to go to them if the symbolic function and integrity of the court are to be maintained. The mobile courts have this

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69 See s. 251(1)(n) & Second Schedule Part 1 of the 1999 Constitution (n 34), as amended. See also s. 7 of *the Federal High Court Act*, Cap F12 LFN 2004.

70 Abeokuta (n 37).

71 (1997) 6 NWLR pt. 508, 238.

72 (2001)1 NWLR pt. 693, 156.

73 (2006) 6 NWLR pt. 967, 284.

74 (2005) 8 NWLR pt. 927, 367.

advantage. They are everywhere in these corners and serve this class of people.[75] They provide all-inclusive justice at the grassroots levels by the extension of state presence and visibility through the state officials (the Magistrates, lawyers, representatives from the Office of the Public Defenders (OPD), registrars, cashiers, Commissioner for Oaths, an interpreter, and policemen) in areas where they are not ordinarily present. They can sit in open spaces. This will further enhance the confidence of these victims in the government, and in turn, promote peace and unity in these areas.[76] This also relieves people from social stress, tension and pressure related to litigation, and they feel safer than travelling to the cities merely to seek justice.

Another reason advanced for the justification of mobile courts is that its expeditious resolution of conflicts, facilitated by mobile investigations, prosecution and defence teams, can have direct and powerful effects on the levels of investment and economic activity. They avoid wastage of time without compromising the rules of evidence or defeating the end of justice. If environmental cases are resolved timely with well-established rules and procedures, investors perceive less risk and are more willing to invest. Entrepreneurs are scared where a lot of issues remain unresolved, but where there is peace, business thrives. For most people, where justice is delayed or denied, the victims are bound to feel some frustration and outrage, especially the most vulnerable people, and this may be counterproductive. In contrast, prompt and fair adjudication as well as the certainty of enforcement and penalties constitute the necessary inducement for respect and obedience to laws.

V CHALLENGES OF MOBILE COURTS IN NIGERIA

There is no wish to create the impression that mobile courts do not have any shortcomings. Perhaps, the greatest challenge is that it is not all kinds of environmental cases that the courts can handle. Mobile courts, which are magistrate courts on wheels, are inferior courts in Nigeria meant to dispose of cases of minor importance such as cases arising from monthly environmental sanitation exercise.[77] Magistrate Courts are established by the Magistrates Laws of the various states in Nigeria with limited jurisdiction. The

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[75] Mobile courts are generally housed in temporary structures such as tents which are dismantled on daily basis after proceedings. They move within their jurisdiction and are manned by up to two Magistrates who prosecute Sanitation law violators arrested by the police. They can issue custodial sentences such as detention under nearby trees or tents, or non-custodial penalties such as fines or community services, like sweeping roads, picking of litter, impounding of cars or motorcycles etc. See Odi Lagi, 'NULAI Program Director Odi Lagi on the use of mobile courts and the impact of COVID-19 on pretrial detention', *Partners Global* (Web page, 25 May 2020) < https://www.partnersglobal.org/newsroom/nulai-program-director-odi-lagi-on-the-use-of-mobile-courts-and-the-impact-of-covid-19-on-pretrial-detention/>.

[76] Mohammad Shahjahan (n 50).

[77] Environmental sanitation refers to the promotion of hygiene for the prevention of disease and other consequences of ill-health. In Nigeria, it requires community participation in the clearing of their surroundings to improve people's health and living conditions. During the military era in Nigeria (between1983-1999), people were compelled to remain indoors during the environmental sanitation exercise, which is once a month. Under the present civilian government, the governors still impose a curfew in their respective states during this exercise and people are forced to remain at home for at least three hours. However, there is no law empowering the government or law enforcement agencies to limit people's movement in this way. See Afe Babalola, 'Illegality of Forceful Restriction of Movement on Account of Environmental Sanitation' (2019) *The Vanguard* 18.

jurisdiction of each Magistrate Court in terms of the punishment it can impose varies from state to state. In the Oyo State, for instance, the highest punishment a Magistrate can impose is seven years imprisonment or a fine of N30,000 (USD78) or both.[78]

Any matter regarding environmental rights of victims of pollution in Nigeria is beyond the jurisdiction of the mobile courts. Section 46 of the 1999 Constitution conferred that jurisdiction only on the High Courts. By s. 251 of the same Constitution, issues concerning mines and minerals (including oil fields, oil mining, geographical surveys and natural gas) are exclusively conferred on the Federal High Courts.[79] Even the *National Environmental Standards and Regulations Enforcement Agency Act* (NESREA) empowered to establish mobile courts for the enforcement of environmental laws, regulations, standards and policies, has no jurisdiction over pollution resulting from oil and gas sectors. The NESREA Act itself confers jurisdiction directly on the Federal or State High Courts.[80] Therefore, the mobile courts are incapacitated with a very narrow jurisdiction. Almost 80% of the air, land and water pollution in Nigeria today results from oil exploration activities without sufficient and accessible courts to manage the cases. Tens of thousands of Nigerians affected by oil pollution cannot access the courts without incurring serious travelling expenditures. The after-effect is self-help resulting from frustration. How do we account for the human rights violations? How do we guarantee environmental justice by enforcing compliance with the extant laws? In fact, mobile courts should be more relevant in this area than say, in municipal waste, traffic or environmental sanitation.[81]

Related to this is the inability of the mobile courts to grant civil remedies such as compensation or damages to the victims of environmental degradation. There is no record in Nigeria that mobile courts have granted compensation or damages to such victims. Even the NESREA Act empowering NESREA to establish mobile courts is a criminal statute. Therefore, its jurisdiction is limited to criminal cases, that is to say, to prosecute offenders of environmental sanitation laws. That is why its main justice approach has been arrest, prosecution, conviction and incarceration of offenders or fine in lieu of incarceration. For instance, under s. 29(1) of the Environmental Sanitation Law of Lagos State, 2001, the punishment prescribed for contravention of the Law is a fine of N200 (less than USD1) or three months imprisonment.[82] The fine goes to the state not to individual victims. However, majority of environmental cases in Nigeria are instituted by individuals claiming damages on the restitutionary basis of *quantum meruit*.[83] Mobile courts, as criminal courts, lack such remedies, and it is a major defect. Any court that does not have the capacity to grant relief to victims of pollution is not a court of justice. More frequently, civil remedies are blended with or used to supplement criminal sanctions in

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This restriction of movements in Nigeria has been declared illegal by the courts. See *Okafor v. Lagos State Government* (2017) 4 NWLR pt.1556 ('*Okafor*').

78 James Atta Agaba, *Practical Approach to Criminal Litigation in Nigeria* (Renaissance Law Publishers, 3rd ed, 2015) 151-152.

79 Section 251(1)(n).

80 Section 37 NESREA Act.

81 See n 77 above.

82 Section 29(2) provides for a fine of N4,000 (US$10) for a body corporate.

83 See *Oladehin v. Continental Textile Mills Ltd* (1978) 2 S.C. 23, as an instance.

other courts of justice.[84] Mobile courts should therefore be courts of both criminal and civil matters with more emphasis on the rights and responsibilities of private parties. For instance, in Pakistan today, mobile courts resolve both civil and criminal cases. Access to justice is made easier by the mobile courts especially as the poor litigants are no longer charged litigation fees. In many instances, the judges offer to the parties the opportunity of settling their disputes through the Alternative Dispute Resolution mechanism without recurring to a formal judgment. As a result, the government of Pakistan, in collaboration with the United Nations Development Programme, (UNDP) has trained many judges and advocates in Pakistan for this special purpose.[85]

Typically, mobile courts are held for a short period of time, usually a few days due to the dearth of logistics. These mobile courts dispense justice in a summary and arbitrary way since they do not have the room for full-fledged trials within the time at their disposal. Section 15 of the Abuja Municipal Area Council Bye-Law, for instance, provides, *inter alia*, that the mobile courts shall operate only on days of environmental sanitation. In Nigeria, environmental sanitation takes place once a month and it is mainly on Saturdays. Affirming this, Professor Lawrence Atsegbua, commenting on the functions of the Edo State Environmental Sanitation Task Force, stated that 'enforcement by the Task Force is also irregular and ineffective, except on sanitation days when offenders are brought before Sanitation courts'.[86] The implication is that a lot of cases are left unattended and there is no rapid pace of justice. This also limits the ability of these courts to take a problem-solving approach or deal with environmental cases comprehensively. A court should sit regularly and promptly. Taking part in proceedings regularly facilitates administration of justice, be it in a court room or in a village square, as the courts are exclusively devoted to the cases for justice delivery.

One of the greatest challenges of mobile courts in Nigeria today is that environmental law was only recently introduced into Nigerian universities as an academic course, and so many of the Magistrates administering environmental sanitation cases today are untrained and inexperienced in environmental pollution laws to be able to make useful impact in the enforcement of these laws. Increasingly, it has been recognised that a court with special expertise in environmental matters is best placed to achieve the best for the people.[87]Therefore, an adjudicator should be well versed in the kind of law he is expected to administer. A magistrate must master the environmental laws such as the provisions of the NESREA Act, and other environmental sanitation laws in Nigeria. A magistrate cannot be expected to dispense environmental cases efficiently when he or she is not knowledgeable in such laws. According to Justice A.O. Obaseki:

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84 Mary M Cheh, 'Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction' (1991) 42(5) *Hastings Law Journal* 1326.

85 See 'Mobile Courts Bring Justice to Rural Pakistan' *United Nations Development Programme* (Web page, 26 September 2013) <https://reliefweb.int/report/pakistan/mobile-courts-bring-justice-rural-pakistan> ('Mobile Courts Bring Justice to Rural Pakistan').

86 L Atsegbua, 'A Critical Appraisal of Environmental Legislation in Edo State' (1996/99) 3 *University of Benin Law Journal* 19.

87 Umukoro (n 39).

> The judgment seat in any court of law cannot be allowed to be occupied by anyone not versed in the art and science of judging. The resolution of any dispute between two persons even in the simplest of societies is not allowed to be undertaken by any person or tribunal ignorant of or untutored in the norms or rules and custom regulating the relationship and dealing among members of the society. Judging is a science in that it is governed by laws, rules and regulations with which it must comply in order to be acceptable in the society.[88]

Specialisation enables the use of special knowledge and expertise in both the process and the substance of resolution of these problems. In other climes, we have special courts with specialised adjudicators exclusively for environmental cases.[89] Such adjudicators have a better understanding of the characteristics of environmental disputes and are better positioned to move more quickly through environmental cases, achieve efficiencies and reduce the overall cost of the litigation and dispute resolution process. In India, for instance, the *National Green Tribunal Act 2010* passed by the Indian Parliament established a special tribunal with the power to expedite legal cases pertaining to environmental issues in the country. The innovation has, in no small measure, succeeded in the reduction of environmental cases heaped in the traditional courts.[90] The same applies to other countries of the world, such as Australia, Bangladesh, New Zealand, Thailand, Pakistan and India. The environmental courts are made up of judges specialised and dedicated to specific matters of environmental cases with a degree of autonomy. Article 10 of the 2010 Constitution of Kenya required the Parliament to 'establish courts with the status of the High Court to hear and determine disputes relating to … the environment and the use and occupation of, and title to, land'.[91] The establishment of these courts has led to the astronomical reduction in the volume and costs of environmental actions in Kenya.[92]

Security is another great challenge to the operation of mobile courts in Nigeria. It has become a notorious fact, especially as of recent that judges and magistrates being kidnapped in Nigeria for ransom. Unarguably, the series of kidnapping today have assumed an unprecedented dimension with the current data placing Nigeria as the third highest in kidnapping cases in the world.[93] The targets are the judges and magistrates, some of whom are kidnapped from their homes. It is worse when they try to navigate and access the rough terrain down to the remote villages for their assignment. Many have died in the process.[94] In fact, their safety is no longer guaranteed even in the court premises.

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88 A. O. Obaseki, 'The Art and Science of Judging: Style and Creativity', referred to in Umukoro (n 39), 22.

89 Brian J. Preston, 'The Enduring Importance of the Rule of Law in Times of Change' (2012) 86 *Australian Law Journal* 175.

90 Gita Gill, 'The Indian National Green Tribunal – Environmental Lessons Learned', (Web page) <https://www.northumbria.ac.uk/research/research-impact-at-northumbria/legal-impact/the-indian-national-green-tribunal---environmental-lessons-learned/>.

91 Specialised Courts (n 29).

92 Ibid.

93 E. I. Obarisiagbon and A. A. Aderinto, 'Kidnapping and the Challenges Confronting the Administration of Criminal Justice in Selected States of Nigeria' (2018) 11 *African Journal of Criminology and Justice Studies* 42.

94 See George Onyejiuwa, 'Why I Kidnapped, Murdered Imo Magistrate-Suspect' *The Sun Nigeria* (Owerri, 31 March 2019) 12. See also Chidiebube Okeoma, 'Police Arrest Killer of Imo Judge, Rescue 15 Kidnapped Persons' *The Punch* (Owerri, 30 March 2019) 17.

This hinders the progress of justice. Environmental business is a serious business. So, the common man and indeed the entire Nigerian populace expect the government to provide these Magistrates with adequate security and conducive environment for their operations so that justice can be dispensed in a friendly and fearless atmosphere, especially in the remote rural communities. This will enhance the enforcement of their duties. Regrettably, however, the incidence and prevalence of kidnapping of these court officials are still on the increase with no solution in sight. This trend is an unfortunate one and is not in accord with the dictates of democracy and constitutional order. In Pakistan, one of the efforts of the government, with the aid of the UNDP, to boost the security of the justice system was to bolster the police and other security operatives, especially in relation to mobile courts. Perhaps, Nigeria can adopt the same approach.[95]

It is interesting to note that courts have ruled against the restriction of people's movements on environmental sanitation days as being inconsistent with ss. 35, 36(12) and 41 of the 1999 Constitution[96] and Article 12 of the *African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act*.[97] Even the Environmental Sanitation Laws have no provisions restricting peoples' movements during this exercise.[98] It was mere Executive proclamations. In *Okafor v. Lagos State Government*,[99] the appellant was arrested by the officers of the Lagos State Task Force on Environmental Sanitation. She was accused of wandering, loitering and walking about in defiance of the Governor's instruction that movements should be restricted during the State's monthly compulsory environmental sanitation exercise, and was held for five hours in a police vehicle. Thereafter, she was arraigned before a Sanitation Tribunal where she pleaded guilty and paid a N2,000.00 (USD5) fine. Dissatisfied with the arrest and arraignment, she appealed to the Lagos State High Court. The main thrust of her case was that the restriction of her movement during the exercise was unlawful, illegal and unconstitutional. Her application was dismissed. Still aggrieved, she appealed to the Court of Appeal which allowed the appeal. The respondents conceded that there is no written law in the Lagos State restricting the movement of persons within the State on its environmental sanitation days, but that the Governor's directive was sufficient to validate such restriction. While rejecting the respondent's submission, the appellate Court reiterated that 'the directive of the Governor of Lagos State does not amount to a written penal law under which any citizen could be arrested, tried, convicted and punished'.[100] Consequently, the trial and conviction of the appellant violated her right under the Constitution. Whilst we applaud this judgment, it

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95 See Mobile Courts Bring Justice to Rural Pakistan (n 85).

96 Sections 35 and 41 provide for the rights to personal liberty and freedom of movement respectively, while s. 36(12) provides that a person shall not be convicted of a criminal offence unless that offence is defined and the penalty prescribed in a written law must be either an Act of the National Assembly or a Law of a state, a subsidiary legislation or instrument under the provisions of a Law.

97 Cap A 9 LFN 2004. See also Unini Chioma, 'Court of Appeal Nullifies Restriction of Movement During Environmental Sanitation in Lagos' *The Nigeria Lawyers* (Web page, 8 November 2016) <https://thenigerialawyer.com/court-of-appeal-judgement-on-restriction-of-movement-on-environmental-sanitation-staturdays/>.

98 See for instance Lagos State Environmental Sanitation Law, 2000.

99 *Okafor* (n 77) 341-513.

100 Ibid, pp.442-443, paras H-F.

should not be a cover for non-adherents to evade the monthly environmental sanitation exercise, which is a novel environmental policy in Nigeria.

As the sole responsibility of the mobile courts in Nigeria is to prosecute citizens flouting the stay-at-home order and clamping them into detention or with an option of paying a fine, the nullification of the restriction has seriously undermined the efficacy of the mobile courts. The Governors' emphasis today is on 'no restriction of movements during the exercise'.[101] Therefore, the mobile courts have become moribund.

VI CONCLUSION AND RECOMMENDATIONS

In any democratic society, it is particularly important that all citizens get access to economic, social and environmental justice. Access to justice is fundamental to the establishment and maintenance of the rule of law because it enables people to have their voices heard and to exercise their legal rights, whether those rights are derived from constitutions, treaties, statutes or the common law. Over the years, courthouses only existed in urban and thickly populated areas, leaving the rest of the country without proper access to the formal justice system. Today, the mobile court system exists to make access to justice readily available.

Environmental issues are best handled with the participation of all concerned citizens at the relevant levels. In volatile areas, such as the Niger Delta region of Nigeria, victims of environmental degradation are especially vulnerable to discrimination and unequal treatment. Thus, seeing the havoc ravaging the Niger Delta region and the inability of the traditional courts to address such problem is a justification for the mobile court as a necessary option, especially considering that in most countries of the world where it operates, it has triumphed where the conventional courts have failed. Access to justice supports sustainable peace by affording the population a more attractive alternative to violence in resolving personal and political disputes. Mobile courts contribute to the promotion of a peaceful society, as conflicts are settled through legal means rather than through violence.

While mobile courts are the best option to get to the remote and rural areas and to the disadvantaged people, there is the need for legal awareness campaigns by the state in collaboration with non-governmental organisations and other administrative agencies to enable such people to understand their rights and the means for claiming them. Unarguably, a good number of people living in the remote communities in Nigeria today are illiterate and do not know their rights, whether fundamental, legal or environmental, and neither do they appreciate the importance of mobile courts within their vicinities. Nevertheless, they are all entitled to their rights to quality environment and access to environmental justice. Such campaign will highlight their environmental rights and the remedies available in cases of breach, and more so the proximity of the mobile courts to their doorsteps for justice delivery.

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[101] See for instance, 'Special Environmental Sanitation to Hold on Saturday April 13 by Edo Government' *Thisday* (Web page, 13 April 2018) <https://www.thisdaylive.com/index.php/2018/04/13/special-environmental-sanitation-to-hold-on-saturday-april-14-edo-govt/>.

The judiciary should expand the scope of these courts by establishing more centres in the remote villages, where the courts should access the rural dwellers for on-the-spot resolution of their environmental conflicts. In Tanzania, for instance, the judiciary expanded the scope of this service by establishing other centres in the remaining regions in different phases.[102] In Bangladesh, the activities of mobile courts encouraged the government in 2005 to amend its existing laws to widen the area of functioning and powers of those courts.[103] Such expansion should include civil jurisdiction to enable the courts grant relief to victims of environmental pollution. Most victims of pollution approach the courts for relief – damages, compensation or injunction especially when the injury affects their personal rights. This should fall within the ambit of the mobile courts, particularly where injustice will result if none is awarded. As the court has the power to entertain criminal matters, it will be conferred with a corresponding power to entertain civil cases as and when due, as it is done in other courts – High Courts, Court of Appeal and Supreme Court.

Ordinarily, Magistrate court can hear criminal as well as civil cases, containing disputes in between individuals and the government, but there is no record that mobile courts has ever granted relief to successful litigants. Mobile courts will not protect the interest of all if it is exclusively a criminal court, i.e., to convict and send to jail. If we must relax our laws to allow mobile courts to protect the people, we have to do so. The downtrodden in the society need either free or state sponsored legal assistance to get justice. A victim of pollution in a remote village must not be required to travel to the city before he or she can claim damages.

Finally, the use of Information and Communication Technology (ICT) is another option. This is one of the key elements that provide general and specific information on its activities to many court users thereby significantly improving the administration of justice. An instance is the use of e-mail to share electronic documents. Fortunately, many countries in the world today have embarked on statutory reforms to accommodate the use and exchange of electronic documents within the national judicial systems. In Nigeria, for instance, s. 84 of the *Evidence Act 2011* provides that statements in documents produced by computers are admissible in evidence in Nigeria. Many courts' websites provide electronic forms to be downloaded, printed, filled up and filed rather than the traditional manual format. One must not travel to the court before he can obtain the necessary documents.[104] The only impediment is that to date, the internet remains inaccessible in most rural areas. Fortunately, the trend is changing due to the influx of affordable smart phones and constant expansion of telecommunication companies and their operations. Mobile phones can best be used to link up remote areas. An important innovation today in this respect is the use of WhatsApp for exchange of electronic documents and publication of court decisions. As access to the internet increases, more people can learn about their rights and the justice

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[102] Kapama (n 68).

[103] Gazi Delwar Hosen and Syed Robayet Ferdous, 'The Role of Mobile Courts in the Enforcement of Laws in Bangladesh' (2010) 1 *The Northern University Journal of Law* 83-95.

[104] Marco Velicogna, 'Justice Systems and ICT, What Can Be Learned from Europe?' (2007) 3(1) *Utrecht Law Review* 129.

system.[105] Other improvements include the use of radio and television programmes to fix dates for courts' sittings or notify the public when any court sitting is interrupted by unforeseen circumstances. All these not only increase accessibility, improve efficiency and promote confidence in the justice system but also help resolve disputes quicker and reduce the pressure on courts' premises.

