Journal Of Malaysian And Comparative Law

The *Journal of Malaysian and Comparative Law* (*JMCL*) is a refereed journal published annually by the Faculty of Law of the University of Malaya. It began publication in 1974 with two issues a year, in June and in December. The *JMCL* accepts and publishes contributions from scholars all over the world. Its articles, in English reflect its dual character as a Malaysian and comparative law journal. Its subject matter and contents, wide-ranging in character, reflect a bias towards Malaysian and Asian laws.

ISSN: 0126-6322

(2016) 43 (ISSUE 1) JMCL

JOURNAL OF MALAYSIAN AND COMPARATIVE LAW

Journal Of Malaysian And Comparative Law

Jurnal Undang-Undang

VOLUME 43 (ISSUE 1) 2016 ISSN: 0126-6322

Faculty of Law, University of Malaya, 50603, Kuala Lumpur, Malaysia

JOURNAL OF MALAYSIAN AND COMPARATIVE LAW 2016

NOTE TO CONTRIBUTORS

The Journal of Malaysian and Comparative Law (JMCL) is a refereed journal that publishes original unpublished works comprising articles, comments, case notes and reviews on the whole spectrum of legal topics and issues. Currently, the JMCL is published twice a year by the Faculty of Law, University Malaya.

Contributions are invited from staff, practitioners and legal scholars worldwide. We welcome the submission of articles and comments for publication in the journal. Please submit manuscript to the Managing Editor, Journal of Malaysian and Comparative Law (JMCL) at the address given below. Submissions may also be done via email.

Each manuscript will be reviewed by a panel of reviewers before approval for publication. Contributors will be notified of acceptance, rejection or the need for revison of their respective manuscripts. The Editors retain the right to make stylistic and grammatical changes to manuscripts accepted for publication without necessarily informing the contributor.

SUBSCRIPTIONS

For full details of subscription rates and back issues, please write to:
the Administrative Assistance, Journal of Malaysian and Comparative Law, Faculty of Law, University of Malaya, 50603, Kuala Lumpur, Malaysia.

Tel No: 03 - 7967 6509 / 6575
Fax No: 03 - 7957 3239 / 7967 6573
Email address: jcml@um.edu.my

Printed by University of Malaya Press, 50603 Kuala Lumpur

JOURNAL OF MALAYSIAN AND COMPARATIVE LAW

JURNAL UNDANG-UNDANG

VOLUME 43 (ISSUE 1)

2016

Faculty of Law
University of Malaya
50603 Kuala Lumpur
MALAYSIA

THE ISSUE MAY BE CITED AS (2016) 43 (1) JMCL

Contents

Changing the Corporate Landscape: Enhancement of Corporate Governance in Malaysia

Tie Fatt Hee*

Abstract

Questions about corporate governance emerged following the financial failures in Asia, Europe, and the United States. In Asia, the sharp depreciation of some of the countries' currencies and fall in the stock market during the 1997-98 period has been attributed to four reasons - failed corporate governance; inappropriate and weak economic policies; the International Monetary Fund's mistake in forcing an increase in interest rates resulting in the closure of some banks; and the "Pangloss equilibrium" that created a bubble in asset prices. Additionally, rampant cases of corporate greed and widespread abuse in the financial sectors further aggravated the crisis. Following the breakdown in the corporate governance regimes and market discipline, a number of countries embarked on reforming their corporate governance legislations. This article examines the three phases of corporate governance reforms in Malaysia which have significantly altered the corporate governance landscape.

I. INTRODUCTION

This article examines corporate governance reforms in Malaysia. First, it discusses corporate governance reforms in Asian countries and the first phase of the reforms in Malaysia vis-à-vis, the Code on Corporate Governance 2000. Secondly, it discusses the second phase of the corporate governance reforms that aimed to further strengthen the corporate governance regulatory framework through the Malaysian Code on Corporate Governance 2007 and the subsequent Malaysian Code on Corporate Governance 2012. Finally, it examines some of the challenges that regulators faced while implementing these reforms.

II. CORPORATE GOVERNANCE REFORMS IN ASIA

Most researchers attributed the Asian financial crisis to four reasons, namely: failed corporate governance[1]; inappropriate macroeconomic policy during the 1990s that was

* B.A.(Hons)(Malaya), Dip. Ed. (Malaya), M.Ed.(Malaya), LL.B.(London), CLP (Malaya), LL.M. (Malaya), SJD (Bond); Professor, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia. E-mail:tiefh@um.edu.my.

1 Haspeslagh P, "Corporate Governance and the Current Crisis", *Corporate Governance: The International Journal of Business in Society*, 2010, Vol. 10 Issue 4, pp. 375-380. Also available online at - http://www.emeraldinsight.com/doi/pdfplus/10.1108/14720701011069614. Site accessed on 5 January 2016.

further aggravated by inept management during the initial phase in 1997[2]; the International Monetary Fund's pressure on certain countries to increase interest rates that eventually led to the closure of a number of banks[3] and, the "Pangloss equilibrium" that led to a bubble in asset prices[4]. These four interconnected factors that contributed to the financial crisis also encompass elements of greed, wishful thinking and linear extrapolation, the persistent addiction to efficient capital markets and the principal-agent model thinking[5]. The crisis exposed the poor level of legal protection of minority shareholders, lack of transparency and financial disclosure, and various levels of cronyism embedded in a majority of corporations.

The outflow of foreign capital from Thailand set off a subsequent loss of confidence among local and foreign investors in other countries such as Malaysia, South Korea, and Indonesia. The collapse of the property and stock market, lack of prudential regulations, over exposure by banks, structural weaknesses in the domestic financial institutions and unsound macro-economic policies aggravated the crisis.[6] The crisis revealed a number of corporate scandals characterised by high levels of mismanagement, inadequate regulation and greed.

Generally, a weak corporate governance regulatory framework is the main reason that contributed to the financial meltdown. The existing legal mechanisms which minimises agency conflicts among managers, and the specific mechanisms that prevent the expropriation of minority shareholders appear to be weak. The corporate governance regulatory framework seems to be ineffective. Past research showed that when there is an increase in expropriation by managers as a result of a fall in the expected rate of return on investment, the subsequent loss of investors' confidence would eventually lead to an increase in expropriation, lower capital inflow and greater capital outflow[7]. These caused stock prices to fall and the exchange rate to depreciate. Under such circumstances, creditors and minority shareholders often received little legal protection. In situations where the prospect of economic growth is poor, a sound corporate governance regulatory framework is critical. Conversely, where shareholder protection is weak and ineffective, there is an increase in expropriation when an economic down turn occurs. Unfortunately, the expropriation of minority shareholders and creditors by the controlling shareholders is extensive in many countries. Investor protection is crucial to ensure that the returns on investments materialise without the threat of expropriation. To a certain extent, corporate governance provides investors some form of protection against expropriation by the insiders[8].

---

2 Giancarlo Corsetti, et. al., "What Caused the Asian Currency and Financial Crisis?", NBER Working Paper Series, http://www.nber.org/papers/w6833.pdf . Site accessed on 22 April 2015.

3 Radelet S and Sachs J, "The Onset of the East Asian Financial Crisis", NBER Working Paper Series, http://www.nber.org/papers/w6680. Site accessed on 12 March.2015.

4 Krugman P, "What Happened to Asia?", http://web.mit.edu/krugman/www/DISINTER.html. Site accessed on 28 March 2015.

5 *Supra* n 1, at p. 375.

6 *Supra* n 4, at p. 3.

7 Johnson S, Boone P, Breach A, and Friedman E, "Corporate Governance in the Asian Financial Crisis", *Journal of Financial Economics*, 2000, Vol. 58, pp. 14-150.

8 La Porta R, Lopez-de-Silanes F, Shleifer A and Vishny R., "Investor Protection and Corporate Governance", *Journal of Financial Economics*, 2000, Vol. 58, pp. 3-20.

In Malaysia, the ineffective policies to address the devaluation of the ringgit resulted in a steep increase in the interest rate and consequent severe credit contraction. Consequently, corporate output and profits suffered severe contractions and the prices of equity fell significantly. The Kuala Lumpur Composite Index declined by 72% during the period from the end of June 1997 to the end of August 1998.

Subsequently, regulatory reforms were introduced to strengthen the corporate governance framework. Reforms in the corporate governance regulatory structure, among others, focused on improving financial disclosure, better monitoring via an improved board structure, and shareholder's empowerment. The reforms also addressed the following issues: - disclosure requirements; enhanced governance mechanisms with specific requirements on the role and composition of the board of directors and public enforcement[9]. Reforms to strengthen the corporate governance regulatory framework considered the existing weak market mechanisms, and specifically, the problems associated with asymmetric information, opaque corporations, and information overload.

Research showed that asymmetric information is one of the major causes of market failures and corporate scandals. According to Zalewska, asymmetric information is an issue in the business environment. This is due to three reasons, namely: (a) the increasing opaqueness of the corporations as a result of the rise of large scale businesses with complex organisational forms. This situation resulted in the emergence of greater informational asymmetry between investors and management; (b) rapid development in information technology which led to an increase in asymmetry. It has now become difficult to extract relevant and important information as more information that is made available creates the problem of information overload; and, (c) changes in ownership structure in line with the unprecedented growth of stock markets. Eventually, shareholders faced difficulty in monitoring the performance of the management.[10].

Consequently, a number of countries in Asia have introduced codes of corporate governance to address these problems. These regulatory reforms were successful in improving corporate governance in the respective countries. The establishment of the codes on corporate governance include the Malaysian Code of Corporate Governance in 2000 (the 'MCCG 2000'), South Korea's Code of Best Practices for Corporate Governance in 2003, the Singaporean Code of Corporate Governance in 2005, the Indonesian Good Corporate Governance Guideline in 2006, Thailand's Principles of Good Corporate Governance for Listed Companies in 2006, and the Philippines Code of Corporate Governance in 2009. These national codes on corporate governance had a common objective, that is, to improve the quality of the company's board of directors, increase corporate accountability to shareholders, and to further protect the interests of the investors.

In the context of Malaysia, corporate governance reforms were encapsulated in three main documents, namely: - the MCCG 2000 set out by the Finance Committee on

---

9 Kim EH, Lu Y, "Corporate Governance Reforms Around the World and Cross-Border Acquisitions", *Journal of Corporate Finance*, 2013, Vol. 22, pp. 236-260.

10 Zalewska A, "Challenges of Corporate Governance: Twenty Years after Cadbury, Ten Years after Sarbanes-Oxley", *Journal of Empirical Finance*, 2014, Vol. 27, pp. 1-26.

Corporate Governance (the 'FCCC'); the Capital Market Master Plan by the Securities Commission ('the CMMP'); and, the Financial Sector Master Plan (the 'FSMP') by Bank Negara Malaysia.

In 2008, a second wave of financial crisis, commonly known as the global financial crisis 2008, afflicted the economies of many countries. The global financial meltdown in 2008 shows that despite the numerous measures and initiatives to reform and strengthen corporate governance globally, the reforms achieved limited success. Corporate scandals, such as Enron, WorldCom, Adelphia Communications, Maxwell Group, Polly Peck, Satyam, and Parmalat revealed persistent shortcomings in corporate governance that resulted in the loss of billions of dollars and jobs. These corporate scandals exposed a high level of mismanagement and insatiable greed. The lack of active disclosure and reporting along with a responsible and sound accounting and reporting system were some of the reasons that contributed to the economic disaster. Both the previous meltdown that occurred eight years ago and the consequent legislation, such as the Sarbanes-Oxley Act in the United States, and the waves of corporate governance rules and revised codes that were implemented across the globe does not seem to make any difference towards improving corporate governance. Despite considerable time and effort to reform the regulatory structure during the 1997-2008 period, corporate governance practices and control mechanisms appear to remain weak and ineffective. The lack of adequate regulation and prudential control, structural weaknesses of regulatory institutions and commitment continue to pose a challenge to good corporate governance.

III. CORPORATE GOVERNANCE REFORMS IN MALAYSIA – PHASE ONE: SETTING THE MILESTONE

The 1997 Asian financial crisis provided an impetus for the first phase of reforms in corporate governance in Malaysia. The crisis exposed a number of weaknesses among companies that were badly hit by the stock market collapse. In the late 1980s and the early 1990s, companies faced numerous problems that were related to abuse of corporate dealing, fraud, bribery, asset stripping, favouritism, and opaque corporate practices. There was a lack of an independent and accountable monitoring body to ensure transparency and proper implementation of policies.[11]

In March 1998, the Malaysian government established the Finance Committee on Corporate Governance (the 'FCCG'). The FCCG's main task was to identify and remedy weaknesses in the corporate governance framework. The FCCG recommended two major initiatives, namely: - (a) the implementation of the Malaysian Code on Corporate Governance 2000, and (b) the establishment of the Minority Shareholders Watchdog Group. The initial steps to strengthen the corporate governance regulatory framework addressed the following areas:- fair treatment for all shareholders and protection of shareholder rights, with specific focus on the rights of the minority shareholders; transparency through

[11] Vithiatharan V and Gomez ET, "Politics, Economic Crises and Corporate Governance Reforms: Regulatory Capture in Malaysia", *Journal of Contemporary Asia*, 2014, Vol. 44 No. 4, pp. 572-580. Also available online at - http://www.tandfonline.com/doi/pdf/10.1080/00472336.2014.933062. Site accessed on 10 May 2015.

the timely disclosure of adequate, clear and comparable information concerning corporate financial performance, corporate governance and corporate ownership; accountability and independence of the board of directors; strengthening regulatory enforcement and promoting training and education at all levels to ensure that the framework for corporate governance is supported by the necessary human resource capital.[12]

The MCCG 2000 represents a significant milestone in corporate governance reform. Based on the recommendations of the United Kingdom's Cadbury Report (1992) and the Hampel Report (1998), the MCCG 2000 attempted to codify principles and best practices of good governance as well as describe the optimal corporate governance structures and internal processes. It consists of four sections, namely: (a) Principles of corporate governance; (b) Best practices in corporate governance; (c) Exhortations to other participants; and (d) Explanatory notes and 'mere best practices'. The sections set out a broad and general guideline for the new corporate governance framework. Of more significance is the attempt to clearly define the role and functions of the board. Specifically, the MCCG 2000 focused on corporate reforms in four major areas, that is: - the board of directors; director's remuneration; shareholders and accountability and the audit. The MCCG 2000 strives to ensure that boards are able to function in a more transparent and responsible manner.

The recommendations for reform are almost similar to the provisions in the United Kingdom's Combined Code on Corporate Governance. The MCCG 2000 is prescriptive in nature even though it is regulatory driven. It sought to improve the quality of the company's board of directors, increase corporate accountability to shareholders, and improve the governance of companies to protect the various key stakeholders such as investors, directors, shareholders, political and social institutions.

The regulators decided to adopt a concerted and holistic approach towards the enhancement of corporate governance. The changes to the corporate governance system are significant as it has resulted in a stronger regulatory governance framework. Companies are accorded some degree of flexibility to apply the broad principles of good corporate governance set out in the MCCG 2000. The government, as in other ASEAN countries, has provided strong support to these reforms. In the latter, strong governmental support has resulted in the establishment of new institutions to monitor and enhance corporate governance, an increase in shareholder activism, and some positive changes among market participants' attitudes and behavior[13]. The regulators are aware that investors and shareholders recognise the positive benefits associated with high

---

[12] Securities Commission Malaysia, "Finance Committee Report on Corporate Governance", http://www.sc.com.my/finance-committee-report-on-corporate-governance/. Site accessed on 28 May2015.

[13] The MCCG 2000 listed out six specific responsibilities of the board, that is - (a) to review and adopt a strategic plan for the company; (b) oversee the conduct of the company's business and assess whether the business is being properly managed; (c) identify principle risks and ensure the implementation of appropriate systems to manage these risks; (d) succession planning, including appointing, training, fixing the compensation for, and where appropriate, replacing senior management; (e) develop and implement an investor relations programme or shareholder communications policy for the company; and (f) review the adequacy and the integrity of the company's internal control systems and management information systems, including systems for compliance with applicable laws, regulations, rules, directives and guidelines.

corporate governance standards. Among these benefits are a higher level of transparency and disclosure, improved risk management as well as enhanced control mechanisms that are able to attract more domestic and foreign investment.

The MCCG 2000 has brought some positive changes to the corporate landscape. The approach that has been adopted to increase the standard of corporate governance is both flexible and constructive in nature. It differs markedly from the traditional and conservative approach that is usually based on statute. The MCCG 2000 also set out the principles and best practices on structures and processes that companies may use to establish an optimal governance framework. At the micro-level, the reforms include the board's composition, procedures for recruiting new directors, remuneration of directors, the use of board committees, setting the mandates and activities. The prescriptive approach allows directors to focus on form, rather than exercising their judgment on what corporate governance practices are best for their companies. Investors are assumed to be able to assess the performance of the companies when there is sufficient disclosure which is reflected from a narrative statement in the annual report that explains how the companies have complied with the relevant principles. Compliance is voluntary in nature. Companies are required to give reasons for any non-compliance. In most cases, to comply with best practices, directors respond to the questions on corporate governance by merely ticking a series of boxes to show that they have complied with the prescribed best practices. Unfortunately, the prescriptive approach failed to ensure that a company has, in reality, complied with the procedures on corporate governance. The MCCG 2000 is applied on a compliance basis where the KLSE requires a listed company to disclose whether it has complied with the Code.

Multiple regulatory regimes are involved in the effort to strengthen corporate governance framework. The MCCG 2000 is supported by the Capital Market Master Plan (the 'CMMP') and the Financial Sector Master Plan (the 'FSMP'). The CMMP recommended that companies mandatorily disclose the state of compliance with the MCCG 2000. It duly recognised that good corporate governance is vital to promote a positive environment for investors. On the other hand, the FSMP aimed to develop a more resilient, competitive and dynamic financial system with a particular focus on promoting shareholders' and consumers' activism, regulatory control, and priority sector financing.

IV. PHASE TWO: STRENGTHENING THE CAPITAL MARKET

Since 2000, the standard of corporate governance in Malaysia has improved. The mandatory reporting of compliance with the MCCG 2000 has allowed shareholders and the public to access and determine the standards of corporate governance of public listed companies. However, the rapid development of both the local and international capital markets prompted regulators to review the MCCG 2000 to further strengthen corporate governance practices. The comprehensive review sought to further enhance the quality of the board of public listed companies.

The changes listed out in the Malaysian Code on Corporate Governance 2007 (the 'MCCG 2007') emphasised the following areas: the eligibility criteria for the appointment of directors and audit committee member; the composition of audit committees, the

frequency of meetings, and the need for continuous training. [14] Executive directors are not allowed to become members of the audit committee, a step seen as promoting a more effective audit committee. The internal audit function was mandatory for all public listed companies. The board of directors became responsible for the internal audit.

The MCCG 2007 recommended a formal and transparent procedure for the appointment of new directors to the board. The board should appoint a committee of directors that consists of non-executive directors, the majority of whom are independent, with the responsibility for proposing new nominees to the board and for assessing directors on an ongoing basis. The actual decision as to who should be nominated should be the responsibility of the full board after considering the recommendations of such a committee.

The nominating committee should recommend to the board, candidates for all directorships to be filled by the shareholders or the board. In making its recommendations, the nominating committee should consider the candidates' skills, knowledge, expertise and experience; professionalism; integrity, and in the case of candidates for the position of independent non-executive directors, the nominating committee should also evaluate the candidates' ability to discharge such responsibilities/functions as expected from independent non-executive directors; consider, in making its recommendations, candidates for directorships proposed by the chief executive officer and, within the bounds of practicability, by any other senior executive or any director or shareholder; and recommend to the board, directors to fill the seats on board committees.

V. PHASE THREE: CHARTING THE FUTURE CORPORATE LANDSCAPE

In March 2012, the Securities Commission implemented the Malaysian Code on Corporate Governance 2012 (the 'MCCG 2012')[15]. This represents the third phase of corporate governance reforms in the country. It sets out the future corporate landscape of the nation in a more transparent manner. The MCCG 2012 set out broad principles and specific

---

[14] Securities Commission Malaysia, "Malaysian Code on Corporate Governance (Revised 2007)", Securities Commission, Kuala Lumpur, 2007. Also available on line at - http://www.ecgi.org/codes/documents/cg_code_malaysia_2007_en.pdf. Site accessed on 3 June 2015; The MCCG 2007 reforms set out seven specific responsibilities of the board, namely, to (a) facilitate the discharge of the board's stewardship responsibilities; (b) review and adopt a strategic plan for the company; (c) oversee the conduct of the company's business to assess whether the business is being properly managed; (d) identify principal risks and ensure the implementation of appropriate systems to manage these risks; (e) succession planning, including appointing, training, fixing the compensation of and where appropriate, replacing senior management; (f) develop and implement an investor relations programme or shareholder communications policy for the company; and, (g) review the adequacy and the integrity of the company's internal control systems and management information systems, including systems for compliance with applicable laws, regulations, rules, directives and guidelines.

[15] *Ibid.* The MCCG 2012 also contains eight broad principles together with 26 corresponding recommendations. The principles and recommendations include (a) setting a strong foundation for the board and its committees to carry out their roles effectively: (b) promoting timely and balanced disclosure; (c) safeguarding the integrity of financial reporting; (d) emphasizing the importance of risk management and internal controls; and (e) encouraging shareholder participation in general meetings. It seeks to raise the standard of corporate governance to a higher level with the purpose to enable companies to face the challenges posed by rapid global economic development.

recommendations on structures and processes that companies can adopt to make good corporate governance as an integral part of their business dealings.

The objectives of the MCCG 2012 are to (a) strengthen self and market discipline; (b) promote compliance with the law and ethics; (c) promote corporate governance culture; (d) strengthen board structure and composition, and (e) set up an effective governance structure to manage risks in an appropriate manner. The MCCG 2012 advocates the adoption of standards that exceeds the minimum prescribed by regulation. Listed companies are required to explain in their annual reports how they have complied with the recommendations even though it is not mandatory for companies to observe the MCCG 2012. Nevertheless, companies are required to explain and give reasons if there is non-compliance with any of the MCCG 2012 recommendations.

