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REGULATING PRIVACY IN CYBERSPACE: ISSUES AND CHALLENGESPROF. M AFZAL WANI¹**INTRODUCTION**

All the members of human society are with an inherent tendency of having relations with one another and maintain a harmonious mutual existence. They, however, fall apart on just perceiving some traces of conflict. They sometimes opt to manage it, but many time, overwhelmed by self interest, fail to adjust it. This is one of the major factors that prepares a person to retain a certain degree of confidentiality to overcome the ordinary friction of social existence. The confidentiality has to be maintained at higher level if the conflict is with higher intensity. In ordinary course of life also there are certain matters about which every human being is by virtue of his human nature inclined to avoid display. It is in this reality of human life, the genesis of ‘privacy’ can be found. Privacy is a “*right to be let alone*”. The nature of privacy depends on the socio-political, economic and cultural outlook of the people of a place at a particular moment of time. It is divergent and the uniformity in its contours is more or less unachievable. In each situation, speaking jurisprudentially, it needs protection to make human life possible. Privacy-regulators, as substantial and procedural, are sure to be relative and not uniform. Any legal system will have to attain its acceptable regulatory framework to avoid the vices emerging out of exploitation and non-regulation of conflict.

In its essence the privacy, thus, is the withholding of some particular information about anyone who needs its retention for social reasons or to avoid conflict or to fight conflict. Etymological survey shows that privacy is freedom from intrusion by the public and avoidance of notice, publicity and display. It is a privilege of concealment; a place of retreat and retirement; or a private matter. It is a state of being alone and not being watched or disturbed by other people. In other words, this is a state of being alone to exclusion of others with a feeling of being quite secure without threat of others being informed about his secretes. It occupies space in the life of a person in multiple dimensions—psychological, social, economic, political or so. When a person finds any particular information about him has come to others knowledge without his willingness he feels totally lost, deprived, harmed and empty. He feels timid and finds his self only reduced to a vegetative existence rather than being a respectable member of the society with due honour and dignity.

To reiterate, it may be said that this is true of any human being that he wants a mechanism for enabling him to live with protection of his privacy and dignity. In traditional societies the urge for privacy is much more intense and wide. In a society like India social status of a person depends totally on his image in others mind, as it may be for any reason, based exclusively on their own perceptive? Privacy of a person can be impacted here by any negative information coming to public domain and devastate his whole life. When matters even if totally private to one’s self are in any way coming to others knowledge that can in no time ruin his self, home, society and career (political, social or busines).

There is a group-privacy also in India which when violated results into problems of public order. There are open secrets not to be stated. That has very serious political implications and

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affects the whole set of alliances in family, society, politics and even government formation. On the same pretext many times riots are caused resulting into enormous damage to life and property. Modern strides in science and technology have created more issues and concerns about protecting privacy. The power of man to intervene, reproduce and publicise has unimaginably multiplied to his advantage and may others advantage and disadvantage. Right from accessing a website to use of cloud computing or big data, the latest application of software has made possible the collection, processing and analyzing the privacy related data with or without the consent of the affected persons for their commercial or any other vicious or virtuous purposes putting individuals at the risk of unknown financial as well as emotional threats and losses. What can prevent the misuse of technologies is a moot question. What can be done by law and what more should be looked for has to be seriously identified, understood and acted upon.

Hot issue is to balance the rights of individuals against the rightly or wrongly described public interest in required information. It is a cause of worry for increasing violations of rights by both state and individuals. The stakeholders, not confident about any existing protective legal regime and its implementation in the background of dilution of traditional values and non-extension of jurisdiction beyond cross borders, are in a situation wary and vulnerable. Immediate need is to analyze the emerging dimensions of privacy and the challenges it faces in cyberspace. Some focussed gloss is required to be put on promoting a legal mechanism and value system for the purpose.

India is realizing the heat of the privacy issue. Though not specifically defined in the Constitution, the Apex Court has time and again reiterated that it is an integral part of right to life. Keeping the ongoing development relating to the privacy issue in background, the urgent need is to analyze the emerging developments relating to privacy and the challenges it faces which are to be met now in the cyberspace.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

Article 12 of the Universal Declaration of Human Rights (1948) describes privacy as:

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

Article 17 of the International Covenant on Civil and Political Rights (to which India is a party) provides:

"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."