The Courts should also open its doors to entertain cases from non-governmental organisations, which may intend to institute actions on behalf of the less privileged, especially in the remote rural communities without the restrictive standing rule as an albatross. There is also the need to create environmental awareness among the rural populace especially on the purpose, availability and accessibility of these courts. People perish for lack of knowledge. Therefore, this awareness is a necessity. Legal aid can as well be of immense assistance especially to the downtrodden in the creeks who do not approach the courts because they lack the wherewithal. Finally, we should expand the scope of mobile courts in Nigeria as is done in Bangladesh and other countries in the world so that part of the case files heaped on the High Courts for decades may be expeditiously treated and reduced.

[105] Halima Doma, 'Enhancing Justice Administration in Nigeria through Information and Communication Technology' (2016) 32(2) *John Marshal Journal of Information Technology and Privacy Law* 93.

REVISITING THE RIGHT TO PRIVACY IN THE DIGITAL AGE: A QUEST TO STRENGTHEN THE MALAYSIAN DATA PROTECTION REGIME

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Abstract

The world goes through diverse privacy dilemmas, particularly after the discovery of Information Communication Technologies (ICTs) in the 1960s. It can be argued that such a scenario will continue in the future, as the vast majority of our works are done online using personal data. Perceivably, in the future, our online activities will increase, being facilitated by the pace, efficiency, accuracy of borderless connectivity and commercial engagement of the ICTs. Invariably, we are being captured on cameras, monitored and identified by numerous public and private actors, and all these lead to threats to our privacy. There is no one-size-fits-all solution to privacy problems due to the inefficiency of the regulatory measures and the pace of the growth of ICTs. These realities lead researchers across the globe to revisit the notion of 'privacy and data protection' to strike a balance between privacy invasion and enforcement. Malaysia is no exception. Nonetheless, there is no in-depth analysis of the adequacy of the current data protection regime in Malaysia. This article aims to fill that gap by revisiting the concepts of 'privacy' and 'data protection' and analysing the extensive literature in the field, keeping the Malaysian data protection regime in a special focus. The findings of this study reveal that in some respects, the data protection regime of Malaysia falls short of the global data protection standard. This study suggests that to strengthen the data protection regime of Malaysia, the policymakers may consider amending the *Personal Data Protection Act 2010* (PDPA) to make it in line with the international data protection standards and especially, the General Data Protection Regulation (GDPR).

Keywords: privacy, data protection, data protection regime in Malaysia, PDPA, GDPR.

I INTRODUCTION

In this era of information, Information Communication Technologies (ICTs) have enhanced the ability of governments, businesses and private individuals to operate

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surveillance, intercept communication and collect large scale personal data. These matters ultimately pose huge threats to the right to privacy and personal data of individuals.

Further, the data protection regime of a jurisdiction faces numerous challenges including (1) the gaps in scope; (2) addressing latest technologies; (3) governing trans-border data flows; (4) striking a balance in surveillance and data protection; (5) enhancing enforcement; (6) ascertaining jurisdiction and (7) handling the compliance issues.[1] Hence, in recent decades, privacy appears as one of the pressing issues in contemporary global political agenda.[2]

In such a context, the law has to reconcile the conflicting interests of individuals in an ever-complex society, while the judiciary has to determine whether the right to privacy is to be upheld.[3] There is no explicit provision regarding the right to privacy in the Federal Constitution of Malaysia, although some sort of privacy is recognised in the constitutions of nearly 130 countries of the world.[4] This stand of the Malaysian Constitution raises a substantial question as to whether privacy can be labelled as one of the fundamental rights in Malaysia. In *Ultra Dimension Sdn Bhd v Kook Wei Kuan*,[5] Justice Faiza Tamby Chik unequivocally asserted that Malaysian laws do not recognise the right to privacy.[6] In reaching this conclusion, the Malaysian High Court referred to another famous case,[7] in which it was held that the right to privacy is not acknowledged in the English common law. Justice Faiza Tamby Chik reasoned that since English common law is applicable in Malaysia pursuant to s 3 of the *Civil Law Act* 1956, privacy rights which are not recognised under English Law is accordingly not recognised under Malaysian law.

It may be relevant to state that there exist isolated privacy provisions in a wide array of domestic laws of Malaysia, as discussed briefly in part V of this article. These scattered privacy provisions which are embedded in numerous laws do not provide adequate protection for privacy and personal data in the digital age; thus, a comprehensive data protection law is needed.

Following from this, Malaysia has enacted the *Personal Data Protection Act 2010* (PDPA) to introduce a systematic data protection regime in the country. The PDPA sets the basic standard for data processing activities for individuals, businesses and other entities in Malaysia. It establishes an extensive cross-sectoral system of data protection regime regarding commercial transactions, the key enabler to enhance the trust of consumers

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1 Technology and Logistics Division, UNCTAD, *Data Protection Regulations and International Data Flows: Implications for Trade and Development* (UNCTAD/WEB/DTL/STICT/2016/1/iPub, April 2016) xii.

2 Md Toriqul Islam, Abu Bakar Munir, Siti Hajar Mohd Yasin and Ershadul Karim, 'Data Protection Law in Asia' (2018) 8(4) *International Data Privacy Law* 338.

3 John J Thauberger, 'Right to Privacy' (1965) 30 *Saskatchewan Bar Review* 30, 167. See also Adekunle, Adedeji and Irekpitan Okukpon, 'The Right to Privacy and Law Enforcement: Lessons for the Nigerian Judiciary' (2017) 7 (3) *International Data Privacy Law* 202.

4 'What Is Privacy?', *Privacy International* (Web Page) <https://privacyinternational.org/explainer/56/what-privacy>.

5 [2001] MLJU 751.

6 Ibid 757.

7 *Kaye v Robertson* (1991) FSR 62.

in business and e-commerce by addressing an increased number of credit card frauds, identity thefts, and sale of personal data without the consent of the persons concerned.[8]

Above all, the PDPA is a unique data protection legislation in Malaysia. However, it has several shortcomings in comparison with the latest global data protection standard, especially the General Data Protection Regulation, 2018 (GDPR). Against this backdrop, this article attempts to offer a general overview of the right to privacy in Malaysia, covering the emergence, meaning, and its value, together with a holistic examination of the data protection regime in Malaysia. The article concludes with some suggestions that the Malaysian policymakers may consider in amending the PDPA to secure a safer online eco-system in Malaysia.

II UNDERSTANDING PRIVACY

The right to privacy has gone through a long process in its development. It has been said that the debate over privacy concerns is as old as human beings.[9] We may depict this long historical journey of privacy as the long walk to personal freedom. Earlier, legal norms approved only a few rights such as the right to life, right to property, and so forth. Subsequently, the law started recognising numerous other human interests such as feelings, sensitivity, emotions, and intellect.[10]

Gradually, the notion of the 'right to life' began to apply horizontally to cover a wide array of rights, including 'the right to be let alone',[11] popularly known as the 'right to privacy' as coined by Warren and Brandeis.[12] Due to long-standing support and recognition in the national, regional and international legal instruments, the desire for personal freedom reached such an extent that people were no longer interested to share their personal affairs with everyone, and would prefer to do so with selective persons. The authors prefer to treat this trend as the right to privacy in the digital age.

In today's data-driven world, there has been monetisation of data, and thus, personal data has appeared as a Holy Grail, turning it into a commodity, and accordingly, being sold and bought.[13] Diverse actors often pile up reams of personal data, through various means, for multiple purposes posing tremendous challenges to our personal life. Privacy is crucial for the wellbeing of a free society, thus no one can violate it unless there remains a pressing State interest.[14] Hence, the right to privacy is to be respected from the cradle to the grave.

Nevertheless, it is a huge challenge to protect privacy in this era of ubiquitous computing. Denis O'Brien, for example, lamented that maybe the right to privacy is a charming idea to the philosophers but not to the legislators, who try to place it within the

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8 Shanthi Kandiah, 'Malaysia' in Alan Charles Raul (ed) *The Privacy, Data Protection and Cybersecurity Law Review* (Law Business Report Research, 6th ed, 2019) 251.

9 Jan Holvast, 'History of Privacy' in *The History of Information Security* (Elsevier, 2007) 737-69.

10 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) *Harvard Law Review* 193.

11 Thomas McIntyre Cooley, *A Treatise on the Law of Torts* (Callaghan, 1930) Vol 2.

12 Warren and Brandeis (n 10) 1.

13 JW Jerome, 'Buying and Selling Privacy Big Data's Different Burdens and Benefits' (2013) 66 *Stanford Law Review* 47.

14 Larry M Elison and Dennis NettikSimmons, 'Right of Privacy' (1987) 48(1) *Montana Law Review* 1.

legal framework.[15] To the legislators, privacy is a pressing problem in terms of explaining it with precision, determining its boundaries, and suggesting remedies in case of its invasion. This landscape widened the philosophy 'the right to be let alone' to capture more complexities encompassing privacy, and associated economic, social, political, psychological, and legal concerns. Hence, the conceptualisation of privacy has not lost its appeal, rather, it has led the researchers to revisit and rethink this right in the digital age. Thus, in the following section, a short account of privacy covering its history of emergence, meaning and value is covered.

A *Emergence of Privacy*

Even though privacy seems to be a newly emerged notion, it can be found in the ancient codes and texts of the Greeks, Romans, and the Anglo-Saxon ages.[16] There were also references to privacy in both ancient anthropological and sociological discourses.[17] It is believed that Aristotle attempted, for the first time in history, to distinguish private and public life,[18] and later, the Romans advanced with the idea and approached to protect privacy judicially.[19] Thus, Aristotle's demarcation on the public-private sphere of politics, i.e., the *polis* and *oikos*, two separate circumferences of life, was identified as the early references to privacy.[20] This public-private construction was also employed to mean the domain of national authority, in contrast, the self-regulation, as described in John Stuart Mill's essay, *On Liberty*.[21] A similar justification appears in Locke's 'Second Treatise on Government' as well.[22] Despite the series of the awareness of privacy in the long past, the emergence of privacy has become evident in the late 19th century, although most people have become conscious about privacy mostly in the past century.[23]

Indeed, the modern construction of the notion of 'privacy' surfaced first in 1890 through a seminal piece 'The Right to Privacy' by Louis Brandeis and Samuel Warren.[24] On 25 January 1883, Samuel Dennis Warren, a famous American author and attorney, got married to Miss Mabel Bayard, the daughter of Thomas Francis Bayard, a former US Senator. One day, they spent intimate moments at the exclusive Back Bay section in Boston. Later, the 'Saturday Evening Gazette' in its specialized 'Blue Blood Items'

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15 O'Brien, 'The Right of Privacy' (1902) 2 *Columbia Law Review* 445.

16 Samuel H Hofstadter, Samuel Dennis Warren and Louis Dembitz Brandeis, *The Development of the Right of Privacy in New York* (Grosby Press, 1954); Roscoe Pound, 'Interests of Personality [Concluded]' (1915) 28 (5) *Harvard Law Review* 445.

17 Metaphysics Research Lab, Stanford University, *Stanford Encyclopaedia of Philosophy* (online on 22 March 2020) (Spring ed, 2018), 'Privacy'.

18 Rhys Smith and Jianhua Shao, 'Privacy and E-Commerce: A Consumer-centric Perspective' (2007) 2(7) *Electronic Commerce Research* 89.

19 Stanford Encyclopaedia of Philosophy (n 17).

20 Ibid.

21 John Stuart Mill, 'On Liberty', *A Selection of His Works* (Springer, 1966) 1-147.

22 John Locke, *Second Treatise of Government: An Essay Concerning the True Original, Extent and End of Civil Government* (John Wiley & Sons, 2014).

23 George Edward Richie, 'The Role of the Epistemic Community in Influencing Privacy Legislation: The United State and The European Union' (PhD Thesis, University of Denver, 2010).

24 Warren and Brandeis (n 10).

published their passionate intimate moments with shocking details.[25] This incident embarrassed Warren immensely, and subsequently, he discussed it with his friend Louis Brandeis, an American lawyer and Associate Justice of the US Supreme Court.[26] Consequently, their thoughts and written work on that issue created history.

Warren and Brandeis started inquiring into the existing legal principles whether there were any provisions for preventing that intrusion of Warren's privacy and became convinced that the conventional torts for libel and slander were not sufficient. They discovered that there was no law recognising the principles by way of which damages may be awarded for the violation of one's feelings.[27] They mourned for the personal life of individuals and warned people about its invasion. They wrote the words 'leave me alone', and henceforth, introduced, what judges referred to as 'the right to be let alone'.[28] From then onwards, the right to privacy has been recognised in almost all legal systems in the civilized world.

B *Meaning of Privacy*

The term 'privacy' is a notion that is full of fascinating and distinctive features but not clearly understood. Richard A. Posner, for example, remarked that privacy is an elusive and poorly defined conception.[29] Being abstract, privacy is not an easy-going concept. Thus, much ink has been spilt in attempts to define the term 'privacy'. Besides, privacy and technology shape and mould each other in the contemporary world. Hence, privacy protection mechanisms may not work unless it is designed while looking at technological developments.

Over the years, many scholars from different disciplines have attempted and continue to conceptualise privacy in a wide range of tones. In the present study, the researcher aims to explain the meaning of the notion of 'privacy' by analysing these scholarly works as offered by famous legal scholars.

Some scholars attempt to explain the notion of 'privacy' by demonstrating its synonyms. For example, to paraphrase Ruth Gavison, privacy has some constituent components, such as anonymity, solitude, and secrecy.[30] Helen Nissenbaum classifies privacy as a dynamic and complex issue, and the sensitivity to the data in terms of the purpose, context, and trust.[31] Westin attempted to articulate privacy in terms of social, personal, and regulatory dimensions.[32] While Anita Allen surmises that privacy

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25 James H Barron, 'Warren and Brandeis, the Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation' (1979) 13 *Suffolk University Law Review* 875. See also Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (Plunkett Lake Press, 2019).

26 Robert Sprague, Kevin Grauberger and Nicole Barberis, 'One Hundred Twenty Years of US Privacy Law Scholarship: A Latent Semantic Analysis' (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602904>.

27 Warren and Brandeis (n 10) 195.

28 PJ Gray-Lukkarila, 'The Right to Privacy: Constitutional and Theoretical Foundations' (PhD Thesis, The Claremont Graduate University, 1997).

29 Richard A Posner, 'The Right of Privacy' (1977) 12 *Georgia Law Review* 393.

30 Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *The Yale Law Journal* 421.

31 Helen Nissenbaum, 'Privacy as Contextual Integrity' (2004) 1(79) *Washington Law Review* 119.

32 Alan F Westin, 'Social and Political Dimensions of Privacy' (2003) 59(2) *Journal of Social Issues* 1.

appears in the multifaceted denominations, such as physical, proprietary, decisional, and informational.[33]

William Parent volunteers to offer a viewpoint of privacy that is harmonious to the common expression and does not exaggerate or disconcert the central idea of other key terms. To him, privacy denotes the state of not getting their personal data stored, noticed or owned by others.[34] This is no doubt an estimable definition, but there remain questions as to its conciseness. Furthermore, the definition contains a descriptive account and is devoid of any normative principle.

Observing the intricacies encompassing the meaning of privacy, Daniel Solove argues that the notion of 'privacy' is full of disarray; hence, none can enunciate its proper meaning. Moreover, privacy encompasses numerous aspects and includes many things, such as freedom of thought against surveillance, control over one's own body, and personal data, aloneness in residence, the capacity of protecting reputation, and safeguard against searches and questionings.[35] While articulating privacy as a tort, D. W. Prosser emphasised that privacy does not contain one, but rather a group of *four* torts, such as-

> (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[36]

Adam Moore is of the view that privacy refers to the right to have control in the access to premises, places, and personal data, and together with the usage and controlling powers thereof.[37] He argued that there is hardly any definition of privacy that can please everybody. Besides, the evaluation and justification of privacy in society play a crucial role in rendering dimensions to the definition, and hence, any endeavour of defining privacy would perhaps always be incomplete.[38]

Indeed, the notion encompassing privacy is not generally unified, but rather it varies in diverse features, scope, and nature based on locality, society, culture, custom, moral values, etc. Though there are differences among the scholars about privacy in terms of concepts and contexts, certain things are common as to the notion as shared by all discourses. For example, all privacy-related discourses acknowledge that privacy is an intrinsic human right; it facilitates the individuals to exile the outsiders from their intimate zone, and it uplifts the dignity and other constitutional guarantees of humankind. The Australian Privacy Charter, for example, states, 'privacy is such a value, which underpins human dignity and other key values, e.g., freedom of association and freedom of speech'.[39]

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33 Anita L Allen, 'Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm' (1999) 32 *Connecticut Law Review* 861.

34 WA Parent, 'Privacy, Morality and the Law' (1983) 12(4) *Philosophy and Public Affairs* 269.

35 Daniel J Solove, *Understanding Privacy* (Harvard University Press, 2008) vol 173.

36 William Lloyd Prosser, 'Privacy' (1960) 48 *California Law Review* 383.

37 Adam Moore, 'Defining Privacy' (2008) 39(3) *Journal of Social Philosophy* 410.

38 Ibid.

39 Council, Australian Privacy Charter, 'Australian Privacy Charter' (1994) *Australian Privacy Charter Council* <http://www.privacy.org.au/apcc/charter.html>.

From the above discussion, it is apparent that the term 'privacy' incorporates a wide range of issues within its domain. Therefore, to offer a precise definition of privacy is almost impossible. Nonetheless, privacy is explained as a matter of protecting one's private spheres from the interference of others, though due to the complexities in this information era, the distinction between private and public domain is not easy to draw. However, we may prefer to share Blaine Thacker's definition as an acceptable definition of privacy. To paraphrase Thacker, privacy refers to the *claim of the persons, groups, or organisations to determine how, when, and to what extent their information will be shared with others*.[40]

C *Value of Privacy*

The evolving information age is transforming our lives in ways that we could never have imagined. Nowadays, privacy is a pressing concern due to numerous reasons, such as - the globalization of human communication, the commercial importance of data, the interest of governments in accessing and processing data, voluntary data sharing by people on social media, the commercialization of personal data and the usage of cloud computing – coupled against the recognition of privacy as one of the fundamental human rights, such as freedom of speech.[41]

Since long ago, governments across the world have conducted diverse surveillance programs for safety, security, public order, or on public interest grounds. George Orwell once warned in his dystopian novel entitled '*1984*' that Big Brother (a fictional character to refer to the government authorities) is always watching you.[42] Focusing on the governmental interests on people's activities, George Orwell wrote:

> It was even conceivable that they watched everybody all the time. But at any rate, they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.[43]

Rotenberg remarked back in 1996 that '[p]rivacy will be to the information economy of the next century what consumer protection and environmental concerns have been to the industrial society of the 20th century'.[44] His prediction has become reality as privacy emerges as one of the most desired interests in current times. Besides, in this data-driven society, people deliberately share large amounts of personal data on social media, and to

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40 Justice, Canada. Parliament. House of Commons. Standing Committee on, Solicitor General and Blaine A Thacker, *Open and Shut: Enhancing the Right to Know and the Right to Privacy: Report of the Standing Committee on Justice and Solicitor General on the Review of the Access to Information Act and the Privacy Act* (Queen's Printer for Canada, 1987).

41 Christopher Kuner et al, 'The Extraterritoriality of Data Privacy Laws—An Explosive Issue Yet to Detonate' (2013) 3 (3) *International Data Privacy Law* 147.

42 George Orwell, *Nineteen Eighty-Four* (Everyman's Library, 2009).

43 Ibid Part One, Section 1.

44 James Gleick, 'Big Brother Is Us', *The New York Times* (online 29 September 1996) <http://www.nytimes.com/1996/09/29/magazine/big-brother-is-us.html?pagewanted=all&src=pm>.

numerous public and private bodies. Nevertheless, there must be a balance between the compelling necessities of data sharing and the right to privacy of individuals.

Interestingly, privacy is essential not only for human beings but also for animals. Fascinated by the outputs of various animal and cultural studies, Alan Westin, for example, remarked that the basic outcomes of animal studies reveal that every animal essentially searches for its privacy in the small-group intimacy.[45] Westin added that the ecological studies have shown that the scarcity of intimate space due to congestion may cause huge threats to survival.[46] Some other authors argue that due to the lack of intimate private space, beasts may destroy themselves, or grossly involve in the suicidal decreasing of their population.[47] For example, while experimenting with mice and sloths in cages, Calhoun, noticed that a certain proportion of space is inevitable for each species and the lack of which leads to the splitting in friendly relations and causes diverse illnesses, such as heart failure and an increase of blood pressure.[48]

In line with the above philosophy, it can be argued that the right to privacy is essential for the well-being and prosperous life of almost all animals in the world. Besides, in the absence of privacy protection mechanisms, people might incur numerous irreparable losses. For instance, data revelation may cause one to wreck his marriage, or the news of addiction to alcohol or illicit drugs may be sufficient for losing one's job.

Some scholars even identify that privacy is important for democracy, though the relationship between them is a complex and dynamic one and there are diverse disagreements between them.[49] Privacy may be compromised in a democracy by the polling agents, who endeavour to mobilise, involve and stimulate voters to vote– or not to vote. Today, we see the massive roles of polling agents, particularly in social media, to manipulate the voter's psychology. All these eventually influences the result of the election and creates debates in the political discourses.