The MCCG 2012 focuses on strengthening board structure and composition. It recognised the role of directors as responsible fiduciaries, effective stewards and guardians. It recommends that companies should adopt certain structures and processes that allow good corporate governance to be an integral part of its business dealings and culture.

The MCCG 2012 requires listed companies to report on their state of compliance with the MCCG 2012 in their annual reports even though compliance is voluntary in nature. It also clarifies the role of the board in providing leadership and also the enhancement of board effectiveness. It encourages companies to adopt good corporate disclosure policies. Further, it encourages companies to make public their commitment to respecting shareholder rights.

The above recommendations for reform were based on the following reasons - to further safeguard investors' confidence; develop markets that are fair, orderly, and transparent; and to ensure more consistency and equivalence of regulatory outcome.[16] The process to reform the MCCG 2000 was also prompted by the convergence of global corporate governance standards. This arises from increased cross-border activities and investment flows that in turn, has motivated many countries to adhere to international standards of corporate governance in order to attract domestic and international capital via a country's higher level of competitiveness.

The Malaysian regulators' focus on ex-ante monitoring is evident from the MCCG 2012 strategy to strengthen board structure and composition. Effective ex-ante monitoring is a better measure to reduce the problem of asymmetries of information between agents and principals. Policy makers find it more effective to establish conditions for effective ex-ante monitoring.

The reforms in corporate governance have been successful with a significant improvement in corporate accountability, transparency and board independence. To a certain extent, it has helped to reduce the agency problem with more effective monitoring and control over the opportunistic behavior of the management. The MCCG 2000 had a significant effect on the wealth of shareholders as the prices of stocks reportedly increased by about 4.8% following the integration of the MCCG 2000 into the Bursa

[16] See Singh R.A's opening remarks at the International Corporate Governance Seminar, 6 June 2013, Kuala Lumpur. Speech available online at: http://www.sc.com.my/wp-content/uploads/eng/html/resources/speech/2013/sp20130606.pdf. Site accessed on 7 January 2016.

Malaysia Listing Rules in 2001[17]. The McKinsey's survey in 2002 showed that 82% of Asian institutional investors perceived corporate governance to be of similar importance to financial issues while evaluating which companies to invest[18].

VI. CHALLENGES TO CORPORATE GOVERNANCE REFORMS

In Malaysia, the regulatory bodies have advocated a comprehensive and rigorous approach towards corporate governance reforms. The various reforms have produced positive changes to the corporate governance landscape. Despite the encouraging changes in Malaysia's corporate governance laws, the authorities have to address some challenges to ensure that the corporate governance reforms achieve its objectives.

A. An Optimal Board Structure

The answer to the question of what is the optimal structure of the board remains elusive. Research conducted intra-country even produce contradictory results. Some of these findings showed that a large board is effective while another research within the same country showed that a large board faced numerous difficulties.[19] An optimal board structure may not deter instances of non-compliance with disclosure norms, lax enforcement of audit rules and regulations, and even success in protecting the rights of creditors and minority shareholders.

B. The Nexus Between the State and Private Businesses

In mixed economies, governments often share a large percentage of the ownership with private investors. The close nexus of relationship between the State and private businesses is also prevalent in many Asian countries where the State functions as a key player or actor in corporate governance. In this context, ownership of business equity by the government often raises the issue of a conflict of interest. This is pertinent as the State functions in the dual role of the State as a shareholder and, simultaneously, as a corporate governance regulator.[20]

Although the government has reduced direct participation and responsibilities in many areas of businesses, its presence and traditional influence remains strongly entrenched. Political intervention has resulted in the emergence of many problems associated with the political economy of corporate governance. The influence of an extensive network of politically connected companies on corporate governance practices is a significant challenge to good corporate governance[21].

---

17 Effiezal A. Abdul Wahab, Janice C.Y. How and Peter Verhoeven, "The Impact of the Malaysian Code on Corporate Governance: Compliance, Institutional Investors and Stock Performance", *Journal of Contemporary Accounting and Economics*, 12/2007, Vol. 3(2), pp. 106-186.

18 *Ibid*. at pp. 106-186.

19 *Supra* n 10, at pp. 1-26.

20 *Supra* n 11, at pp. 1-20.

21 Faccio M, Masulis R and McConnell J, "Political Connections and Corporate Bailouts", *Journal of Finance*, 2006, Vol. 61, pp. 259-267.

Political connections have a significantly negative effect on corporate governance even though the evidence did not show that politically connected firms perform better[22]. In addition, regulators may lack the political will to investigate some of the corporate improprieties, as reported in China and India[23]

C. Lax Monitoring and Enforcement

The recurrence of corporate scandals and distress such as that of a major government-linked corporation, Malaysia Airlines System's RM11.7 billion debts[24], the Port Klang Free Zone, the National Feedlot Corporation, and Sime Darby, reflects questionable corporate governance practices. Concern over the effectiveness of the reforms by the government continues despite the implementation of numerous regulations and codes of governance.[25]

The involvement of the State with well-connected companies raises questions about where ultimate responsibility lies in terms of monitoring and regulating corporate abuse. The relatively weak or lax monitoring and enforcement mechanisms in turn promote a lax governance environment. This weakness does not align with the principle that corporate governance provides legal protection to the rights of both shareholders and creditors where it reduces the risks of expropriation related to asset stripping, transfer pricing, investor dilution, or diversion of corporate opportunities from the company[26]. The quality of enforcement set up by a company, and the strict adherence to securities laws by both regulators and courts are important elements of corporate governance and finance[27].

D. Protection of Investors

The protection of investors remains a constant concern among the different stakeholders. Investors' confidence is closely associated with good corporate governance. In Malaysia, there is growing concern over the decline in foreign investment during the past ten years. Between 1998 and 2008, the inflow of foreign direct investment into Malaysia have declined to an average of RM4.3 billion, compared to an average of RM5.2 billion between 1990 and 1997. Private investments have dropped from 31.2% in 1995 to 10.9% in 2008. The stock market fell by 40 percentage points during the period from July 2008 to February 2009[28].

---

22 Supra n 17, at pp. 106-186.

23 Rajagopalan N and Zhang Y, "Corporate Governance Reforms in China and India: Challenges and Opportunities", *Business Horizons*, 2008, Vol. 51, pp. 55-70.

24 Anshuman Daga and Yantoultra Ngui, 25 March 2014, *"Struggling, Malaysian Airline may need Government Bailout"*, Reuters: http://www.reuters.com/article/us-malaysia-airlines-financing-idUSBREA2O1U420140325. Site accessed on 2 May 2015; As of December 2013, Malaysia Airlines System's total debt amounted to 11.7 billion ringgit.

25 *Supra* n 11, at pp. 1-23.

26 *Supra* n 8, at pp. 3-20.

27 La Porta R, Lopez-de-Silanes F, Schleifer A and Vishny R, "Legal Determinants of External Finance", *Journal of Finance,* 1997, Vol. 52, pp. 1131-1159; La Porta R, Lopez-de-Silanes F, Schleifer A, and Vishny R, "Law and Finance", *Journal of Political Economy,* 1998, Vol. 116, p. 1113.

28 *Ibid.,* "Legal Determinants of External Finance", at pp. 1131-1159.

E. Quality of Disclosure

The quality of corporate disclosure continues to be a challenge. A study by Todd showed that, firms with a higher disclosure quality tend to have a significantly better stock price performance.[29] The study among 398 companies from Indonesia, Korea, Malaysia, the Philippines, and Thailand revealed that firm-level differences in variables related to corporate governance had a strong impact on the firm's performance during the East Asian financial crisis of 1997–1998. Significantly better stock price performance is reported to be associated with firms that had indicators of higher disclosure quality (ADRs and auditors from Big Six accounting firms), with firms that had higher outside ownership concentration, and with firms that were focused rather than diversified. The results suggest that individual firms have some power to preclude expropriation of minority shareholders if legal protection is inadequate.

F. The Rights of Shareholders

In terms of shareholder rights, it is notable that the amended Listing Requirements in Malaysia prevent companies from imposing restrictions on proxy appointment by shareholders. In addition, the amendment to allow a registered shareholder to appoint multiple corporate representatives is significant. Nevertheless, the function of the two-proxy rule is not clear since a standard and uniform rule that relates to the name to be registered in the shareholder register has yet to be introduced. The question that arises is whether the name of the beneficial owner should be the beneficial owner or the trustee[30].

There are other obstacles that prevent equitable treatment and enforcement of shareholders' rights. Corruption, political interference, discrimination, and inaction are some of the common barriers to foreign investment. Some countries have set up special courts to enhance the enforcement of shareholders' rights. In Malaysia, five Sessions Courts and three High Courts seem to be effective, to some extent, in strengthening the enforcement of shareholders' rights as the courts deal with commercial and capital market cases. An enforcement division in the Kuala Lumpur Stock Exchange has also been set up to enhance enforcement capacity.

G. Institutional Investors' Activism

Traditionally, the level of activism among local institutional investors remains at a relatively low level even though the authorities provide strong support to promote more active participation. The MCCG 2012 recommended the establishment of a new code for institutional investors and the setting up of an umbrella body for institutional investors.

---

[29] Todd M, "A Cross-Firm Analysis of the Impact of Corporate Governance on the East Asian Financial Crisis" *Journal of Financial Economics*, 2002, Vol. 64, pp. 215-268.

[30] Asian Corporate Governance Association, "Response to the 'Corporate Governance Blueprint'", December 2011. At http://www.acga-asia.org/public/files/ACGA%20Response%20to%20CG%20Blueprint%20(final%20draft).pdf. Site accessed on 25 April 2015.

This is useful as it allows institutional investors to participate more actively in corporate governance rather than adopting a "voting by feet" approach.

H. Ownership of Companies

Although it is mandatory to separate the position of the chairman and the Chief Executive Officer, the majority of listed companies in Malaysia tend to be either family-controlled or State-owned. Thus, it is a challenge to have an independent chairman who is loyal to the majority stakeholder. The question is whether the new Code is feasible as unit trust fund managers, government fund managers, and other fund managers often tend to lobby against each other[31] .

I. International Best Practices

The Malaysian regulators have also actively participated in the Asian Roundtable meetings and have committed themselves to comply with the OECD Principles and best practices. It recognised that weak corporate governance can lead to economic and financial vulnerabilities. It has followed its other Asian neighbours in placing significant efforts to strengthen the laws and regulations, define shareholder rights and improve shareholder engagements. Although regulators may examine and even adopt universal corporate governance principles and best practices, the intricacy that prevails usually requires the contextualisation of the corporate governance framework to accommodate domestic need and demands.

J. Business Culture

The geo-diversity of business culture and cross country differences means that different approaches are needed to overcome problems related to corporate governance. Unfortunately, some policy makers continue to apply the 'one-size-fits-all' solutions while past research recognised cross—country differences required different strategies.[32] The European Union countries have different levels of economic, financial, and social development. Unfortunately, the European Union authorities sought to impose uniform rules in dealing with corporate governance policies[33]. Policy makers seem to ignore the specific characteristics of individual countries. In this context, the Malaysian regulators need to exercise caution to avoid problems associated with the adoption of the 'one-size-fits-all' approach.

K. An Improved Corporate Landscape

Generally, the Malaysian corporate landscape has experienced some positive changes due to the authorities' active commitment in the implementation of a strong corporate

---

31 *Ibid*.
32 *Supra* n 9, at pp. 236-260.
33 *Ibid*.

governance standard. The authorities have often sought guidance from the Principles of Corporate Governance set out by the OECD to maintain a high standard of corporate governance[34]. The country continued to place corporate governance as a priority and a core component in its strategic plan for the development of the capital market[35]. It has also signed the International Organization of Securities Commission's Multilateral Memorandum of Understanding to participate in cross-border enforcement and international collaboration via the exchange of information among regulators such as information related to beneficial ownership and control structures[36].

In terms of strengthening the quality of auditing, the Securities Commission in Malaysia has established the Audit Oversight Board to empower securities regulators and the KLSE to improve enforcement. Malaysia strives to adhere to the IOSCO's recommendations to establish an independent body to enhance the quality of the audit system. In 2007, Malaysian auditors who resigned are required to disclose the reasons for resignation or removal from office to the regulators.

The establishment of board committees is mandatory for listed companies by law, regulation, or listing rules. In Malaysia, board committees consist of a majority of independent directors. The requirements regarding the number of independent board members on audit committees are different among Asian countries. In Malaysia, they have to consist of at least a majority of the independent board members.

Corporate governance reforms in Malaysia appear to focus on internal mechanisms. The reforms stressed on the responsibilities of directors and management, and the need to promote disclosure. However, effective governance is also determined by the existence of an efficient external institutional framework that comprises the regulatory, legal, and financial frameworks. Although the focus is mainly on the internal governance mechanisms, there is a need to ensure that there is strong support from the external mechanisms, namely, the courts, and the institutional investors. In addition, the internalisation of good corporate governance culture incorporates good business management practices that are supported by moral and ethical values. Under such circumstances, regulatory discipline would, perhaps be less critical.

VII. CONCLUSION

Three major waves of regulatory changes entered the market as a response to enhance corporate governance practices in Malaysia. These reforms focused on improving and promoting a culture of good corporate governance with an enhanced market discipline and the creation of more shareholder value. The reforms aimed at reducing corporate scandals in the future. Concerted efforts and commitment to enforcement are vital to

---

[34] The Organisation for Economic Cooperation and Development (OECD), "Reform Priorities in Asia: Taking Corporate Governance to a Higher Level", Asian Roundtable on Corporate Governance, 2013. Available online at: http://www.oecd.org/daf/ca/49801431.pdf. Site accessed on 26 May 2015.

[35] *Supra* n 16.

[36] Securities Commission Malaysia, "Compliance with IOSCO Principles". Available online at: http://www.sc.com.my/general-section/international/compliance-with-iosco-principles/. Site accessed on 20 May 2015.

achieve success otherwise the reforms would, at best, be characterised by, sporadic knee-jerk reactions by the regulators and appears to be superficial in nature.

Corporate governance reform must also circumvent the factors related to the lack of transparency, an unwillingness to accept global best governance practices, adherence to governance rules that are opaque and the traditional strength of a culture of relative secrecy in companies that are predominantly family-controlled. Otherwise, significance governance lapses in practice would continue despite the plethora of reforms in rules and regulations. These obstacles would outweigh the efforts of the regulators to establish a climate of greater accountability and transparency[37]. The transition from a closed, opaque, and relationship- based governance system to a more open, transparent, and rule-based governance system is indeed a formidable challenge.

[37] Mohd Ghazali N.A and Weetman P, "Perpetuating traditional influences: Voluntary disclosure in Malaysia following the economic crisis", *Journal of International Accounting, Auditing and Taxation*, 2006, Vol. 15, pp. 226-239.

The New Prevention of Terrorism Act 2015 (POTA): A legal commentary

Ho Peng Kwang*

Abstract

On April 7, 2015, our Parliament passed the new Prevention of Terrorism Act. 2015 (POTA) after going through heated debate for more than 10 hours. The new POTA faced considerable opposition and criticism for introducing the continuing detention without trial, which the lawmakers have claimed to be similar to the already repealed Internal Security Act (ISA) that dominated Malaysia for the past 52 years. It was further contended by many quarters that the new POTA gives our government greater authority to track and intercept terrorist acts and the fear of it being abused is not guaranteed, judging from the past history of cases under preventive detention in Malaysia. Although our Prime Minister himself has given his assurance that the executive arm will not have any say on who to detain under POTA, nevertheless it creates new crimes, new penalties, and new procedures for use. The introduction of POTA by our government has also attracted adverse comments by Human Rights Watch Deputy Director Phil Robertson with the following remarks: " by restoring indefinite detention without trial, Malaysia has re-opened Pandora's box for politically motivated, abusive state actions". Thus, it is the aim of this article to provide an assessment and legal commentary on the relevant sections of the POTA that are claimed to be 'controversial' by many, and whether it undermines basic human rights besides looking at other nations as a comparative study.

I. INTRODUCTION

The turmoil caused by the Islamic State (ISIS) to Syria and Iraq, and the growing threat of other forms of terrorism in the world has led to the passing of the new Prevention of Terrorism Act 2015 ('POTA') in Malaysia. The Prime Minister, on 26 November 2014 delivered a White Paper entitled: *'Towards Combating the Threat of Islamic State'* [1] after recognising that there was a continuous threat of violence within and outside the country. Resolution 2178 adopted by the United Nations Security Council against imminent threats

* Advocate & Solicitor, High Court of Malaya.

1 Office of the Prime Minister, Putrajaya, Malaysia, 26 November 2014, "Teks Ucapan Pembentangan Kertas Putih ke Arah menangani Ancaman Kumpulan Islamic State", http://www.pmo.gov.my/home.php?menu=speech&page=1676&news_id=745&speech_cat=2. Site accessed on 7 April 2015.

to global peace and security perpetrated by these terrorist acts were noted in the White Paper and brought up for discussion. The White Paper proposed the creation of a new law.

POTA was born from this initiative, as a new preventive measure to address and to combat militancy in the country. It enables law enforcement officials to track down and penalise those who are suspected terrorists. It is a preventive measure utilised alongside other existing Acts, intended to combat terrorism by de-radicalising detained suspects. Those Acts are the Penal Code [Act 574], Prevention of Crime Act 1959 [Act 297] and the Security Offences (Special Measures) Act 2012 [Act 574] known as SOSMA. POTA created a fresh definition of counterterrorism, and its primary goal is aimed at suspected individuals committing or supporting any terrorist in or outside the country. It is also intended to curb the activities of terrorist organisations as listed and provided for in the preamble of the Act. The Prime Minister had given his personal guarantee that this new law would not be utilised for the advancement of any political agenda. He further affirmed that the executive body of the government would not interfere in matters of one's detention under the new Act.[2] However, reading the interpretation section 2(1), words like '*engaged*', '*commission*', '*support*' and '*involving*' have not been clearly explained. In what way do these general words come into play when ascertaining an act of terrorism? These concerns were raised by human rights activists as well as the Malaysian Bar Council, that POTA is too broadly drafted and thus open to abuse; as almost anyone could potentially be a victim under POTA.

II. THE CRITIQUES OF POTA

With the demise of the controversial Internal Security Act 1960 (ISA) in 2011, after almost 52 years of dominance the inherent fear in most critics of POTA is that POTA would be just another 'reincarnated' ISA, regardless of its improvements. While there are positive features in POTA that outweigh the superseded ISA, critics such as Amnesty International,[3] International Bar Association and Human Right's Watch[4] contend that its provisions may nevertheless have violated basic human rights despite many of the improvements made in counterterrorism. This concern has led opposition legislators to call it the twin of ISA. This article will address the relevant sections that are of concern to many.

A. Part I: Preliminary [Section 1-2]

Section 2 is the interpretation section that provides the definition for selected words and terms used in the Act. As highlighted earlier, this section did not include definitions for

---

2 Datuk Seri Najib further added, "We will place it under a credible body so that only those truly involved in terrorism can be detained under the new act. That way, we can guarantee Malaysia will continue to be safe". Available at https://sg.news.yahoo.com/sedition-act-curb-terrorism-says-najib-023817008.html. Site accessed on 11 April 2015.

3 "*Malaysia: New Anti-Terrorism Law A Shocking Onslaught Against Human Rights*" accessible at https://www.amnesty.org/en/press-releases/2015/04/malaysia-new-anti-terrorism-law-a-shocking-onslaught-against-human-rights/. Site accessed on 4 April 2016.

4 "*HRW slams Malaysia's new 'repressive' anti-terrorism law*" accessible at:https://www.hrw.org/news/2015/04/07/hrw-slams-malaysias-new-repressive-anti-terrorism-law. Site accessed on 4 April 2016.

the words '*engaged*', '*commission*', '*support*' and '*involving*' although these words were in the preamble. Without a clear definition, it provides the police a wide discretionary power of arrest under section 3 to interpret what is deemed as preparatory actions taken by the suspected terrorist. This has a far-reaching effect and is open for abuse by law enforcement officers. As an example, the disproportionate targeting of suspects by the police often leads to periods of pre-arrest detention, followed by a release when the police have decided not to charge the suspects under the Act. These pre-arrests are done with merely 'reasonable belief' by the officer that the suspect has likely engaged, committed, supported or been involved in terrorist activities which restrict civil liberties. In fact, for the term '*terrorist act*', reference must be made to the Penal Code under Chapter VIA.[5]

---

[5] "Section 130B (2) defines terrorist act as an act or threat of action within or beyond Malaysia that:-
(a) the act or threat falls within subsection (3) and does not fall within subsection (4);
(b) the act is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
(c) the act or threat is intended or may reasonably be regarded as being intended to-
(i) intimidate the public or a section of the public; or
(ii) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization to do or refrain from doing any act.
(3) An act or threat of action falls within this subsection if it:
(a) involves serious bodily injury to a person;
(b) endangers a person's life;
(c) causes a person's death;
(d) creates a serious risk to the health or the safety of the public or a section of the public;
(e) involves serious damage to property;
(f) involves the use of firearms, explosives or other lethal devices;
(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the public to-
(i) any dangerous, hazardous, radioactive or harmful substance;
(ii) any toxic chemical; or
(iii) any microbial or other biological agent or toxin;
(h) is designed or intended to disrupt or seriously interfere with, any computer systems or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
(i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;
(j) involves prejudice to national security or public safety;
(k) involves any combination of any of the acts specified in paragraphs (a) to (j) and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [Act 307].
(4) An act or threat of action falls within this subsection if it-
(a) is advocacy, protest, dissent or industrial action; and
(b) is not intended-
(i) to cause serious bodily injury to a person;
(ii) to endanger the life of a person;
(iii) to cause a person's death; or
(iv) to create a serious risk to the health or safety of the public or a section of the public.
(5) For the purposes of subsection (2)-
(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Malaysia; and
(b) a reference to the public includes a reference to the public of a country or territory other than Malaysia.
[Note: Previously known as the Anti-Money Laundering Act 2001. Change in short title vide section 3 of the Anti-Money Laundering (Amendment) Act 2003 [Act A1208]"

There are ten mentioned acts or threats of action listed under paragraphs (a) to (j) of subsection (3) of the Penal Code. In addition, paragraph (k) thereof provides for the act or threat of action involving any combination of the acts named in the previous 10 sub-paragraphs. A terrorist act is the act or threat of action intended or may be reasonably regarded as intended to intimidate the public or a section of the public [paragraph (i) of subsection 2 (c)] or influence or compel the Government of Malaysia or of any state in Malaysia, any other government, or any international organisation to do, or refrain from doing any act [paragraph (ii) of subsection 2 (c)]. Interestingly, there is no definition of what is a terrorist act. In the illustration section, it shows aspects of the act or threats having characteristics of a terrorist act. If we look further at paragraph (j), even the threat of action which "involves prejudice to national security or public safety" is also vague and general. Such a definition allows for a broad interpretation of what is believed to be a threat to national security.