JUDICIALLY ACCEPTED FACETS OF PRIVACY AND LIMITS IN INDIA

As a Fundamental Right

In India privacy is a judicially created fundamental right. In 1963, the Supreme Court of India refused to grant validity to surveillance and domiciliary visits under police regulations without a statute and considered that as a violation of right to life and personal liberty under article 21 of the Constitution of India.² In this case the expression 'life' and 'personal liberty' were elaborately measured by the court. Though the majority found that the Constitution contained no explicit guarantee of a 'right to privacy', it read the right to personal liberty expansively to include a right to dignity. The court observed: "an unauthorised intrusion into a person's home and the disturbance

² . *Kharak Singh v. State of UP*, AIR 1963 SC 1295

caused to him thereby, is as it were the violation of a common law right of a man —an ultimate essential of ordered liberty, if not of the very concept of civilization”. Justice Subba Rao said that—
 “the right to personal liberty is not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle" it is his rampart against encroachment on his personal liberty.”

These observations pave way for recognition of the right to privacy on concrete grounds.

Now the challenge is of putting information about a person, his family and other relatives on internet and violation of his privacy that has become a very easily attainable mischief for many as now all the records are put and stored on soft ware by all government and non-governmental agencies. To understand the nature of government intervention into privacy of people in Indian experience some judicial experiences are incorporated here.

In 1972, the Supreme Court, in *R. M. Malkani v. State of Maharashtra*,³ a case of telephone tapping, upheld the right to privacy but observed: “the telephonic conversation of an innocent citizen will be protected by courts against wrongful or high handed interference by tapping the conversation. But the protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants.”

In 1975, the Supreme Court, in *Gobind v. State of M.P.*,⁴ recognised in principle the right to privacy and allowed surveillance of only those who have determined to live the life of a criminal as may be established on the basis of materials available about the case. Subba Rao J, clarified:

[T]he word liberty in Article 21 was comprehensive enough to include privacy also. He said that although it is true that our Constitution does not expressly declare right to privacy as a fundamental right but the right is an essential ingredient of personal liberty.

The court further observed:

“The right to privacy will, therefore, necessarily, have to go through a process of case by case development. Hence, assuming that the right to personal liberty, the right to move freely throughout India and the freedom of speech create an independent fundamental right of privacy as an emanation from them it could not be absolute. It must be subject to restriction on the basis of compelling public interest. But the law infringing it must satisfy the compelling state interest test. *It could not be that under these freedoms that the Constitution-makers intended to protect or protected mere personal sensitiveness*”

In *R. Rajagopal v. State of Tamil Nadu*,⁵ was involved a balancing of the right to privacy of citizens against the right of the press to criticize and comment on acts and conduct of public officials. The case related to the alleged autobiography of a convict, sentenced to death for committing six murders, who had commented on his contact and relations with various police officials. The Supreme Court commented on the matter as follows:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, childbearing and

³ .AIR 1973 SC 157

⁴ . AIR 1975 SC 1378

⁵ . AIR 1995 SC 264

education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication, concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

Here the court has taken a cautionary stance holding that “the right to privacy...will necessarily have to go through a process of *case-by-case* development.” A strong inference that follows is that the relevant state agencies and courts have to exercise due alertness in the new situation created by use of cyberspace by people throughout in the world without borders with possible violation of the right to privacy.

In a well known case, namely *People’s Union for Civil Liberties v. Union of India*,⁶ gave thorough consideration to the issue of wiretapping, which can include SMS and Email etc., and declared:

[P]rivacy—by itself—has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one’s home or office without interference can certainly be claimed as a ‘right to privacy’. Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone-conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law.

The court simultaneously stated in relation to Article 19:

When a person is talking on telephone, he is exercising his right to freedom of speech and expression”, the court observed, and therefore “telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1) (a) of the Constitution.”

The court in this case rejected the contention that ‘prior judicial scrutiny’ should be mandated before any wiretapping could take place and accepted the contention that administrative safeguards would be sufficient.

⁶ . AIR 1997 SC 568

Privacy of Communications

All Communication-laws related to posting, telegraph and telephony and Email permit interception under specified conditions. Section 26 of the India Post Office Act 1898 confers powers of interception of postal articles for the ‘public good’ in situations of public emergency, or in the interest of the public safety or tranquillity”. This can be certified by the “State or Central Government” and the certificate issued by them is conclusive in this regard. Section 5(2) of the Telegraph Act is to the same effect in case of:

- a) the occurrence of any public emergency, or in the interest of the public safety; and
- b) in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence.