This strategy was applied by the election campaign of Barack Obama both in the 2008 and 2012 US general elections. The summary of these techniques includes an unprecedented ability to use advanced technologies to influence targeted voters and precisely specified constituencies with a tailored message in both online and offline formats.[50] There were allegations against former US President Donald Trump that his election campaigns used the voter suppression strategy in the 2016 US election by sending negative messages (dark posts), based on race, ethnicity, and socio-economic status by using the advertising tools of Facebook.[51] Therefore, the issue is no longer restricted to the

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45 Alan F Westin, *Privacy and Freedom* (Atheneum, 1967) vol 7.

46 Ibid.

47 Adam D Moore, 'Privacy: Its Meaning and Value' (2003) 40(3) *American Philosophical Quarterly* 215.

48 John B Calhoun, 'The Study of Wild Animals Under Controlled Conditions' (1950) 51 *Annals of the New York Academy of Sciences* 1113.

49 Colin Bennett and Smith Oduro Marfo, *Privacy, Voter Surveillance and Democratic Engagement: Challenges for Data Protection Authorities*, International Conference of Data Protection and Privacy Commissioners (ICDPPC) 7.

50 Colin Bennett, 'The Politics of Privacy and the Privacy of Politics: Parties, Elections and Voter Surveillance in Western Democracies' (2013) *First Monday* 1.

51 Bennett and Smith (n 49) 3.

privacy of the individual voter, but rather, correlates to greater issues such as democracy and politics of the day.

Above all, privacy matters because we all wish to have a personal life and like to share our correspondence and memories with only those whom we trust. Whereas in a pure democratic culture, personal liberty includes the autonomy and freedom of individuals from the unauthorised access of the businesses, or diverse public and private actors. Indeed, in a networked society, privacy is more valued than any other rights, because, in current times, we cannot help but share our valuable and personal information to numerous bodies as a course of modern lifestyle, despite knowing the vulnerability of our rights. Therefore, it would be disastrous, if any of these actors leak, in any way, our sensitive personal data. Undoubtedly, these losses will be unthinkable, as most of them are irreparable, and hardly they admit any substitutes or compensation.

III THE EMERGENCE OF DATA PROTECTION

The phrase 'data protection' usually, covers two specific things, namely (1) the standard to deal with one's personal data and (2) the followed practices to secure and uphold that standard.[52] Indeed, data protection or data privacy is more than a relationship among a wide array of issues, such as data collection, sharing or transfer, and legal, political, technological, and public demand encompassing them.[53] Sometimes, it is described as a notion which rises from an attempt to strike the balance among some contesting groups, and sometimes, it can be presented as an output of certain chain reactions.[54] To put it simply, data protection refers to the law adopted for the protection of personal data which is likely to be processed, collected, and retained through automation or any other profiling means. Data protection law monitors how governments, businesses, or other organisations use the personal data of individuals.[55] Therefore, data protection means such a mechanism that enables individuals to take lawful control over their personal data.

Whilst talking about data protection, it is equally essential to focus on personal data and sensitive personal data, as by data protection, we usually mean the protection of these two. Personal data means any information about an identifiable natural person (data subject) who may be recognised directly or indirectly, by using some identification signs, such as the person's name, identification (ID) number (including online ID), socio-economic and cultural identity, location data, or data relating to any specific physical, physiological, genetic or mental condition.[56] Under the Malaysian PDPA, personal data implies any information regarding commercial transactions, which is-

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52 Angus Hamilton and Rosemary Jay, *Data protection: Law and Practice* (Sweet & Maxwell, 2003) 1.

53 MG Michael, *Uberveillance and the Social Implications of Microchip Implants: Emerging Technologies: Emerging Technologies* (IGI Global, 2013).

54 Hamilton and Rosemary (n 52).

55 'Data Protection' *GOV.UK* (Web Page) <https://www.gov.uk/data-protection>.

56 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) (GDPR) [2016] OJ L 119/1, art 3(2).

> (a) being processed entirely or partially employing equipment operating automatically in response to instructions given for that purpose; (b) recorded with the intention that it should wholly or partly be processed employing such equipment; or (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, and relates directly or indirectly to a data subject, identified or identifiable from that or other information possessed by the data user, including any sensitive data or expression of opinion regarding the data subject, but shall not include any information processed to carry on a credit reporting business by a credit reporting company under the Credit Reporting Agencies Act, 2010.[57]

Therefore, to assume 'personal data' under the purview of the PDPA, a piece of information must meet at least three conditions. *Firstly*, the data must be in respect of a commercial transaction; *secondly*, it must be processed either electronically or manually as part of a filing system, and *lastly*, it must connect directly or indirectly to a data subject, identified or identifiable from that information or other information held by the data user.[58] Simply speaking, **personal data** refers to such pieces of data which, by a combined reading, leads to the identification of an identifiable natural person. In the context of Malaysia, the *MyKid*,[59] *MyKad*,[60] driving license and passport are certain official documents that contain the personal data of the Malaysian nationals.[61]

Sensitive personal data means a wide range of information, such as the person's physical or mental health, religious, political or other beliefs or views, criminal records, and together with such other personal information about data subject as determined and published in the Official Gazette by the concerned Ministry.[62]

However, from time immemorial, data in respect of persons are collected, retained, exchanged in diverse ways or transferred to the third parties for multiple purposes. Thus, data collection is one of the old habits, though it may not be the old profession.[63] The threats on data privacy arise from numerous public-private entities encompassing chiefly the health sector, criminal justice system, financial sector, location data, academic research, and online activities. The threats upon personal information are often identified as identity theft or fraud, misprocessing, mishandling or misapplication of personal data.[64]

Whatever the case may be, in the networked world, protecting personal data has become increasingly challenging because of several factors, such as emerging technologies, modern business models, services and systems, growing reliance on different

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57 *Personal Data Protection Act 2010* (Act 709) (Malaysia) (PDPA) s 4.

58 Shanthi Kandiah (n 8) 253.

59 The *MyKid* is the identity card for Malaysian children under 12 years old which contains specific personal data, including information regarding birth date, health and education. See Noriswadi Ismail, *Understanding Personal Data Protection Law* (LexisNexis, 2013) 1.

60 Malaysian citizens above 12 years old are bound to register compulsorily for this national registration identification card and they hold this card till death. See Ismail (n 59).

61 Ibid 2.

62 PDPA (n 57) s 4.

63 Ibid.

64 Andrew Murray, *Information Technology Law: The Law and Society* (Oxford University Press, 2nd ed, 2013).

analytics, Big Data, tracking of data, sharing or profiling, and artificial intelligence.[65] Further, the atmospheres and surroundings in which we live, gets through, generates and assembles much more information on human conduct. Furthermore, the appliances we use or set up into our residences such as communication devices, transportation and street systems, all produce reams of data. This backdrop requires the emergence of data protection regulations to strike the balance among the interests of the governments, business entities, and private individuals.

Consequently, regional and international regulatory frameworks have been introduced to secure data protection around the globe. Among these, the notable instruments are, *inter alia*, the OECD Privacy Guidelines (1980), the OECD Privacy Framework (2013), the Convention 108 of Council of Europe (1981), the Modernised Convention 108 of Council of Europe (2018), the UN Guidelines for the Regulation of Computerized Personal Data Files (1990), the UN Principles on Personal Data Protection Privacy (2018), the Reports of the Special Rapporteur on the Right to Privacy in the Digital Age 2016-2020, the APEC Privacy Framework 2005, the APEC Privacy Framework (2015), the ASEAN Framework on Personal Data Protection (2016), the EU Directive 95/46/EC, and the General Data Protection Regulation, 2018 (GDPR). Besides these, privacy has been recognised by many other international and regional human rights instruments.[66]

At the national level, there has been a wave of data protection law enactments, especially, in the last two decades. It started from the *Hessian Data Protection Act* (*Hessisches Datenschutzgesetz*), 1970 of Germany, followed by Sweden, France, Germany, Denmark, Austria, Norway, and the USA. To date, a total of 143 countries have enacted data protection laws,[67] and many other nations are attempting to do the same. In Malaysia, the Personal Data Protection Act (PDPA)[68] (Act No. 709) was passed on June 2, 2010 and came into effect on 15 November 2013.[69]

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65 'Data Protection', *Privacy International* (Web Page) <https://privacyinternational.org/topics/data-protection>.

66 The human rights instruments that contain privacy provisions include, among others, the Universal Declaration of Human Rights, 1948 (art 12); International Covenant on Civil and Political Rights, 1966 (art 17); the United Nations Convention on Migrant Workers, 1990 (art 14); the United Nations Convention on the Rights of the Child, 1989 (art 16); African Charter on the Rights and Welfare of the Child, 1990 (art 10); the Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019 (art 4); American Convention on Human Rights, 1969 (art 11); American Declaration of the Rights and Duties of Man, 1948 (art 5); Arab Charter on Human Rights, 1994 (updated in 2004) (arts 16 and 21); ASEAN Human Rights Declaration, 2012 (art 21), and European Convention on Human Rights, 1950 (art 8).

67 A 2020 article of Greenleaf and Cottier reveals that so far, a total of 142 countries have enacted the data protection laws across the globe. At the time of writing, it is estimated that there are at least 143 countries with data protection laws. See generally, Graham Greenleaf and Bertil Cottier, '2020 Ends a Decade of 62 New Data Privacy Laws' (2020) 163 *Privacy Laws & Business International Report,* 24-6.

68 Edwin Lee Yong, 'Personal Data Protection and Privacy Law in Malaysia', *Beyond Data Protection* (Springer, 2013) 5-29.

69 Abu Bakar Munir, Siti Hajar Mohd Yasin and Md Ershadul Karim, *Data Protection Law in Asia* (Sweet & Maxwell/Thomson Reuters, 2018) 209.

IV DATA PROTECTION REGIME IN MALAYSIA

In the last few decades, the issue of privacy and personal data protection has gained increased attention in many parts of the world, including Malaysia. In the current section of this article, the gradual development of privacy and data protection issues in diverse legal contexts of Malaysia is analysed. Additionally, this section will also summarise the shortcomings of the Malaysian data protection regime and conclude with certain workable suggestions for strengthening the same. While doing so, it is equally important to focus on the contextual surroundings of the data protection regime in Malaysia. By contextual surroundings, the treaty obligations regarding privacy and the recognition of privacy in the Malaysian Federal Constitution, and other existing laws will be discussed.

With respect to treaty obligations, the provisions of the Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Civil and Political Rights (ICCPR) 1966 are worthy of discussion here. It may be relevant to state that the 'right to privacy' became an international human right before it was constitutionally recognised as a fundamental right.[70] The right to privacy was recognised first in the UDHR when States' Constitutions ensured only a few aspects of privacy, for example, the inviolability of one's home and correspondence. For instance, Article 12 of the UDHR provides,

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

17 years later, privacy was recognised in Article 17 of the ICCPR using similar language as in Article 12 of the UDHR. The only difference between the two documents implies that Article 17 of the ICCPR not only prevents the 'arbitrary' interventions in one's privacy and associated rights but also the 'unlawful' ones.

Since the UDHR is not a treaty or a convention, its provisions are not obligatory for the Member States of the United Nations but remains as an international obligation for the signatories of the ICCPR. As Malaysia has not signed the ICCPR, it does not have any international treaty obligations concerning privacy.[71]

Being an ASEAN Member State, Malaysia is a signatory to the ASEAN Human Rights Declaration, 2012. Malaysia is also part of the Asia Pacific Economic Cooperation (APEC), and accordingly, is assumed to be attached with the APEC Privacy Framework, 2015. However, Malaysia is not a signatory to the APEC Cross-border Privacy Rules (CBPR), 2005 (updated in 2015). Consequently, it appears that Malaysia does not have any binding international or regional commitment toward the recognition or protection of

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[70] O Diggelmann and MN Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 *Human Rights Law Review* 441.

[71] Other than Malaysia, the countries that have not yet ratified the ICCPR include- Qatar, Singapore, Sao Tome & Principe and St. Lucia. Among all, Malaysia, Qatar, Singapore have never signed the ICCPR, whereas Sao Tome & Principe and St. Lucia have signed but not ratified the ICCPR. See generally, Graham Greenleaf, *Asian Data Privacy Laws: Trade & Human Rights Perspectives* (Oxford University Press, 2014) 321.

the right to privacy. It is worth mentioning that there are only five UN Member States with data protection laws, but have never ratified the ICCPR, and Malaysia is one of them.[72]

Regarding the recognition of privacy in the national constitution, it is to be noted that the Federal Constitution of Malaysia does not recognise the right to privacy in the 'fundamental liberties', or any other parts thereof. The Malaysian courts have dismissed the claims of privacy as an invasion of common-law tort. For example, in the *Ultra Dimension Sdn Bhd v Kook Wei Kuan* case,[73] the Malaysian High Court rejected a petition that claimed damages on the ground of violation of privacy and breach of confidence. In *this case*, Justice Faiza Tamby Chik, in declaring that Malaysian laws do not recognize the right to privacy, said as follows:[74]

> I am of the view that it is clear that English law does not recognise privacy rights and it, therefore, follows that invasion of privacy rights does not give rise to cause of action. As English law is applicable in Malaysia pursuant to section 3 of the Civil Law Act 1956, privacy rights which [are] not recognised under English law [are] accordingly not recognised under Malaysian law.

Similarly, in *Dr Bernadine Malini Martin v MPH Magazine Sdn Bhd & 2 Lagi*,[75] the Court of Appeal observed that 'the law of this country, as it stands presently, does not consider the invasion of privacy as an actionable wrong'.

However, some scholars have pointed out that in several cases, the Malaysian judiciary have argued that the Federal Constitution of Malaysia recognises the right to privacy.[76] For example, in *Re Kah Wai Video Bhd*,[77] it was held that the operation of search and seizure infringes the right to property under Article 13 of the Federal Constitution.[78] The viewpoint was based on the decision of an Indian case, *Sharma & Ors v Satish Chandra,*[79] in which the same issue was raised under Article 19 of the Indian Constitution.[80] The Supreme Court of India held that such search and seizure were constitutional as conducted for a short period required for merely an investigation. In the same case, the court also acknowledged that privacy is a fundamental right.

Furthermore, in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor case,*[81] the Federal Court observed, in the form of *obiter dicta*, that personal liberty as recognised in Article 5(1) of the Federal Constitution includes many rights, *inter alia*, the right to

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72 Graham Greenleaf, Global Data Privacy Laws 2017: 120 National Data Privacy Laws, Including Indonesia and Turkey (2017) 145 *Privacy Laws & Business International Report*, 10-13; *UNSW Law Research Paper,* No. 17, 45.

73 [2001] MLJU 751.

74 Ibid 757.

75 (2010) 5 MLJ 755.

76 Abu Bakar Munir and Siti Hajar Mohd Yasin, Personal Data Protection in Malaysia: Law and Practice (Sweet & Maxwell Asia, 2010) 12-15.

77 (1987) 2 MLJ 459.

78 Munir and Yasin (n 76) 13.

79 AIR 1954 SC 300.

80 Munir and Yasin (n 76) 13.

81 (2010) 2 AMR 301; (2010) 2 MLJ 333.

privacy.[82] Taking note of this, it has been remarked that it is likely that some protection of privacy could still develop through the Federal Constitution of Malaysia.[83]

Article 5(1) of the Federal Constitution states that 'no person shall be deprived of his life or personal liberty save in accordance with law'. The right to life and personal liberty shall have to be interpreted widely to cover all physical and emotional aspects of humankind, and that essentially includes the privacy of persons and human dignity. Warren and Brandeis, for example, asserted that some human affairs, e.g., pleasure and enjoyment may not be noticed in the material objects but in the human feelings, emotions and thoughts that form an indispensable portion of human personality.[84] Moreover, privacy is also essential to lead a quality life, as it is argued that privacy protects the interests of individuals in becoming, being, and remaining as a person.[85]

Hence, the *Sivarasa* case may be considered to set the basis for the protection of a constitutional right to privacy in Malaysia. Though in principle, the lower courts are duty-bound to obey the precedent of the Federal Court, strangely, several lower courts have endorsed this right in subsequent cases but with no reference to the judgement of *Sivarasa case*.[86] Besides, in several cases, the Malaysian High Court also recognised privacy on different grounds, such as the preservation of modesty, decency and human dignity,[87] or the autonomy, dignity, self-esteem and comfort of the plaintiff.[88] Given these matters, it is hoped that the Federal Court may have an opportunity to make a clearer statement on the fact once and for all.

Despite the above-mentioned stand of the Federal Constitution, the term 'privacy' appears in a number of statutes and regulations of Malaysia, such as Births and Death Registration Act 1957 (s. 4(4) (b)), Private Hospitals Regulations 1973, Penal Code 1976 (s. 509), Law Reform (Marriage and Divorce) Act 1976 (s. 46A (2) (b)), Private Healthcare Facilities and Services Act 1998 (s. 107 (2) (ii)), Communication and Multimedia (Licensing) Regulations 1999, Child Act 2001 (s. 12(2)) and Credit Reporting Agencies Act (CRRA) 2010 (s. 30(5) (c)).

Among the above laws, the provisions of the Penal Code 1976 are especially worth mentioning, as s. 509 of the enactment explicitly recognised privacy under the heading of 'word or gesture intended to insult the modesty of a person'. Section 509 of the Act states,

> Whoever intending to insult the modesty of any person utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such person, or intrudes upon the privacy of such person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

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82 Munir and Yasin (n 76) 15.

83 Greenleaf, *Asian Data Privacy Laws* (n 71) 321.

84 Warren and Brandeis (n 10) 194.

85 Jeffrey H Reiman, 'Privacy, Intimacy, and Personhood' (1976) *Philosophy & Public Affairs* 44.

86 Munir, Yasin and Karim (n 69) 214.

87 *Lee Ewe Poh v Dr Lim Teik Man & Anor* 25 [2011] 1 MLJ 835 (HC), 8.

88 *Lew Cher Phow @ Lew Cha Paw & Ors v Pua Yong Yong & Anor* [2011] MLJU 1195 (HC).

In addition, there are at least six other laws, in which there are references for privacy, although they are not directly connected to the issue of data protection.[89] These laws include (1) Banking and Financial Institutions Act (BAFIA) 1989 (Act 372), containing legal protection to the confidentiality of consumer data (Part XIII: Information and Secrecy) (subsequently repealed by the Financial Services Act, 2013 (Act 758)), (2) Communications and Multimedia Act (CMA) 1998 (with amendment—Act A1220/ 2004), providing that consumers can address affairs regarding concerns affecting the quality of services, which conceivably involve the data privacy (Part VIII; s. 189 (consumer forum), and s.190(2)(e) (matters for consumer code)), (3) Electronic Commerce Act (ECA) 2006 (Act 658), rendering additional protection to anybody wishes to manage and join in e-commerce transactions, including online and offline privacy issues (s. 4), (4) Digital Signature Act (DSA) 1997 (Act 562), which impose obligations of secrecy over the use of the digital signature (s. 72), (5) Official Secrets Act (OSA) 1971 (Act 88), which governs the use of confidential public records (s. 2B and 2C), and (6) the Electronic Government Activities Act (EGAA) 2007 (Act 680), which governs the recognition of e-messages and the fulfilment of its legal postulates in regulating e-government procurement effectively, but does not cover data protection of the parties contracting with the government.[90]

From the above, it is evident that Malaysian law ensures the protection of privacy in certain specific circumstances. The highest court has, in the form of *obiter dicta*, stated that the right to privacy is implicit in the right to life as embedded in Article 5(1) of the Federal Constitution. Although privacy is impliedly recognised under the cover of the constitutional right to life, this application is not horizontal but rather, vertical covering the State and citizens' relation. Nonetheless, the Malaysian courts have, in some exceptional instances, upheld the invasion of privacy as an actionable tort for the protection of modesty, decency and dignity of the plaintiff, reflecting the significance of moral values in Malaysian society.[91]

As stated earlier, Malaysia entered the elite club of countries with comprehensive data protection laws in 2010, through the enactment of the PDPA. However, in terms of the latest development in data protection frameworks, there remains a question as to whether the PDPA is adequate to ensure the protection of personal data of Malaysian citizens. In the following section, we would search for the answer to this question by examining some key aspects of the PDPA along with some of its the major shortcomings.

A *The Personal Data Protection Act 2010 (PDPA)*

After a wait of more than 10 years since the late 1990s, Malaysia enacted the PDPA in 2010. It was the first data protection legislation among the ASEAN nations.[92] The Act produced a significant impact on the data protection regimes in Malaysia and in the

[89] Noriswadi Ismail, 'Selected Issues regarding the Malaysian Personal Data Protection Act (PDPA) 2010' (2012) 2 (2) *International Data Privacy Law* 105.

[90] Ibid 105, 106.

[91] *Maslinda bt Ishak v Mohd Tahir bin Osman* [2009] 6 MLJ 826; *Lee Ewe Poh v Dr. Lim Teik Man*, [2011] 1 MLJ 835 (HC); *M. Mohandas Gandhi v Ambank (M) Berhad* [2014] 1 LNS 1025; *John Dadit v Bong Meng Chiat* [2015] MLJU 1961 and *Toh See Wei v Teddric Jon Mohr* [2017] MLJU 704.