As an example, does it mean that groups such as 'Bersih 2.0' or 'Kita Lawan' are terrorist groups and a threat to national security or public safety having organised street demonstrations, comparable to extremist groups like 'Al-Ma'unah' or 'Kumpulan Mujahidin Malaysia' (KMM)? By having such ambiguity in the law, there is no assurance that police officers may not violate one's fundamental liberties guaranteed under Articles 5, 9 and 10 of the Federal Constitution. For detention matters under POTA, reference must be made to section 130B of the Penal Code. There are also some exemptions provided for under sub-section 4 of the Penal Code such as: "*for protests and strikes that does not cause or is not intended to cause death or serious bodily harm by violence, endanger a person's life or cause a serious risk to public health or safety*." Such 'lawful' protests or strikes are not an act of terrorism. Another significant point to note here is that under section 130B (2)(b) of the Penal Code, there is also a need to show that the acts of terrorism are to propagate an ideological, religious or political cause. Which means to say that to prove a terrorist act under POTA, motive is necessary to justify any detention or restriction order. This requirement of motive may encourage political and religious profiling, targeting those who do not share similar mainstream views. These concerns were raised by Kent Roach in his article when he argued that "…investigations into political and religious motives can inhibit dissent in a democracy."[6]

B. Powers of Arrest and Remand [Sections 3 -7]

Section 3(1) states that a police officer may without a warrant, detain any person if the officer has reason to believe that grounds exist which would justify the holding of an inquiry into the person arrested. Whenever a person is under arrest, the police officers shall refer to the public prosecutor for further instructions within seven days from the arrest [section 3(2)]. The relevant issue here for consideration is the subjectivity of the phrase '*reason to believe*' by the police officer. As far as the interpretative section 2 is concerned,

[6] Kent Roach, *The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001* (2004) *Studi Senesi* 487, 491.

it provides us with nothing about the meaning of the phrase. So, we may have to look elsewhere for guidance. Section 26 provides us with the meaning of reason to believe [7].

Section 26 tells us that a person is said to have reason to believe when he has "*sufficient cause*" to believe. To believe a thing is to assent to a proposition or to accept a fact as real even though he has no immediate personal knowledge of such fact. In *Gulbad Shah*[8] Ratigan J explained the phrase "reason to believe" in section 411[9] of the Indian Penal Code which is *in pari materia* with our section 26. Further, the word used in the section is "believe" and not "suspect" or "suspicion". In another Indian case of *Rango Timaji*[10] Melvill J distinguished the words "believe" and "suspect" as:

> "The word believe is a very much stronger word than suspect, and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property."

In a local case, *Ahmad bin Ishak v Public Prosecutor*,[11] the appellant was convicted on the charge of voluntarily assisting in disposing of property (a cheque) valued at $2,000.90, which he knew or had reason to believe to be stolen property, in contravention of section 414 of the Penal Code. The appellant received twelve months imprisonment. On appeal, Arulanandom J held:

> "Now, reasons to believe, knowledge, intention, are things in a man's mind and you cannot see it, you cannot hear it... You must look into the circumstances and consider if the circumstances are such that *any reasonable man could see sufficient cause to believe* that it was stolen". (Emphasis added)

Relying on the Indian court's decision and *Ahmad bin Ishak*, the test to adopt is a reasonable man test with sufficient cause to believe. Mere suspicion should not be the only ground for an arrest as it needs further solid evidential grounds to justify the arrest based on case-laws cited.

However, a closer scrutiny of cases involving security offences show that the court is reluctant to treat an arrest under security offences in the same way as that of an ordinary arrest. The Court of Appeal's landmark case of *Borhan Hj Daud & Ors v Abd Malek Hussin*[12] has dealt with this issue directly. This case was an appeal against the

---

7 Section 26 of the Penal Code states that – "*A person is said to have reason to believe a thing, if he has sufficient cause to believe that thing, but not otherwise*."

8 (1888) PR No 37 of 1888, 95.

9 Section 411 Indian Penal Code: "*A person must be held to have 'reason to believe' property to be stolen within the meaning of section 411... when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the property he was asked to deal with was stolen property, although the circumstances may fall short of carrying absolute conviction to his mind on the point."*

10 (1880) 6 Born 402, 403.

11 (1974) 2 MLJ 21.

12 (2010) 8 CLJ 6.

High Court's decision in awarding the respondent general, aggravated and exemplary damages for unlawful arrest and detention, assault and ill-treatment and for oppressive, arbitrary and unconstitutional action. The High Court judge found that the respondent was never properly informed by the first appellant of why he was arrested as mandated under article 5(3) of the Federal Constitution. His Lordship also found that the first appellant was unable to provide the court with adequate details and material evidence of the respondent's conduct to validate the arrest and detention of the respondent under section 73(1) of the ISA. The appellants appealed against the High Court's decision. The first appellant claimed that after taking the respondent to the Police Contingent Headquarter (IPK) and after lodging a report, he had prepared a form as required under article 5(3) of the Constitution explaining to the respondent the grounds of his arrest.

Raus Sharif JCA (as he then was) when delivering the judgment of the court in allowing the appeal stated that, the arrest of the respondent was not an ordinary arrest. The respondent was arrested under section 73 (1) of the ISA, this was a special law made under article 149 of the Constitution. Article 149 of the Constitution expressly provides that laws such as the ISA is valid even though it is contradictory with arts. 5, 9 or 10 and 13 of the Constitution. The Court of appeal followed the Federal Court case of *Kam Teck Soon v Timbalan Menteri Dalam Negeri Malaysia*[13] even though *Kam Teck Soon* was a case under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. What one can infer from here is that security legislations tend to tilt the judges'minds when it comes to balancing national security and the due process of law. There seems to be a greater emphasis on national security rather than on a fair trial. The legal position in *Borhan's* case was applied by Justice Su Geok Yam recently on 22 April 2015 at the Kuala Lumpur Criminal High Court in *Teresa Kok's* case.[14]

The Court of Appeal in *Borhan* went further to say that the police officer was not required to inform the respondent in detail of the grounds of his arrest. It was legitimate for the first appellant to state that he had "*reason to believe*" that there were grounds to justify the respondent's detention under section 73(1) of the ISA. There is also no requirement for the first appellant to provide the court with sufficient details and material evidence of the respondent's conduct to justify the arrest and detention of the respondent under section 73(1) of the ISA. This is the broad view taken by the court in security offences like ISA, and certainly it will apply to cases that come under POTA, which has the similar phrase "*reason to believe*" under section 3 like *Kam Teck Soon*. The approach taken by the court in security offence cases has undermined fundamental liberties as enshrined under article 5(3) Federal Constitution, when there is no necessity imposed on the police to inquire and/or to provide details to show the culpability of the suspect detained. Under the established criminal liability principle, criminal offences comprise the so-called *actus reus* – that is, committing a prohibited, or omitting a required act - the objective element of the crime, and the so-called *mens rea* – having a specified level of knowledge or intent, or both, concerning the act - the subjective element. The broad provision under section 3 of POTA seems at odds with the established principles of criminal liability. As long

[13] (2003) 1 CLJ 225 FC.

[14] Teresa Kok, 22nd April 2015: "The unjust High Court decision on my unfair ISA detention" – Available at www.thestar.com.my/news/nation/2015/04/22/court-teresa-kok-loses/ Site accessed on 11 April 2016.

as the police officer has reason to believe the suspects' actual or likely intentions (rather than their acts), this will suffice for an arrest and detention.

A lesser burden of proof is required to make an arrest and to detain people under this section. The combined effect is that the likelihood of innocent people may be arrested, detained, and tortured for wrongful arrest, may not be rulled out. At the very least, the police should go further to prove the suspect provided support and such support provided will likely help the listed organisation[15] to pursue its unlawful terrorist aims instead of merely relying on reasonable believe to be so, which may be based on mere rumours or suspicion.

Another noteworthy legal observation here is that, under POTA, the harm may not be done as yet or is not completed at the point of arrest. This is termed as 'inchoate' offence under the criminal law. Under the Penal Code, a person attempts to commit an offence when he/she causes such an offence to be committed and in such an attempt does any act towards committing such offence.[16] Offences like conspiracy, abetment and instigation fall under this category. The rationale behind inchoate offence is to deter a potential crime before it crystallises - a proactive step in crime prevention.

The terrorism offences under Chapter VIA of the Penal Code echo the same intent by criminalising acts made in preparation of a terrorist act. However, under POTA, even at the formative stages of an action (for example, giving a speech can be deemed as an offence of '*supporting*' although a terrorist act may not occur or has yet to occur) an offence may have been perpetrated. This 'catch-all' offence may cause individuals to be penalised with detention even before any clear criminal intent can be found, bearing in mind, there is no court of law to determine that element under POTA. In the attempt to counter terrorism, the authorities seem to have opted to act pre-emptively by arresting people before any explicit plan to commit the terrorism act is found, an approach known as 'precautionary principle'[17] But what is more worrying is the broad definition drafted in POTA that will give the authorities a wide discretion to make an arrest. Once a suspect is arrested, the evidential burden lies on the suspect to prove that the preparatory activity has not gone further toward devising a terrorist attack. Shifting the burden of proof, runs contrary to the fundamental criminal justice system that everyone charged with a criminal offence shall be presumed innocent until proven guilty.[18] This is further compounded by case law precedent like *Borhan* which had decided that the police is not required to satisfy to the court (arguably will also apply before the Prevention of Terrorism Board set up under section 8 of the POTA) with sufficient particulars and material evidence of the suspect's actions to validate the arrest and detention in security offences case.

An interesting new feature introduced in POTA is the introduction of an electronic monitoring device that can be attached to a person if that person is released. This is provided under section 6(2), sub-sections (3) and (4). The special procedures relating

---

15 As provided under section 66b and 66c of the Anti- Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activites Act 2001 [Act 613].

16 See Section 511 of the Penal Code.

17 For review of this principle, see Cass R Sunstein, *Laws of Fear: Beyond the Precautionary Principle,* Cambridge University Press, 2005.

18 *Woolmington v Director of Public Prosecution* (1935) AC 462, 481.

to the electronic monitoring device are to be adhered to under section 7 of POTA. The sessions court judge has a statutory duty to explain the operation of the device and the terms and conditions to the person to be attached with the device. Any breach of the terms and conditions imposed on the suspect gives rise to an imprisonment for a term not exceeding three years [section 7(6)].

C. Inquiries [Section 8 – 12]

Section 8(1)(a) – (c) provides for the setting up of the Prevention of Terrorism Board (the Board), which comprise a Chairman (with at least 15 years of legal experience), Deputy Chairman and between 3 and 6 members to be appointed by the Yang di-Pertuan Agong. Each sitting shall have a quorum of three members [subsection (5)] and the Board shall determine its own procedure [subsection (6)]. The Home Mninister is also empowered under section 9(1) to appoint any person as an Inquiry Officer. A police officer shall not be appointment to the position [section 9(2)]. The proposed powers being conferred upon the Inquiry Officer are powerful and wide. It allows an Inquiry Officer to get evidence by whatever means he feels necessary during an investigation against a suspect. It does not matter whether such evidence is admissible or inadmissible so long as the evidence is desirable or necessary for the officer [section 10(3)(a)].

Basically, the rules of evidence do not apply at all. The inquiry officer may also, using his own discretion and based on his own judgment call for any documents related to the detainee. The crucial part is the non-representation of lawyers at the inquiry for the suspect or any witnesses called at the inquiry - [section 10(6)]. Critics have argued that if lawyers are not allowed to be at the inquiry, how is the suspect going to present his case in the best possible manner. The denial of the right to counsel is not only unjust, it also makes a mockery of the right to apply for *habeas corpus* as guaranteed by art. 5(2) of the Constitution as decided by Justice Hishamudin (as he then was) in the much notable ISA case of *Abdul Ghani Haroon v Ketua Polis Negara & Anor.*[19] Subsequent to that, the Federal Court in *Mohamad Ezam Bin Nor & others v Ketua Polis Negara & Others,*[20] decided that the police could not count on judicial tolerance where there is a denial of access to legal counsel.

Writing for the entire bench, Judge Siti Norma Yaakob found that the denial of legal assistance during the initial sixty-day detention period –

> "is conduct unreasonable and a clear violation of article 5(3)…Responding to the respondent's argument that under the ISA, the police has absolute powers during the entire period of the sixty day detention to refuse access under the guise that the investigations were ongoing…I find no justification to support the respondent's argument"

To sum up, the inquiry officer appointed under POTA in this section has unfettered powers and discretion to act as he sees fit with no system for check and balance from the

[19] [2001] 2 CLJ 709.
[20] (2002) 4 CLJ 309.

scrutiny of the judiciary. Although the appointment of such officers is in the hands of the Home Minister [section 9], what is unclear is the qualification needed and the criteria of appointment to be satisfied by the Minister.

D. Detention and Restriction Orders [Section 13 – 28]

Under sections 13(1)(a) and (b) of POTA, the Board, after considering the complete report submitted of the investigation or the report of the Inquiry Officer, if it is satisfied that it is necessary in the interest of the country's security, could issue a detention order for the person, not exceeding two-year period in a place of detention as the Board may direct; or may issue a restriction order and the person shall be subject to police supervision not exceeding a five-year period [section 13(3)] with restrictions and a variety of conditions to obey. The detention and restriction period can be further extended if the Board determines that there are reasonable grounds to do so, and if not, it can direct a person be set free. If the restricted person contravenes the terms of the restriction order, he/she is liable to a term of imprisonment not exceeding ten years and not less than two years [section 13(5)]. No hearing before the court of law is accorded to the suspect. Rather the order is issued personally by the authority i.e. Prevention of Terrorism Board.

The executive powers are no longer vested in the Home Minister, like the ISA but a five- member Advisory Board empowered with the tasks. Unlike ISA cases in the past, where it is the police who decides who to detain, under POTA only the Board is allowed to make such a decision. Criticisms hurled at the POTA for being the twin of the ISA is thus inaccurate and wrong, at least within the ambit of issuing detention or restriction orders on the suspect. Further to reinforce this point, there is a provision under subsection 10 which allows for judicial review of the Board's decision under section 13(1).

However, the controversial issue remains unresolved in that, as a general rule, no one should be detained beyond the initial period provided for in section 4(1) and (2) POTA without a finding of guilt or going through the judicial process. Whether it is a detention order or a restriction order, both orders target suspects not for what they have done, but for what they might do. Such preventive measures taken by the authority under POTA not only restrict one's personal liberty, but is also contrary to the legal maxim of being '*innocent until proven guilty*'. Practitioners have raised real concern over such detention orders issued by the Board, relying only on a lower standard of proof as opposed to the well established higher standard of proving 'beyond reasonable doubt' for criminal offences. The broad scope of the provisions in POTA makes this concern even stronger than those highlighted earlier in the preceding paragraphs. In the past, preventive orders were generally issued as an attempt to circumvent the judicial process by disallowing evidence that would have normally applied in court, to be challenged and tested in trial; offences under POTA are of no exception.

One of the most objectionable features of POTA is the ouster of judicial scrutiny. This can be seen in section 19(1).[21] Section 19(1) limits the power of the court to exercise its

[21] "Section 19 (1) (*inter-alia*) : There shall be no judicial review in any court on any act done or decision made by the Board in the exercise of the discretionary power **except** in regard to any question on compliance with any procedural requirement governing such act or decision."

inherent jurisdiction to review the decision of the Board to issue the detention order under section 13, in what we usually term as '*ouster clause*'. This similarly worded ouster clause can also be seen in the repealed section 8B of the Internal Security Act, 1960 ('ISA') prior to POTA. Under section 8B of the ISA, the courts are empowered to scrutinise the authority if it is about "*the non-compliance with any procedural requirement governing such act or decision*". The term "procedural requirements" include jurisdictional requirements. This legal position is derived from the case of *Anisminic v Foreign Compensations Commission*[22] where The House of Lord's decision has achieved two significant results - in that it not only diluted the efficacy of the ouster clause by confining their protection to non-jurisdictional errors but also extended the scope of jurisdictional error. Hence, it is crystal clear that unless the specific pre-requisites *are* satisfied, the power to issue the Detention Order cannot be lawfully invoked. *Anisminic'*s decision has been considered and applied by the High Court in the case of *Raja Petra Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri.* [23]

A scrutiny of the express provisions of the ouster clause under section 19 of POTA reveals that no judicial review is permissible where any act is done or decision is made by the Board when exercising its discretionary power under the Act. The operative words here are '*in accordance with the Act*' which simply means if the Board has acted outside the express objects of POTA, then it has acted outside its jurisdiction allowed under the Act. Under such circumstances, the Board is deemed to have acted *ultra vires* the object of the Act. The ouster clause does not take effect as decided in the case of *Raja Petra*. Whether the detaining authority has acted *ultra vires* the objects and provisions of the Act, the Supreme Court in the case of *Karpal Singh v Menteri Hal Ehwal Dalam Negeri* [24] opined that there are exclusions to the non-justifiability of the Minister's mental satisfaction which includes *mala-fides* as in that case where one of the six charges was found to be factually incorrect and made in error. As a result, habeas corpus was granted. Therefore, the principle that can be elucidated from here is that if the decision-making body goes outside its powers, or misconstrues the extent of its powers, then the Courts can interfere regardless of the ouster clause. And for judicial review, it is trite that the test to be adopted now will be the objective test as laid down by the recent Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors.*[25]

The next sections 20 and 21 of the POTA deal with the removal of any detained person from one place to another while section 21(1) empowers the Commissioner

---

22 [1969] 2 AC 147 - Lord Morris held that: "…it becomes necessary, therefore, to ascertain what was the question submitted for the determination of a tribunal. What were its terms of reference? What was its remit? What were the questions left to it or sent to it for its decision? What were the limits of its duties and powers? Were there any conditions precedent which had to be satisfied before its functions began? If there were, was it or was it not left to the tribunal itself to decide whether or the conditions precedent were satisfied? If Parliament has enacted that provided a certain situation exists then a tribunal may have certain powers, it is clear that the tribunal will not have those powers unless the situation exists."

23 [2008] 1 LNS 920.

24 [1988] 1 MLJ 468.

25 [2014] 6 CLJ 541.

General of Prison or Inspector General of Police to produce a detainee at any place for the purpose of any public or other inquiry. Sections 22 and 23 deal with the keeping and maintaining of a proper record by the Registrar of Criminals on those who have been served with a detention or restriction order. Sections 24 – 28 supervises the movement of restricted person or persons over whom a detention order is in force. It is an offence for any registered person to consort or habitually associate with any other registered person in the place where he lives without the permission of the District Police Chief (OCPD) [section 24], or found in any place in which any act of violence or breach of peace is being committed [section 26] and for anyone to knowingly harbour any registered person [section 27].

E. General [Sections 29 – 35]

This part contains general provisions of POTA. Section 30 empowers a police officer to arrest any person committing an offence under sections 24, 26 or 27. Section 31 deals with the taking of photograph and finger impressions of any person arrested. It is an offence for any person arrested to refuse to the taking of photographs or finger impressions and such refusal can be penalised with a maximum six months imprisonment or to a fine [subsection 31(2)]. Section 32 prohibits the disclosure of information to protect the public interest, witness or his family.

III. LEGISLATIVE RESPONSES ON COUNTERTERRORISM FROM OTHER JURISDICTIONS

In the aftermath of the Al-Qaeda attack on 9/11 in the United States, it was reported that about 140 countries world-wide passed counter-terror laws.[26] However, there are few debates or any reflection on the impact of this draconian power. There can be no doubt that all governments have a legitimate interest in protecting the public from any acts of terrorism by taking pre-emptive steps to prevent them from occurring. However, the problem is that most counterterrorism legislations are particularly elusive given that these legislations circumvent criminal procedural laws and the constitutional protection of basic rights as guaranteed by the State. This creates a 'dual' criminal justice system which is antithetical to the already accepted principle of presumption of innocence. As highlighted earlier in the preceding paragraphs, any detention under counterterrorism laws is mostly preventive, unlike the punitive nature of criminal law. Simply put, an individual's freedom can be restricted merely by reasonable suspicion he/she may commit an act that might violate the national security of the State. Therefore, a comparative study (though cursory) of other nations (in this instance India and the United States of America) in their war against terror, could be an advantage for Malaysia; highlighted in particular is an analysis of the flaws of preventive laws that curtail basic rights.

---

[26] "*Global: 140 Countries Pass Counterterror Law since 9/11, Human Rights Watch,* accessible at http://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-911". Site accessed on 4 April 2016.