Now section 69 of the Information Technology Act 2008 contains an elaborate version of the interception law in the interest of:

- a) sovereignty or integrity of India,
- b) defence of India,
- c) security of the State,
- d) friendly relations with foreign States or
- e) public order or
- f) preventing incitement to the commission of any cognizable offence relating to above or
- g) for investigation of any offence.

There is an apparent dilution of protection of privacy from earlier laws to Information Technology Act. Any unscrupulous government can feel it ‘necessary or expedient’ any time to violate any person’s privacy and dignity under the false pretext of public interest.

In any case there is need for a limit on the ability of the government to impinge on the individuals’ privacy. How far that can be done under the sweeping powers of the government in the case of electronic communications falling under the purview of the Information Technology Act in the name of “sovereignty of the nation” or “investigation of any offence” is a moot question. The current volatile situation is a catalyst for impairment of privacy dashing down of select people at the hands of the persons with Crush Button,

Breach of Privileged Communications

Privileged Communications are also under threat of breach which include under the Indian Evidence Act, 1872 communications between spouses and communications with legal advisors. Section 122 of the Evidence Act forbids married couples from disclosing any communications made between them during marriage without the consent of the person who made it. The rule has an exception of not applicable to suits “between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.” In *T.J. Ponnen v. M.C. Varghese*⁷, this was held which was a case of man suing his son-in-law for defamation based on statements about him written in a letter addressed to his daughter. The trial court held that the prosecution was invalid since it was based on privileged communications between the couple.

⁷ . AIR 1967 Ker 228

Breach through Laws on Search and Seizure Provisions

Any law that allows search and seizure does virtually permit invasion of our privacy. Examples of such laws are: The Income Tax Act, the Narcotics Act, the Excise Act and the Customs Act. The Code of Criminal Procedure (Cr. PC) provides that a house or premises may be searched either under a search warrant issued by a court, or, in the absence of a court issued-warrant, by a police officer in the course of investigation of offences. Thus, a court may issue a search warrant where:

- (a) it has reason to believe that a person to whom a summons has been, or might be, addressed, will not or would not produce the document or thing as required by such summons; or
- (b) where such document or thing is not known to the court to be in the possession of any person, or
- (c) where the court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection.

Section 165, Cr. PC permits conduct by “police officers in charge of police station or a police officer making an investigation” without first obtaining a warrant if there is a “reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached”, and if, in his opinion, such thing cannot “be otherwise obtained without undue delay”. Such officer must record in writing the grounds of his belief and specify “so far as possible” the thing for which search is to be made. The Cr. PC requires the search to conform to procedures including the presence of “two or more independent and respectable inhabitants of the locality”. There is also requirement of preparation, in their presence, of “a list of all things seized in the course of such search, and of the places in which they are respectively found”, the delivery of this list to the occupant of the place being searched. However, in reality, these requirements are observed more in the breach denouncing the saying “man’s house is his castle”. Courts have been declaring evidence so obtained admissible, terming it irregular, not unlawful. The enforcement agencies need to ensure privacy in all situations of using and not-using the Information Technology for their ordinary process of search and seizure and maintenance of records.

The Supreme Court has struck down provisions of Andhra Pradesh Stamp Act on grounds that it was too intrusive of citizens’ right to privacy, which authorized the collector to delegate “any person” to enter any premises in order to search for and impound any document that was found to be improperly stamped.⁸ The Court held that in the absence of any safeguards as to probable or reasonable cause or reasonable basis, this provision violated the constitutionally guaranteed right to privacy “both of the house and of the person”. This is a good example of judicial prevention of violating right to privacy by state intrusion.

PRIVACY OF THE BODY

Court-ordered Medical Examinations

In *Sharda v. Dharmpal*⁹, the Supreme Court upheld the rights of matrimonial courts to order a person to undergo medical test to prove the existence of unsound mind. Such an order, the court held, would not be in violation of the right to personal liberty if the applicant had a strong prima

⁸ . *State of UP v. Ram Babu Mishra*, AIR 1980 SC 593

⁹ . 2003 SC decision.

facie case. Privacy can be assured to the extent that any other person is not deprived of a statutory right.

Reproductive Rights

Can a 13-year-old girl medically terminate her pregnancy after she conceives on being repeatedly raped? According to the Medical Termination of Pregnancy Act, 1971 a pregnancy may be terminated before the twentieth week if:

- (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
- (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped;
- (iii) where any pregnancy is alleged by the pregnant woman to have been caused by rape;
- (iv) where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children.

Consent for termination needs to be obtained from the guardian in cases of minors or women who are mentally ill. In all other cases, the woman herself must consent. Beyond the period of 20 weeks, the pregnancy may only be terminated if there is immediate danger to the life of the woman.