[92] Munir, Yasin and Karim (n 69) 209.

region. It is noteworthy that the Malaysian Government drafted the PDPA in 1998 but did not take any action until November 2009. After progressing with several stages of redrafting, the PDPA was placed for the first reading in November 2009, and in May 2010, the Federal Parliament passed the PDPA. After receiving the Royal Assent, the Act was officially published in June 2010.[93]

After another three years, the PDPA came into effect on 15 November 2013. On this very day, the Malaysian Government issued and gave effect to some other subordinate legislation regarding data protection, such as Personal Data Protection Regulations, Personal Data Protection (Registration of Data User) Regulations, Personal Data Protection (Fees) Regulations, Personal Data Protection (Class of Data Users) Order, and Appointment of the Personal Data Protection Commissioner.[94]

The Malaysian journey to enacting data protection regime is a noble endeavour and paved the way for other ASEAN and Asian nations. Following the tracks of Malaysia, the Philippines enacted the Data Privacy Act on 8 September 2012, Singapore passed its Personal Data Protection Act on 15 October 2012, Indonesia passed the Electronic Information and Transactions on 25 November 2016 (amending its previous Law No. 11 of 2008) and Thailand enacted the Personal Data Protection Act (PDPA) on 28 May 2019.[95]

The PDPA applies to the processing of personal data conducted by entities operating in Malaysia but does not apply to the processing performed outside the border unless that is further processed in Malaysia.[96] The enactment is divided into 11 Parts and consists of a total of 146 sections. Some major provisions of the PDPA, include, amongst others, the application (s. 2); definition and interpretation (s. 4), personal data protection principles (s. 5), registration (ss. 13-20), rights of the data subjects (ss. 30-44), exemptions (ss. 44-46), provisions about commissioners (ss. 47-60), data protection fund (ss. 61-69), advisory committee (70-82), appeal tribunal (ss. 83-100), inspection, complaint and investigation (ss. 101-109), enforcement (ss. 110-127), miscellaneous (ss. 128-144), and savings and transitional provisions (ss. 145-146).

It is pertinent to mention that a detailed and comprehensive analysis for all provisions of the PDPA is neither intended nor required for this article. Therefore, for the purpose of this article, some key provisions of the enactment shall be analysed, such as application and scope of the Act, definition and interpretation of certain matters, data protection principles, registration of data users, rights of the data subjects, the function of the national data protection authority, transborder data transfer and enforcement mechanisms under the Act.

1 *Application and Scope*

The provisions regarding the application and scope of the PDPA are mostly conventional in nature, like all other data privacy laws around the world. The PDPA applies to any person processing personal data of individuals (the processor), and the person having control over processing activities.[97] The other provisions, for example, the establishment

93 Ismail 'Selected Issues regarding the Malaysian Personal Data Protection Act' (n 89) 106.
94 Munir, Yasin and Karim (n 69) 209.
95 DLA Piper, *Data Protection Laws of the World: Full Handbook* (2017).
96 PDPA (n 57) s. 3(2).
97 Ibid s. 2(1).

and equipment principles,[98] the exclusion of artistic, literary and journalistic works (except the Security Principle),[99] personal, family and household affairs,[100] and educational institutions, churches, and non-profit organisational activities are also typical in nature. However, problems lie in two sectors, where the PDPA only applies to commercial transactions, and the public sectors remain outside of its ambit.

There are several criticisms that can be brought against the PDPA. In particular, the PDPA falls short of several specific issues, such as the scope limitations, lack of independence of the Commissioner, loopholes in privacy principles, extra-territoriality issues and due diligence.[101] Above all, one of the weakest features of the PDPA is that it does not apply to the public sector at all.[102] Many other authors also identified that the non-application of PDPA over public authorities is one of the main shortcomings of PDPA.[103]

2 *Definition and Interpretation*

Section 4 of the PDPA provides the interpretations for a wide array of important terminologies, including personal data, sensitive personal data, data processor, processing, data user, the data subject and commercial transactions. The meaning of both the personal data and sensitive personal data have been discussed in Part III of the article, and the rest other terms are discussed below.

> **Data processor**
> Data processor, in respect of personal data, refers to a person other than an employee of the data user, who processes the personal data on behalf of the data user only, not for any of his purposes.[104]

> **Processing**
> In respect of personal data, processing means the collection, storing, holding, recording or conducting any operation on the personal data. It also includes some other issues encompassing personal data, such as adaptation, organization, alteration, retrieval, consultation, use, disclosure (through transmission, transfer, dissemination or otherwise), alignment, combination, correction, erasure or destruction.[105]

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98 Ibid.
99 Ibid s. 45(2)(f).
100 Ibid s. 45(1).
101 Graham Greenleaf, 'Limitations of Malaysia's Data Protection Bill' (2010) *Privacy Laws & Business International Newsletter*, Vol 104, No 1, 1-4.
102 Ibid 1.
103 Ismail 'Selected Issues regarding the Malaysian Personal Data Protection Act' (n 89) 108.
104 PDPA (n 57) s. 4.
105 Ibid.

Data user
Data user means a person, who processes the personal data either alone or jointly with other persons, or who authorises, or has control over the processing of personal data, but shall not include a data processor.[106]

Data subject
Data subject refers to a person, who is the subject of the personal data.[107]

Commercial transactions
Commercial transactions imply any transaction of a commercial nature, being contractual or not, and includes affairs concerning the supply or exchange of goods or services, agency, investments, financing, and banking and insurance, but does not include a credit reporting business carried on by a credit reporting company under the Credit Reporting Agencies Act 2010.[108]

3 *Data Protection Principles*

At the heart of the PDPA, there are seven personal data protection principles as outlined in ss. 6 to 12. The principles include (a) General Principle (s. 6), (b) Notice and Choice Principle (s. 7), (c) Disclosure Principle (s. 8), (d) Security Principle (s. 9), (e) Retention Principle (s.10), (f) Data Integrity Principle (s. 11), and (g) Access Principle (s. 12). The PDPA obliges a data user to comply with these principles while processing personal data and a non-compliance, subject to ss. 45 and 46, shall lead to a fine not more than RM300,000 or imprisonment not exceeding for a term of two years or both.[109]

The potential weakness of the principles lies in the limitations on use and disclosure. For example, businesses can potentially misuse the limits of sharing the data to third parties simply by exposing the class of third parties to whom the data is likely to transfer.[110] Furthermore, the 'Security Principle' is comparatively weak, which requires the data users to take *practical* steps, instead of taking *reasonable* steps as often practised in other jurisdictions.[111]

4 *Registration of Data Users*

The Malaysian data protection legislation is undoubtedly a valiant effort that adds a unique and new taste to the increasing number of data protection legislation in the Asian region.[112] The PDPA prescribes the mandatory registration requirement for certain data users, which is a unique practice in the world.

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106 Ibid.
107 Ibid.
108 Ibid.
109 Ibid s. 5(2).
110 Greenleaf, 'Limitations of Malaysia's Data Protection Bill' (n 101) 2.
111 Ibid 3.
112 Ibid 1.

For example, although the GDPR does not require such registration for the data users, Malaysia and a few other countries have had this provision.[113] The PDPA requires the mandatory registration for processing personal data of certain specific sectors, such as the communications, banking and the financial institutions, insurance, health, tourism and hospitalities, transportation, education, direct selling, services, real estate, utilities, pawnbrokers and moneylender.[114]

5 *Rights of the Data Subjects*

The PDPA grants many rights for individuals concerning the processing of their data, including the right of access to personal data (s. 30), the right to correct personal data (s. 34), the right to withdraw consent (s. 38), right to prevent processing likely to cause damage or distress (s. 42) and the right to prevent processing for purposes of direct marketing (s. 43).

It is worth mentioning that many of these rights are similar to the EU standard as evidenced by the latest GDPR. For example, Article 15 of the GDPR deals with the right of access to personal data. Article 16 includes provisions as to the right to rectify personal data. Article 7(3) deals with the data subject's right to withdraw consent and Article 18 contains provisions regarding the right to restriction of processing., Article 21(2) and (3) comprise provisions against direct marketing. Nonetheless, unlike the GDPR, the PDPA falls short of certain rights, including the right to be forgotten (Article 17 and recital 65 and 66), the right to data portability (Article 20), and the right not to be subject to automated decision making and profiling (Article 22).

6 *National Data Protection Authority*

To ensure an effective data protection regime, an independent supervisory body is a must. However, the PDPA does not make provision for this mainly because of the lack of independence of the Personal Data Protection Commissioner. This can be inferred from the fact that the Personal Data Protection Commissioner's appointment,[115] allowance, remuneration,[116] and dismissal[117] are determined by the Minister, who, in turn, makes the Commissioner less independent.[118] Additionally, the Commissioner is responsible to produce an annual report to the concerned Minister. This annual report does not need to be tabled before Parliament.[119] Moreover, the PDPA also explicitly asserts that the Commissioner is responsible to the Minister and shall perform his or her responsibilities

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113 These countries include Argentina, Bahrain, Bosnia and Herzegovina, Cape Verde, Chile, Colombia, Costa Rica, Ghana, Gibraltar, Guernsey, Honduras, Indonesia, Israel, Jersey, Kyrgyzstan, Lesotho, Luxembourg, Macau, Madagascar, Malta, Mauritius, Monaco, Montenegro, Morocco, North Macedonia, Peru, Qatar-Financial Centre Free Zone, Russia, Serbia, South Korea, Switzerland, Tunisia, Turkey, United Kingdom and Uruguay. See generally, DLA Piper (n 95).

114 DLA Piper (n 95) 472-3.

115 PDPA (n 57) s. 47.

116 Ibid s. 57.

117 Ibid s. 54.

118 Greenleaf, 'Limitations of Malaysia's Data Protection Bill' (n 101) 1-2.

119 PDPA (n 57) s. 60.

in accordance with the directions of the Minister.[120] The Commissioner, Deputy Commissioner, Assistant Commissioner or any officer or servant of the Commissioner enjoy certain immunities. For example, these officials are exempted from any suit, prosecution or other proceedings for their activities which are carried out in good faith.[121]

7 *Transborder Data Transfer*

The PDPA does not apply to any data processing activities performed outside Malaysia unless there remains an intention that such data would be further processed in Malaysia.[122] It also lays down that the personal data cannot be transferred outside Malaysia unless the place is in the 'whitelist' as determined by the Minister in consultation with the Commissioner.[123]

However, if the Commissioner does not take a strict stand as prescribed, i.e., 'data users take all logical precautions and due care',[124] this may open an unexpected door to data transfers which needs to be closed.[125] Moreover, the Minister is likely to specify the countries (whitelist) to which personal data can be transferred freely.[126] In 2017, the Commissioner issued a 'Public Consultation Paper'[127] seeking feedback from the public on the draft whitelist of countries to which the personal data may be freely transferred without relying on the exemptions as laid down in s. 129(3) of the PDPA.

The stated whitelist comprises the names of numerous countries, including Andorra, Argentina, Australia, Canada, China, Dubai, European Economic Area (EEA) Member States, Faroe Islands, Guernsey, Hong Kong, Isle of Man, Israel, Japan, Jersey, Korea, New Zealand, Philippines, Singapore, Switzerland, Taiwan, UK, Uruguay and the USA.[128] It was further instructed that until the Proposed Order of 2017 is gazetted, the data user shall have to rely on the certain exemptions as set out in s. 129(3) of the PDPA before transferring any data outside Malaysia.[129] Such exemptions include, among others, (a) the data subjects have given their consents to that transfer, (b) the said transfer is essential to perform the contract made between the data user and data subject, (c) the data user has taken reasonable initiatives and care to ensure the compliance of the PDPA and (d) the transfer is crucial for the protection of vital interests of the data subjects.[130]

8 *Enforcement Mechanisms*

The Department of Personal Data Protection (DPDP), led by a Commissioner is entrusted with certain powers to enforce the PDPA. Section 48(2) of the PDPA states that the

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120 Ibid s. 59.
121 Ibid s. 139.
122 Ibid s. 3(2).
123 Ibid s. 129.
124 Ibid.
125 Greenleaf, 'Limitations of Malaysia's Data Protection Bill' (n 101) 3.
126 Munir, Yasin and Karim (n 69) 224.
127 Personal Data Protection (Transfer of Personal Data to Places Outside Malaysia) Order 2017 (the Proposed Order 2017), (PCP) No. 1/2017. See also Kandiah (n 8) 253.
128 Ibid.
129 Ibid.
130 PDPA (n 57) s. 129(3).

Commissioner shall have the functions to enforce and implement the personal data protection legislation, including the preparation of functional procedures and policies. Under s. 49, the Commissioner shall have the powers to do all things essential, convenient, incidental or consequential to carry on the performance of his functions under PDPA.

Moreover, the Commissioner may exercise numerous other powers, including the issuance of enforcement notice (s.108), refusing of registration for a data user (s. 16(1)(b)), refusing to renew the registration (s. 17(3)), revoking of registration for the data users (s. 18(1)), carrying out inspections on the personal data systems of the data users (s. 101) and publishing reports setting out the recommendations resulting from the inspections users (s. 103).

Similarly, the Commissioner's authorised public officers are also empowered with certain powers, such as conducting investigations of any offence under the PDPA users (s. 112), conducting search and seizure on equipment, systems, electronic data, records and properties of the data user with or without a warrant (ss. 113-114), requiring to produce the books, computers, accounts, electronic data or other records held by data users (s. 121) and arresting any alleged person without a warrant, who has allegedly committed or attempted to commit an offence under the PDPA (s.127).

B *The Shortcomings of the PDPA*

In recent years, enacting data protection law has become one of the major enablers for economic development and upholding a country's image in the world. Malaysia did not waste time to join in the global wave of enacting a comprehensive data protection legislation. There are, however, several shortcomings in the PDPA, particularly, in comparison with the GDPR.

Although the PDPA adopts the traditional approach in defining the term 'personal data', it restricts its application to automated transactions and a few manual transactions only.[131] Moreover, the enactment covers only the personal data in commercial transactions and excludes the public sector. Considering this, Greenleaf remarks, 'within its scope, it will be valuable, but the narrow scope of the Act must always be kept in mind'.[132] The enforcement mechanisms of PDPA are seriously deficient, and unless there exist strict prosecutions of offences, the complainants would become powerless due to the lack of the rights of taking civil litigation.[133]

In another work, Greenleaf portrays the data privacy regime of Malaysia as an inactive one because of several deficits, such as the non-application of the PDPA to the public sectors, the lack of independence of the Commissioner, and falling short of minimum standards in few privacy principles.[134] On a different note, it was further remarked that it would not be easy to achieve the EU adequacy standard for some Asian

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131 Greenleaf, *Asian Data Privacy Laws* (n 71) 322.

132 Ibid.

133 Ibid 334, 335.

134 Graham Greenleaf, 'Asia's Data Privacy Dilemmas 2014–19: National Divergences, Cross-Border Gridlock' (August 30, 2019). (2019) No 4, Revista Uruguaya de Protección de Datos Personales (Revista PDP), August 2019, 49-73, UNSW Law Research Paper No. 19-103, available at SSRN: https://ssrn.com/abstract=3483794) 64.

countries, such as Taiwan due to the lack of data protection authority, Singapore and Malaysia because of the lack of independence of the data protection authority.[135]

Above all, the PDPA is no doubt a robust and comprehensive data protection legislation but in comparison with the latest data privacy standards, especially, the GDPR, it has several shortcomings, which need to be addressed. Taking account of the gaps, necessity and demand of the day, this article finds the following shortcomings of the PDPA.

i. Compared to the GDPR, the material and territorial scope of the PDPA is limited and needs to be expanded. For example, the PDPA covers only the data processing activities which are processed for commercial purposes, and it is not always easy to determine whether a particular transaction is commercial or not.[136] The PDPA also does not have any application against any government office. In addition, unless further processed in Malaysia, the Act does not apply to the data processed outside the border of the country.

ii. Unlike the GDPR, there is no provision prohibiting an automated decision-making in the PDPA. It is generally presumed that the PDPA shall not pass the EC's adequacy test because of several reasons, and importantly due to the lack of provisions against automated decision-making.[137] The automated decision-making is a provision that allows the data subjects the right not to be subjected to decision-making and profiling based on entirely automatic processing, which generates legal implications concerning them and substantially affects them.[138]

iii. It is noteworthy that the objective against automated decision-making is to impose control over automated decision-making because of the dangers it could potentially pose. For instance, persons of a particular area may be denied of having any credit from any financial institution, not because of their bad history of debt, but as the automation suggests so. Arguably, other than human intervention, automation or computers should not decide whether an individual can get any job, loan or credit facilities.[139] It may be relevant to note that the provision against automated decision-making was incorporated in s. 41 of the draft of PDPA. However, there is no explanation why it has been dropped from the PDPA later.[140]

iv. By use of the Internet protocol addresses (IP address), cookies or radio frequency identification (RFID), coupled with some other exclusive identifiers, personal data can be collected through the servers or the personal profile of an individual or his identity may be exposed. Thus, the latest data protection regulations, for example, the GDPR requires that the data subjects not to be traced by such kinds of tools.[141] The PDPA does not contain any provision like this.

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135 Ibid 71.

136 PDPA (n 57) s. 4.

137 Munir and Yasin (n 76) 218.

138 GDPR (n 56) arts 21, 22(1), (4) and numerous recitals.

139 Munir and Yasin (n 76) 218.

140 Ibid.

141 GDPR (n 56) recital 30.

iv. Although the PDPA requires the data subject's consent as a lawful basis for data processing, it does not explicitly explain what is meant by consent, and how can consent be taken. Since it is one of the lawful bases for the processing of personal data, consent must be freely given. For consent to be free, it must not be caused by coercion, undue influence, fraud, misrepresentation or mistake, as stated in the Contracts Act 1950. Unlike the PDPA, Article 4 (11) of the GDPR, on the contrary, explains:

> 'Consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

v. The GDPR obliges the controller and processor to appoint a data protection officer (DPO),[142] specially to handle the following cases, (1) the processing of personal data conducted by a public body other than the courts serving in a judicial capacity and (2) the processing of a large-scale personal data which, by their nature, scope and purposes, requires continuous and systematic monitoring.[143]
Under the GDPR, the DPO performs numerous other works, such as advising the controller, or processor, and employees regarding the processing activities, monitoring the compliance of the Regulation, giving advice on the data protection impact assessment and monitoring its performance, cooperating with the supervisory body and performing as a connecting link for the supervisory body on issues relating to processing, prior consultation.[144]
Thus, it is apparent that the role of a DPO is vitally important, especially for the processing of personal data by a public authority other than the court, and the processing of large-scale personal data that requires continuous and systematic monitoring. The DPO also plays the role of an intermediary as between the data controller, processor and supervisory authority. Notably, there is no provision requiring the appointment of a DPO in the PDPA.

vi. The GDPR requires data controllers to report to the supervisory authority within 72 hours about any data breach incident. The controllers are also bound to inform the data subjects about such breach which is likely to affect their interests significantly.[145]
In PDPA, there is no requirement for data controllers to inform either the supervising authority or the data subjects regarding any occurrence of a breach.

vii Under the GDPR, the data subjects have the right to obtain their personal data which was provided to a controller in a structured and machine-readable format. Moreover, the data subjects can transfer those data to another controller without any interruption from the first controller. This is called the right to data portability, which is genuinely a novel inclusion to the GDPR compared to the previous Directive 95/46/EC. To

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142 Ibid art 37(1).
143 Ibid art 37(1)(a)(b).
144 Ibid art 39.
145 Ibid art 33(1) and recital 85.

exercise this right, certain conditions must be satisfied - such as the processing shall have to be made with the consent of the data subjects, done by automated means, and the exercise of this right does not adversely affect the freedoms and rights of others.[146] The PDPA does not provide for any right like this at all.

viii. The GDPR imposes a revenue-based fine, the minimum amount of which is €10 million or 2% of annual global turnover,[147] and the maximum is up to €20 million or 4% of annual worldwide turnover, whichever is higher.[148] Additionally, it allows the filing of legal suits for the capture of profits, injunctions and the perpetual prohibition on data processing.[149] On the contrary, the PDPA incorporates both fines and imprisonment. Under the PDPA, the minimum sanctions include a fine not exceeding fifty thousand ringgit or imprisonment for a term not exceeding six months or both.[150] The maximum sanctions include a fine not exceeding five hundred thousand ringgit or imprisonment for a term not exceeding three years or both.[151] Thus, it has become explicit that to compare with the GDPR, the PDPA imposes fewer sanctions for data breaches. The high sanctions have a great utility to compel the data processing companies regarding the compliance of the legal postulates. For example, due to facing the highest GDPR sanctions, the top US giant businesses, such as Google, Facebook, Twitter, Amazon, Microsoft and Apple have been bound to change their privacy policy in compliance with the GDPR.[152] It is assumed that considering the potential of higher sanctions, the Personal Data Protection Act 2012 of Singapore imposes a maximum of $1 million for non-compliance with the Act.[153]

ix. Unlike the previous Directive 95/46/EC, the GDPR introduced purely a new idea, i.e., privacy by design and by default to ensure better protection for privacy and personal data of individuals.[154] It can be argued that privacy can be protected not only by legal norms but also various other techniques, and privacy by design and by default is one of them. This regulatory concept regards privacy as one of the key elements in the design, maintenance and operation of the information systems that belong to every institution.[155] This technique also ensures that by default personal data should not remain accessible to an unspecified number of natural persons without any human interference.[156] Nevertheless, the PDPA does not contain such an innovative mechanism.