A. India

Historically, India has been embroiled in a war against terror since independence 68 years ago. Over the decades, India has been fighting with insurgents in Kashmir, Pakistan and Afghanistan at their borders. In the South, they faced the now defunct LTTE or commonly known as 'Tamil Tigers' until the group was defeated in 2009. In 1984, when Indira Gandhi was assassinated, Parliament enacted the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) specifically as an anti-terror legislation. Subsequent to that, following the bold attack in December 2001 on their Parliament house, the Prevention of Terrorism Act 2002 (Indian POTA) was introduced to repeal TADA. Indian legislators acted quickly, announcing that the Indian POTA was a necessary tool against terrorism given the attack at the heart of the world's largest democracy. Like the Malaysian POTA, the Indian POTA also had dissenters who condemned the law as unnecessary and draconian. As an example, the Indian police was granted sweeping powers to detain a suspect for up to 180 days without being formally charged in court.[27] The police is supposed to notify a suspect the grounds for his or her detention promptly under the Indian Constitution and to provide the "earliest opportunity to make a representation" before a presiding magistrate.[28] But the Indian POTA circumvented these fundamental protections against the indiscriminate detention of innocents as enshrined in their constitution. For bail applications, the Public Prosecutor is given the absolute veto to oppose the bail unless the accused is not guilty of committing the offence and the court is fully satisfied with the grounds advanced by the suspect in support of the bail.[29] This provision has effectively reversed the presumption of innocence of the accused at the bail hearing in court. Another drastic provision observed is in section 53 in that when a suspect is caught in possession of explosives or arms unlawfully or if his/her fingerprints were found at the site of the offense, an adverse inference can be drawn against the suspect.[30] The provision has in effect mandated the presumption of guilt for those caught under terrorist activities.

However, one noteworthy difference between the Malaysian POTA and the Indian POTA is the provision of judicial review in the latter as seen under section 34, one which is not available under the Malaysian POTA. With some of the weaknesses highlighted in the Indian POTA above, it is irrefutable that certain provisions can be susceptible to misuse and abuse by the enforcement officials. Like TADA, the prevalent critique of POTA is that it can be misused and used to haul up a political dissenter who is not involved in any terrorist activities. It was argued by the detractors that the broad meaning of what tantamounts to terrorist act consist of intent not only to threaten the security and unity of the State, but it also comprises any other means which "disrupt services" that can be a useful weapon for the government to apply against dissidents if they wish to.[31] According to Human Rights Watch Report issued in March 2003, it was reported that –

---

27 Section 49(2)(b) of the Indian POTA.
28 Article 22(2) of the Indian Constitution (Part III).
29 Section 49(7) of the Indian POTA.
30 Section 53 of the Indian POTA.
31 Section 3(1)(a) of the Indian POTA.

> "POTA had in fact been abused and misused against political dissents including religious minorities. This has included the arrest of leaders of various political parties in Kashmir, Tamil Nadu and Uttar Pradesh."[32]

In response to the continued abuse of power by enforcement officials, the Indian government later repealed POTA in September 2004. Although the law was repealed, POTA remains relevant today given its continued application in cases that are still pending legal proceedings or on investigation that began under the act.

With the departure of POTA, the Unlawful Activities Prevention Act, 1967 (UAPA) is the main anti-terrorism law in force in India now. UAPA was in fact enacted by Parliament in 1967. The original purpose of the Act was to impose reasonable restrictions on the rights to freedom of speech and expression, peaceful assembly in the interest of preserving the integrity and sovereignty of the State of India. Stringent provisions on terrorism were only added later through various amendments starting in 2004 following the repeal of POTA. It was in response to the Mumbai terrorist attacks in 2008 that UAPA incorporated the definition of a 'terrorist act' under section 15.[33] The period of pre-trial detentions without bail of up to 180 days remained the same under UAPA[34] although it conflicts with Article 22 of the Indian Constitution on the rights against arbitrary detention as discussed earlier. The fear that UAPA inherited some of the controversial provisions from the repealed Indian POTA is similar to the mounting concerns of many critics in Malaysia (that the Malaysian POTA will be the 'twin of the ISA'). In the case of UAPA, for example, previously under the section 53 of the Indian POTA only an adverse inference was drawn against the accused found with explosives or arms unlawfully or if

---

[32] Human Rights Watch, 25 March 2003, "*In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, accessible at: https://www.hrw.org/report/2003/03/25/name-counter-terrorism-human-rights-abuses-worldwide/human-rights-watch-briefing" Site accessed on 4 April 2016.

[33] Section 15(1) reads: "Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,-

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause -
   i. death of, or injuries to, any person or persons; or
   ii. loss of, or damage to, or destruction of, property; or
   iii. disruption of any supplies or services essential to the life of the community in India or in any foreign country; or
   iiia. damage to the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin, or of any other material; or
   iv. damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act; commits a terrorist act. "

[34] Section 43D(2) UAPA is the same as section 49(2)(b) of the POTA.

fingerprints were found at the site of the offence. A similar provision was incorporated into section 43E UAPA, albeit with the new imposition of a direct presumption of guilt by the court on the accused person unless the contrary is proved. Therefore, it has the effect of putting the culpability of an accused person upfront by shifting the burden of proof. Further, under section 1(4) the UAPA, a person may be penalised, even when the unlawful acts were committed outside of India. The basis behind this provision is that the source of planning or funding terrorism activities can originate from outside Indian territory.

Therefore, any terrorist activities occurring outside of India could still harm the "*unity, integrity, security, economic security, or sovereignty of India",* which amounts to a 'terrorist act' as defined in section 15 UAPA. For Indian citizens living outside India; persons in government service wherever they may be; and persons on ships and aircrafts registered in India wherever they may be, will be caught under section 1(5) if found guilty of any offence under the UAPA. This goes to show that personal liberty of an accused person under terrorism offences is usually ignored by the State when executing 'extraordinary laws'. Apart from the UAPA, it is to be noted that India also has the Indian Penal Code (IPC), which are in *pari materia* with our Malaysian Penal Code that deals with terrorism and related offences. This includes the offence of waging war against the Indian government much like the provision in the Malaysian Penal Code,[35] except that we have the specific Chapter VIA that deals directly with terrorism offences. In many aspects, India does share common legal similarities with Malaysian laws such as the Criminal Procedure Code (CrPC) and the Evidence Act.

More often than not, in most terror cases in India charges can be preferred against the accused person based on multiple Central and State Laws. The Mumbai attacks case was a clear example of the multiplicity of charges being trumped-up against the accused.[36] Although in India, the general procedural and evidentiary rules under the CrPC and Evidence Act apply to all criminal laws, with terrorism laws, there are special rules which depart from the general principles. This is due to the fact that there are various Central laws enacted to address similar areas of law and at times overlapping with other enacted State laws.[37] This will certainly give rise to the issue of duplicity and multiplicity of charges which operate unfairly against an accused person in a trial. The lesson we can learn in terms of the experiences in combating terrorism is that India has in hand a myriad of strategies to share and emulate. However, there are also pitfalls encountered by India in counterterrorism rhetoric despite having abundant years of experience.

B. United States of America

The nature of the terrorism threat in America cannot be equated with India; the latter faces multifaceted threats from domestically bred terrorism. The terrorist threat in America

---

35 Under section 121 of IPC (Chap VI) which is similar to our section 121 of Malaysian Penal Code (Chap VI)

36 In *State of Maharashtra v Mohammed Ajmal Mohammad Amir Kasab* (2012) 8 SCR 295 where Ajmal Kasab was convicted under nine different offences under IPC, two under UAPA (s.16 & 13), one each under Arms Act 1959, Explosives Act 1884, Explosive Substances Act 1908.

37 Such as the Maharashtra Control of Organised Crime Act 1999 (MCOCA), Karnataka Control of Organised Crime Act 2000 ('KCOCA') and the Chhattisgarh Vishesh Jan Suraksha Adhiniyam 2005 [Chhattisgarh Special Public Safety Act] ('CVJSA').

emanates largely from anti-American sentiments and the reactions by Islamist groups from perceived American interference in the affairs of the Muslim world. Therefore, existing terrorism policies and strategies in America are more inclined to the reaction towards external or foreign terrorism on American soil. When the Pentagon and the World Trade Center were hit on 11 September 2001 (9/11), a jittery US Congress speedily and unanimously authorised the USA Patriot Act 2001 (USPA) in just six weeks for fear of another recurrent attack on a similar scale. Against the backdrop of the 9/11 horrific attacks launched on American soil that sent shockwaves across the globe, Congress was convinced that the USPA was a significant piece of legislation. This is indicative in the expanded name of the USPA - Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001. Aside from the USPA, Congress also passed numerous pieces of new laws in the months subsequent to the strikes. They are, amongst others, the Aviation and Transportation Security Act 2001; the Bioterrorism Response Act 2001; Enhanced Border Security and Visa Entry Reform Act 2002; Terrorist Bombing Convention Implementation Act 2001; and the Victims of Terrorism Relief Act 2001.

The new enlarged powers accorded under USPA to enforcement officials have, similar to their counterpart in India, received many criticisms. Critics have evinced that the USPA may have been too extreme in some of its provisions, such as the capability of the authority to track e-mails and internet,[38] the sharing of data among investigators and other intelligence agencies, impounding of seized property, and conducting nationwide roving wiretaps.[39] These are just some of among the many disturbing features. In the light of these circumstances, some argue the USPA sanctions government's outright violation of civil and human rights, having no regard on the accountability for such overreaching actions taken by the authority.

Not surprising is that the evidence from the comparative study of the preventive model adopted by the US such as the USPA, suggests that its shortcomings are similar to those found in the Malaysian POTA. First, the USPA created an expansive new offence of 'domestic terrorism' and then proceeded to bar non-citizen entry into America based on their beliefs or ideologies which maybe deemed radical. Secondly, the USPA enhanced the surveillance power of its enforcement agencies, disregarding a citizen's private rights. Thirdly, the government cloaked itself with power to enforce mandatory detention and deportation of foreigners based on activities deemed as terrorist activities. The broad definition of 'domestic terrorism' is stated in section 802 USPA as -

> [A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or

---

38 Section 216 of USPA.

39 Section 206 of USPA: "Roving wiretaps authorise wiretaps on any phone that a target may use, making Individuals and not the equipment the object of a warrant."

kidnapping; and occur primarily within the territorial jurisdiction of the United States.[40]

Much like the vague section 2(1) of the Malaysian POTA (as discussed above) similarly broad and ambigious meanings can be found in the USPA (as seen underlined above); this could likely be construed by State enforcement agencies as an authorisation to begin investigation into any political activist groups that 'appear to be intended to intimidate or coerce a civilian population'. Where there is any confrontation between the demonstrators and the police, even if it does result in physical injury it could nevertheless be interpreted as 'dangerous to human life and in violation of the criminal laws'. As an example, groups such as Greenpeace or anti-globalisation activists at the World Trade Organisation may be vulnerable to prosecution as they could be deemed as 'domestic terrorists' under this ambiguous provision. Section 411 USPA denies non-citizens entry into the United States if "a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines the United States efforts to reduce or eliminate terrorist activities." By giving the State Secretary full power in deciding who to restrict and on what ideological grounds, this will have the effect of barring many foreign scholars, speakers and political activists who may not even endorse nor espouse terrorist activities dreaded by the United States.

Next, we shall examine the enhanced intrusive surveillance and investigative powers given to the enforcement agencies such as the National Security Agency (NSA), Federal Bureau of Investigation (FBI) and the Central Intelligence Agency (CIA). In the past, due to legal and political impediments faced by the enforcement agencies, they did not combine forces in fostering counter terrorist efforts. However, this was made possible by introducing USPA that removed all the barriers. As an example, there are provisions in the USPA which stretched the application of the Foreign Intelligence Surveillance Act, 1978 (FISA) to comprise the roving wiretaps, trace devices and the use of pen registers. Under the USPA, the FBI director may seek a court order to demand the surrender of "any tangible things (including books, records, papers, documents and other items)" on his confirmation that the articles sought are required for the purpose of an investigation "to protect against international terrorism or clandestine intelligence activities." [41]

Besides the power of seizure, the FBI may also conduct secret searches at a person's office or residence without the requirement of a search warrant until the search has been completed.[42] These unwarranted searches contravened their very own common law principle as provided in the Fourth Amendment's reasonableness test.[43] Hence, civil libertarian groups like the American Civil Liberties Union (ACLU) have claimed that with such a significant expansion of surveillance accorded to the authority, it was feared

---

40 Underlined for emphasis.

41 Section 215 of USPA.

42 Section 213 of USPA.

43 Under the Fourth Amendment (Amendment IV): "*it does prohibits unreasonable searches and seizures and requires any warrant to be judicially sanctioned and supported by probable cause.*"

that whatever information obtained secretly would be used for improper purposes. This has proven to be true in June 2013 when Edward Snowden, the former CIA contractor leaked numerous aspects of NSA surveillance practices to the public.[44] Because of the continuous disclosure by Snowden, this implores further question marks on whether the right to privacy of US citizens has been infringed by NSA's unjustified surveillance which the Congress has overlooked. In responding to the public outcry, a more efficient mechanism to reduce the continued abuse by the NSA is therefore warranted. Task forces were then organised to study the legitimacy and latitude of the NSA's surveillance works. The weaknesses posed by the NSA's surveillance authority and intelligence gathering have even caught President Obama's attention in early 2014 when he agreed on the need to "…revisit the question of limitation on NSA's collection and storage of data."[45] In sum, what we can gain from the American experience in so far as the surveillance activity is concerned is that the authorities have encroached into the private lives of many Americans in the name of counterterrorism.

Another controversial issue in the USPA (like the preventive laws in India and Malaysia) is that it allows the enforcement agencies to arrest and detain aliens *suspected* of engaging in terrorist acts. The US Attorney General may detain a suspect for up to seven days before he/she decides whether to charge the alien or to release him/her.[46] One of the most renowned cases of indefinite detention post-9/11 is that of *Jose Padilla*.[47] In the case of *Padilla*, he is an American citizen arrested by federal agents at the Chicago airport for planning to detonate a bomb. After his arrest, he was not tried in court but was held in solitary detention and denied any legal counsel. This case shows that indefinite detention not only applies to aliens, it also extends to citizen like Padilla caught on American soil. Another case to look at is the case of *Yasser Hamdi* [48] also an American citizen. Hamdi was apprehended on the battleground in Afghanistan. The US government designated him as an 'enemy combatant' and held him under 'secret detention' for two years, until he agreed to renounce his American citizenship and leave America.[49] These cases cited are just some of the many examples why civil libertarians have condemned the harsh approach taken by the government against American citizens charged with this crime; citizens are blatantly denied the criminal justice system, labelled under the Act, as a 'terrorist'. In most cases involving aliens, when an accused is designated as an 'enemy combatant' the government conveniently moves the prosecution of the accused from the

---

44 See Glenn Greenwald, 5 June 2013, "NSA collecting phone records of millions of Verizon customers daily", The Guardian.com: http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order. Site accessed on 4 April 2016.

45 Remarks by the President, 17 January 2014, Review of Signals Intelligence,: https://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence. Site accessed on 4 April 2016.

46 Section 412 of USPA.

47 *Padilla v Rumsfeld*, (2003) 352 F.3d 695.

48 *Hamdi v Rumsfeld* (2004) (03-6696) 542 U.S. 507.

49 Eric Lichtblau, 23 September 2004, "*U.S., Bowing to Court, to Free 'Enemy Combatant",* New York Times, http://www.nytimes.com/2004/09/23/politics/us-bowing-to-court-to-free-enemy-combatant.html?_r=0. Site accessed on 4 April 2016.

purview of the criminal justice jurisdiction into the military tribunal.[50] A trial before the military tribunal as opposed to the criminal courts effectively means a trial conducted with more relaxed rules of evidence and a hearing presided over by the executive arm instead of an independent judiciary.[51] In most cases involving foreign terrorists, the scale of justice will be tilted in favour of the executive and no judicial review is available.[52]

Therefore, in the final analysis of the American counter terrorism policies when compared to their counterpart in India, the intents and purposes appear to be the same. Both countries have introduced multiple legislation in response to the war against terror, albeit with some variations in the approach taken. Because of the American position in the world today, its counterterrorism policies are looked upon as an important role model in manipulating the way counter terrorist strategies and policies are perceived world-wide.

According to a recently published report,[53] in the last four years counterterrorism policies in the United States have transformed. As an example, the use of abusive interrogation practices have reduced significantly and there is an open acceptance of international laws into the United States' counter terrorism practices. This is definitely a positive development in counter terrorism practices for other democratic nations to follow, especially given the growing complaints concerning human rights abuse, often sacrificed in the fight against terror.

IV. FINAL REMARKS

In the government's effort to combat terrorism, one may ask if POTA is necessary or just another piece of legislative redundancy. There are already several punitive legislations in force that can penalise terrorist acts or rather it can serve the same purpose as POTA, to curb terrorism activities. For example, we already have Chapter VIA of the Penal Code, which covers crimes that are envisaged by POTA such as, travelling to, through or from Malaysia for the commission of terrorist acts in a foreign country,[54] possession of items associated with terrorist groups or terrorist acts; [55] or even preparation of terrorist acts.[56] The question is do we still need another preventive law to serve the same objective? In fact, the Penal Code has extensively dealt with any preparatory acts of terrorism, save for the differing punitive sanctions one will receive it is not that different. The broad definition under POTA concerning what amounts to an act of terrorism, failed to meet the requirement that a criminal act must be clearly determined. Due to the lack of perspicuity, any person is liable to the risk of being subject to harsh punishments provided by this

---

50 For example, the case of Ali Saleh Kahlah Al-Marri, a Qatari student, charged with credit card fraud and was later moved into military custody. See more at: Eric Lichtblau, 9 July 2003, *Man Held as 'Combatant' Petitions for Release,* New York Times: http://www.nytimes.com/2003/07/09/politics/09COMB.html). Site accessed on 4 April 2016.

51 "Laura Dickinson, "Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law," (2002) 75 *S. Cal. L. Rev*. 1407.

52 *Ibid.*

53 Sudha Setty, "Country Report on Counterterrorism: United States of America", (2014) 62 *AM. J. COMP. L.* 643.

54 Section 130 JA of the Penal Code.

55 *Ibid.* at s. 130 JB.

56 *Ibid.* at s. 130 JD.

preventive law. It can be argued that the wide discretionary power bestowed on the police to arrest suspects merely on reasonable belief that a terrorist act is imminent, individual rights and freedoms will be swapped for detention without trial. Indeed, POTA shifts the role of the police from being responsible for guaranteeing civil liberties into a mere repressive tool against citizens. Moreover, the government in being so hasty in legislating new laws that are already covered by existing laws could raise further discrepancies and confusion in the enforcement agency. The question is which law will the enforcement agency apply. Will it favour a harsher punishment or a lesser one? Is it going for detention without trial or the full process of law in court? This will cause unfairness and disparity in sentencing in all security offences in future. The law must be refined to the extent that it can judiciously decide the extent and the consequences of the criminal offence in line with the rule of law. Given the effectiveness of the new counterterrorism measure it is unclear at the moment, whether the danger posed to the public of arbitrary detention by over zealous authority is more critical than the menace posed by terrorism itself.

An Assessment of Malaysia's Compliance with the Current and Future International Standards of Criminal Enforcement Measures to Protect against Copyright Piracy on a Commercial Scale

Ainee Adam*

Abstract

Being a WTO member, Malaysia is compelled to implement the standard of criminal enforcement measures established in Article 61 of the Trade-Related Aspects of Intellectual Property Rights Agreement in its national copyright laws. More specifically, Malaysia is required to criminalise wilful copyright piracy on a commercial scale and make available imprisonment and/or pecuniary penalties as punishment for the offence. The punishment should be set at a level sufficient to provide a deterrent, consistent with that made available for crimes of a corresponding gravity. While the Trade-Related Aspects of Intellectual Property Rights Council confirmed Malaysia's compliance with the standard in 2003, it is time for the penal provisions in the Copyright Act 1987 (Malaysia) to be re-assessed particularly in view of Malaysia's keen interest in ratifying the Trans-Pacific Partnership Trade Agreement (TPPA), and by extension, subscribing to a higher standard of criminal enforcement measures against copyright piracy on a commercial scale. The article first examines the penal provisions in the Copyright Act 1987 (Malaysia) with reference to the article 61 standard and subsequently assesses if the TPPA standard will herald a change in the national enforcement regime.

I. INTRODUCTION

Article 61 of the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement) requires WTO members to, first, criminalise wilful copyright piracy on a commercial scale and secondly, make available imprisonment and/or pecuniary penalties 'sufficient to provide a deterrent, consistent with the level of penalties applied for crimes of a corresponding gravity.'

As the first (and current) international standard of criminal enforcement measures for combatting wilful copyright piracy on a commercial scale, the standard is a bare minimum standard and has been described by some as 'lacking sufficient teeth' and 'totally useless'.[1] Nevertheless, Malaysia became formally bound to comply with this standard

* Postdoctoral Fellow, Centre for Law & Business, Faculty of Law, National University of Singapore; Senior Lecturer, Faculty of Law, University of Malaya.

1 See Tove Iren S Gerhardsen, 15th November 2005, "Japan Proposes New IP Enforcement Treaty" Intellectual Property Watch <http://www.ip-watch.org/2005/11/15/japan-proposes-new-ip-enforcement-treaty/>.Site accessed on 15 January 2016

following ratification of that Agreement in 1995 and its compliance was confirmed in a review conducted by the Trade-Related Aspects of Intellectual Property Rights Council (TRIPS Council) in 2003 on the criminal enforcement measures taken by the Malaysian Government against copyright piracy.[2] This meant that: (1) wilful copyright piracy on a commercial scale was criminalised; (2) the penalties made available in the Copyright Act 1987 (Malaysia) (1987 Malaysian Act), at that time, were sufficient to provide a deterrent to curb wilful copyright piracy on a commercial scale; and (3) that the penalties were at a level consistent with those made available for crimes of a corresponding gravity.

However, more than a decade has passed since the Malaysian criminal copyright regime has been assessed. It is timely for the regime to be re-assessed, particularly in view of Malaysia's intention to ratify the Trans-Pacific Partnership Agreement (TPPA) which prescribes a higher standard of criminal enforcement measures for wilful copyright piracy on a commercial scale and has been portrayed as being 'significantly TRIPS-plus' and 'ACTA-plus'[3] (that is, Anti-Counterfeiting Trade Agreement-plus).