In August 2009, the Supreme Court, in *Suchita Srivastava v. Chandigarh Administration*,¹⁰ affirmed, generally, women's rights to make reproductive choices as an exercise of their 'personal liberty'. The court observed: "It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.... The court in the same breath affirmed that there was "a compelling state interest" in protecting the life of the prospective child. There are multiple arguments which have a bearing on privacy, especially in Indian social conditions.

DNA Tests

In the case of *Rohit Shekhar v. Narayan Dutt Tiwari*¹¹ the Delhi High allowed a petitioner's plea to subject the person he named as his biological father to a DNA test. The court relied on international covenants to affirm the "right of the child to know of her (or his) biological antecedents" irrespective of her (or his) legitimacy. According to the court there was a vital interest of child to not be branded illegitimate; yet the conclusiveness of the presumption created by the law in this regard must not act detriment to the interests of the child. If the interests of the child are best served by establishing paternity of someone who is not the husband of her (or his) mother, the court should not shut that consideration altogether.

There is also a strong Supreme Court opinion that our right to 'bodily integrity' is not absolute and that may be interfered with in order to settle many terrestrial issues. Such questions generally arisen in the context of the determination of paternity, divorce or maintenance proceedings. Medical examination is now an integral part of certain criminal investigations. In same line fall Fingerprints, handwriting samples, photographs, Irises, narco-analysis and brain maps.

¹⁰ . (2009) 9 SCC 1

¹¹ . Decided in 2010.

Privacy of Records

We are in an age very advanced in civilisation and culture. The practice of maintain records is almost universal. Now another stride if from paper to paper less records. Records of birth, death, academic achievements, business transactions, property titles, income tax filings, food entitlements, travels, employment, judicial proceedings, official works, medical examination, public and private events and expenditures and other activities of life are being maintained now without fail. A significant sector of private service providers has come up in the area like banks, hospitals, insurance and telecommunications. Many statutory requirements about maintenance of records are being followed as an obligation as well as a benefit. The Registration Act, the Evidence Act, the Right to Information Act are its prominent examples.

Section 52 of the Registration Act, 1908 and Section 74 of the Evidence Act consider “public documents” as including the following:

1. Documents forming the acts, or records of the acts:
 - (i) of the sovereign authority,
 - (ii) of Official bodies and the Tribunals, and
 - (iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country.
2. Public records kept in any state of private documents.

Section 76 mandates that every public officer “having custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof.

There is no legislative guidance within the Evidence Act to indicate who may be said to possess “a right to inspect”.

The Right to Information Act 2005 confers on citizens the right to inspect and take copies of any information held by or under the control of any public authority. Information is defined widely to include “any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force”. *Section 8 (j) of the Act exempts “disclosure of personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual” unless the relevant authority “is satisfied that the larger public interest justifies the disclosure of such information”.* In *Mr. Ansari Masud A.K v. Ministry of External Affairs*¹² the Central Information Commission held that “disclosure of details of a passport cannot be considered as causing unwarranted invasion of the privacy of an individual and, therefore, is not exempted from disclosure under Section 8(1)(j) of the RTI Act.” It observed that for the no good reason that “details of a passport are readily made available by any individual in a number of instances, example to travel agents, at airline counters, and whenever proof of residence for telephone connections etc. is required. This is so in spite of the fact that nothing in the Passport Act itself authorizes disclosure of any documents under any circumstances. Under the Right to Information Act denial of information about religion of a person was upheld on grounds of privacy. In *Mr. X v. Hospital Z*,¹³ a person sued a hospital for having disclosed his HIV status to his fiancé without

¹² . 22nd December 2008

¹³ . AIR 1999 SC 495

his knowledge resulting in their wedding being called off. The Supreme Court held that the hospital was not guilty of a violation of privacy since the disclosure was made to protect the public interest. While affirming the duty of confidentiality owed to patients, the court ruled that the right to privacy was not absolute and was “subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others.” Concept of ‘public interest’ would be accordingly relevant when private companies would be asked to disclose personal information without a person’s consent.¹⁴

CONCLUSION

Privacy in its traditional context is very dear to every Indian. Whether the information is in electronic form or any other, they want to retain it from disclosure rightly so for security and dignity. The judicial pronouncements on the issue, in multiple facets, reveal that privacy cannot be extended to hide guilt, however. It is quite reasonable but there is need for protection of privacy of millions, mostly not well with technological knowhow, for whom a legal framework needs to be adopted. There is absence of mechanism for redress of grievances and inability to seek justice through ordinary mechanism for justice.