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146 Ibid art 20.

147 Ibid arts 8, 11, 25 to 39; 41(4), 42 and 43.

148 Ibid arts 5, 6, 7, 9; 12 to 22; 44, 49 and 58(2).

149 Ibid arts 83, 84.

150 PDPA (n 57) s. 113(7).

151 Ibid ss 16(4), 18(4) and 130(7).

152 Matt Burgess, 'How Apple, Facebook and Google Are Changing to Comply with GDPR' (24 May 2018) *Wired* <https://www.wired.co.uk/article/gdpr-facebook-google-analytics-apple-amazon-twitter>.

153 *Personal Data Protection Act 2012* (No. 26 of 2012) (Singapore) s. 29(1)(d).

154 GDPR (n 56) art 25.

155 AB Makulilo, 'The GDPR Implications for Data Protection and Privacy Protection in Africa' (2017) 1 *International Journal of Data Protection Officer, Privacy Officer & Privacy Counsel* 15.

156 GDPR (n 56) art 25.

x. Pseudonymisation is another new technique regarding data processing under the GDPR, which ensures the processing of personal data without connecting them to any data subject.[157] The GDPR incorporates this tool to ensure better protection of the personal data of individuals. Under this technique, the data users can process personal data without identifying the data subjects.[158] Therefore, this new tool benefits both the data subjects and the data users. Again, the PDPA does not contain any such mechanism.

It is pertinent to mention that the Malaysian authorities has taken the shortcomings of the PDPA seriously as evinced by the media news. In early November 2019, the former Minister of Communications and Multimedia informed the media that the laws on internet regulation and data protection are under study.[159] In the words of the Minister,

> We had identified there are gaps within the Act and its position when compared to personal data protection legislation in ASEAN member nations, Japan, South Korea and also the European Union's (EU) General Data Protection Regulation (GDPR).[160]

Later, the Ministry of Communications and Multimedia of Malaysia identified several gaps in the PDPA, mostly identical to the above-mentioned shortcomings. Accordingly, the said Ministry issued a document titled 'Public Consultation Paper No. 01/2020 – Review of Personal Data Protection Act 2010' giving options to the public to give their comments on 22 issues[161] encompassing the PDPA.[162]

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157 Ibid art 4(5).

158 Ibid arts 4(5) and 32.

159 Ida Lim, 'Gobind: Laws on Internet Regulation, Personal Data Protection under Study', *Malaymail* (online at 7 November 2019) <https://www.malaymail.com/news/malaysia/2019/10/06/gobind-laws-on-internet-regulation-personal-data-protection-under-study/1797635>.

160 'Minister: Govt to Consult Public on Amendments to Personal Data Protection Law', *Malaymail,* (online at 12 February 2020) <https://www.malaymail.com/news/malaysia/2020/02/12/minister-govt-to-consult-public-on-amendments-to-personal-data-protection-l/1836984>.

161 Comments from the public were solicited for the following shortcomings of the PDPA: (1) direct obligation of the data processor, (2) right to data portability, (3) appointment of DPO, (4) reporting about data breach incidents, (5) clarity in the consent of data subjects, (6) transfer of personal data outside Malaysia, (7) privacy by design, (8) establishing Do Not Call Registry (DNCR), (9) disclosure of the list of the third parties who may use the personal data, (10) civil litigation against the data user, (11) privacy concerns arising from data collection endpoints, (12) application of PDPA over public authorities, (13) cross border data transfer, (14) exemption of business contact information, (15) disclosure of personal data to public regulatory bodies, (16) classification of data users, (17) voluntary registration, (18) application of PDPA on non-commercial processing, (19) application of PDPA on foreign controllers which monitor personal data of the Malaysian citizens, (20) ensuring unsubscribe options from online services, (21) first direct marketing call and (22) processing of personal data in cloud computing.

162 Ministry of Communications and Multimedia, *Review of Personal Data Protection Act 2010* (Public Consultation Paper, No 01/2020, February 2020).

V STRENGTHENING THE PDPA: THE GDPR WAY

To sketch a model of a data privacy legislation for a country with no specific laws or attempting to amend the existing privacy regime is not easy, as there is neither any consensus nor convention indicating the standard for data privacy legislation. For decades, among all data protection models,[163] the EU-based comprehensive model and the US-based sectoral and self-regulatory model are most popular around the world. Although earlier, along with the USA, many countries favoured the sectoral approach to data protection,[164] the scenario has been changed, especially after the introduction of the GDPR on 25 May 2018.

The GDPR now appears to be the gold standard for the global data protection regulations being facilitated by its omnibus legal substance, extensive extraterritorial scope, and together with the influential market powers of the EU.[165] This is evident by the increasing trend of countries enacting or amending relevant domestic legislation across the globe in harmony with the GDPR.

For example, many countries in Europe other than the EU Member States, such as Iceland, Liechtenstein, Norway and Switzerland have changed their data protection laws in line with the GDPR.[166] Besides, numerous other countries, including Africa, Asia, the Caribbean and Latin America are either enacting new data privacy law or amending the previous laws in harmony with the GDPR.[167] Lawyers working with *Ius Laboris* show that there at least 24 countries outside the EU, in which there exist GDPR-related legal developments, verdicts or harmonizing trends.[168]

Thus, the GDPR emerges as one of the most influential data privacy regimes across the globe. In the words of Schwartz, the GDPR appears as the building blocks of the EU and is widely considered as the data privacy law, not only for the EU but also for the entire

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163 Colin Bennett characterizes four principal models of privacy management - (1) licensing model (Sweden and Denmark, for example, adopted this model), (2) data protection commissioner model (adopting nations, e.g., Canada and New Zealand), (3) registration model (the UK adopts this model while enacting privacy legislation), and (4) self-help and voluntary compliance model (the US adopted this model). Banisar and Davis categorize national privacy frameworks into three central models, e.g., comprehensive model; sectoral model, and self-regulatory model. There can be another two models as well, for example, the coregulatory model and privacy technologies model. See generally, Colin Bennett, 'The Governance of Privacy: New Zealand in Global Perspective', (Presentation at Privacy Awareness Week, Wellington, New Zealand, 5 May 2010) <https://www.colinbennett.ca/Presentations/WellingtonMay2010.pdf>; David Banisar and Simon G Davies, 'Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments' (1999) 18(1) *John Marshall Journal of Computer & Information Law* 1.

164 IJ Lloyd, *Information Technology Law* (Oxford University Press, 2017) 26.

165 Md Toriqul Islam and Mohammad Ershadul Karim, 'Extraterritorial Application of the EU General Data Protection Regulation: An International Law Perspective' (2020) 28(2) *IIUM Law Journal* 531.

166 Nymity, 'Happy Birthday GDPR. At One Year On, What Have We Learned?' (Web Page) <https://www.lexology.com/library/detail.aspx?g=649cd552-7853-4abc-81c6-37af2c8dd415>.

167 Graham Greenleaf and B Cottier, 'Data Privacy Laws and Bills: Growth in Africa, GDPR Influence' (2018) 152 *Privacy Laws & Business International Report* 5.

168 Countries with GDPR-creep legal developments concerning data protection include – Argentina, Bahrain, China, Egypt, Hong Kong, Iraq, Jordan, Kazakhstan, Kuwait, Mexico, Norway, Oman, Peru, Qatar, Russia, Saudi Arabia, United Arab Emirates, United States of America and the United Kingdom. See generally, 'The Impact of the GDPR Outside the EU' (Web Page) <https://theword.iuslaboris.com/hrlaw/whats-new/the-impact-of-the-gdpr-outside-the-eu>.

world.[169] He further remarks that the EU has appeared as a global privacy cop, working unilaterally and applying de facto influence on other States through its market power.[170]

Therefore, this article argues that the Malaysian data protection regime may also be strengthened in light of the GDPR. However, this background may raise several questions encompassing the GDPR, such as what does the GDPR mean? What are its implications on global data protection regulations? How relevant is the GDPR to the PDPA? In the following part, this article discusses the answers to those questions.

A *Introduction to the GDPR*

Operating as a single market of 27 countries, the EU emerged as a major trading partner for many countries of the world. Together with the US and China, the EU is one of the three biggest global actors in worldwide trade.[171] Consequently, the norms, rules and policies of the EU affect the whole world, including Malaysia. The GDPR refers to an EU regulation on the protection of privacy and personal data in the EU and the EEA. The primary objectives of the GDPR are to strengthen the data protection rights of individuals and to develop business opportunities promoting the free flow of data in the EU single market.[172]

The development of the GDPR started from January 2012 with a proposal of the European Commission that was approved on 27 April 2016. Finally, it came into force on 25 May 2018 followed by a long-term dialogue.[173] It is regarded as one of the most comprehensive and far-reaching pieces of Regulation ever enacted as it addresses all possible challenges that people might face regarding their personal data in the digital age. It supersedes the preceding EU Data Directive 95/46/EC offering several changes in almost everything from technology to advertising, and medicine to banking.[174] The long arm of the GDPR reaches to any entity outside the EU dealing with the personal data of EU's inhabitants by offering goods and services or monitoring their behaviours, and the non-compliance thereof may lead to severe consequences.

In the words of Kuner et al., the GDPR shall have global implications by limiting the transnational data transfers, governing the conduct of numerous non-EU institutions, and affecting data protection laws across the world.[175] This statement has become true as

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169 Paul M Schwartz, 'Global Data Privacy: The EU Way' (2019) 94 *New York University Law Review* 1.

170 Ibid.

171 European Union, 'The Economy' (Web Page) <https://europa.eu/european-union/about-eu/figures/economy_en>.

172 European Council, 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation)' (2012) Brussels: European Commission <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>.

173 Gonçalo Almeida Teixeira, Miguel Mira da Silva and Ruben Pereira, 'The Critical Success Factors of GDPR Implementation: A Systematic Literature Review' (2019) *Digital Policy, Regulation and Governance* 404.

174 Alex Hern, 'What Is GDPR and How will it Affect You?' *The Guardian* (Online on 21 May 2018) <https://www.theguardian.com/technology/2018/may/21/what-is-gdpr-and-how-will-it-affect-you>.

175 Christopher Kuner et al, 'The GDPR as a Chance to Break Down Borders' (2017) 7(4) *International Data Privacy Law* 231.

the GDPR has emerged as a clarion call for a unique global data privacy gold standard.[176] This is reflected in the following words of Ursula Gertrud von der Leyen, the President of the European Commission- 'with the GDPR, the EU has set the pattern for the entire world'.[177]

B *Implications of the GDPR*

The recent Report of the UN Special Rapporteur on 'the right to privacy' reveals that the influence of the GDPR is exerted not only on the local legislative measures or extraterritorial application but also for the voluntary compliance of big companies outside the EU, like Microsoft.[178] In mid-2019, top US lawmakers, lobbyists, and business leaders including Mark Zuckerberg (CEO of Facebook), Tim Cook (CEO of Apple) and Sundar Pichai (CEO of Google) called for enacting GDPR-like comprehensive regulation in the USA.[179] Greenleaf remarks, this 'GDPR-creep' is likely to be as crucial as the legislative adoption.[180]

Rustad and Koenig argue that the GDPR has the potential not only to close data privacy wars between two sides of the Atlantic, but also to emerge as the gold standard for global data privacy laws.[181] They also admit the US' roles in global data protection standards. To them, the GDPR imports numerous long-standing US principles of tort into the EU data privacy law, such as wealth-based sentence, deterrence-based fines, collective redress, and empowerment of the data subjects to proceed for public enforcement.[182] The net impact of the GDPR is two-fold – (1) transatlantic privacy convergence and (2) rapid evolution as the global data privacy standard.[183] To support their viewpoints, they mention that countries across the globe, many US States, and most US-based processors introduce policies in conformity with the GDPR.[184] Moreover, based on their survey on global data privacy standards, they also show that the African data privacy standard is usually undeveloped, whereas the approach to the data privacy legislation in Asian countries are mostly inclined to the GDPR.[185] The result of their survey reveals that the

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176 Giovanni Buttarelli, 'The EU GDPR as a Clarion Call for a New Global Digital Gold Standard' (2016) 6(2) *International Data Privacy Law* 77.

177 European Commission, 'Keynote Speech by President Von Der Leyen at the World Economic Forum' (Web Page) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_102>.

178 Joseph A Cannataci, *Report of the Special Rapporteur on the Right to Privacy to the General Assembly of the United Nations,* Advanced Unedited Report, A/73/45712 (17 October 2018).

179 Elizabeth Schulze, 'The US Wants to Copy Europe's Strict Data Privacy Law – but Only Some of It', *CNBC* (online at 23 May 2019) <https://www.cnbc.com/2019/05/23/gdpr-one-year-on-ceos-politicians-push-for-us-federal-privacy-law.html>.

180 Graham Greenleaf, 'Global Convergence of Data Privacy Standards and Laws: Speaking Notes for the European Commission Events on the Launch of the General Data Protection Regulation (GDPR) in Brussels & New Delhi' (2018) *UNSW Law Research Paper*, No 18-56, 3.

181 Michael L Rustad, and Thomas H Koenig, 'Towards a Global Data Privacy Standard' (2018) 71 *Florida Law Review* 366.

182 Ibid 365.

183 Ibid 365, 366.

184 Ibid 366.

185 Ibid 449.

emergence of a 'GDPR-creep' privacy standard is found not only in the 'First World' but also in the 'Second World' and the 'Third World' countries.[186]

C *Relevance of the GDPR to the Malaysian Data Protection Regime*

Generally, the GDPR does not apply to the countries outside the EU unless they process the personal data of the EU residents being within or outside the EU. Therefore, like other non-EU States, Malaysians are not directly bound to comply with the provisions of the GDPR. This backdrop may raise the question – how can the GDPR be relevant for the Malaysian data protection regime?

Generally, the GDPR applies against any establishment in the EU, which processes the personal data of EU individuals regardless of the place of such processing.[187] Further, the GDPR applies against foreign companies, which process personal data of EU residents offering goods or services to them and monitor their behaviour.[188] Finally, it covers data processing activities of any controller or processor having no establishment in the EU but in other places where laws of EU Member States apply by way of public international law.[189] Thus, any entity outside the EU, including Malaysia, may come under the grip of the GDPR if it processes the personal data of the EU residents by offering goods and services or monitor their behaviour.

Furthermore, the GDPR may have a considerable impact on Malaysian business, legal, and policy affairs, as the EU is one of the largest trading partners of Malaysia.[190] In terms of the GDP, Malaysia is the 3rd-biggest economy in the ASEAN and the 3rd-major business partner of the EU in the region.[191] After China and Singapore, the EU is Malaysia's 3rd-major business partner sharing a market of 11.6% of its total trade.[192] Besides, Malaysia became the EU's 23rd global biggest business partner in goods, and accordingly, shared an amount of € 39.8 billion in 2018.[193] Therefore, the implications of GDPR cannot be ignored in the context of Malaysia, but rather the GDPR may play a major role in Malaysian policies, politics and businesses.

D *Global Acceptance and Diffusion of the GDPR*

Despite the above, many authors try to search for the reasons for the worldwide acceptance and diffusion of the GDPR. Working with global acceptance and diffusion of the EU law, Paul M. Schwartz, Anu Bradford, Jack Goldsmith, and Tim Wu have shown that the EU law, particularly the GDPR, has received an unprecedented extension due to three

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186 Ibid 365, 366.
187 GDPR (n 56) art 3(1).
188 Ibid art 3(2).
189 Ibid art 3(3).
190 Munir and Yasin (n 76) 213.
191 'Countries and Regions' *European Commission* (Web Page) <https://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/>.
192 Ibid.
193 Ibid.

factors, such as: (1) the omnibus legal substance,[194] (2) the 'Brussels Effect',[195] and (3) the influential market power.[196] Moreover, the GDPR has been recognised and diffused across the globe by dint of the adequacy decision of the European Commission.

To explain the omnibus legal substance, Paul M. Schwartz remarks that due to the contextual relevance and highness, the EU initiatives toward data protection has always been in the legal talk of the world's leading institutions and individuals. This eventually transplants the GDPR into other privacy protection mechanisms in the world.[197] Businesses' *de facto* adaptation toward EU law lays the foundation for lawmakers' *de jure* enforcement of these laws, which Bradford calls the 'de jure Brussels Effect'.[198] To explain the influential market power, Goldsmith and Wu remarks that the EU's privacy laws are the fourth types of global legislation - not any treaty, like cybercrime convention; not implemented through the architecture of the internet, like the ICANN; not a WTO-regulated trade dispute, like online gambling, but rather, global legislation arising out of the EU's immense market power and it's tenacity for its resident's privacy.[199]

E *The Adequacy Decision*

The GDPR further expands its long arm to countries beyond the EEA area through the adequacy decision. The adequacy decision is the decision of the European Commission as conferred by Article 45 of the GDPR, by which it can evaluate whether a country outside the EEA area provides a similar degree of protection for the personal data of individuals through the domestic law and international commitments.[200] In recent years, it has become a trend across the globe to have adequacy status from the EU. Consequently, many countries, mostly the global trading partners of the EU are either enacting or amending the existing data privacy laws in conformity with the GDPR to obtain the 'adequacy status' from the EU.

Currently, Andorra, Argentina, Guernsey, Isle of Man, Israel, Japan, Jersey, New Zealand, Switzerland, and Uruguay have obtained the complete adequacy decision, and partial findings of adequacy were granted to Canada and the USA.[201] Recently, the EC is working on the adequacy decision on South Korea.[202] Malaysia is neither on the list nor under any consideration.[203]

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194 Schwartz (n 169) 4.

195 Anu Bradford, 'The Brussels Effect' (2012) 107 *Northwestern University Law Review* 1.

196 Tim Wu and Jack Goldsmith, *Who Controls the Internet? Illusions of a Borderless World* (New York: Oxford University Press 2006).

197 Schwartz (n 169) 4.

198 Bradford (n 195) 8.

199 Wu and Goldsmith (n 196) 176.

200 European Commission, 'Adequacy Decisions' (Web Page) <https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy-decisions_en>.

201 Ibid.

202 ICO, 'International Transfers' (Web Page) <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers#adequacy-decision>.

203 Md Toriqul Islam and Mohammad Ershadul Karim, 'A Brief Historical Account of Global Data Privacy Regulations and the Lessons for Malaysia' (2019) 28(2) *SEJARAH: Journal of the Department of History* 179.

However, there remains an obvious question as to whether there is any way of processing or transferring data from the EU to Malaysia and vice-versa when Malaysia does not fulfil the adequacy requirement. The personal data can still be transferred to Malaysia subject to the fulfilment of appropriate safeguards. Article 46 of the GDPR, for example, renders that in the absence of an adequacy decision under Article 45(3), personal data may also be transferred to the third countries or international institutions only when the controllers or processors have ensured three things for the data subjects - (a) appropriate safeguards, (b) enforceable data subject rights and (c) effective legal remedies.

At the time of enactment of the PDPA, it was generally expected that the PDPA would promote the free flow of data in trade and other joint global initiatives. Given that if Malaysia cannot satisfy the adequacy test, and both the EU and Malaysian businesses are to depend on further contracts for data transfer, then the PDPA is said to be a missed opportunity.[204]

VI CONCLUSION

The existing literature reveals that over time, numerous rights have been recognised across the globe as a natural outcome in major socio-economic and political reforms. Privacy is comparatively a new addition to those rights. It is now settled that the infringement of privacy or a data breach cannot go beyond any challenge. Thus, privacy and data breaches are addressed by multiple legal and regulatory mechanisms. In particular, specific regulations or laws have been made around the world in response to the issues encompassing privacy and data protection. Malaysia has not been lagging in this respect, but rather has joined the elite club of countries with comprehensive data protection laws through the enactment of the PDPA.

Whilst the PDPA is certainly a robust data protection legislation, in comparison with the GDPR, it has shortcomings that need to be addressed. In this article, we have discussed some of the shortcomings and loopholes of the PDPA. In particular, when amending the PDPA, the Malaysian legislature may consider extending the definition of 'personal data' to cover non-commercial transactions. Other issues that may be considered include - widening the scope of the PDPA to cover the government activities, expanding the territorial scope to include both the national and international processors and controllers, adding an explanation to the meaning of 'consent', incorporating provisions for the appointment of DPOs to monitor the data subjects' rights, and inserting some other provisions, such as data breach notification, right to be forgotten and data portability. Further, the Malaysian legislature may also consider revising the provisions of punishment in the light of global best practices and add the pseudonymisation technique for benefitting both the data subjects and the data users.

The PDPA may also incorporate provisions enabling the data subjects to file civil suits for the protection of his or her personal data. Many data protection regimes, such as Singapore,[205] Switzerland,[206] USA, UAE, Portugal, South Africa, Malta, Macau, Chile,

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[204] Munir and Yasin (n 76) 224.

[205] *Personal Data Protection Act 2012* (n 153) (Singapore) s. 32.

[206] *Federal Act on Data Protection 1992* (235.1) (Switzerland) art 15.

Lesotho, Cape Verde, Bahrain and Uzbekistan incorporate provisions for filing civil suits in regarding the protection of personal data.[207] Moreover, there should be provisions in the PDPA to make data protection authorities answerable to the Federal Parliament of Malaysia. This article concludes by suggesting to the Malaysian legislature to consider the GDPR as a guiding star when it takes steps to amend the PDPA for the purpose of strengthening the data protection regime in Malaysia.