Part II of the article analyses the penal provisions in the 1987 Malaysian Act and determines whether the provisions are TRIPS-compliant while part III examines the significance and possible impact of ratifying the TPPA to the current copyright criminal enforcement measures. Lastly, part IV concludes the article by determining that: (1) the current criminal enforcement measures in the 1987 Malaysian Act are TRIPS-compliant; and (2) the ratification of the TPPA (and subsequently, its coming into force) will not likely necessitate any significant amendments to the Malaysian criminal enforcement regime.

II. THE COPYRIGHT ACT 1987 (MALAYSIA) AND ARTICLE 61 OF THE TRIPS AGREEMENT

The current international standard of criminal enforcement measures in article 61 of the TRIPS Agreement reads as follows:

> Parties shall provide for criminal procedures and penalties to be applied at least in cases of wilful … copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity …

Following from this, it is clear that an exhaustive assessment of the national criminal enforcement measures against the Article 61 standard necessarily involves an examination of the offences in the 1987 Malaysian Act as well as the penalties that may be imposed for those offences.

---

2 *Review of Legislation: Malaysia*, Council for Trade-Related Aspects of Intellectual Property Rights, WTO Doc IP/Q/MYS/1, IP/Q2/MYS/1, IP/Q3/MYS/1, IP/Q4/MYS/1 (2003) 3.

3 Kimberlee Weatherall, "*Section By Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 3 – Enforcement*" The Selected Works of Kimberlee G Weatherall, 2015 <http://works.bepress.com/kimweatherall/33> 47. Site accessed on 15 January 2016.

Accordingly, part [A] first sets out the standard established by Article 61 in relation to the criminalisation of conduct falling within the scope of 'wilful copyright piracy on a commercial scale', taking into account the WTO Panel's interpretation of the term 'commercial scale' in the *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* dispute. It then analyses the offences prescribed in section 41(1) of the 1987 Malaysian Act and determines whether the provision satisfactorily addresses wilful copyright piracy on a commercial scale.

Next, part [B] lays out the international standard concerning the punishment to be made available for wilful copyright piracy on a commercial scale, as prescribed in the second sentence in the Article 61 standard. As the standard is two-pronged, the analysis of the Malaysian penalties scheme is divided into parts. The first part examines whether the penalties in the 1987 Malaysian Act are sufficient deterrence while the second part assesses whether the level of penalties in the Malaysian copyright regime are consistent with that made available for crimes of a corresponding gravity. By adopting and applying the position accepted by most expert commentary on the Article 61 standard that serious non-violent theft is a crime of a corresponding gravity to wilful copyright piracy on a commercial scale, this article assesses the adequacy of the level of punishment made available in the 1987 Malaysian Act by comparing the criminal penalties prescribed in section 41(1) of the 1987 Malaysian Act with the penalties prescribed for theft in the Penal Code (Malaysia) ('Malaysian Penal Code'). It is important to note that the crime of theft is selected for this comparison exercise upon considering the elements required to prove theft in the Malaysian Penal code, as opposed to robbery, is most suitable to be considered as a crime of corresponding gravity.

Part C concludes the examination by determining whether section 41(1) is in compliance with the Article 61 standard.

A. Offence

In determining whether the national criminal enforcement measures have satisfactorily implemented the Article 61 standard in criminalising wilful copyright piracy on a commercial scale, it is necessary to first understand the range of conduct falling within the scope of commercial scale wilful copyright piracy.

The TRIPS Agreement is silent on how to determine whether a particular act of wilful copyright piracy is on a commercial scale. An examination of the Uruguay Round of Negotiations as well as the preparatory works for the TRIPS Agreement similarly does not shed light onto the meaning of the term 'commercial scale'.[4] Subsequently, a reference may be made to WTO Panel's interpretation of the term in the *China – Measures Affecting the Enforcement and Protection of Intellectual Property Rights* dispute to provide some much needed clarity on the meaning of that term.[5] It is, however, necessary to bear in mind that the WTO Panel's interpretation is binding only on parties to the dispute (namely, China

---

4 See Ainee Adam, "What is "Commercial Scale"? A Critical Analysis of the WTO Panel Decision in WT/DS362/R" *European Intellectual Property Review* 2011, Vol 33, Issue 6, 342, p 346.

5 *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WTO Doc WT/DS362/R (2009) (Report by the Panel Adopted on 20 March 2009) ('*China – Intellectual Property Rights*').

and the US). Nevertheless, it 'create(s) legitimate expectations among WTO members and, therefore, should be taken into account where they are relevant to any dispute'.[6]

In the *China – Measures Affecting the Enforcement and Protection of Intellectual Property Rights* dispute, the US essentially alleged that China failed to satisfy its obligations under Article 61 of the TRIPS Agreement in criminalising *all* wilful trademark counterfeiting and copyright piracy on a commercial scale.[7] This resulted in a thorough examination of the term 'commercial scale'. Yet, the term remains vague as the WTO Panel adopted a flexible interpretation of that term. According to the Panel, 'the question of whether a counterfeiting or piracy is on a commercial scale depends on the type of product that was infringed, its market, and the magnitude or extent of the commercial activity that is considered to be typical or usual for the product that was infringed.'[8] Furthermore, the Panel adopted the presumption that all WTO members have satisfied the Article 61 standard unless proven otherwise.[9]

Following from this, it appears that the range of conduct falling within the scope of copyright piracy on a commercial scale is highly dependent on a WTO member's interpretation of the term 'commercial scale'. Australia, for example, determines that factors such as the 'volume and value of any articles that are infringing copies' should be taken into account when considering whether an infringement is on a commercial scale[10] whereas Malaysia does not make any reference whatsoever to the scale of the infringement in criminalising copyright piracy.[11] It merely criminalises all infringements except those occurring for private and domestic use.[12]

Having shed some light onto the first sentence of the Article 61 standard, we now turn to examining the Malaysian penal provisions. The criminal enforcement measures prescribed in section 41(1) of the 1987 Malaysian Act is relatively straightforward. While the section criminalises conduct including the making, selling and distributing of infringing copies of copyrighted work, it does not specifically address piracy on a commercial scale. Instead, its penal provisions are set out in a form that is general enough to cover both small and commercial scale piracy. For the current purpose, the article focuses on section 41(1)(*c*) of the 1987 Malaysian Act as this provision appears to be most relevant to Article 61 of the TRIPS Agreement as well as Article 18.77.1 of the TPPA.

Section 41(1)(*c*) essentially criminalises the distribution of more than three infringing copies of a work in the same form.[13] The purpose of distributing the copyright material, such as for commercial advantage or financial gain, and the scale in which the infringement

---

6 *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (1996), [13] (Appellate Body Report); *United States – Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc WT/DS263/AB/R (2004), [38] (Appellate Body Report).

7 China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WTO Doc WT/DS362/1; IP/D/26; G/L/819 (2007) (Request for Consultations by the United States).

8 Ainee Adam, n 4, p 344. See also China – Intellectual Property Rights [7.577].

9 The Panel did not identify the basis for its presumption. See China – Intellectual Property Rights [7.602].

10 Section 132AC Copyright Act 1968 (Cth).

11 See section 41(1), Copyright Act 1987 (Malaysia) Act 332 in general.

12 Section 41(2) Copyright Act 1987 (Malaysia), Act 332.

13 Read together with section 41(2) Copyright Act 1987 (Malaysia), Act 332.

occurs, do not appear to be relevant under this provision. Following from this, it can be said that this provision is couched in such general terms that it could cover commercial scale piracy and also infringements occurring in the private sphere such as distribution of infringing copies of the same work in the same form to friends and relatives.

Consequently, taking into account Article 61 of the TRIPS Agreement and the WTO Panel's interpretation of the term 'commercial scale' and referring back to section 41(1)(*c*) of the 1987 Malaysian Act and the manner in which the provision has been worded, it is reasonable to arrive at the conclusion that, *prima facie,* the section satisfies the first sentence of the Article 61 standard. We then turn to examining whether the penalties provided for the offence described in section 41(1)(i) satisfies the second sentence of the standard.[14]

B. Punishment

The second sentence of the Article 61 standard is two-pronged. It first requires the penalties made available for wilful copyright piracy on a commercial scale to be sufficient to provide a deterrent and second, that the level of penalties made available should be consistent with that made available for crimes of a corresponding gravity. The analysis of the penalties in the 1987 Malaysian Act in this part of the article is therefore divided into two stages. The first stage examines whether the penalties are sufficient deterrence and the second stage examines whether those penalties are consistent with those made available for theft in the Malaysian Penal Code.

(i) Sufficient to Provide a Deterrent

The Article 61 standard clearly states that the penalties made available in national laws have to be sufficient to provide a deterrent.[15] This means that the implementation of the Article 61 standard should be consistent with the principles of deterrence theory which require the punishment to be (1) proportionate to the crime; and (2) minimised but its deterrent effects maximised.[16]

Furthermore, the standard's emphasis on the level of punishment being made comparable to that made available for crimes of a corresponding gravity shows that the standard relies on setting a minimum severity of punishment (as distinct from the other two properties of punishment; certainty and celerity or swiftness of punishment) in order to deter copyright piracy on a commercial scale.[17]

---

[14] Note that the article examines s. 41(1)(i) which prescribes the penalties for offences under s. 41(1)(a) – (f) and not s. 41(1)(i) which criminalises the removal or alteration of any electronic rights management information without authority.

[15] Article 61 of the TRIPS Agreement provides that '… [r]emedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level or penalties applied for crimes of a corresponding gravity.'

[16] See Ainee Adam, "Celerity, Severity and Certainty of Punishment in Article 61 of the TRIPS Agreement" (forthcoming).

[17] See Ainee Adam, n 16 for more on the properties of punishment as theorized by deterrence theorists.

Bearing this in mind, we then examine the penalties scheme in the 1987 Malaysian Act. Section 41(1)(i) prescribes that first offenders convicted of the offence in section 41(1)(*c*) may be punished with a minimum fine of RM2,000 and a maximum fine of RM20,000 for each infringing copy, or imprisonment for a maximum term of five years or both. As offenders convicted of this offence must be guilty of distributing *at least* three copies,[18] this means that the minimum fine that may be imposed on an offender is RM6,000.

Repeat offenders, on the other hand, may be fined a minimum amount of RM4,000 and a maximum amount of RM40,000 for each infringing copy or imprisoned for a maximum term of 10 years or both.[19] Again, effectively, the minimum fine that may be imposed on a repeat offender is RM12,000.

The 1987 Malaysian Act further imposes criminal liability on 'every director, chief executive officer, chief operating officer, secretary, manager or other similar officer of the body corporate or every other partner in the firm' if the offender is a body corporate or a partner of a firm. These officers of the body corporate offender or firm could be made liable to the same punishment as provided for individual offenders, severally or jointly, unless they exercised due diligence to prevent the commission of the offence.[20]

While the conduct being criminalised under section 41(1)(*c*) seems rather simplistic, the punishment made available is extensive in the sense that it not only distinguishes the punishment that may be imposed on first and repeat offenders, but also extends that punishment to officers of a body corporate offender or firm. Additionally, by merely determining the maximum fine that may be imposed *per infringing copy*, the amount of fine that may be imposed on an offender is effectively not capped, following which an offender who distributes 10 infringing copies could potentially be fined with RM200,000 whereas a repeat offender could be fined with RM400,000.

Considering both the Article 61 standard as well as the penalties prescribed in section 41(1)(i), it is now necessary to assess whether the penalties in section 41(1)(i) are sufficiently severe to be likely to deter commercial scale infringements. As explained above, the minimum fine that may be imposed on an offender is effectively RM6,000 with the possibility of imprisonment of up to five years and there is effectively no cap on the maximum fine imposed (the fine being determined in accordance with the number of infringing copies). We can therefore reach the tentative conclusion that, purely on the basis of the severity of the penalties set by the provision (and not taking into account the certainty or celerity of the criminal enforcement regimes), the Malaysian regime imposes maximum penalties at levels that are sufficiently severe to deter infringements.

It is, however, more important to assess whether the punishment is excessively severe, or in other words, is the punishment proportionate to the crime? While deterrence theory places considerable emphasis on proportionality between crime and punishment, it does not provide detailed guidance concerning the manner in which this assessment can be made. Nevertheless, proportionality in deterrence theory requires the level of punishment to be carefully calibrated to both maximise the effectiveness of the punishment in preventing harms and minimise the potential adverse effects on society as a whole.

---

18 Section 41(2), Copyright Act 1987 (Malaysia), Act 332.
19 Section 41(1)(i), Copyright Act 1987 (Malaysia), Act 332.
20 Section 41(4), Copyright Act 1987 (Malaysia), Act 332.

Disproportionate severity of punishment should be avoided as, for example, perceptions of excessive levels of punishment may increase anti-copyright sentiment, potentially leading to an erosion in the legitimacy of the copyright system as a whole.

The punishment that would be proportionate to the crime, however, is dependent on the extent of harm caused by that crime. As it would not be feasible to examine the harm specifically caused by the distribution of infringing copies (as per the offence in section 41(1)(*c*) of the 1987 Malaysian Act), the article focuses on the extent of harm caused by wilful copyright piracy on a commercial scale in general. Even so, the extent of those harms is extraordinarily difficult to estimate.

This is because even with rigorous empirical studies, it is extraordinarily difficult to collect accurate data, seeing that copyright piracy is a clandestine activity and few respondents are likely to be forthcoming about the extent of their involvement. Copyright owners, on the other hand, have an incentive to overstate the gravity of copyright piracy so as to influence governments and legislatures to act in their favour. Given the complex methodological issues at stake in assessing the empirical literature, this article does not propose to examine this point any further, other than to acknowledge the general consensus, emerging from the empirical studies, that piracy is one factor, among many, leading to a loss of sales in the music and motion picture industries, while it is difficult or impossible to accurately estimate the extent of any harm. Consequently, the uncertainties involved with analysing the effects of copyright piracy suggest that care should be exercised in setting the level of penalties so as to avoid potential over-criminalisation.

In this analysis, it is important to appreciate that perceptions are important in assessing the effectiveness of a criminal enforcement regime in targeting relevant behaviour.[21] Although there is a common perception that theft and copyright piracy are crimes which are essentially similar in nature (actively and largely promoted by organisations representing the interests of copyright owners and government agencies),[22] the distinction between the perceived harms arising from theft of tangible property, on the one hand, and copyright infringements, on the other hand, is potentially significant.

While the harms caused by the theft of a car, for example, are obvious, copyright infringements do not deprive the copyright owner of the copyright, leading some

---

[21] Contemporary deterrence theorists believe that, rather than the actual risk of being arrested and punished, and the severity of that punishment, it is the perceived risk and severity that influence an individual's decision. See for example Kirk R Williams and Richard Hawkins, "Perceptual Research on General Deterrence: A Critical Review" *Law & Society Review* 1986, Vol 20, Issue 4, p. 545; Randi Hjalmarsson, "Crime and Expected Punishment: Changes in Perceptions at the Age of Criminal Majority" *American Law and Economic Review* 2009, Vol 11, p 209; Bruce A Jacobs, 'Deterrence and Deterrability' *Criminology* 2010, Vol 48, Issue 2, p. 417.

[22] See for example "*Copyright Thieves*" Malaysian Screen Industry <http://www.msi.org.my/moviethieves_internet.html>. Site accessed 10 January 2016 ; "*What is Online Piracy*" RIAA <http://www.riaa.com/physicalpiracy.php?content_selector=What-is-Online-Piracy>. Site accessed on 10 January 2016; "*Content Theft"* Federation against Copyright Theft <http://www.fact-uk.org.uk/content-theft/>. Site accessed on 10 January 2016; "*Software Enforcement and the US Law*" BSA: The Software Alliance <http://www.bsa.org/anti-piracy/tools-page/software-piracy-and-the-law/?sc_lang=re-AP>. Site accessed on 10.1.2016; "*Intellectual Property Theft*" Federal Bureau of Investigation <https://www.fbi.gov/about-us/investigate/white_collar/ipr/ipr>. Site accessed on 10 January 2016.

commentators to claim that copyright infringement is a 'victimless crime'.[23] Given the highly charged public policy discussion regarding the benefits and costs of copyright protection, it may be that levels of criminal sanctions that are acceptable in other areas of the law could be counter-productive in terms of deterrence of copyright piracy. That said, much may depend upon the details of particular prosecutions brought by law enforcement authorities: public perceptions of large-scale importation of pirated DVDs may, for example, be viewed differently by sectors of the public to downloading of music or films by a teenager. In any case, public perceptions must be taken into consideration in applying the deterrence theory, as with the requirement of proportionality, to the level of penalties imposed under the Malaysian laws.

Applying the principle of proportionality, we can see that there are some safeguards incorporated into the Malaysian penal provisions. Section 41(1) of the 1987 Malaysian Act, although drafted in extremely broad terms, establishes a defence where a person has acted in good faith and has no reasonable grounds for supposing that copyright would be infringed. Furthermore, as explained above, the Malaysian provision does incorporate a degree of proportionality in that it provides for fines to be set in accordance with the number of infringing copies.

While these safeguards may, to an extent, alleviate concerns regarding the proportionality of the criminal penalties, the particular policy considerations relating to the public perceptions on copyright piracy as identified in this article may suggest that the maximum penalties imposed under the relevant Malaysian provision may not be proportionate to the conduct sought to be deterred.

This tentative conclusion, however, must be qualified by considerations relating to the actual enforcement of punishment. For example, if only certain kinds of infringement on a commercial scale are prosecuted, then the harms caused by potential negative perceptions of the copyright system may well not be as significant as might otherwise be the case.

Moreover, in assessing whether the penalties in the Malaysian provisions are proportionate to the crime, we must consider the requirement set by Article 61 of the

---

[23] See for example Stephen Rosebaugh-Nordan, 20th June 2013 "*Video Game Piracy: A Victimless Crime?*" Video Game Growing Pains, <http://videogamegrowingpains.blogspot.com/2013/06/video-game-piracy-victimless-crime.html>. Site accessed on 15 January 2016; Tom Utley, 28th August 2009 "*Internet Piracy is a Despicable Crime ... But Try Telling That to the Jolly Roger Crew I've Fathered"* MailOnline (online) <http://www.dailymail.co.uk/debate/article-1209576/Internet-piracy-despicable-crime---try-telling-Jolly-Roger-crew-Ive-fathered.html>. Site accessed on 15 January 2016; Byteshertz, 16th November 2011 "*PIRACY - Should Not be a Crime: Here is Why"* AboveTopSecret, <http://www.abovetopsecret.com/forum/thread776386/pg1>. Site accessed on 15 January 2016. Various creative industries and government agencies are, however, trying to change this perception by educating the public on the effects of copyright piracy. See for example Caitlin Dewey, 26th April 2013 "*Why A US Ambassador Asked Australians to Stop Pirating 'Game of Thrones"*, The Washington Post (online) <http://www.washingtonpost.com/blogs/worldviews/wp/2013/04/26/why-a-u-s-ambassador-asked-australians-to-stop-pirating-game-of-thrones/>. Site accessed on 15 January 2016; Eamonn Duff, Rachel Browne, 28th June 2009 "*Movie Pirates Funding Terrorists"*, The Sydney Morning Herald (online) <http://www.smh.com.au/national/movie-pirates-funding-terrorists-20090627-d0gm.html>. Site accessed on 15 January 2016; Nick Tabakoff, 30th June 2008 "*Organised Crime Gets Into Video Piracy"*, The Australian (online) <http://www.theaustralian.com.au/media/organised-crime-gets-into-video-piracy/story-e6frg996-1111116770389>. Site accessed on 15 January 2016.

TRIPS Agreement which compels all WTO members to ensure that the level of punishment is consistent with that imposed for 'crimes of a corresponding gravity'. Therefore, the section below assesses whether the penalties set by section 41(1)(i) are consistent with those set for 'crimes of corresponding gravity' under the Malaysian Penal Code.

(ii) Crimes of a Corresponding Gravity

While the Article 61 standard does not indicate the type of crimes which would be considered to possess corresponding gravity to wilful copyright piracy on a commercial scale, most academic commentators on Article 61 agree that serious property offences, such as serious non-violent theft, should be considered as 'crimes of a corresponding gravity'.[24] Accepting this as a working proposition, the analysis below compares the criminal penalties prescribed in section 41(1)(i) of the 1987 Malaysian Act with the penalties prescribed for theft in Malaysia.

Theft is described in section 378 of the Malaysian Penal Code as the moving of any movable property with the intention 'to take dishonestly any movable property out of the possession of any person without that person's consent'. In describing the punishment that may be imposed for theft, section 379 distinguishes the punishment that may be imposed on a first and repeat offender. It provides that a first offender may be punished with either imprisonment for a maximum term of seven years or fine or both while a repeat offender will be punished with either a fine or whipping in addition to a mandatory term of imprisonment.[25]

As can be seen, section 379 of the Malaysian Penal Code is silent on the amount of fine and whipping that may be imposed on an offender. Following from this, it is necessary to refer to the *Criminal Procedure Code* (Malaysia) to shed some light onto this matter, whereby section 283(1)(a) provides that there is no limit to the amount of fine that may be imposed on an offender in the event that the penal provision is silent. The amount, however, should not be excessive.[26] Section 288(1), on the other hand, imposes a maximum limit on the amount of strokes for a whipping of an adult offender for any particular offence to 24.

Consequently, it is clear that a first offender convicted of theft may be imprisoned for up to seven years or fined a discretionary amount or both, whereas a repeat offender faces mandatory imprisonment *and* a fine (of an indeterminate amount) or a whipping (of up to 24 strokes). Comparing these sanctions and those made available in section 41(1)(i) of the 1987 Malaysian Act, there are several obvious points of similarity and difference between the two sets of sanctions.

One of the most significant similarities relates to the sanctions made available for first offenders. For example, the maximum term of imprisonment prescribed in section

---

[24] Justin Malbon et al, The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary, Edward Elgar Publishing Limited, 2014, p 709; Daniel J Gervais, The TRIPS Agreement: Drafting History and Analysis, 3rd edition, Sweet & Maxwell, 2008 p. 327.