[207] DLA Piper (n 95).

CAN THE CONCEPT OF 'JUSTICE' BE EMPLOYED IN NORTH-SOUTH TRADE TO SERVE THE INTERESTS OF THE SOUTH IN WAYS THAT SUSTAINABLE DEVELOPMENT CANNOT?

Hossain Mohammad Reza*

Abstract

This paper examines the issue of how trade, environment and sustainable development has impinged on aspirations of the global South. The paper finds that the existing trade-related environmental measures, particularly several rules and principles of *GATT* and WTO agreements, such as the *GATT* Articles XX(b) and (g), and the WTO covered *Agreement on the Application of Sanitary and Phytosanitary Measures* are used by the Northern countries without considering the interests, concerns, abilities and the socio-economic conditions of developing countries. Against this backdrop, it is argued that any unfair and unbalanced trading system, without considering the capacity constraints of the global South is bound to perpetuate poverty and thus will hamper the advancement of developing countries. In a bid to bring a pertinent solution congruent with the interests of the global South this paper argues for the adoption of concepts of distributive, procedural and corrective justice in the global trade regime.

Keywords: sustainable development, GATT, WTO, global trade.

I INTRODUCTION

This paper examines the issue of how trade, environment and sustainable development has impinged on aspirations of the global South.[1] The nexus between trade and the environment is meaningfully considered in the Brundtland Commission Report, *Our*

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1 In this paper, the terms 'North' and 'South' have been used several times. The term 'North' indicates wealthy and industrialised countries such as Australia, the United States of America, Canada, New Zealand and the member states of the European Union. This author has also used the term 'developed country' or 'rich country' instead of the term 'North'. On the other hand, the term 'South' is used to mean the less prosperous countries in Africa, Asia and Latin America. This author has also used the terms 'developing country' or 'poor country' in lieu of the term 'South'. Importantly, countries of 'the South' share some common characteristics. Southern countries experienced Northern political and economic domination that triggered these nations to work as a negotiating bloc (The Groups of 77 and China). They are hugely marginalised, disadvantaged and economically weaker. See Frantz Fanon, *The Wretched of the Earth* (Constance Farrington Trans, Grove Weidenfeld, 1963) 9-10 [trans of: *Les damnés de la terre* (first published 1961) and Carmen G. Gonzelez, 'Environmental Justice, Human Rights, and the Global South' (2015) (13), *Santa Clara J. Int'l L* 151.

Common Future. The report provides the oft-cited definition of sustainable development as 'development that meets the needs of present generations without compromising the ability of future generations to meet their own needs'.[2] The Brundtland Commission, for the first time, wanted to reconcile environmental protection, economic growth and social equity in a single concept of sustainable development.[3] This reconciliation attempt is explicit when the report declares '[w]hat is needed now is a new era of economic growth — growth that is forceful and at the same time socially and environmentally sustainable'.[4] Following the report, the United Nations Earth Summit manifested a global consensus that 'it is no longer possible to treat ecology and [the] international political economy as separate spheres'.[5]

However, the interface between trade and the environment has given rise to acute tensions between the international trade regime, which seeks the general elimination of trade barriers, and the international environmental regime, which imposes barriers to trade products produced in an environmentally harmful way.[6] The relationship between trade and the environment has also generated anxiety for the nations of the global South that believe the trade and environment nexus is hampering their ability to pursue economic development and consequently**,** they are not able to reap the full benefits from international trade.[7]

International trade is regulated under the World Trade Organisation (WTO)[8] regime.[9] The successive rounds of *General Agreement on Tariffs and Trade* (*GATT*)[10] and the establishment of the WTO have created enormous opportunities for developing countries to access the Northern market more easily.[11] The Uruguay Round and Doha Ministerial Mandate[12] also stressed the enhancement of market access by bringing a balance between

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2 World Commission on Environment and Development (WCED), *'Our Common Future*' (Oxford University Press, 1987) 5 (*Our Common Future*).

3 Sam Adelman, 'The Sustainable Development Goals, Anthropocentrism and Neoliberalism' in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Pub, 2018) 15, 24.

4 Ibid 23.

5 Andrew Hurrell and Benedict Kingsbury, 'The International Politics of the Environment: An Introduction' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment: Actors, Interests, and Institutions* (Oxford University Press, 1992) 3.

6 See generally Alice Palmer, Beatrice Chaytor and Jacob Werksman, 'Interactions between the World Trade Organisation and International Environmental Regimes' in Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance : Synergy and Conflict among International and EU Policies* (MIT, 2006) 181, 181.

7 Bernhardt Thomas, 'North-South Imbalances in the International Trade Regime: Why the WTO Does Not Benefit Developing Countries as Much as It Could' (2014) (12) *Consilience: The Journal of Sustainable Development* 123, 123.

8 *Marrakesh Agreement Establishing the World Trade Organisation,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

9 Oberthür and Gehring (n 6).

10 *General Agreement on Tariffs and Trade,* opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (*'GATT'*).

11 Murali Kallummal, Aditi Gupta and Poornima Varma, 'Exports of Agricultural Products from South-Asia and Impact of SPS Measures: A Case Study of European Rapid Alert System for Food and Feed (RASFF)' (2013) 8(2) *Journal of Economic Policy & Research* 41, 41.

12 *Doha Ministerial Declaration*, WTO Doc WT/MIN (01)/DEC/1, [13]–[14], [16], [27]–[28].

the reduction of tariffs and the Non-tariff Barriers (NTBs).[13] However, the establishment of a trade-environment nexus in international trade, through the emergence of the concept of sustainable development, has created a new concern for the South. Several rules and principles of *GATT* and WTO agreements, such as the *GATT* Articles XX(b) and (g), the WTO covered *Agreement on the Application the Sanitary and Phytosanitary Measures* (*SPS Agreement*)[14] and the *Agreement on Technical Barriers to Trade*[15] have become the centre of concerns of the global South.[16] It is alleged that by virtue of the *GATT* and WTO trading system, the Northern countries, in the name of environmental protection, are imposing lofty environmental standards on developing countries' products such as labelling requirements, compositional and quality standards and food safety regulations.[17] Developing countries do not have sophisticated environmentally friendly technologies to implement the Northern standards. Resultantly, the Northern countries impose trade barriers when developing countries fail to achieve their imposed standards.[18] Developing countries argue that such trade barriers frustrate developing countries' products from being accessed in the Northern market.[19] These environmental Non-tariff Barriers (NTBs) as a trade policy creates a trade imbalance favouring developed countries, given their technological capabilities. This unexpected trade imbalance results in the problem of the balance payment in Southern economies and works as a substantial impediment in achieving their sustainable development.[20]

Against this backdrop, this paper finds that the use of the *GATT*/WTO article XX and the SPS measures by developed countries, without any global coordination, raises the question of equity and fairness in the North-South trade. It is frequently argued by the South that the existing trade-related environmental measures are used by the Northern countries without considering the interests, concerns, abilities and socio-economic conditions of developing countries.[21] The paper argues that any unfair and unbalanced trading system which does not consider the capacity constraints of the global South is bound to perpetuate poverty and thus hamper the development of developing nations. Such an unfairness in the global trade will eventually frustrate the objectives of the WTO. This paper, in a bid to bring a pertinent solution thereto, conceives of the incorporation

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13 Sungjoon Co, 'Doha's Development' (2007) 25 *Berkeley Journal of International Law* 165, 170.

14 *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on the Application of Sanitary and Phytosanitary Measures'*) [496] ('*SPS Agreement'*).

15 *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('Agreement on Technical Barriers to Trade') arts 2.1, 2.2 ('*TBT Agreement'*).

16 Spencer Henson and Rupert Loader, 'Impact of Sanitary and Phytosanitary Standards on Developing Countries and the Role of the SPS Agreement' (1999) 15(3) *Agribusiness* 355, 357–9.

17 Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence: Pressing Issues for Developing Countries [2005] (Issue 2) *Bond Law Review*, 21 ('Trade-Environment Nexus in GATT Jurisprudence').

18 See generally ibid 20, 21.

19 Emeka Adibe, 'World Trade Organisation (WTO): Trade Rules/Agreements and Developing Countries' [2013] *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 121, 134.

20 Kallummal, Gupta and Varma (n 11) 41.

21 Shawkat Alam, 'Free trade and Sustainable Development Challenges Ahead' in Shawkat Alam (ed) *Sustainable Development and Free Trade Institutional Approaches* (Routledge, 2008) 205, 211.

of distributive, procedural and corrective justice in the global trade regime as a viable model for ensuring sustainable development.

The paper is organised into five parts in which Part II explores how trade and environment are inseparably embedded into the notion of sustainable development. Part III is dedicated to the textual rules that are invoked frequently in defence of environmental regulations, focusing on the *GATT* Article XX(b) and (g), the Article XX chapeau and the *SPS Agreement*. This part will demonstrate that the impact of Article XX and SPS measures, when applied vis-à-vis developing countries, can impede the development and trade of these countries. Part IV defines distributive, procedural and corrective justice taking into account the debates in the trade and environment discourse. This part discusses how distributive, procedural and corrective justice can offer a solution to the global trade and how the interests of the global South would be met. Part V sums up the analyses and draws a conclusion.

II TRADE-ENVIRONMENT NEXUS IN SUSTAINABLE DEVELOPMENT

The most ubiquitous, indispensable and contested concept of our time is 'sustainable development'.[22] The root of the concept goes back to 1971 when the Founex Report, 'Development and Environment', was released by a panel of experts convened by the Secretary-General of the United Nations Conference on the Human Environment.[23] With an eye on the Stockholm Conference, 1972, the report aimed to establish the relationship between economic growth, environmental protection and poverty.[24] Emerging from this conference, the Stockholm Declaration on the Human Environment emphasised that economic development and environmental protection are compatible and mutually reinforcing goals.[25]

This conceptual change in developmental and environmental thinking was clearly resisted by many developing countries of the global South.[26] They viewed environmental pollution as a result of industrialisation and therefore it should be a concern for the developed states only.[27] However, the resistance was proved to be futile.[28] The term 'sustainable development' was first publicly visible in 1980 when the World Conservation Strategy (WCS)[29] defined it as 'the integration of conservation and development to ensure modifications to the planet indeed to secure the survival and well-being of all

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22 Carlos J Castro, 'Sustainable Development: Mainstream and Critical Perspectives' (2004) 17(2) *Organisation and Environment* 195, 195 ('Sustainable Development').

23 Ulrich Beyerlin and Thilo Maruhn, *International Environmental Law* (Hart Publishing, 2011) 73.

24 Daniel Barstow Magraw and Lisa D. Hawke, 'Sustainable Development' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 614.

25 Beyerlin and Marauhn (n 23) 73.

26 Ibid 9.

27 Ibid.

28 See RP Anand, 'Development and Environment: The Case of the Developing Countries' (1980) *20 Indian Journal of International Law* 1, 10.

29 World Conservation Strategy (WCS) is a document prepared by International Union for Conservation of Nature and Natural Resources (IUCN).

people.'[30] This concept was refined and put on the international map in 1987 by the World Commission on Environment and Development (WECD or the Brundtland Commission). Its report, *Our Common Future*,[31] proposed the following concept of 'sustainable development':

> Humanity has the ability to make development sustainable – to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs. … The Commission believes that widespread poverty is no longer inevitable. Poverty is not only an evil in itself, but sustainable development requires meeting the basic needs of all and extending to all the opportunity to fulfil their aspirations for a better life. A world in which poverty is endemic will always be prone to ecological and other catastrophes.[32]

The report further says, 'If large parts of developing world are to avert economic, social, and environmental catastrophes, it is essential that global economic growth be revitalised.'[33]

According to the Commission, reduction of poverty will reduce environmental degradation and developing countries need to pursue economic growth to reduce poverty. Achieving economic growth needs freer markets.[34] The report also says, in addition to freer markets, developed countries need to transfer knowledge, technology and capital to the underdeveloped countries which actually indicates that businesses 'will continue accumulating capital by selling expertise, capital, and technology to the countries of the periphery'.[35] The 1992 'Earth Summit', the UN conference on Environment and Development (UNCED), turned the notion of sustainable development into international prominence.[36] Though the summit did not produce any new ideas to deal with the environmental crisis, the summit carried more weight as the global leaders from 172 countries officially endorsed sustainable development as the development paradigm.[37] In institutional respect, Agenda 21 promoted sustainable development by establishing the UN Commission on Sustainable Development (CSD).[38] Since UNCED, a number of international instruments have included the concept of sustainable development.[39] The outcomes of UNCED also influenced the drafting of the preamble to the WTO.

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30 International Union for Conservation of Nature and Natural Resources (currently World Conservation Union) (IUCN), *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (Gland, Switzerland: IUCN, 1980).

31 *Our Common Future* (n 2) 43-46.

32 Ibid 8.

33 Ibid 89.

34 Castro (n 22) 197.

35 Ibid.

36 See Marc Pallemaerts, 'International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process' (1995) 15 *Journal of Law and Commerce* 623, 630.

37 Bodansky, Brunnée and Hey (n 24) 615.

38 Christopher J. Koroneos and Dimitri Rokos, 'Sustainable and Integrated Development—A Critical Analysis' (2012) 4 *Sustainability* 141, 142.

39 See generally John Byrne and Leigh Glover, 'A Common Future or Towards a Future Commons: Globalization and Sustainable Development since UNCED' (2002) 3(1) *International Review for Environmental Strategies* 5, 5 ('A Common Future or Towards a Future Commons').

Despite sustained resistance from developing countries, the environment has entered the WTO through the preambular statement of the WTO.[40] The full reading of the preamble demonstrates that sustainable development in the WTO is not only linked to the optimal use of natural resources but also to the implementation of international trade.[41] However, the inclusion of trade-environment nexus through the concept of sustainable development is crucial for developing countries. Since exports of developing countries are mostly based on natural resources, their exports may be vulnerable to import restrictions, by the developed country, on the ground of environment.[42]

III TRADE-ENVIRONMENT NEXUS IN GATT/WTO: PRESSING CONCERNS FOR THE GLOBAL SOUTH

The *General Agreement on Tariffs and Trade* (*GATT*) was adopted in 1947 with a view to liberalising trade and tariffs and to stimulate economic recovery after World War II. At that time, protection of the environment was not a pressing issue.[43] The World Trade Organisation (WTO), established following the 1994 Uruguay Round, effectively transitioned the international community from the *GATT* to this historic agreement.[44] The WTO is an improvement on *GATT* in the sense that the WTO's framers placed priority on sustainable development, raising standards on living and environmental protection in the preamble.[45] The WTO also formally created a Committee on Trade and Environment (CTE) to promote sustainable development and to identify the entanglement of trade and environment.[46] Thus, the WTO has a dual commitment, on the one hand, it has commitment to ensure an equitable and non-discriminatory multilateral trading system and on the other hand, promotion of sustainable development and protection and conservation of the environment.[47]Article XX is one of the few provisions that explicitly raises environmental concerns.

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40 Konrad Von Moltke, 'Trade and the Environment- the Linkage and the Politics' (Paper prepared for roundtable on trade and the environment, Canberra, 25 August 1999) 1 <https://www.iisd.org/pdf/canberra.pdf>.

41 See generally Michael M Weinstein and Steve Charnovitz, 'The Greening of the WTO Essay' (2001) 80 *Foreign Affairs* 147, 147–8.

42 Scott Taylor, *Trade, Development and the Environment* (February 2004) Sida <https://www.sida.se/contentassets/2874d6290fc146838b1c06fb09bbaa27/trade-development-and-the-environment_1129.pdf>.

43 Nii Lante Wallace-Bruce, 'Global Trade and Sustainable Development: Two Steps Forward in the WTO?' [2002] (2) *The Comparative and International Law Journal of Southern Africa* 236, 238.

44 Jonathan Skinner, 'A Green Road to Development: Environmental Regulations and Developing Countries in the WTO' (2010) 20(1) *Duke Environmental Law & Policy Forum* 245, 246 ('A Green Road to Development').

45 Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton University Press, 2007) 213–4.

46 *GATT* art XX(b). See also Matthew A Cole, *Trade Liberalisation, Economic Growth and the Environment* (Elgar, 2000) 19.

47 Sanford Gaines, 'The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 739, 739.

A GATT/*WTO Article XX*

There are two core principles of *GATT*: Article I (The Most Favoured Nation Obligation) which prohibits discrimination against any 'like product' of all contracting parties and Article III (National Treatment) which prohibits trade restrictions to discriminate 'like domestic product' with 'foreign products'. Article XX offers a general exception to these principles.[48]

Article XX allows states to restrict imports by employing trade measures. Article XX(b) and (g) permit environmental measures and allow 'countries to sidestep the normal trading rules if necessary to protect human, animal or plant life or health'[49] or 'related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.'[50] A defining and limiting chapeau attached to Article XX stipulates that in applying the aforesaid measures under Article XX (b) and (g), a party must satisfy that the trade measures are *'necessary'* and not a '*disguised restriction on international trade'*.[51] Furthermore, these 'trade measures cannot be applied to discriminate arbitrarily between countries where the same conditions prevail'.[52]

Succinctly, *GATT* Article XX(b) and (g) legitimise some non-tariff barriers if they are related to genuine environmental concerns.[53] However, we should not remain oblivious of the fact that Article XX has been controversial from its very inception especially within the North-South dynamic.[54] All the exceptions to Article XX, namely subparagraph (b), (d) and (g) were the proposals of the United States of America (USA) and were included due to their insistence.[55] Some nations from the global South, at that time, feared that developed countries, having the powerful and self-sufficient economy, would get a chance to manipulate the third world market .[56] The following examples will demonstrate that the scepticism, mistrust and fear of developing countries in this regard was justifiable.

In the case of *Tuna -Dolphin,*[57] the USA imposed trade sanctions on the importation of tuna products from Mexico claiming that the measures were justified under Article XX (b) as necessary to protect the life and health of dolphins. Article XX (g) was also invoked to show that the measures related to 'the conservation of exhaustible natural

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48 Yenkong Ngangjoh-Hodu, 'Relationship of GATT Article XX Exceptions to Other WTO Agreements' (2011) 80 *Nordic Journal of International Law* 219, 229.

49 Håkan Nordström and Scott Vaughan, *Trade and Environment* (World Trade Organisation Special Studies 4, 1999) 9.

50 *GATT* art XX(g).

51 *GATT* art XX.

52 *GATT* art XX.

53 Skinner (n 44) 253.

54 Brandon L Bowen, 'The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade in Light of Recent Developments' (2000) 29(1) *Georgia Journal of International & Comparative Law* 181, 184.

55 Padideh Ala'i, 'Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalisation' [1999] (4) *American University International Law Review* 1129, 1136.

56 Bowen (n 54) 184.

57 Panel Report, *United States - Restrictions on Import of Tuna (No 1), GATT* Doc DS21/R (3 September 1991, unadopted) *GATT* BISD 39S/155.

resources'. The USA claimed that its measures should not be viewed as a disguised restriction on trades because the main goal was to conserve and protect the life and health of dolphins. Mexico argued that a contracting party could not simultaneously claim that its measure is compatible with the general rules of the General Agreement and invoked Article XX for the same measure.[58] In this case, the *GATT* Panel articulated that the measures, introduced through *Marine Mammal Protection Act 1972,*[59] are contrary to Article XI:1 and are not justified by Article XX(b) or Article XX(g).[60] Apart from other arguments, the Panel considered that 'a contracting party may not restrict imports of a product merely because they originate in a country with environmental policy different from its own.'[61]

In *Thailand-Cigarettes,*[62] Thailand, through the *Tobacco Act 1966,*[63] prohibited the importation of tobacco without the license of the Director General who had not issued any import licenses for cigarettes in the past ten years. Arguing against the USA, Thailand took recourse to Article XX (b), *inter alia*, stating that the main responsibility of the Government is the protection of public health. The Panel concluded that Thailand failed to satisfy the *GATT*-inconsistent test as there existed other measures which could be legally invoked. The findings of these two cases also reflect the determinations made in *Canadian Fisheries Case*.[64]

All these cases mentioned till now indicate that the *GATT* Panel did not tolerate the discriminatory trade practices although there existed some justification for health, environment and conservation grounds.[65] However, the following cases will demonstrate that the Appellate Body of World Trade Organisation (Appellate Body) showed reluctance to interpret Article XX narrowly and therefore embraced more expansive interpretation in *Shrimp-Sea Turtle*[66] and *Reformulated Gasoline*.[67]

In *Shrimp-Sea Turtle,* a United States regulation was challenged by several Asian nations. The American regulation required, before exporting into the United States, during harvest, a fisherman must use the Turtle Excluder Device (TED) where shrimp and sea turtles co-exist. In this case, the United States lost as it had discriminatorily applied environmental protection policy. Importantly, the Appellate Body in the instant case allowed the trading member to employ measures of flexibility in the protection of

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58 Ibid.

59 *Marine Mammal Protection Act* (USA) 1972 16 USC 1361.

60 Panel Report, *United States - Restrictions on Import of Tuna (No 1), GATT* Doc DS21/R (3 September 1991, unadopted) GATT BISD 39S/155.

61 *United States-Restrictions on Imports of Tuna*, *GATT* Panel Report *GATT* DOC. DS 21/R: *GATT*, 30 ILM 1594 (1991).

62 *Thailand - Restriction on Importation of and Internal Taxes on Cigarettes, GATT* BISD 38 Supp 200, 201 (1990).

63 *Tobacco Act of 1966* (Thailand) *quoted in GATT* Thailand-Cigarettes Report, para. 63.

64 Panel Report, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, Mar. 22, 1988, *GATT* B.I.S.D. Lf6268-35 S/98.

65 Janet McDonald, 'Greening the *GATT*: Harmonising Free Trade and Environmental Protection in the New World Order' [1993] (2) *Environmental Law* 397, 422.

66 Appellate Body Report, *United States — Import Prohibition of Shrimp and Certain Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [157] ('*US — Shrimp'*).

67 Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) ('US — Gasoline').

endangered species. The Appellate Body acknowledged that shrimp could be differentiated on the basis of the TED.[68]

In *Reformulated Gasoline,* where Brazil and Venezuela complained against the United States, the Panel declared that the implementation of the *Clean Air Act,* 1990[69] by the United States was unjustifiable and discriminatory as the said Act mandated specific requirements of emission effects of gasoline from the foreign producers which is more stringent than that of domestic producers. However, the Appellate Body reversed the Panel decision calling it an 'error in law'. The Appellate Body held that the baseline requirement of gasoline fulfils the ingredients of Article XX (g) as the baseline can be considered as 'primarily aimed at' the natural resource conservation.[70]

The interpretation of Article XX by the Appellate Body in these two cases indicates that it takes 'the environment' more seriously than the 'trade liberalisation'.[71] It also indicates that 'it is no longer possible for the WTO to uphold the free trade goals of the *GATT* 1994, such as promoting market access, above all other goals and concerns-e.g., health, the environment, and the objectives of sustainable development.'[72]

Among the cases discussed above, this author agrees with the analysis and outcome of the *Tuna -Dolphin and Thailand-Cigarettes* cases. Though the upshot of these cases has been criticised by some environmentalists for failing to address the environmental outcome, it needs to be remembered that sustainable development does not include environmental protection only. Sustainable development also underpins economic and social considerations. Hence, this author disagrees with the outcome of *Reformulated Gasoline* and the *Shrimp-Sea Turtle* cases that allowed restrictive trade measures as the sole means of achieving environmental outcome. This author argues that sole reliance on trade measures for improving environmental outcome by the North, without considering the capacity constraints of the South, is incompatible with the two core principles of sustainable development: intragenerational equity and common but differentiated responsibility. This is not to say that other principles such as intergenerational equity must be relinquished. Rather, a more nuanced approach should be taken to promote fair trade system which encourages environmental and social outcomes eliminating structural outcome.[73]

It is submitted that the expansive interpretation of Article XX and the emphasis on the environment in the *Reformulated Gasoline* and *Shrimp-Sea Turtle* cases herald few messages to the global South, as follows.

(a) The determinations of the *Reformulated Gasoline* and *Shrimp-Sea Turtle* cases have opened the door for the North to impose unilateral trade restrictions, in the name of environmental requirements and environmental protection. Article XX can be used to constitute a disguised protectionism to block the South from accessing Northern

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68 Shawkat Alam, *International Environmental Law and the Global South* (Cambridge University Press, 2015) 303.

69 *Clean Air Act* (USA), Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

70 Ala'i (n 55) 1158.

71 Ibid 1131.

72 Ibid.

73 Alam, *International Environmental Law and the Global South* (n 68) 303.

markets. Almost all recent cases about environmental NTBs under Article XX (b) and (g) show that the North has been significantly pushing environmental NTBs on the South.[74]

(b) The North can even impose trade-related environmental measures on a test basis. Northern countries' environment NTBs would survive if it is not challenged, and the North knows their unilateral trade barriers would rarely be challenged by the Least Developed Countries in the Dispute Settlement Bodies (DSB). Gregory Shaffer showed that from January 1, 1995 to May 10, 2005, complaints filed by developing countries was roughly 30 to 39 per cent. The percentage would certainly go down if Brazil and India are excluded. Out of the 104 WTO's developing country members,[75] 84 members have never filed a complaint before WTO.[76] Most developing countries have never taken part in the WTO judicial system to defend their interests as either a party or third party in a WTO case.[77] Two main types of constraints are found in the academic literature for holding back participation in the WTO system: 'capacity constraints' meaning lack of skilled human resources and the shortage of finance for employing outside legal assistance, and 'power constraints' implying fear of economic and political pressure.[78]

(c) Developed countries can even impose *unjustified* unilateral trade-related environmental measures on developing countries. As there is no initial filtering mechanism to justify such measures, developing countries must initiate a case and wait until the case is decided to prove that such measures unjustified. This is a waste of time and procedure. For example, according to a consumer advocacy organisation, out of 40 cases in the WTO system that had invoked the general exception under Article XX, only one case: *EC- Asbestos*[79] satisfied all conditions for application under the Article. All other cases failed to satisfy either the subject matter or scope or chapeau threshold and proved to be unjustifiable or arbitrarily discriminatory in the measures.[80] If there was a sifting mechanism to justify such measures initially, those case may not have arisen.

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74 Ibid 304. See e.g. (Brazil – Retreaded Tyres) Appellate Body Report, Brazil –Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, adopted 17 Decembern2007, DSR 2007: IV, p. 1527.

75 The figure of developing countries was based on World Bank income criteria as of June 2005. See categories of World Bank County Groups <http://www.worldbank.org/data/countryclass/classgroups.htm>.

76 Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining' (based on paper prepared for WTO at 10: A Look at the Appellate Body Sao Paulo, Brazil, May 16-17, 2005) 8.

77 Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Institution Press, 2003) 160–163.

78 Gregory Shaffer, 'The Challenges of WTO Law: Strategies for Developing Country Adaptation' [2006] (2) *World Trade Review* 177, 177. See also J Nzelibe, 'The Case Against Reforming the WTO Enforcement Mechanism' [2008] (1) *University of Illinois Law Review* 319, 350.

79 Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc WT/DS135/AB/R (5 April 2001) [161].

80 Public Citizen, 'Only One of 40 Attempts to Use the *GATT* Article XX/GATS Article XIV "General Exception" Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception'(Working Paper No 202/546-4996), Public Citizen, Washington <https://www.citizen.org/sites/default/files/general-exception.pdf>.

Similar instances of inconsistencies are also noticed in actions taken under the *SPS Agreement*.

B *The WTO Agreement on the Application of Sanitary and Phytosanitary Measures*

The *Agreement on the Application of Sanitary and Phytosanitary Measures*[81] enables member states to adopt the appropriate level of protection (ALOP) through taking SPS measures such as labelling requirements, compositional and quality standards, and food safety regulations to protect life and health of humans, animal and plants.[82] The agreement limits the freedom of member states prescribing that the measures must be necessary and based on scientific evidence.[83] Additionally, the agreement authorises ALOP only when they are not inconsistent, protectionist or discriminatory in nature.[84] A 2018 report says that the SPS measures are proliferating in the international trade, and over 18,000 SPS measures were notified in the last 20 years.[85] Albeit, SPS measures provide member countries an opportunity to protect their interest in crucial issues like health and hygiene, it is widely recognised that SPS measures in the developed countries explicitly or implicitly act as a barrier to trade like the quantitative restrictions.[86] In this context, the exports of developing countries have been found to be more vulnerable to SPS measures compared to developed economies.[87]

The *SPS Agreement* stipulates that domestic standards can be more stringent than those of international standards if they are justified by scientific evidence.[88] These provisions are discriminatory because developed countries can take advantage of them. Kallummal and Gurung showed by empirical evidence that this dual standard regime harms developing countries as they typically fix their national standard following international standards while developed countries impose stricter ones.[89] Furthermore, the South does not have the technological skills and capacity to fulfil Northern standards or to challenge Northern standards even if they constitute protectionism.[90] By imposing stricter standards, the Northern countries restrict access of the Southern countries to Northern market and thereby deprive the Southern countries of the resources essential to

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81 *SPS Agreement* (n 14).

82 WTO, The WTO Agreements Series: Sanitary and Phytosanitary Measures (Switzerland, 2010) 27.

83 *SPS Agreement* (n 14) Art 2.2.

84 *SPS Agreement* (n 14) Art 5.5.

85 Hanna Schebesta and Dominique Sinopoli, 'The Potency of the SPS Agreement's Excessivity Test the Impact of Article 5.6 on Trade Liberalisation and the Regulatory Power of WTO Members to Take Sanitary and Phytosanitary Measures' (2018) 21(1) *Journal of International Economic Law* 123, 124.

86 David Vogel, *Trading up: Consumer and Environmental Regulation in a Global Economy* (Harvard University Press, 1995) 187–189.

87 Jacob Wood et al, 'The Economic Impact of SPS Measures on Agricultural Exports to China: An Empirical Analysis Using the PPML Method' (2017) 6(2) *Social Sciences (2076-0760)* 1, 3 ('The Economic Impact of SPS Measures on Agricultural Exports to China').

88 *SPS Agreement* (n 14) Art 2.3 and 3.3.

89 Kallummal Murali, & Gurung Hari Maya, 'Sanitary and Phytosanitary Measures and Analysis of Systemic issues: Trends based on the Online Database of CWS- 1995 to 2010' (WTO Newsletter**,** 2011).

90 Alam, *International Environmental Law and the Global South* (n 68) 307.

achieve sustainable development.[91] For example, to reduce the health risk of 2.3 deaths per billion, the European Union implemented higher aflatoxin standard (2 ppm) which is more stringent than international standard (9 ppm). This standard has decreased African exports by about 64% or US$670 million since African nations lacked the scientific capacity to comply with EU standard.[92] In the context of cost, the reduction of the health risk of 2.3 deaths per billion seems miniscule when in the European Union the number of deaths by liver cancer is about 33,000 per year.[93]

Furthermore, a more stringent standard is sometimes intentionally set to favour some nations and to deprive others.[94] This practice is against the spirit of the *SPS Agreement*, and such stringent standards setting mostly puts hurdles for Southern countries. For example, the Council of the European Union (EU Council) on 26 April 2012, officially approved a tariff rate quota (TRQ) for importing 'high-quality fresh, chilled or frozen beef' into the European Union (the EU) market.[95] Interestingly, the TRQ is open to all countries supplying beef. However, the definition of 'high quality beef' is constructed in such a way in the implementing regulation, that clearly indicates that it is established to favour US and Canadian exports. 'High quality beef' is defined as 'beef cuts obtained from carcasses of heifers and steers less than 30 months of age which have only been fed a diet, for at least 100 days before slaughter, containing not less than 62% of concentrates and/or fed grain co-products on a dietary dry matter basis'.[96] The definition technically excludes beef supply from the Southern countries especially in South Asia and Latin America where grass-feeding is followed.[97]

Southern countries also suffer when Northern countries set a different Appropriate Level of Protection (ALOP) even if there exists a lack of scientific concurrence.[98] It happened in *EC-Hormones,* where EU banned beef imports that applied animal hormone in their process of production. The United States contested, claiming the ban was not based upon scientific evidence. The Appellate Body (AB) determined that the *SPS Agreement* was not violated by setting a different ALOP as to the use of hormones, though the EU's ban was not resting on adequate scientific evidence.[99] Thus, Southern countries have no option except keeping themselves aloof from Northern markets since it is challenging for the Southern countries with limited resources to comply with the Northern environmental requirements, let alone challenge their trade ban based on advanced scientific evidence.

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91 Ibid.

92 T Otsuki, JS Wilson and M Sewadeh, 'Saving Two in a Billion: Quantifying the Trade Effect of European Food Safety Standards on African Exports' (2001) 26(5) *Food Policy* 495, 510 ('Saving Two in a Billion').

93 Ibid 511.

94 Eugenia Laurenza, 'Latest Developments in the Implementation of EC-Hormones II' [2012] (3) *European Journal of Risk Regulation* 408, 409.

95 Ibid 408.

96 See Annex I to COMMISSION REGULATION (EC) No 620/2009 of 13 July 2009 providing for the administration of an import tariff quota for high-quality beef. <https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:182:0025:0030:EN:PDF>.

97 Eugenia Laurenza (n 94) 409.

98 Alam, *International Environmental Law and the Global South* (n 68) 307.

99 Appellate Body Report*, European Communities -Measures Concerning Meat and Meat Products (Hormones),* WTO Doc WT/DS26/AB/R; WT/DS48/AB/R (16 January 1998).

Even when the exporters of developing countries possess the ability to comply with Northern standards, the compliance costs of product redesign, testing and certification are enormous.[100] For example, in 1997 when the European Commission banned the import of Bangladeshi frozen shrimp products, Bangladesh spent $17.6 million between 1997 to 1998 to upgrade sanitary conditions of the plants. It was estimated that Bangladesh would have to spend $225,000 per annum only to maintain hygiene standard.[101] In another example, between 1980-2000, to improve the level of export, Argentina spent more than US$80 million to upgrade its equipment and processes.[102]

Furthermore, developing countries need to incur considerable cost in building their technical capability necessary to participate in international standards-setting bodies. Engaging expert international lawyers is costly for the developing countries' budget.[103] All these issues contribute to the overall increase of concern for the global South.

C *Identifying the Reasons of Concerns of the Global South*

The aforesaid discussion clearly indicates that both the *GATT* Article XX (b) and (g) and SPS measures have created avenues for imposing environmental non-tariff barriers.[104] The realisation of environmental objectives through trade-related environmental measures leads to discrimination since such measures are imposed without considering the socio-economic conditions of the countries.[105] The global South countries fear that Northern countries can impose higher environmental standards which would act as a trade barrier for them and exclude them from any comparative advantage.[106] Further, developing countries argue that the Northern countries are trying to dictate the domestic policy of developing countries by exerting their economic power. For developing countries, it is eco-imperialism.[107] Unfortunately, the Northern countries are frequently using these measures to restrict trade from the Southern countries.[108] Consequently, the developing countries of the South are substantially losing their export markets in the North. Statistics show that there is a sharp decline of South Asian exports of agricultural products to the EU market, although trade liberalisation promises an increase in trade. The South Asian

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100 Spencer Henson and Rupert Loader (n 16) 359.

101 Spencer Henson and Rupert Loader, 'Barriers to Agricultural Exports from Developing Countries: The Role of Sanitary and Phytosanitary Requirements' (2001) 29(1) *World Development* 85, 90 ('Barriers to Agricultural Exports from Developing Countries').

102 J Michael Finger and Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge / Implementation of Uruguay Round Commitments: The Development Challenge* (The World Bank, 1999) 525 ('*Implementation of Uruguay Round Commitments*').

103 Constantine Michalopoulos, *Developing Countries in the WTO* (Palgrave, 2001) 94.

104 Alam, *International Environmental Law and the Global South* (n 68) 303.

105 Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence' (n 17) 20.

106 Jagdish Bhagwati, 'On Thinking Clearly about the Linkage between Trade and the Environment' [2000] (4) *Environment and Development Economics* 485, 494. Cited in Shawkat Alam, 'Trade-Environment Nexus in GATT Jurisprudence' (n 17) 20.

107 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 2011) 1189.

108 Kallummal, Gupta and Varma (n 11) 52.

share of exports to the EU was 62 percent in 1962.[109] It was close to about 30 percent from 1980 to 1995. In 2000, the total agricultural exports dropped to 22 percent, and the decline remained till 2010. The report also showed that this unexpected decline is due to the technical *ex-ante* trade barriers such as SPS measures by the EU market.[110]

Developing countries believe that the existing recurring problems in the international trade regulation is due to the absence of a theory of justice in the international trade regime. Though some academics claim that 'justice' is already embedded in the existing trade regime,[111] other academics strongly oppose the standing. For example, Albin, by using discursive evidence, argues that present international trade negotiations have been facilitated by the principles of justice.[112] Lisa M. Samuel critiques Albin's argument claiming that Albin does not consider the concern, interests and participation of developing states. According to Samuel, if Albin had considered the interests of developing countries, she would have arrived a different conceptualisation of justice.[113] Similarly, Thomas Frank doubted the existence of the notion of justice in the trade regime, arguing that though international economic law claims that it conforms with the notion of distributive and procedural justice, it is not clear whether it provides sufficient provisions to address the differences in the course of pursuing justice.[114] It is true that dispute settlement bodies works for ensuring justice, but it is limited because judges are responsible for applying and enforcing the existing law, they cannot create a just and fair trade regime.[115] Samuel and Frank find there is an absence of justice since the WTO regime fails to address the needs of developing countries. That is why Stiglitz and Charlton comment justice can be achieved in trade, but it needs to be redesigned to accommodate the interests of developing countries from a distributional point of view.[116] They argue that in international trade agreements, the focus should be given to the development of the poor countries and the participation of those countries in the international trade regime.

Given these circumstances, this paper has pointed out that the WTO trading arrangement is plagued with fundamental inequality.[117] This paper only addresses two identifiable areas where the inequality exists. Due to inherent inequality, the WTO's commitment to development, as manifested in its preamble, among developing countries has not been achieved yet.[118] In this endeavour, this author finds that the following three

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109 See generally Francois, J. Francois, McDonald Bradley, & Nordstrom Hakam, 'The Uruguay Round and the Developing Countries' in Martin Will and Winters L. Alan (eds), *The Uruguay Round and the Developing Countries* (Cambridge University Press, 1995) 140, 150-3.

110 Kallummal, Gupta and Varma (n 11) 46.

111 Cecilia Albin, *Justice and Fairness in International Negotiation* (Cambridge University Press, 2001) 24-30.

112 Ibid 24–30.

113 Lisa M Samuel, 'When Negotiating Trade Means Negotiating Difference: WTO Insights' (2015) 64(2) *Social and Economic Studies* 91, 116.116.

114 Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon, 1997) 8, 19, 22.

115 Samuel (n 113) 116.

116 Joseph E Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade Can Promote Development* (Oxford University Press, 2005) 127–9.

117 Adibe (n 19) 134.

118 The preambular declaration of the WTO Agreement is 'there is a need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth of international trade commensurate with the needs of their economic development'.

reasons are primarily responsible for creating inequality and unfairness for the global South.

1. Trade-related environmental measures are not considering the needs, concerns and the limitations of the global South. These measures are unilateral and unregulated. Such measures raise questions of fair trade.[119]
2. The WTO has failed to establish level playing field in the international trade regime. Presently, the international trade system is inequitable. For example, under the existing system, the major players like the USA and EU can carve out exceptions which enable them to continue subsidies in their agricultural sectors. It is unfavourable to developing countries which should have a comparative advantage in this sector. For example, until 2003, one study reveals, the developed world furnished $350 billion per year as subsidies in agriculture which is greater than the gross domestic product (GDP) of sub-Saharan Africa.[120]
3. Developing countries do not have desired representation and active participation in the international trade negotiations, international standards-setting institutions and in the dispute settlement procedures established by the WTO. As a result, the interests of the developing countries are rarely reflected in the decisions of the institutions.[121]

These three problems can be resolved if we can address the following three potential areas.

(a) We should espouse a sense of fairness which will be central to market allocation. It is the fairness which can create equality in opportunity and a level playing field emphasising a condition where no competitor enjoys an unfair advantage over other.[122] A sense of trade fairness addresses the existing economic inequality and development needs of the global South to secure overall welfare.[123] Fairness in trade imposes a moral obligation on the rich countries to favour the economic growth of developing countries.[124] One potential way of doing this is removing unnecessary obstacles to trade that impede developing countries' access to the Northern market.

(b) There may arise some situations where even fairness or justice might yield some disadvantages to a particular state. In such a situation, they should have a mechanism to redress those disadvantages. The redress may take the form of monetary compensation or other types of compensation.

(c) In the existing trading system, the participants (developing countries) differ greatly in their economic capacities and bargaining skills. Developing countries, as weaker

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119 Shawkat Alam, *Sustainable Development and Free Trade Institutional Approaches* (Routledge, 2008) 82, 83.

120 Fabian Globalisation Group, *Just World: A Fabian Manifesto* (Zed Books, 2005) 84 ('*Just World*').

121 See generally Amrita Narlikar, 'Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO' (2006) 29(8) *World Economy* 1005.

122 Oisin Suttle, *Distributive Justice and World Trade Law: A Political Theory of International Trade Regulation* (Cambridge University Press, 2018) 254.

123 Ibid.

124 Andrew G. Brown and Robert M. Stern 'Fairness in the WTO Trading System' in Amrita Narlikar, MJ Daunton and Robert Mitchell Stern (eds), *The Oxford Handbook on the World Trade Organisation* (Oxford University Press, 2012) 677, 683.

participants, accept the outcome 'that leaves it worse off than before'.[125] Thus as a matter of fairness, developing countries need to increase capacity building. For building capacity, they need effective economic, scientific and legal institutions and expertise. They also need to improve the capacity to effectively participate in WTO negotiations, international standards-setting bodies and dispute settlement bodies.

In this paper, this author argues that these three potential areas of international trade require principles of justice. Now the question arises as to why the principles of justice are relevant here. One way of answering the question is when people use social institutions to allocate social goods, this is the domain of justice.[126] According to Rawls, international trade law such as the WTO law, is a 'basic structure' which distributes rights and duties and allocates social goods such as market access, preferences, economic opportunity and trade-related knowledge.[127] So, it is submitted that in order to consider the normative implications of the allocative system in the WTO, this trade law needs a theory of justice. A prominent academic, Shue, also commented that the issues of justice are to be brought at the international level because existing distribution of the wealth displays moral arbitrariness at best and 'systemic exploitation at worst'.[128]

This paper argues that the present concerns of the developing countries can effectively be addressed if the notion of distributive justice, corrective justice, and procedural justice is incorporated in the WTO regime. As a part of this submission, it is argued that the above-mentioned areas in items (a) and (b) can be addressed by employing distributive and corrective justice respectively and the area in item (c) is subject to procedural justice.