[25] Section 379, Penal Code (Malaysia), Act 574.

[26] Section 283(1)(a), Criminal Procedure Code (Malaysia), Act 593. The provision does not, however, explain what 'excessive' means.

379 of the Malaysian Penal Code and section 41(1)(i) of the 1987 Malaysian Act - seven years and five years respectively - are broadly similar.

The monetary penalty for theft, on the other hand, appears to be more severe than that which may be imposed for copyright infringement, as section 379 of the Malaysian Penal Code does not set any limit to the amount of fine that may be imposed on a thief, whereas section 41(1)(i) of the 1987 Malaysian Act fixes the maximum amount of fine that may be imposed on an infringer for every infringing copy.

However, the position is more complex than this, as section 41(1)(i) merely sets the maximum amount of fine for *each infringing copy*, the maximum amount in which an infringer may be fined at any one time is dependent on the number of infringing copies being distributed by the offender. An infringer, for example, who distributed 100 infringing copies could be liable to a fine of RM2 million at the very least and this amount could increase exponentially depending on the number of infringing copies involved.

Therefore, it can be said that there is effectively no limit to the maximum monetary penalty that may be imposed on first offenders for both offences, thus demonstrating that the sanctions for first offenders are broadly comparable.

The sanctions for subsequent offences, however, highlight one of the most significant differences between section 379 of the Malaysian Penal Code and section 41(1)(i) of the 1987 Malaysian Act. Section 379 does not confer on the court a discretionary power to impose only one form of punishment, that is a fine or imprisonment, but requires the court to impose a mandatory term of imprisonment *and* a fine or whipping, whereas section 41(1)(i) confers discretionary powers on the court to impose either imprisonment or a fine. This, alongside the addition of whipping as a form of punishment that may be imposed on a thief, sets the sanctions for theft apart from those for distributing infringing copies, thereby demonstrating that the punishment for theft is far more severe than the punishment for distributing infringing copies.

It is, however, also necessary to consider section 41(4) of the 1987 Malaysian Act which imposes criminal liability on officers of body corporate offender and partners of firm. The extension of criminal liability to persons other than the offender himself significantly adds to the potential severity of the punishment for distributing infringing copies.

Based on the analysis of the sanctions in section 379 of the Malaysian Penal Code and subsections 41(1)(i) and 41(4) of the 1987 Malaysian Act, it is clear that there are important differences between the respective sanctions, especially in relation to the forms of punishment made available. Section 379, for example, provides the court with the option to impose corporal punishment, whereas section 41(1)(i) merely allows for imprisonment and monetary fines.

These differences, however, do not mean that the sanctions are entirely incomparable. This is because the amount of monetary penalty and the length of the term of imprisonment that may be imposed on an offender are broadly similar. The comparison between the penalties for copyright infringement and theft can be analysed by reference to the two dimensions of harm and culpability, which relate to the intrinsic nature of the offence.

In terms of harm, the offence of theft under the Malaysian Penal Code is clearly regarded as more serious than the offence under section 41(1)(c) of the 1987 Malaysian

Act, as the Penal Code imposes higher maximum penalties of imprisonment and fines, as well as the potential for corporal punishment. This may be rationalised by the extent to which theft results in depriving the victim of a right to property, while copyright infringements are confined to economic harms.

In relation to culpability, both section 378 of the Penal Code and section 41(1)(*c*) of the 1987 Malaysian Act require the offender to have intentionally committed the criminalised conduct. While section 378 expressly provides for this requirement in its provision, section 41(1)(*c*) does this indirectly. At first glance, section 41(1)(*c*) appears to be a strict liability offence. However, the proviso that that there is no offence where the alleged infringer is able to prove that he acted in good faith and had no reasonable grounds for supposing that copyright would be infringed shows that the provision requires proof of intention to commit the conduct.[27]

Consequently, although there are significant differences between the penalties under section 41(1)(i) of the 1987 Malaysian Act and for the offence of theft under subsections 378-9 of the Malaysian Penal Code, the penal regimes for theft and copyright infringement under Malaysian law can, after relevant differences in the nature of the offences are taken into account, be regarded as broadly comparable.

C. Summary

Considering the inherent flexibility in Article 61 of the TRIPS Agreement, it is unsurprising that this assessment of subsections 41(1)(*c*) and 41(1)(i) of the 1987 Malaysian Act suggest that the Malaysian national criminal enforcement regime are, *prima facie*, in compliance with the international standard of criminal enforcement measures. It should, however, be borne in mind that this apparent conformity to the TRIPS may be challenged in a WTO dispute if the party alleging non-compliance to the standard has evidence to substantiate the claim.[28]

III. FUTURE DIRECTION OF THE MALAYSIAN CRIMINAL ENFORCEMENT MEASURES

Malaysia recently signed the TPPA and expects to ratify the Agreement in the near future.[29] As the TPPA, a regional free-trade agreement negotiated between 12 countries,[30] contains

---

27 Section 41(1), Copyright Act 1987 (Malaysia), Act 332.

28 China – Intellectual Property Rights [7.602].

29 Note that although Malaysia and 11 other countries signed the TPPA on 5 February 2016, the Agreement has yet to come into force. See 5th February 2016 "Malaysia Inks Landmark TPPA" TheStar Online <http://www.thestar.com.my/news/nation/2016/02/05/malaysia-inks-landmark-tppa-it-joins-11-other-nations-in-signing-pact/>. Site accessed on 16 February 2016; Ankit Panda, 8th October 2015 "Here's What Needs to Happen in order for the Trans-Pacific Partnership to Become Binding" The Diplomat <http://thediplomat.com/2015/10/heres-what-needs-to-happen-in-order-for-the-trans-pacific-partnership-to-become-binding/>. Site accessed on 16 February 2016; Catherine Putz, 5th February 2015 "TPP: The Ratification Race is On" The Diplomat <http://thediplomat.com/2016/02/tpp-the-ratification-race-is-on/>. Site accessed on 16 February 2016.

30 The negotiating parties were US, Brunei, Chile, New Zealand, Singapore, Australia, Malaysia, Peru, Vietnam, Canada, Mexico and Japan. See October 2015 "Summary of the Trans-Pacific Partnership Agreement" Office of the United States Trade Representative <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership>. Site accessed on 10 January 2016.

a chapter specifically addressing the protection of intellectual property rights, the potential ratification of this Agreement is of particular significance to the Malaysian copyright regime and, in this context, the Malaysian criminal copyright enforcement regime.

The criminal enforcement measures in the TPPA are prescribed in Article 18.77, consisting of seven sub-articles. For the present purpose, however, the article focuses on Articles 18.77.1 and 18.77.6(a) due to their similarities to Article 61 of the TRIPS Agreement and their relevance to the analysis of Article 61 undertaken in part [II] of this article.

A. Offence

Article 18.77.1 of the TPPA reads as follows:

Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful … copyright … piracy on a commercial scale. In respect of wilful copyright … piracy, "on a commercial scale" includes at least:

(a) acts carried out for commercial advantage or financial gain; and
(b) significant acts, not carried out for commercial advantage or financial gain, that have a substantial prejudicial impact on the interests of the copyright … holder in relation to the marketplace.[125, 126]

[125] The Parties understand that a Party may comply with subparagraph (b) by addressing such significant acts under its criminal procedures and penalties for non-authorised uses of protected works, performances and phonograms in its law.

[126] A Party may provide that the volume and value of any infringing items may be taken into account in determining whether the act has a substantial prejudicial impact on the interests of the copyright … holder in relation to the marketplace.

As can be seen, the first sentence of the provision mirrors the first sentence of Article 61 of the TRIPS Agreement. If the TPPA standard does no more than this, TPPA Members who are also WTO members and are presently bound to the standard established under Article 61 will not be required to make any changes to their domestic laws to comply with the TPPA standard.

Article 18.77.1, however, continues by explaining the phrase 'wilful copyright piracy on a commercial scale', marking a significant departure from the TRIPS standard. The Article clarifies the phrase by providing that it include: (a) acts carried out for commercial advantage or financial gain; and (b) significant acts that have a substantial prejudicial impact on the interests of the copyright holder in relation to the marketplace.

The inclusive definitions effectively dampen the flexibility provided in the Article 61 standard, which as explained in [II(A)], is silent on the type of conduct falling within the scope of the phrase 'wilful copyright piracy on a commercial scale'. It also appears to be contrary to the definition of the term 'commercial scale' as interpreted by the WTO Panel in the *China – Measures Affecting the Enforcement and Protection of Intellectual*

Property Rights dispute.[31] The differences and effects of the inclusive definitions in Article 18.77.1 are examined in detail below.

(i) Article 18.77.1(a)

As stated in [III(A)], definition (a) of the phrase 'wilful copyright piracy on a commercial scale' criminalises acts carried out for commercial advantage or financial gain. At first glance, the scope of conduct falling within the term 'financial gain' seems fairly broad as the simple act of downloading copyright material for personal use without paying for it could amount to obtaining financial gain (in the sense that the downloader is saved from having to pay for a legitimate copy of the material).[32] Footnote 88 of the TPPA, however, ensures that infringements occurring within the private sphere is excluded from the scope of definition (a) of Article 18.77.1 by providing that acts carried out for financial gain refers to those carried out for commercial purposes.[33]

Nevertheless, in neglecting to include any reference regarding the scale of the infringing act, definition (a) appears to criminalise single acts of infringements (provided the infringements are for commercial advantage or commercial purposes). This apparent disregard of the magnitude of infringements is clearly contrary to the WTO Panel's interpretation of the term 'commercial scale'. As explained in [II(A)], the WTO Panel listed three factors that must be taken into consideration when determining whether an infringing conduct is on a commercial scale, one of which is the magnitude or extent of the commercial activity. Although the US, in its submissions to the WTO Panel, suggested that the term 'commercial scale' should cover all infringements satisfying *any* of the following elements: (1) a certain magnitude; (2) operating at a commercial scale; or (3) financial gain,[34] the WTO Panel expressly rejected this.[35] The Panel stated that the term 'commercial scale' carries with it both the concepts of qualitative (commercial) and quantitative (scale), following which it would be incorrect to merely accord the term with either concepts.[36] It is therefore evident that definition (a) has the effect of overruling the WTO Panel's decision in the *China – Measures Affecting the Enforcement and Protection of Intellectual Property Rights* dispute.

(ii) Article 18.77.1(b)

Definition (b), on the other hand, in criminalising significant acts that have a substantial prejudicial impact on the interests of the copyright holder in relation to the marketplace, expands the scope of the term 'commercial scale' defined by the WTO Panel. The Panel in that dispute confined the scope of criminal conduct to the acts of buying and selling

---

31 See Ainee Adam, n 4, p 342 for more on the WTO Panel's interpretation of the term 'commercial scale'.

32 See also Kimberlee Weatherall, 2015 "*Section By Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 3 – Enforcement"* Selected Works of Kimberlee G Weatherall <http://works.bepress.com/kimweatherall/33> 49. Site accessed on 10 January 2016.

33 See fn 88 of the Trans-Pacific Partnership Agreement ('TPPA').

34 *China – Intellectual Property Rights*, WTO Doc WT/DS362/R (2009) [25 at page A-5].

35 *China – Intellectual Property Rights*, WTO Doc WT/DS362/R (2009) [7.553].

36 *China – Intellectual Property Rights*, WTO Doc WT/DS362/R (2009) [7.553].

involving infringing goods.[37] Definition (b), however, criminalises *significant acts* (as opposed to *commercial act*) causing substantial prejudicial impact.[38] This means that the conduct being criminalised may also include the unauthorised act of sharing copyright materials on the internet.

While the inclusive definitions of the term 'commercial scale' provides significant insight into the standard of criminal enforcement measures prescribed in the TPPA, the fact that inclusive definitions are included in the provision is also noteworthy. By prescribing inclusive definitions to the term, TPPA members are not confined to merely criminalising infringing acts carried out for commercial advantage or financial gain (commercial purposes) and acts causing substantial prejudicial impact on the interests of the copyright holder in relation to the marketplace. Therefore, it is entirely reasonable for a TPPA member to expect another TPPA member to criminalise a wider range of copyright infringement under Article 18.77.1 than what is required under Article 61 of the TRIPS Agreement.

In short, it is clear that the scope of Article 18.77.1 is significantly broader than Article 61 of the TRIPS Agreement. Although it similarly criminalises infringements on a commercial scale, it curtails the flexibility provided to WTO members in interpreting the term 'commercial scale'. The inclusive definitions ensure that the TPPA Members are compelled to criminalise certain relatively trivial conduct which may not commonly be regarded as infringements on a commercial scale.

Taking into account the changes Article 18.77.1 will bring about to the current international standard of criminal enforcement measures, it is then necessary to re-assess the criminal enforcement regime in the 1987 Malaysian Act to determine whether the current regime is consistent with the TPPA standard.

As discussed, definition (a) requires Malaysia to criminalise (single) acts of infringements carried out for commercial advantage or financial gain (commercial purposes) whereas definition (b) requires the criminalisation of significant acts that have a substantial prejudicial impact on the interests of the copyright holder in relation to the marketplace. Also, as explained in part [II(B)(i)], section 41(1)(*c*) of the 1987 Malaysian Act criminalises the distribution of more than three infringing copies of a work in the same without making any references as to the purpose for distributing the infringing copies. In view of the manner in which section 41(1)(*c*) is formulated, it is suggested that the provision is consistent with Article 18.77.1 of the TPPA. This is because not only is the Malaysian provision is unconcerned with the purpose for distributing the infringing copies (be it for commercial gain or financial gain or even not-for profit activities), it is also sufficiently general to include single acts of infringements. Following from this, it does not appear as though any amendments to section 41(1)(*c*) will be necessary to comply with Article 18.77.1 of the TPPA.[39]

---

[37] *China – Intellectual Property Rights*, WTO Doc WT/DS362/R (2009) [7.535].

[38] See Kimberlee Weatherall, 2015 "*Section By Section Commentary on the TPP Final IP Chapter Published 5 November 2015 – Part 3 – Enforcement"* The Selected Works of Kimberlee G Weatherall <http://works.bepress.com/kimweatherall/33> 49. Site accessed on 10 January 2016.

[39] This does not, however, mean that the current formulation of s. 41(1)(*c*) is ideal. But, this will not be addressed here.

* Emphasis added. It is understood that there is no obligation for a Party to provide for the possibility of imprisonment and monetary fines to be imposed in parallel.

B. Punishment

Article 18.77.6(a) prescribes the punishment to be made available for wilful copyright piracy on a commercial scale. As the TPPA standard for criminal enforcement measures is built on the Article 61 standard, the wording in Article 18.77.6(a) resembles the second sentence in Article 61 of the TRIPS Agreement. The Article 61 standard reads as follows:

> Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.

Whereas the TPPA standard reads as follows:

> … [E]ach Party shall provide penalties that include sentences of imprisonment *as well as* monetary fines sufficiently high to provide a deterrent to future acts of infringement, consistently with the level of penalties applied for crimes of a corresponding gravity;*

As can be seen, there are striking similarities between the two standards. Nevertheless, there are slight differences between the two standards, with the TPPA standard requiring its signatory states to provide *both imprisonment and pecuniary penalties* as punishment for wilful copyright piracy on a commercial scale. This is unlike the TRIPS standard which provide WTO members with the option to make available *either imprisonment or pecuniary penalties or both*.

While this departure from the TRIPS standard may appear alarming as the flexibility to determine the range of penalties to be made available is removed, it is to be noted that the TPPA does not compel its signatory states to impose both imprisonment and pecuniary penalties in parallel. This means that the courts' discretion to determine the type of punishment that should be imposed on an offender is unhindered as the judges may choose to impose either sanction. Therefore, the severity of the TPPA standard is effectively tempered.

Upon understanding the measure prescribed by the TPPA standard, it is then necessary to examine whether the Malaysian criminal enforcement measures are consistent with the new measures. As explained in [II(B)], section 41(1)(i) of the Malaysian Act provides that an offender may be fined or imprisoned or both. It is therefore arguable that the provision is in compliance with the TPPA standard in that the provision provides for both imprisonment and pecuniary penalties but leaves it to the judges to exercise their discretion in imposing either or even both sanctions. This means that ratification of the TPPA will not likely result in amendments to the penalties scheme in the Malaysian copyright criminal enforcement measures.

It is, however, necessary to also consider Article 18.71.5 of the TPPA which requires signatory States to '…take into account the need for proportionality between the seriousness of the infringement of the intellectual property right and the applicable remedies and penalties, as well as the interests of third parties' in implementing the

provisions concerning the enforcement of intellectual property rights. This includes the implementation of Article 18.77.6(a).

An examination of the previous leaked texts of the IP chapter of the TPPA interestingly shows that Article 18.71.5 was not part of the measures being proposed by the various negotiating parties.[40] Without access to the negotiating documents, it is not possible to shed any light onto the reasoning behind the addition of Article 18.71.5. This is even more so when the requirement for proportionality in the TRIPS Agreement, while in existence, refers only to measures in relation to the disposal of infringing goods and materials and implements used to create the infringing goods,[41] unlike the TPPA.

Nevertheless, in ensuring proportionality in calibrating the appropriate level of punishment, the TPPA requires signatory States to consider three factors: (1) seriousness of the infringement; (2) the applicable penalties; and (3) the interests of third parties. This means that TPPA members should not only ensure that the punishment to be made available is proportionate to the seriousness of the infringement, but also balanced with the interests of third parties such as copyright holders and consumers.

While the first and second factors are consistent with the method established in deterrence theory when determining the severity of punishment for a particular crime,[42] the third factor adds a new dimension to this formula. This means that TPPA members will be required to consider key stakeholders' interests when determining the level of punishment to be made available for wilful copyright piracy on a commercial scale. In a situation where civil society groups are sufficiently influential to be able to balance the pressure from commonly dominant organisations representing the interests of copyright owners, the third factor would probably not be of much effect to the fine balance between the seriousness of the infringement and its subsequent punishment. However, more often than not, especially in developing countries such as Malaysia, civil society groups, if any, are oft disregarded. This factor may then prove to be problematic as copyright holders would have a degree of unfettered influence in determining the amount of punishment to be made available.

---

40 See 16th October 2014, "*Updated Secret Trans-Pacific Partnership Agreement (TPP) – IP Chapter (Second Publication)"* WikiLeaks <https://www.wikileaks.org/tpp-ip2/>. Site accessed on 10 January 2016; 13th November 2013 "*Secret TPP Treaty: Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions*' WikiLeaks <https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf>. Site accessed on 10 January 2016.

41 Article 46 reads as follows:
In order to create an effective deterrent to infringement, the judicial authorities shall the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce …[and] the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce … In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account…

42 See Beccaria and Bentham's argument that punishment should reflect the level of harm caused by the offender in Cesare Beccaria, *On Crimes and Punishments and Other Writings* Richard Davies, Virginia Cox, Richard Bellamy trans, Cambridge University Press, 1995 (1738 – 1794) pp 19-21; Jeremy Bentham, *The Rationale for Punishment* Robert Heward, 1830 pp. 32 – 34.

Referring back to the penalties in section 41(1)(i) of the 1987 Malaysian Act, the question that arises then, are the penalties consistent with Article 18.71.5? In relation to the proportionality between punishment and the seriousness of the infringement, as Article 18.77.6(a) of the TPPA, similar to Article 61 of the TRIPS Agreement, relies on the level of punishment made available for crimes of a corresponding gravity to determine the level of punishment for wilful copyright piracy on a commercial scale, it will be redundant to repeat the analysis undertaken in part [II(B)(ii)] of this article.

It will be difficult, however, to currently determine whether the punishment is proportionate upon considering the interests of third parties as it is dependent on the demands made by the third parties. Therefore, this is a question that may be answered when, and if, the circumstances arise.

Following from this, for the current purpose, it is sufficient to state that a black letter comparison of the penalties for copyright piracy on a commercial scale and theft as set by the laws as they are on the books *prima facie* shows that that the penalties in section 41(1)(i) of the 1987 Malaysian Act are in compliance with the TPPA standard.

C. Summary

An in-depth analysis of the Articles 18.77.1, 18.77.6(a) as well as 18.71.5 reveals that the TPPA standard of criminal enforcement measures (where it corresponds to Article 61 of the TRIPS Agreement) is comparatively harsher than the TRIPS standard. This is mostly attributable to the presence of inclusive definitions to the term 'commercial scale' which significantly broadens the scope of conduct to be criminalised. Despite this, the manner in which the Malaysian penal provisions have been formulated likely renders the TPPA standard to be of little effect to the current national criminal enforcement regime.

IV. CONCLUSION

The objective of this article is twofold. First, it re-assesses the current criminal enforcement measures in the 1987 Malaysian Act to determine the extent of the compliance with Article 61 of the TRIPS Agreement. Second, it evaluates whether the TPPA standard, if ratified and subsequently comes into force, will result in any amendments on the existing measures.

In assessing Malaysia's compliance with the Article 61 standard, the flexibility inherent in the wording of the standard allows for the presumption that the Malaysian penal provisions are TRIPS-compliant. The TPPA standard, on the other hand, is comparatively more certain than Article 61 as it defines the term 'commercial scale' and determines the range of punishment that must be made available as well as the considerations that should be taken into account when determining the level of punishment that should be made available. Despite these significant changes to the current international standard of criminal enforcement measures, the article finds that penal provisions in the 1987 Malaysian Act will require minimal changes, if any, so as to comply with the TPPA standard.

This tentative conclusion on Malaysia's conformity with the TRIPS and TPPA standard, however, should not be taken as the end of the analysis, as the determination of whether the penalties in the 1987 Malaysian Act are set at a level sufficient to provide

a deterrent should include factors such as community perceptions of the seriousness of copyright infringement in comparison to theft of movable property. For example, if, as seems to be the case, the community perceives copyright infringements as less serious than theft of movable property, then setting criminal penalties at broadly similar levels clearly would not result in the same level of deterrence. In fact, it may result in over-criminalisation by way of excessive punishment. Therefore, extensive empirical work will be necessary to determine whether the Malaysian penalties scheme are properly calibrated so as to provide an effective deterrence to wilful copyright piracy on a commercial scale, as required by both the TRIPS and the TPPA standards.

IN SEARCH OF A MYTHICAL EXCEPTION TO PRIVITY OF CONTRACT IN INDIAN LAW

S.Swaminathan*

Abstract

In a recent judgment, *Utair Aviation v Jagson Airlines*, the Delhi High Court formulated a novel 'conduct, acknowledgement and admission' exception to the privity of contract requirement. Two influential treatises on Indian contract law, Avtar Singh's Contract and Specific Relief and Frederick Pollock and Dinsha Mulla's Indian Contract Act 1872 too, recognise the exception and cite a long list of authorities in its support. This article argues that neither is the exception doctrinally warranted—based as it is on a problematic reading of the authorities cited in its favour—nor its invocation in the case or by the treatises justified. The Court's claim that the 'width' of section 2(d) of the Indian Contract Act which, unlike the English definition of consideration, allows consideration to move from the promisee or another person, provides the doctrinal basis for an expanded list exceptions to the privity rule, will be contested. It will also be argued that the purported exception is rendered conceptually redundant by section 2(d) of the Indian Contract Act 1872. The discussion will have for its backdrop, the contrast between the English law and the Indian Contract Act on two cognate ideas, namely, privity of contract and privity of consideration, the conflation of which, it will be argued, engenders some of the confusion in the case under discussion.

> The rule…is stated in the text-books as based upon the authority of the decision, and afterward, when it offers an easy solution of a difficult case, it is quoted by other judges upon the authority of the text-book, and so, without inquiry into its origin it comes to be regarded as a rule of law; and it is only when it is applied to cases in which it works injustice that the soundness of the rule begins to be questioned.
>
> *Edward Quinton Keasby* [1]

I. INTRODUCTION

For nearly half a century, decisions of the highest courts of the land in India have held that the law on privity of contract at Indian law is substantially the same as the doctrine at English law, with the only difference that under section 2(d) of the Indian Contract

* B.S.L., LL.B (ILS-Pune); B.C.L (Oxford); D. Phil (Oxford). Associate Professor and Executive Director, Centre on Public Law and Jurisprudence O.P. Jindal Global University, NCR (Delhi) India; Email: sswaminathan@jgu.edu.in. Many thanks are due to V. Niranjan, Prashant Iyengar, Rohan Alva, Ankur Sood and Riya Chipre.

[1] Edward Keasby, "The Right of a Third Person to Sue upon a Contract Made for his Benefit", *Harvard Law Review,* 1894, Vol. 8, p. 93, 94.

Act 1872 (ICA) consideration may move from not just the promisee but also from any other person.[2] Therefore, in India, as was the case in England until the enactment of the Contracts (Rights of Third Parties) Act 1999, no third party to a contract may ordinarily sue upon it.[3] The courts in India have also by and large recognised the same set of exceptions to the privity rule as the English law does, namely, agency, trust and covenants running with property.[4] Recently, the Delhi High Court in *Utair v Jagson* recognised and applied another exception to the privity rule, namely, that of 'conduct acknowledgement and admission'.[5] The court, however, did not take itself to be creating a novel exception. Rather, it claimed to be applying to the case on hand, a well-settled proposition supported by a catena of authorities. Although the court did not rely on it, two respected and influential treatises on Indian contract law, namely, Avtar Singh's *Contract and Specific Relief*, and Fredereick Pollock and Dinsha Mulla's *Indian Contract Act 1872* recognise that 'acknowledgment and estoppel' constitutes an exception to the privity rule and cite a long list of authorities in its support.[6]

The central claim of this article is that the existence of such a 'conduct, acknowledgment and admission' exception is a pure myth. It is doctrinally not well founded and the authorities invoked in support of the proposition by the High Court judgment and the two treatises do not bear such a reading. The article also examines the reasoning of the court in *Utair v Jagson* to identify some misconceptions about the privity doctrine. It will be argued that the court did not, in the first place, need to invoke a novel exception to the privity doctrine as the Indian version of the privity rule, thanks to section 2(d) of the ICA, was wide enough to allow the plaintiff to sue in the case before the court. The 'exception', it will be argued, is designed to rescue the plaintiff from the pincers of a problem that the plaintiff would not have needed rescuing from had the court not imagined the plaintiff to be in it in the first place. Finally, it will be argued that the 'conduct and acknowledgment' exception can conceptually never really amount to a functional serviceable exception at all as such a category is rendered redundant by section 2(d) of the ICA.

Section II sets out and compares the law on privity of contract in India and in England. Significantly, it draws a distinction between *privity of contract* and *privity of consideration* and points out that while with respect to the former the law in India and England are similar, with respect to the latter they are different. Section III discusses the

---

2 *M.C.Chacko v State Bank of Travancore* [1970] AIR SC 500 (Supreme Court of India); *National Petroleum v Popat Mulji* [1936] 60 ILR Bom 954 (Bombay High Court); See also *Kepong Prospecting v Schmidt* [1968] AC 810 which was decided by the Privy Council on an appeal arising from Malaysia. The Malaysian Contracts Act 1950 is identical to the Indian Contract Act 1872.

3 There may be and indeed are good grounds for normatively questioning whether the privity of contract *ought* to have any applicability in India, but there it is beyond doubt that this indeed is descriptively the position of law as decided by the courts of the land. For a discussion of the normative question *see* S. Swaminathan, "The Great Indian Privity Trick: Hundred Years of Misunderstanding Nineteenth Century English Contract Law" (unpublished manuscript).

4 See discussion in section IV *infra*.

5 *Utair Aviation v Jagson Airlines Limited* [2012] 129 DRJ 630 (Delhi High Court).

6 Avtar Singh, *Contract and Specific Relief*, 10th ed., Eastern Book Company, 2010, *passim*; Frederick Pollock and Dinsha Mulla, *Indian Contract Act, 1872*, Nilima Bhadbhade, 14th ed., Lexis Nexis, 2012, *passim*.

salient issues emerging from the Delhi High Court's decision in *Utair v Jagson*. Section IV scrutinizes the claim advanced by the judgment that exceptions to the privity rule are possible in India but not England only because the definition of consideration under section 2(d) of the ICA which allows consideration to move from the 'promisee or any other person' is wider than the English definition according to which consideration must necessarily move from the promisee. It will be argued that this argument *inter alia* conflates privity of contract and privity of consideration. Section V argues that the authorities adduced by the decision in support of novel 'acknowledgment and conduct exception' do not bear the reading proposed by the court. It will be argued that the courts in these decisions never took themselves to be inventing a new exception to the privity doctrine but were merely applying the one of other two well recognised exceptions to privity doctrine recognised in English and Indian law, namely, trust and agency. Section VI argues that the mythical 'acknowledgment and conduct' exception is traceable to Avtar Singh's influential treatise *Law of Contract and Specific Relief* and Pollock and Mulla's, *Indian Contract Act 1872*. However, Avtar Singh bases this doctrine on a problematic reading of three High Court decisions, which results in the elevation of facts, which are ultimately of no bearing to the outcome of the case, to the status of conclusive legal principles; and Pollock and Mulla's attribution of this proposition to a handful of authorities is also questionable. In Section VII it will be argued that there are two ways in which the 'acknowledgment, conduct and admission' exception can operate, both of which make it redundant. If the role of acknowledgment is to preclude the promisor from denying the existence of a promise it cannot entitle the third party to sue as the existence of the promise is hardly in question in such cases. On the other hand, if the only purpose of the acknowledgment is to establish an 'implied' promise with the third party, the latter will no longer be a third party in the real sense—it will be the 'promisee' to the second promise instead, and the Indian definition of consideration under section 2(d) of the ICA is wide enough to allow such a party to sue upon the contract, without having to fit its case within any of the exceptions.

II. PRIVITY IN INDIAN AND ENGLISH LAW

The ICA codified, and to a certain extent reformed, the English common law of contract.[7] Among the challenges faced by courts in interpreting any code which consolidates and amends an existing body of law is to determine the extent of the code's fidelity to the antediluvian law warts and all, and the extent of its intent to reform it.[8] It is feared that legislative reforms tend to be stultified as in dealing with codes courts tend to revert to the pre-codification law on the subject.[9] One of the interpretive challenges the courts

7 See A.C Patra, "Historical background of the Indian Contract Act", *Journal of the Indian Law Institute,* 1962, Vol. 4, p. 373 *passim*; G. Rankin, *Background to Indian Law*, Cambridge University Press, 1946, pp. 88-110.

8 W. Swain, "Contract codification and the English: some observations from the Indian Contract Act 1872" in James Devenney and Mel Kenny eds., *The Transformation of European Private Law: Harmonization, Consolidation, Codification or Chaos?,* Cambridge University Press, 2013, pp. 172-195 *passim*.

9 R.N. Gooderson, "English Contract Problems in Indian Code and Case Law", *Cambridge Law Journal* 1958 Vol. 16 p. 67; Warren Swain, "Contract Codification in Australia: Is it Necessary, Desirable and Possible?", *Sydney Law Review* 2014, Vol. 36, p. 131,141.

in India faced in applying the ICA was to do with that bugbear of the common law of contract: the question of the eligibility of third parties or strangers to a contract to bring an action upon it.

At English common law, two canonical cases from the mid-19th century, namely, *Price v Easton*[10] and *Tweddle v Atkinson*[11] are widely taken to have settled conclusively that a stranger to a contract cannot sue upon it—the rule which has come to be known as the *privity of contract* rule. There is some academic controversy over whether these cases do actually stand for this proposition or support a cognate but distinct *privity of consideration rule* instead:[12] that a person from whom consideration has not moved cannot sue upon the contract.[13] Surveying the 'cloudy history' of the doctrine, Vernon Palmer argues that it is a 'basic misconception' to suppose that the cases in question support the privity of contract rule.[14] Whatever view one takes on this academic debate—and nothing here turns on a determination of this historical issue—there is little doubt that these cases have come to be received as the source and origin of the privity of contract rule and as Patrick Atiyah reminds us, commenting on *Tweddle v Atkinson*, in the law, the case becomes 'more important not for what the judges said but for what the legal profession came to believe the case stood for.'[15] In due course, the privity of contract rule was further cemented by *Dunlop v Selfridge*[16] and it came to be ensconced in the law for decades thereafter, Lord Denning's multiple broadsides at it, notwithstanding,[17]until the Contracts (Rights of Third Parties) Act 1999 mitigated some of the rigours of the doctrine by making it possible for third party beneficiaries to sue under specific circumstances. [18]

It was not altogether clear from the outset how a court in India applying the ICA should receive this body of doctrine so well entrenched in the English law. At the heart of the conundrum was the definition of consideration found in section 2(d) of the ICA:

> When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or

---

10 *Price v Easton* [1833] 4 B & Ad 433.

11 *Tweddle v Atkinson* [1861] 1 B & S 393.

12 The pair of expressions 'privity of contract' and 'privity of consideration' are borrowed from Lord Wright, "Ought the Doctrine of Consideration to be abolished from the Common Law", *Harvard Law Review* 1936, Vol. 49, p 1225, 1246. Vernon Palmer refers to the same ideas with the expressions, 'parties only rule' and 'the consideration rule': V. Palmer, *The Paths to Privity*, Law Book Exchange, 2006, p. 23.

13 See, Palmer *ibid*. at p. 22-25, 164-171; D. Ibbetson, *A Historical Introduction to the Law of Obligations,* Oxford University Press, 1999, p. 242; W. Swain, *The Law of Contract 1670-1870,* Cambridge University Press, 2015, pp. 221, 227.

14 Palmer, *supra* n12, at pp. 22-23,165.

15 P.A. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford University Press, 1979, p. 414.

16 *Dunlop v Selfridge* [1915] AC 847.

17 *See* Lord Denning's opinions in *Smith v River Douglas Catchment Board* [1949] 2 ALL E.R. 179; *Midland Silicones v Scruttons* [1962] AC 446; and *Beswick v Beswick* [1966] Ch. 538.

18 We will not, however, discuss the Contracts (Rights of Third Parties) Act 1999 as we are primarily concerned with the comparison between the privity doctrine at English common law and Indian law. Despite the centrality of the privity rule in English law, the Scots law has allowed *jus quaestum tertio*: *See* Hector MacQueen, "Third Party Rights in Contract: Jus Quaesitum Tertio" in Kenneth Reid and Reinhard Zimmermann (eds.) *A History of Private Law in Scotland, II: Obligations*, Oxford University Press, 2000, pp. 220-51.

> to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.

The definition of consideration is clearly wider than the English definition as consideration under the provision could move not only from the promisee but also 'any other person'. As Pollock and Mulla put it in their commentary:

> In modern English law, it is well settled that consideration must move from the promisee. Under the Act, however, the consideration may proceed from the promisee or any other person. The result is to restore...and even extend the doctrine of some earlier English decisions [*Dutton v Poole*] which are no longer of authority in England.[19]

This provision clearly made it possible for parties to sue upon a contract even if the consideration had not moved from them provided they remained *parties* to the contract; something that would not be possible under English law which also required for there to be *privity of consideration* to earn the right to sue upon a contract. An early illustration of the effect of section 2(d) and its contrast with the English law is provided by the Madras High Court's decision in *Chinayya v Ramayya*.[20] A, the mother, transferred property to her daughter B on the stipulation that B give an annuity to her uncle C and D, who were A's brothers. B contemporaneously contracted with her uncles C and D to pay the annuity. The court held that C and D were entitled to sue upon the second contract although they provided no consideration, as consideration provided by A was adequate to support an action by them. *Tweddle v Atkinson* would have precluded such an outcome in England. This was considered to be possible in Indian law because of the wide definition of consideration under section 2(d) which allowed consideration to flow from not just the promisee but also from any third person.

The only question that remained to be answered was whether section 2(d) had the effect of allowing third parties to sue upon the contract as ostensibly the ICA was silent on this specific question.[21] This question could very well have come up in *Chinayya v Ramayya* had the daughter not entered into the contemporaneous second agreement with her uncles promising to pay them the annuity.

At one time, there was considerable judicial authority holding that the 'width' of section 2(d) had the effect of negating the idea of privity of contract, thus enabling a third party to sue upon it. Two particularly illuminating decisions illustrative of this line of thinking were *Debnarayan Dutt v Chunnilal Gose*[22] and *Khirodbehari Dutt v Mangobinda*.[23] In *Debanarayan Dutt* Lawrence Jenkins CJ combined the argument about

---

19 Frederick Pollock and Dinsha Mulla, *Indian Contract Act,* 2nd ed., Sweet & Maxwell, 1909, p. 16.

20 *Chinayya v Ramayya* [1881] 4 I.L.R. Mad. 187 (Madras High Court).

21 George Rankin notes, that 'there is nothing' in s 2(d) 'to suggest that a person who is not a party to a contract can sue upon it': Rankin *supra* n7, at p. 104.

22 [1914] 41 ILR 137 (Calcutta High Court).

23 [1934] AIR Cal 682 (Calcutta High Court).

the width of section 2(d) with another argument drawn from the history of contract at common law: that the courts in India should not be trammeled by restrictions of *indebitatus assumpsit*, the 'form of action' which was predecessor of the modern action of contract, which meant that a 'stranger' could not sue. [24]

The tide began to turn against this position when the courts in India began to take the view that the wide definition of consideration under section 2(d) notwithstanding, the issue of who can sue on the contract was analytically distinct from it and not covered by the terms of the provision at all. The credit for making this constricted view of section 2(d) mainstream belongs to Fredrick Pollock and Dinshah Mulla who collaborated to bring out, what remains under successive editors, the most influential contract law treatise in India, which, for generations now, has assumed the status of a *vade mecum* for the bar and bench like.[25] In their enormously influential commentary on the ICA they took the view that the question of who can sue upon a contract was analytically distinct from the question of who the consideration could move from; and that section 2(d) had nothing to say on the former question. On the contrary, they argued, the definitions of 'promisor' and 'promisee' conclusively precluded any third party from suing on the contract.[26] This argument, it must be noted, is not as straightforward as Pollock and Mulla and those who endorse their reasoning make it out to be section 2 (c) defines the person making the proposal or offer as 'promisor' and the person accepting it as 'promisee'. Pollock and Mulla's argument, effectively, is that this definition precludes any third party from suing upon the contract. But this seems to be a non-sequitur as section 2 (c) has nothing to say on who can sue upon a contract. On the contrary, section 2(h) defines a contract as 'an agreement enforceable by law'—it does not define it as being enforceable by only the promisor or promisee. Despite the inherent weakness of Pollock and Mulla's argument and its resting on what was obviously a non-sequitur, it gained significant traction.

Then followed a line of cases, which, in consonance with Pollock and Mulla's position, held that section 2(d) did not have the effect of negating the privity of contract requirement at all as the definition cannot have a bearing on 'the question whether a third party (who is neither the Promisor nor the Promisee) can enforce the contract.'[27] A paradigmatic instance of this kind of reasoning is provided by Rankin CJ's opinion in *Krishna Lal Sadhu v Promila Bala Dasi*.[28]

> Not only, however, is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of 'promisor' and 'promisee'. [29]

---

[24] [1914] 41 ILR 137, 146.

[25] The treatise is now into its 14th edition: Pollock and Mulla, *Indian Contract Act, 1872*, Nilima Bhadbhade, 14th ed., Lexis Nexis, 2012.

[26] Frederick Pollock and Dinsha Mulla, *Indian Contract Act*, 2nd ed., 1909, p. 19.

[27] *Iswaram Pillai v Sonivaveru Taragan* [1913] 38 ILR Mad 733 (Madras High Court).

[28] *Krishna Lal Sadhu v Promila Bala Dasi* [1928] 32 C.W.N 634 (Calcutta High Court): This view is also reflected in Rankin's extra judicial writings to be found in Rankin (n 7) which we have already had the occasion to consider.

[29] *Utair Aviation v Jagson Airlines Limited* [2012] 129 DRJ 630, 640

Rankin CJ's opinion was quoted with approval in the Supreme Court of India's judgment in *M.C.Chacko v State Bank of Travancore* which settles the privity issue in India decisively by holding that a third party to a contract cannot sue unless the case falls within one of the well-recognised exceptions.[30]

III. *UTAIR v JAGSON*

The Delhi High Court's judgment in *Utair Aviation v Jagson Airlines*[31] purports to liberalise the privity requirement by the formulation of a novel 'conduct acknowledgement and admission' exception to it. The facts of the case are as follows. Defendant 2 (the Contractor) entered into an agreement with Jagson for the supply and maintenance of two helicopters. The Plaintiff Utair, the 'confirming party' to the maintenance agreement between the Contractor and Jagson supplied the equipment required for maintenance of the helicopters directly to Jagson. Despite the agreement between Jagson and the Contractor coming to an end, the plaintiff's equipment continued to remain with Jagson. The Plaintiff, Utair sued for recovery of the equipment. Jagson applied for rejection of the plaint under Order 7 Rule 11 (a) of the Code of Civil Procedure, 1908 —a provision which empowers the court to reject the plaint *inter alia* if no cause of action is disclosed—on the ground that there was no privity of contract between Utair and Jagson and that Utair as a 'third party' could not sue upon a contract which was essentially between Jagson and the Contractor. The plaintiff also pleaded that there was communication between Utair and Jagson and the dealings between them were of the kind that further buttresses the point that there was a contract between the parties. The decision under discussion was handed down by the court on the O.7 R.11 (a) application where it fell for the court to decide, without questioning any of the facts alleged in the plaint, whether a cause of action was disclosed. The court held in Utair's favour by holding that the case fell within what the court regarded to be one of the 'well-recognised exceptions' to the privity doctrine: 'conduct, acknowledgment and admission'.[32]

---

30 [1970] AIR SC 500 (Supreme Court of India). Article 141 of the Constitution of India provides that any decision of the Supreme Court of India is binding on all the courts in India including the High Courts. All the other decisions referred to in this article apart from this decision are decisions by High Courts. This has also by and large been the position taken in Malaysia whose Contracts Act 1950 is identical to the Indian Contract Act, 1872—that the privity rule is applicable. The Privy Council too confirmed this position on appeal from Malaysia in *Kepong Prospecting v Schmidt* [1968] AC 810. Lord Wilberforce held:

> It is true that section 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England, particularly in that it enables consideration to move from another person than the promisee, but the Appellant was unable to show how this affected the law as to enforcement of contracts by third parties.

The courts in Malaysia too have by and large used the same set of exceptions that Indian courts have to get around the privity rule. For a discussion on the privity rule in Malaysia and the exceptions thereto see: Tan Pei Meng, "Circumventing the Privity Rule in Malaysia", *Journal of International Commercial Law and Technology,* 2009, Vol. 4, p. 262 *passim*. For a discussion on the circumventions to the privity rule used by the Indian courts see, see discussion in Section IV below.

31 [2012] 129 DRJ 630.

32 [2012] 129 DRJ 630, pp. 640-41.

> [T]he party may by acknowledgment or by his conduct…proceed to create privity with the said third party by virtue of it being a subordinate to the party to the contract or dealing with the parties to the contract etc…[33]

> [P]rivity can be created by virtue of conduct acknowledgment and admission, it becomes clear that any case where one party is made aware of the relationship of the other party with that of a stranger…and the conduct suggests a kind of relationship, then there can be said to be a nexus or a privity which can be said to be created by virtue of conduct.[34]

The court appears to have been steered in the direction of making the case turn on privity because the question was squarely raised by Jagson. It is not entirely clear, however, if this course was at all necessary. Firstly, a cause of action could be made out *quasi ex contractu* without having to invoke any contract under section 70 of the ICA.