IV HOW THE CONCEPTS OF 'DISTRIBUTIVE, PROCEDURAL AND CORRECTIVE JUSTICE' OFFER A SOLUTION

A *Distributive Justice*

Distributive justice is an 'umbrella' term and has no universally accepted definition.[129] Some academics use the term 'economic justice' instead of 'distributive justice'.[130] To Professor Kaswan, distributive justice addresses unfair distribution, unfair treatment and the systemic history of inequality that have given birth to current disparities.[131] John Rawls has given two principles of distributive justice.[132] The relevant second principle is 'social

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125 Ibid 685.

126 Frank J Garcia, 'Why Trade Law Needs a Theory of Justice' (2006) *American Society of International Law Proceedings* 375, 377.

127 Ibid.

128 Andrew Hurrell and Benedict Kingsbury (eds.), *The International Politics of the Environment: Actors, Interests and Institutions* (Oxford University Press, 1992) 386.

129 Ethan B Kapstein, *Economic Justice in an Unfair World: Toward a Level Playing Field* (Princeton University Press, 2008) 3.

130 See especially Stephen Nathanson, *Economic Justice* (Prentice Hall, 1998) 93.

131 Alice Kaswan, 'Distributive Justice and the Environment' (2002) 81 *North Carolina Law Review* 1031, 1031.

132 Broadly, the first principle of Rawls relates to political liberty such as the right to vote and freedom of speech. See generally John J Flynn and Piero Ruffinengo, 'Distributive Justice: Some Institutional Implication of Rawls' A Theory of Justice' (1975) 1975 *Utah Law Review* 123, 131-132.

and economic inequalities are only then permissible if they are to everyone's advantage'.[133] Rawls argues that in the principle of justice 'no one is advantaged or disadvantaged' and 'the principles of justice are the result of a fair agreement or bargain'.[134] Both Kaswan and Rawls emphasise on equality and fairness. Helen Hodgson rightly observed equity, equality and fairness are intricately related with distributional justice.[135] The attributes of distributive justice given by John Rawls, Professor Kaswan and Helen Hodgson lead this author to conclude that distributive justice ensures (a) equality in opportunity (b) fair trade (c) reciprocity for mutual benefit (d) mitigation of historic inequalities and (e) development, considering the economic and social ability of all participants.

Equality in opportunity has a long tradition in WTO Agreements. The principles of fair competition and non-discrimination in the WTO are the manifestations of the equality of opportunity. However, the problem is these principles are losing their practical significance in North-South trade relationship. Unilateral trade restrictions, bilateral trade agreements and deliberated impositions of stricter environmental requirements on importing products are eroding the established norms of non-discrimination and detracting equality of opportunity. Unfortunately, such trade restrictions do not care about greater good. This purposeful disregard for fairness is clearly revealed in North-South trade where powerful nations are imposing conditions which are not conducive to the trade of poorer nations. This can be termed as injustice. Distributive justice ensures the right of equal opportunity and global institutions to redress such a right. The history of distributive justice encourages people to raise a voice against such injustice and fairness.

Fairness in trade promotes equitable standards while goods are exported from the global South to global North. Fair trade is defined as 'a trading partnership, based on dialogue, transparency and respect, that seeks greater equity in international trade. It contributes to sustainable development by offering better trading conditions to, and securing the rights of, marginalised producers and workers –especially in the South'.[136] From the point of view of fairness, the aim of the WTO structure is the removal of barriers which leads to overall welfare. The welfare gains of both developing and developed countries lie in the facilitation of trade and investment.

Distributive justice would encourage richer countries to assist the poorer countries. It is not dignified for developing countries always to desire foreign aid. Furthermore, international trade is not a mechanism for transferring aid too.[137] So, foreign *trade*, instead of foreign *aid*, should be encouraged. In such cases, distributive justice patently requires an arrangement for the promotion of reciprocal commercial relations for mutual benefit.[138]

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133 Peter Koller, 'The Principles of Justice' in Otfried Höffe (ed), John Rawls*, A Theory of Justice* (Brill, 2013) 37, 41. See also Urs M. Lauchli, 'What is Distributive Justice - The Legal Theories of Rawls and Nozick' (1994) 4 *Tilburg Foreign Law Review* 169, 173.

134 John J Flynn and Piero Ruffinengo, 'Distributive Justice: Some Institutional Implication of Rawls' A Theory of Justice' [1975] *Utah Law Review* 123, 128.

135 Helen Hodgson, 'Theories of Distributive Justice: Frameworks for Equity' (2010) 5 *Journal of the Australasian Tax Teachers Association* 86, 90.

136 Cephas Lumina, 'Free Trade or Just Trade - The World Trade Organisation, Human Rights and Development (Part 1)' [2008] (Issue 2) *Law, Democracy and Development* 20, 26.

137 Narlikar, Daunton and Stern (n 124) 683.

138 Ibid.

In this context, the rich countries can provide developing countries the access to foreign markets by specially favouring them considering their socio-economic conditions. This flexibility may contribute to the economic betterment of the South.

Most importantly, distributive justice recognises the North-South inequality arising from the colonial encounter and the development practice in the post-colonial period.[139] It is to be acknowledged that international law introduces norms of differential treatment designed to favour Southern countries. These differential treatments is a form of distributive justice as Professor Kaswan also addresses the issue of history of inequalities in her definition of distributive justice.[140] The existing WTO Agreement contains nearly 155 provisions relating to Special and Differential Treatment (SDT) of Developing Countries and Least Developed countries.[141] SDT clauses mainly deal with the flexibility of commitments, technology transfer, transitional time period and provisions relating to safeguarding the interests of developing countries.[142] These SDT clauses are also not free from unfair practices. For example, Hunter shows that developing countries acquire the three-quarters technology from the developed countries not as assistance but purely on commercial terms.[143] Furthermore, SDT provisions are crafted in a soft law language. As a result, developing countries are not able to seek redress potentially in the dispute settlement body of the WTO.[144] One prominent writer termed SDT clauses as a 'carrot-and-stick mechanism' that is used to promote liberalisation by the developing nations.[145] It is argued that such unfair practice develops because the international economic law does not address the root causes of the crisis. Distributive justice is the right framework to talk about, to seek an explanation for claiming one's right more prominently and clearly.

The inclusion of distributive justice in the WTO regime will also challenge the 'excessive mercantilist approach'[146] of the global North which does not pay heed to the development needs of the global South. The rich countries have left an impression that they are reluctant to allow equal access to the economic pie.[147] The disregard of the ability of developing countries and the hidden emphasis on the consumption of developed countries

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139 Carmen G. Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam (ed), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 77, 87.

140 Kaswan (n 131) 1031.

141 Manuela Tortora, *Special and differential treatment and development issues in the multilateral trade negotiations: The skeleton in the closet,* UNCTAD, WEB/CDP/BKGD/16 (2003) 8 <https://unctad.org/Sections/comdip/docs/webcdpbkgd16_en.pdf>.

142 Mehedi Hasan, 'Special and Differential Treatment in the WTO: Its Content and Competence for Facilitation of Development' (2016) 7 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 41, 48 <https://heinonline.org/HOL/P?h=hein.journals/naujilj7&i=50> ('Special and Differential Treatment in the WTO').

143 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Foundation Press, 2011) 1188.

144 Olivares Gustavo, 'The Case for Giving Effectiveness to *GATT*/WTO Rules on Developing Countries and LDCs' [2001] (3) *Journal of World Trade* 545, 551.

145 Paola Conconi and Carlo Perroni, 'Special and Differential Treatment of Developing Countries in the WTO' (2015) 14 *World Trade Review* 67, 67.

146 Adibe (n 19) 134.

147 M. Halle, *Trading into the Future: Rounding the Corner to Sustainable Development,* GTI Papers Series Frontiers of Great Transition, no.6 (2006) 7.

are blatant unfairness.[148] The gap between the harsh reality and development rhetoric is frequently established at the negotiating table which provides credence that the North is 'kicking away the ladder' and preventing the South's sustainable development.[149] Such an approach is against the principle of distributive justice given by John Rawls as it leads to disadvantage and inequality for the poor nations.

The Northern countries, by enforcing lofty environmental requirements in trade, want to make the unequal equal. But they must know, to make unequal equal in itself is inequality. Therefore, this author strongly argues that this unfair treatment can only be redressed through the notion of 'distributive justice'. For example, if distributive justice had been incorporated in the WTO regulation, the WTO or the developed countries would have had to show to the world community that any measures taken will not negatively affect the interests of the developing countries.

In this section, it was argued that distributive justice requires an arrangement of world trade regime where the interest, concerns and abilities of developing countries will be considered. It was also argued that the idea of distributive justice will challenge the excessive mercantilist approach of the global South. Now the question is, in a world where it is said 'all is fair in love, trade and war'[150] – why would the rich country agree to ensure distributive equity? This author argues that there are at least three reasons: (a) if distributive justice is persistently violated, the world trade regime will be undermined, threatened and finally collapse because existing trade systems rests on the idea of cooperation, (b) distributive justice can yield benefits for all trading parties, and (c) it is the moral obligation of the richer countries to assist the poorer countries because the existing disparities, arguably, are the result of the systemic history of inequality and exploitation during colonialism by the North.

Further, historic injustices can also be redressed by the theory of corrective justice. Apart from it, in the next section it will be argued that in any area where distributional justice seems disadvantageous, there should be a mechanism for corrective justice, meaning compensation for the more disadvantageous states.

B *Corrective Justice*

Corrective justice ensures compensation for historic inequities[151] and retribution for violating legal rules.[152] It addresses the damage inflicted on individuals or communities.[153] The question of corrective justice in trade arises when no viable option remains open to be adopted. For example, trade liberalisation creates market inequality because it always looks for aggregate production and tries to increase economic efficiency through

148 Ibid 7-8.

149 Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem, 2005) 19–51.

150 Lisa M Samuel, 'When Negotiating Trade Means Negotiating Difference: WTO Insights' (2015) 64(2) *Social and Economic Studies* 91, 115.115.

151 Shawkat Alam (ed), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 79.

152 Kent Greenawalt, 'Punishment' (1983) 2 *Journal of Criminal Law and Criminology* 343, 349.

153 Robert R Kuehn, 'A Taxonomy of Environmental Justice' (2000) (9) *Environmental Law Reporter* 10681, 10693.

international competition.[154] In this globalised world, it would be impracticable to go against trade liberalisation. But as a matter of justice, if a policy is preferred under trade liberalisation to serve a particular goal, although there may be sufficient reasons for rejecting such policies, there should be a mechanism for compensation for those who are adversely affected by these policies.[155] Thus, when reduction of agricultural protections in developing countries undermines the farmer's ability to compete with big agribusiness firms of the rich countries, then such policy should be rejected if there is no provision for compensation for those poor farmers.

Darrel Moellendorf states that the present trade is full of systemic injustices having no mechanism to redress present, past and future inequities.[156] He said the developed world, in pursuing development, systematically protects their infant industries.[157] But presently they are not allowing developing countries to protect their vulnerable industries. Developed countries neither paid for their past protectionism nor made any mechanism to compensate for the loss and damage caused to developing countries due to the reduction of protectionist policies in developing countries.[158]

In our context, the use of unilateral environmental non-tariff barriers by the developed countries constitutes a clear case of injustice. Absent distributive justice, the developed countries should compensate those countries whose interests are adversely affected by such barriers. Jagdish Bhagwati, a leading economist, argued:

> You could certainly compensate the country whose trading rights (i.e. access to your market) are being denied or suspended by offering other concessions or having the other country withdraw some equivalent concessions of her own to you or, better, through cash compensation for the gains from trade lost by the country.[159]

This approach is not free from limitation. It will allow countries to impose measures inconsistent with WTO rules by paying compensation. It may be adjudged immoral to pay compensation to continue illegal measures.[160] However, there may be very few areas where distributive justice may not produce the desired result, in such cases corrective justice can be the second-best available option. Furthermore, the issue of compensation may not arise if the decision is taken in a transparent manner where all those affected by a decision can participate in the decision-making process in the true sense of the term. This fair decision-making procedure is a matter of procedural justice.

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154 Darrel Moellendorf, 'The World Trade Organisation and Egalitarian Justice' [2005] (1/2) *Metaphilosophy* 145, 152.

155 Ibid.

156 Ibid.

157 Darrel Moellendorf (n 154) 152.

158 Ibid.

159 Vinod Rege, 'GATT Law and Environment-Related Issues Affecting the Trade of Developing Countries.' (1994) 3 *Journal of World Trade* 95, 118.

160 Ibid.

C *Procedural Justice*

Procedural justice encompasses an open, inclusive, representative and communicative decision-making process.[161] Aristotle evaluates procedural justice as a status where each has 'an equal share in ruling and being ruled'.[162] Professor Kaswan emphasised the political dynamics of procedural justice so that all groups are treated fairly in decision-making processes.[163] In light of the North-South dimension, another qualification of procedural justice needs to be added. It is 'equal status, in terms of skills, among decision-makers'. The justification is if an equal status is not ensured, there is a chance of manipulation or coercion from the part of stronger participants.[164] Thus, 'procedural justice' includes: (a) all those who can be affected by a decision should have an opportunity to be heard; (b) equal status among decision-makers in terms of skill and knowledge; (c) equal opportunity of influencing decisions; and (d) a fair procedure so that the outcome can be just.[165]

In our context, there are two areas- the decision-making procedure of the international standard-setting institutions, and the dispute settlement bodies of the WTO, where developing countries are experiencing procedural injustice.

The GATT/WTO Article XX implicitly requires the standard setting of products.[166] The *SPS Agreement* is also going to balance SPS measures with international standards through recognising international standard-setting bodies.[167] Presently, the role of the Codex Alimentarius Commission is gaining prominence in setting international standards. However, the standard setting is mainly based on scientific evidence and the South does not have the scientific capacity and the governance structure to participate in the creation of standards effectively.[168] Consequently, at present, the South is notoriously under-represented there.[169] For example, at the 64th Joint FAO/WHO Expert Committee on Food Additives (JECFA) meeting, it was found that all JECFA Secretariat representatives are from developed countries.[170] At the International Organisation for Standardisation (ISO), a similar situation prevails.[171] Codex is also criticised for the under-representation of developing countries.[172]

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161 Ibid.

162 RM Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 273.

163 Alice Kaswan, 'Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"' (1997) 47 *American University Law Review* 221, 233 ('Environmental Justice').

164 Luke Tomlinson, *Procedural Justice in the United Nations Framework Convention on Climate Change: Negotiating Fairness* (2015) 120 ('*Procedural Justice in the United Nations Framework Convention on Climate Change*').

165 Ibid 9, 85, 70,110.

166 See Cora Dankers, 'The WTO and environmental and social standards, certification and labelling in agriculture' (FAO Commodity and Trade Policy Research Working Paper No. 2, Food and Agriculture Organisation, March 2003) 1-2.

167 Panagiotis Delimatsis, 'Global Standard-Setting 2.0: How the WTO Spotlights Iso and Impacts the Transnational Standard-Setting Process' [2018] (2) *Duke Journal of Comparative & International Law* 273, 275.

168 See generally Marion Jansen, 'Developing Countries, Standards and the WTO' (2010) 19(1) *Journal of International Trade & Economic Development* 163, 180.

169 Ibid.

170 Ibid.

171 Ibid.

172 See especially Mariëlle D Masson-Matthee, *The Codex Alimentarius Commission and Its Standards* (T.M.C. Asser Press, 2007) 241–245.

On the other hand, the Northern states having sophisticated scientific capacities are dominating the standard setting institutions. According to some observers it is 'techno-imperialism'.[173] The de facto limited representation of developing countries and over-representation of the Northern countries in the standard-setting process seriously raises the question of procedural justice and legitimacy.

Another area of procedural injustice is the dispute settlement procedures in the WTO. Disputes settlement procedures require specialised legal expertise to argue a case which poses a serious disadvantage to the global South since many poorer countries can hardly afford such legal expertise.[174]

As a matter of fairness, it is the demand of procedural justice that developing countries should participate in standard setting bodies so that the developed countries might not distort trade by setting a stricter international standard which would be costly for developing countries to implement.[175] They need to participate to convey their interests appropriately. Developing countries should also get the opportunity to engage in dispute settlement procedures so that they can seek redress if they believe their fellow members are in violation of their rights.

Now we need to determine what procedural justice would serve the interest of the South. Procedural justice entails that the decision-makers should get equal opportunity to shape or regulate decisions. The challenge is to identify the means of ensuring equal opportunity to influence decisions. Luke Tomlinson shows two viable ways of ensuring equal opportunity: by political equality and by equalising the actor's capabilities.[176]

In our context, equalising the actor's capabilities is more important than political equality. Political equality means voting rights, having equal time to speak and participating in the discussion. But these opportunities are not able to exert much influence in decision-making in the North-South dimension. Unlike the participants of the developing nations, the decision-makers of the developed countries are equipped with skill, knowledge and eloquence. If the representatives of the global South do not understand the process of hazard analysis, risk analysis, verification procedures and critical control point identification,[177] what would be the value of their physical participation in standard setting decision-making bodies? So, in such cases giving equal time to discuss will not serve the interest of South. However, if the ability of the representatives of the global South can be upgraded, then an equal opportunity of participation can be utilised by them through advancing their interests independently. Thus, the WTO should ensure that the participants from the global South are equally equipped with knowledge, skills and resources. This is the true demand for procedural justice. Promoting education in the global South to enable expert representation can be one option. But it is a long-term procedure. The short-term option is knowledge, skill and technology transfer in terms of

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173 Uche U Ofodile, 'Import (Toy) Safety, Consumer Protection and the WTO Agreement on Technical Barriers to Trade: Prospects, Progress and Problems' [2009] (2) *International Journal of Private Law* 163, 163.

174 Narlikar, Daunton and Stern (n 124) 691–693.

175 Jansen (n 168) 180.

176 Tomlinson (n 164) 120.

177 David Demortain, 'Standardising through Concepts: The Power of Scientific Experts in International Standard-Setting' (2008) 35(6) *Science & Public Policy (SPP)* 391, 391 ('Standardising Through Concepts').

assistance. Apart from assistance, developing countries also require a considerable level of investment by the developed countries. The rationale behind these transfers should be based on procedural justice, not the redistribution. Such investment would encourage developing countries to participate in the international negotiation processes to have their interests considered.

Both the WTO and *SPS Agreement* can play a vital role in ensuring procedural fairness. The *TBT Agreement* can be a good example which establishes the standards of impartiality, consensus, transparency and openness. The *TBT Agreement* has also paid attention to the concerns and interests of developing nations.[178]

V CONCLUSION

Koenig's model[179] demonstrates the sustainable development agenda of the global South as goals of overcoming poverty, achieving a high standard of living and conserving the local environment.[180] There is a significant body of literature showing that trade plays a central role in achieving economic development, poverty eradication and environmental protection.[181] Both the South and the North need each other for economic growth and global environmental protection. The countries of the global South are the most vulnerable and are socially and economically marginalised. Unfortunately, they are further marginalised in terms of the trade-environment interaction.

In this context, this paper has argued that a distributive trading system requires a differentiated and nuanced approach to integrate developing countries within the system on a fairer basis. Furthermore, no trade policy should be taken in isolation of the socio-economic conditions and the abilities of the global South. Any policy which adversely affects the global South and worsens the situation of poverty should be reformed or rejected to meet the demands of distributive justice and fairness. This paper has also argued that there should be provisions for compensation where there is a chance of violation of rights. It was also argued that mere participation of developing countries in the decision-making process at the international trade regime might not ensure procedural and substantive justice. Concepts of procedural justice require the participation of all trade actors on a level playing field. Hence, the participants should be of reasonably equal

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178 Marceau Gabrielle and Trachtman Joel P., 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organisation Law of Domestic Regulation of Goods' [2002] (5) *Journal of World Trade* 811, 840 ('The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade'). See also Committee on Technical Barriers to Trade, 'Decision of the Committee on Principles for the Development of International Standards Guides, Recommendations with relation to Articles 2, 5 and Annex 3 of the TBT' G/TBT/9, July 2000, Annex 4, 24.

179 Koenig's model portrays the differential agendas of the North and South. It is a tabular representation. According to Koenig, the countries of the North focus on the safeguarding of their monetary interests, affluence, lifestyle and prevention of an environmental catastrophe.

180 OP Dwivedi and Dhirendra K Vajpeyi, *Environmental Policies in the Third World: A Comparative Analysis* (Greenwood Press, 1995) 5.

181 Slike Steiner, 'Global Poverty and Sustainable Development-Challenges addressed by the EU's Renewed Sustainable Development Strategy' in Duncan French (ed), *Global Justice and Sustainable Development* (Martinus Nijhoff, 2010) 291, 295.

status in terms of skills, technology and knowledge. For the sake of procedural efficiency, developing countries need capacity building support, knowledge and technology transfer. The incorporation of distributive, corrective and procedural aspects of justice is not only essential to the participation of the global South in the trade system but also necessary for a fair and just trade regime.