> S. 70. Obligation of person enjoying benefit of non-gratuitous act.—Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered

In this case, all of the relief claimed by the Plaintiff would also have been available under section 70 of the ICA, which is a quasi-contractual provision that allows the owner of goods who has non-gratuitously handed them over to recover them from another party along with compensation even in the absence of a contract. And secondly, even if one were to hold, however improbably, the view that any cause of action in this case must be *ex contractu*, the question of privity still remained orthogonal to the relief sought as Utair claimed in the plaint to be a 'confirming party' to the agreement: a pleading, by virtue of which it could not be termed as a 'stranger' to the contract. A confirming party may literally be the third party *in* the contract but that does not mean that it is the third party *to* the contract. The court's decision to bring the case within one of the exceptions of the privity rule seems to be premised on such a conflation. Thus the judgment, for the most part can be seen as an attempt to rescue the plaintiff from the pincers of a problem that the plaintiff would not have needed rescuing from had the judgment not imagined the plaintiff to be in it in the first place. The plaintiff's case didn't need to be brought within one of the exceptions to the privity rule because privity did not seem to pose any hurdle to the plaintiff's case in the first place.

---

[33] *Ibid.* at p. 641.
[34] *Ibid.* at p. 642.

IV. THE IRRELEVANCE OF THE WIDE DEFINITION OF CONSIDERATION

The decision prefaces its discussion on exceptions to the privity rule by claiming that while in England no stranger to a contract can sue upon it, they can under exceptional circumstances do so under Indian law only because the definition of consideration under section 2(d) of the ICA which allows consideration to move from the 'promisee or any other person' is wider than the English definition which provides that consideration may move from the promisee only.[35] But this claim seems problematic for three reasons. *Firstly*, English law does recognise exceptions to the privity rule: [36] a) trust;[37] b) agency;[38] c) covenants running with property.[39] It follows therefore that the width of the definition of consideration has no bearing on the question of who can sue upon it. Exceptions (a) and (b) have also been received by Indian cases with there being no doubt that their source is the English common law.[40] And exception (c) has comparable statutory recognition in sections 39 and 40 of the Transfer of Property Act (India) 1882 albeit only with respect to immovable property.[41] Additionally, section 15(c) of the Specific Relief Act 1963 (India) allows any beneficiary of a contract made for a family or marriage settlement to bypass privity and sue thereupon.

Secondly, if the reasoning underlying the argument—that exceptions to privity were made possible in Indian law only because consideration may move from 'any other person'—were to be taken to its logical conclusion, the privity doctrine in India would be obliterated in a single swoop and consideration moving from anyone should allow anyone to sue upon a contract as there would then be no good reason to read 'any other person' restrictively to mean just the category of persons forming one of the recognised exceptions to the privity doctrine. Consider for instance, the agency exception. If the only reason why consideration provided by A (agent) to B (promisor) is good enough for C (principal) to sue on is because the agent A is 'any other person' under section 2(d), there is nothing to preclude this principle from extending to all cases where consideration moves from just about any person: because it should not matter on the plain terms of section 2(d) who the 'any other person' is. It should be an inexplicable mystery for someone

---

35 *Ibid.* at p. 638.

36 See M. Furmston and G. Tolhurst, *Privity of Contract*, Sweet & Maxwell, 2014, pp. 44-102; In addition to the 'exceptions' set out here there is also the scope for other 'circumventions' of the privity rule or ways round it such as collateral contracts and assignments which will not be discussed in this article: *See* the UK Law Commission's Consultation Paper No. 121, "Privity of Contract: Contracts for the Benefit of Third Parties", 1991, *passim*; and G.Trietel, *Some Landmarks of Twentieth Century Contract Law,* OUP 2002, pp. 84-89 (where he discusses some ways around the privity requirement in the context of *Beswick v Beswick*).

37 This exception has been recognised since as early as *Tomlinson v Gill* [1756]. See also *Gregory and Parker v Williams* [1817] 3 Mer 582; and *Les Affréteurs Réunis SA v Leopold Walford* [1919] AC 801.

38 Palmer *supra* n 12, at pp. 64-67.

39 Furmston and Tolhurst *supra* n at 36, pp. 50-53. *Smith v River Douglas Catchment Board* [1949] 2 ALL E.R. 179. The exception is also recognised by Ss. 56, 78 & 79 of the *Law of Property Act 1925*.

40 *Khirodbehari Dutt v Mangobinda* [1934] AIR Cal 682 (Calcutta High Court); *National Petroleum v Popat Mulji* [1936] 60 ILR Bom 954 (Bombay High Court).

41 Furthermore, while S.56 of the Law of Property Act (UK) 1956 is wide enough to cover any condition or covenant, the Ss. 39 & 40 of the Transfer of Property Act (India) 1882 deal only with a limited nature of covenants relating to immovable property.

endorsing this claim why the term 'any other person' should be read restrictively to mean only category of persons falling within one of the recognised exceptions such as trust, agency, etc. The fact of the matter is that, contrary to what the judgment claims, the width of section 2(d) has nothing to do with the exceptions, which have been received from the English common law.

Finally, the argument in question seems to conflate *privity of contract*, the idea that a stranger to the contract cannot sue and *privity of consideration*, the idea that a consideration must move from the promisee. No one can cavil about the wider definition of consideration under section 2(d) having a direct bearing on the idea of privity of consideration. But as we have seen in Section II, for better or worse, it is conclusively settled by the Supreme Court of India now that section 2(d) cannot be taken to have the effect of negating the privity of contract requirement.

V. THE MYTH OF THE NOVEL EXCEPTION

Utair v Jagson traces the origin of the 'conduct, acknowledgment and admission' exception to a decision of a single judge of the Calcutta High Court in *Narayani Devi v Tagore Commercial Corporation*.[42] That decision, in turn, purports to follow an earlier decision of the Calcutta High Court in *Jnan Chandra v Manoranjan Mitra*.[43] It must be noted that the court in *Narayani Devi* never took itself to be inventing a new exception to the privity doctrine but was merely applying the 'agency exception' to the case which was described by the court in *Jnan Chandra* to be one of the 'two well-recognised exceptions' to the privity doctrine. This is borne out from the excerpt from *Narayani Devi* set out in the judgment and reproduced below.

In my opinion, even if it is held, that there was no privity between the plaintiff and these two defendants, when the said contract was entered into, yet in the facts and circumstances of this case, it must be held that the two defendants have created such privity with the plaintiff by their conduct and by acknowledgment and by admission, as stated above and they have constituted themselves the agent of the plaintiff. Such admission will also be found in Exhibit 'C' and such conduct will be found from the evidence both oral and documentary. This is a case which comes directly within the exceptions to the general doctrine that the stranger to the agreement cannot sue to enforce his right because of want of privity between the promisor and the stranger (Vide: observation of the Division Bench of this Court in *Jnan Chandra Mukherjee v Monoranjan Mitra*, AIR 1942 Cal 251 at p. 252).[44]

The facts in *Narayani Devi* bore some resemblance to those in *Beswick v Beswick*.[45] A sold his business to B in return of B's promise to pay him a lifetime annuity and upon his death to his wife C. And much like *Beswick* there was there also an acknowledgment of his contractual liability by B in the form of the payment of some instalments of the

[42] [1973] AIR Cal 401 (Calcutta High Court).
[43] [1942] AIR Cal 251 (Calcutta High Court).
[44] Excerpted at [2012] 129 DRJ 630, 641.
[45] [1968] AC 58.

annuity to C. Here C could have sued B as the legal heir of A, but brought the suit in her personal capacity instead. Upholding C's right to sue in her personal capacity, somewhat improbably, the court found that B was C's agent: a fact that it took to be established by B's conduct and acknowledgment thus bringing the case within the well-recognised 'agency' exception as set out in *Jnan Chandra Mukherjee*.[46] The anomalous result seems to have been produced by language used in *Narayani Devi* to formulate the agency exception which is identical to that used in *Jnan Chandra* for this purpose—'where the promisor, between whom and the stranger no privity exists, creates privity by his conduct and by acknowledgment or otherwise constitutes himself an agent of the third party'. This formulation is not altogether apposite. The source of this phraseology is probably Rangnekar J's judgment in *National Petroleum v Popat Mulji*[47] a celebrated decision which predates *Jnan Chandra*

> [T] here are two exceptions made to this general rule. The first exception is where the contract is made by a trustee for the benefit of a beneficiary, in other words, where there is a case of trust, and the other exception is where by acknowledgment or part payment or by estoppel privity may be established as a ground of agency. These two exceptions are also recognised by the decisions in this country.[48]

Rangnekar J in *National Petroleum* makes it tolerably clear that trust and agency are the two exceptions to privity; and estoppel and acknowledgment are among the means of establishing agency. There is little doubt that it is precisely this sense in which acknowledgment and estoppel appear in *Jnan Chandra* and *Narayani Devi* as well.

Under the well-recognised agency exception, the agency is between the promisee and the third party with the former being the agent; not between the promisor and the third party.[49] However precarious the court's hanging the case on the agency exception—and precarious it was indeed it was—it is the agency exception that was dispositive of the case in *Narayani Devi*, but the judgment in *Utair* extracts from the excerpted passage, the doubtful proposition that the court evolved a novel free standing exception based on 'conduct, acknowledgment and admission of the defendant'.

The judgment in *Utair v Jagson* further claims that this principle can also be found to be relied on by the Punjab High Court in *Babu Ram v Dhan Singh*.[50] However, even this does not seem to be right. In *Babu Ram* the court had allowed relief on another well recognised exception to the privity rule, namely, 'trust':

> By now it is well settled that ordinarily a stranger to a consideration cannot take advantage of a contract even though it may be for his benefit. This rule is, however,

---

46 Whichever way one choses to view the facts, no relationship of principal and agent was in fact made out between C and B.

47 [1936] 60 ILR Bom 954 (Bombay High Court).

48 *Ibid*. at p. 995.

49 *See* the UK Law Commission's Consultation Paper No. 121, "Privity of Contract: Contracts for the Benefit of Third Parties", 1991, p. 14.

50 [1957] AIR P&H 160 (Punjab High Court).

> subject to certain exceptions. One of the exceptions covers cases where a stranger holds the position of cestui que trust in relation to the obligee.[51]

Finally, the court also argues that the 'conduct, acknowledgment and admission' exception is instantiated in the decision of the Mysore High Court in *Devaraje Urs v Ramkrishnaniah*.[52] This doesn't appear to be correct, either. As we will see in the following section, the plaintiff in *Devaraje Urs* had argued that his case falls within the well-recognsied 'trust sexception' and that is the submission accepted by the court.

VI. QUESTIONING THE SCHOLARLY ENDORSEMENT OF THE NOVEL EXCEPTION

The judgment in *Utair v Jagson* does not rely on Avtar Singh's textbook *Contract and Specific Relief*, but in it the court could have found support for its proposition about there being the kind of exception to the privity doctrine that it was trying to invoke. Avtar Singh, in fact, reads one of the decisions relied on by the Delhi High Court, *Devaraje Urs v Ramakrishnaiah* as creating an 'acknowledgment or estoppel exception'. This reading is open to question. Avtar Singh extracts the following proposition from *Devaraje Urs*:

> The suit was held to be maintainable. 'Though originally there was no privity of contract between B and C, B having subsequently acknowledged his liability, C was entitled to sue him for recovery of the amount.'[53]

The quotation from *Devaraje Urs* used by Avtar Singh, it turns out, comes *not* from the body of the judgment but from the headnote. And that headnote, it appears, wrongly summarises what was held in the judgment. The text of the judgment itself leaves no doubt that the plaintiff had sought to fit the case within the 'trust' exception and that is just what the court had permitted.

> The Respondent [Plaintiff] has…referred to a case…which was a suit by the creditor of the vendor against the purchaser under a sale deed with *terms in it similar to the present*, it was held by Subanna J that a person who is not a party to the contract and with whom there is no privity cannot gain any advantage by it, yet a contract can be so framed as to secure a benefit to a third party as a *cestui que trust* in which case the latter may sue in his own name to enforce the contract… these cases clearly help the Respondent.[54]

---

51 *Ibid.*

52 [1952] AIR Mys 109 (Mysore High Court).

53 Avtar Singh, *Contract and Specific Relief,* 10th ed., Eastern Book Company, 2010, pp. 122.

54 *Devaraje Urs v Ramakrishnaiah* [1952] AIR Mys 109,110 (Mysore High Court). Emphasis added by the author.

Another case Avtar Singh adduces as 'illustration of acknowledgment by conduct' and of estoppel is *Khirodbehari Dutt v Mangobinda*.[55]

> The tenant and the sub-tenant of a piece of land agreed between themselves that the sub-tenant would pay the tenant's rent direct to the landlord. The agreement was acted upon by all the parties interested. Under these circumstances the landlord was allowed to obtain a decree for his rent direct against the sub-tenant. In other words, the sub-tenant was estopped from denying his liability to pay the tenant's rent on the ground that there was no such contract between him and the landlord.[56]

None of the factors enumerated by Avtar Singh in the above paragraph had any more role to play in the reasoning of the court than the colour of the plaintiff's shirt and his inference that the ratio of the decision was to create an exception to the privity rule on that basis that the sub-tenant was estopped from denying his liability is based on a purely gratuitous reading of the case. *Khirodhbehari Dutt*, it will be recollected from the discussion in Section II, was in the same line of cases such as *Debnarayan Dutt v Chunnilal Gose* and Lort-Williams J was reiterating the kind of reasoning offered by Lawrence Jenkins CJ in *Debnarayan Dutt* painting with broad strokes Lort-Williams J wanted to strike at the roots of privity of contract by claiming that it had no application under the ICA. He was not trying to create any 'exception' to the privity of contract doctrine. Rather, his point was that the doctrine was not applicable in India at all, *tout court*.

> We now have ample authority for saying that the administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v Atkinson*… I prefer to base my decision, on a frank recognition that these [the trust and agency exceptions] are fictions and that in India no necessity arises for resorting to them.[57]

It would not have mattered to the outcome of the case whether or not the defendant acknowledged anything after having made the promise. Nothing turned on it because the effect of Lort-Williams J's judgment was to uproot the privity of contract doctrine in its entirety.

Finally, we must turn to another case mentioned by Avtar Singh in passing in support of this principle, namely, *Debnarayan Dutt v Chunnilal Ghose* which seems to exhibit a similarly problematic extraction of the ratio underlying the case. We have already had the occasion to consider briefly in *Debranayan Dutt* in Section II. In this case, the defendants 1 to 4 had borrowed money from the plaintiff subsequent to which they transferred all their properties to defendant 5 with a direction to repay the plaintiff. Contemporaneously the plaintiff and defendant 5 entered into an oral 'arrangement' by which the 'liability of defendant No. 5 under the transfer was acknowledged and accepted.' The plaintiff

---

55 [1934] AIR Cal 682 (Calcutta High Court).
56 Avtar Singh, *Contract and Specific Relief,* 10th ed., Eastern Book Company, 2010, p. 122.
57 [1934] AIR Cal 682, 690-691.

argued that this amounted to an oral contract. Whilst accepting that there was certainly an acknowledgment of liability the court refused to hold that it amounted to a contract. But none of this was of any bearing in the matter because Lawrence Jenkins CJ, just like Lort-Williams J did in *Debnarayan Dutt* meant to dismantle the very doctrine of privity root and branch by claiming that it was not to be applicable in India at all.

> [T]he administration of justice in these Courts is not to be in any way hampered by the doctrine laid down in *Tweddle v Atkinson* … In the old writ in indebitatus assumpsit… the breach of contract was charged as deceit and it was only the person deceived who could sue. The bar then in the way of an action by the person not a direct party to the contract, was probably one of procedure and not of substance. In India we are free from these trammels and are guided in matters of procedure by the rule of justice, equity and good conscience.[58]

The fact that the defendant had acknowledged his liability had no bearing whatsoever in the ultimate outcome of the case. Jenkins CJ made it tolerably clear that if A and B enter into a contract which is to benefit C, the latter should be entitled to sue upon it as courts in India need not follow the constricting privity rule of *Tweddle v Atkinson*. If *Tweddle v Atkinson* is not applicable to India, it should be inapplicable to the whole gamut of cases where a third party is suing upon a contract made for its benefit—the subtleties in state of relations between the parties is of no further consequence than the plaintiff having 'red hair and freckles' or that 'his name was Smith' or that in incident giving rise to the suit 'arose on a Friday'.[59] What we find here is yet another instance of one of the facts in the case, of no ultimate bearing to the outcome, being elevated to the status of a legal principle.

The 'acknowledgment and estoppel' exception is also endorsed by another standard textbook on contract law in India, namely, Pollock and Mulla's *Indian Contract Act 1872*.[60] Pollock and Mulla argue[61] that 'a stranger to a contract can sue where one of the parties to the contract agrees with the stranger to pay him directly or is estopped form denying liability to so pay.'[62] The principal authority cited in favour of this proposition is *Subbu Chetty v Arunachalam Chettiar*.[63] Sastri J in *Subbu Chetty* does indeed allude to the 'acknowledgment and estoppel' exception, but does so only as a summary of the list of exceptions enumerated in another judgment of the Madras High Court which he approves, namely, *Iswaran Pillai v S. Taregan*.[64] It turns out that *Iswaran Pillai* no mention of the acknowledgement and estoppel exception whatsoever and Sastri J appears to have produced an erroneous summary of the *Iswaran Pillai* in so far as he reported that

---

58 [1914] 41 ILR 137, 144-145.
59 Glanville Williams, *Learning the Law,* 11th Universal Indian Reprint, p. 68.
60 Pollock and Mulla, *Indian Contract Act, 1872*, Nilima Bhadbhade, 14th ed., Lexis Nexis, 2012, p. 106.
61 The reference here is to the 14th edition, *ibid*.
62 Pollock and Mulla *supra* n 60, at p.106.
63 [1930] 31 *Law Weekly* 371 (Madras High Court).
64 *Ibid*. at p.376; *Iswaran Pillai v S. Taregan* [1914] AIR Madras 701.

it included the 'acknowledgment and estoppel exception'. Another two decisions, *Seth Bhabhootmal v Munnalal Sagotia*[65] and *Daw Po v U Po Hmyin*[66] relied on by Pollock and Mulla in support of the estoppel exception, merely cite *Subbu Chetty* as authority for the proposition; and in any event, no question of applying such an exception arose in the cases and the exception in question was not dispositive of the dispute on hand in any of them. None of the other cases cited by Pollock and Mulla in favour of the acknowledgment and estoppel exception make any mention of it let alone applying it.[67]

VII. THE REDUNDANCY OF THE EXCEPTION

There are two ways in which the 'acknowledgment, conduct and admission' exception can operate, both of which, it will be claimed, make it redundant. If the role of 'acknowledgment' is to preclude the promisor from denying that a state of affairs existed—which at the most would mean precluding him from denying the existence of a promise—it is not clear how the third party profits from it. If a state of affairs, which is to say an express promise, cannot give a third party a right to sue, a fortiori, the principle which precludes the promisor from denying that state of affairs—which is precisely what estoppel or acknowledgment do—cannot either. To allow that would lead to the absurd result that while it would not be possible to sue on an express promise it would be possible to sue on an implied promise or on something even weaker. The absurdity can be demonstrated by applying the acknowledgement exception to the case of *Beswick v Beswick*.[68] A, a coal merchant entered into an agreement with his nephew B, transferring his entire business to him, in return for B agreeing to employ him as a consultant for life on a fixed salary and in the event of A's death to pay A's wife C, an annuity of £5 per week. On A's death B paid C one instalment of £5 but made no further payment. Overruling the Court of Appeal the House of Lords held that C could not sue in her personal capacity, although she could sue for specific performance as A's administratix. If the exception endorsed by *Utair v Jagson* be applied to *Beswick v Beswick*, B's payment to C of £5 would amount to an 'acknowledgment' of liability to pay her and hence would entitle C to bring an action against B. But the acknowledgment by B is, in any event, only an acknowledgment of what he had promised in the agreement with A—which was signed and stamped—and that is not in any doubt. The absurdity in the operation of the acknowledgment exception can be gauged from the fact that where a written, signed and stamped agreement between

---

65 [1943] AIR Nag 266 (Nagpur High Court).

66 [1940] AIR Rang 91 (Rangoon High Court).

67 *Ramaswamy Ayyar v Krishnasa*; [1935] AIR Mad 904 (Madras High Court): not only does this case not refer to estoppel but it pins the case on an implied promise between the promisor and the 'third party'; *Surjan Singh v Lala Nanak Chand*; [1940] AIR Lah 471 (Lahore High Court): the court brought the case within the agency exception and there was not as much as a mention of the acknowledgment and estoppel exception; *Deb Narain Dut v Ram Sadhan Mandal* [1911] 9 Ind Cases 988 (Calcutta High Court); *Jiban Krishna Mullick v Nirupama Gupta* [1926] Cal 1009 (Calcutta High Court); *Hashmatlal v Pribhadas* [1929] AIR Sindh 117 (Sindh High Court); *Noratmal v Mohanlal;* [1966] AIR Raj 89 (Rajasthan High Court); *Moitrali Mukherjee v Manik Chand Jojuri* [1996] AIR Cal 226 (Calcutta High Court): the concept of estoppel does find mention in this case but in an entirely different context namely estoppel of the tenant to deny the title of the landlord which is statutorily recognised under s. 116 of the Indian Evidence Act 1872.

68 [1968] AC 58.

A and B expressly making C the beneficiary would not entitle C to sue upon it, a mere acknowledgment by B to C about his obligation under the agreement would do so.

On the other hand, if the only purpose of the acknowledgment exception is to make the perfectly anodyne point that the acknowledgment and estoppel could establish an 'implied' promise with the third party, then the 'exception' becomes redundant. This is because the so-called third party will no longer be a third party in the real sense—it will be the 'promisee' to the second promise instead. The situation would then resemble *Chinnayya v Ramayya* (except that *Chinayya* was the case of an express promise and this would be a case of implied promise) and the promisee to the second promise will in any case be able to sue.[69] In the case under discussion, all the pleadings regarding 'conduct and acknowledgment' in the plaint could, at best have gone to strengthen the point that there was indeed an 'implied' promise between the Utair and Jagson making Utair the 'promisee', which further buttresses the point that there was no need to invoke an exception to the privity doctrine at all, whether real or mythical.

[69] The situation resembles that in *Ramaswamy Ayyar v Krishnasa* [1935] AIR Mad 904 (Madras High Court) discussed in *supra* n 67.