No study can disprove exploitation of weaker individuals and sections of the society only for their inability to maintain privacy and dignity embedded in their records in cyberspace. There is blackmail and bloodshed evident from every new magazine and news paper which is not totally for reasons other than violation of privacy. In reality, the cases on privacy came to courts on the pretext of few influential persons and not the ordinary victims of others exploitation and onslaught. Most of the people are as members of a credulous society not even conscious about their rights to privacy and dignity. Courses taught from school to university are mainly oriented to bread earning. Enforcement agencies are not oriented to this cause.

Certain people have turned more aggressive and unruly in respecting others privacy. They even adopt corrupt means to acquire personal information about other in whom they are interested. They also put tactfully wrong information in media about such persons. In any case the theft of private information and its misuse needs immediate attention of authorities and in this regard help may be taken from The OECD privacy Guidelines; The Council of Europe Convention on data protection; International Covenant on Civil and Political Rights (ICCPR); The European Union privacy Directive; and Self-regulation as a national solution.

The development of technology, Internet and creation of cyberspace lacks a legal, normative, sociological, cultural and even psychological analysis. This should be done along with study about the legal problems arising from the widespread use of the Internet. This should, however, be an in depth study of the changing behaviour of the people in India with vices which dominate the scene.

¹⁴ . CIS/Privacy India DRAFT Tuesday, 12 April 2011 i LIMITS TO PRIVACY Prashant Iyengar 1

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COLONIAL REPARATIONS, COLLECTIVE REDRESS AND THE COLONIAL LEGAL SERVICE IN THE POST-WAR BRITISH EMPIREDR. HELEN O'SHEA¹**ABSTRACT**

In the context of current debates surrounding the success of colonial reparations in the case of Kenya, this paper explores the historiography of the complex engagement of the British colonial legal service in counter-insurgency (COIN) operations in the post-Second World War period. It surveys tangential approaches that help shed light on the possible usefulness of exploring the extent to which twentieth century British courts were neutral arbiters of justice or active participants in the various emergency campaigns. Given the complex historical relationship between British courts and the conduct of counterinsurgency campaigns, the paper concludes by questioning the extent to which empirical historical research on the British colonial legal service might feed into the legal arguments for reparations from different national perspectives and help chart the relationship between colonial emergency law and its legacy today. In doing so, the following underscores the utility of using interdisciplinary collaborative approaches connecting history, law and political science.

Key words: British colonial legal service, emergency law and order, Kenya, Hanslope disclosure, reparations, COIN

INTRODUCTION

On 6 June 2013, Foreign Secretary William Hague announced that Britain was to pay out £19.9million in costs and compensation to more than 5,200 elderly Kenyans who suffered torture and abuse during the Mau Mau uprising in the 1950s. While he claimed that the payment was being made as a 'full and final settlement', he stressed that the government continued to deny liability for the actions of the colonial administration (Hague, 2013). Contrary to Hague's assertion, it is anticipated that the recent success of compensation claims for these Kenyan Mau Mau veterans may pave the way for further claims by suspected insurgents and collaborators during COIN campaigns in Malaya, Nyasaland, Cyprus, Aden, Indonesia, Oman and Northern Ireland between the late 1940s and 1970s. Furthermore, with the increasing prominence of emergency law in a post-9/11, post-Arab spring world order struggling to effectively confront Daesh, the philosophical, ethical, legal and practical issues of emergency law are receiving increased attention.

Despite these developments, the legal contexts of the British COIN machinery have yet to be systematically explored, more specifically emergency colonial and post-colonial judicial systems. Despite this however, it is no exaggeration to say that the historiography of the post-war empire has been one of the most rapidly expanding areas of British imperial history. Several factors are behind this shift of interest in imperial studies of which the Kenya reparation case is key. With the historic high court ruling in London in April 2012, resulting in the 'Hanslope disclosure' of over 8,500 previously concealed colonial records dealing with emergency and extraordinary legal measures in 36 colonies, it is anticipated that this material will deepen our understanding of the

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impacts these judicial measures had. This historic case has also opened up new reparation disputes concerning Britain's response to suspected anti-colonial insurgents, and feeds into contemporary debates surrounding British popular perceptions of their imperial past. In these ways, imperial legacies are no longer within the domain of former colonies or in the historical past but are being played out in Britain as a result of the successful Kenyan reparations case in 2013. Led by the human rights legal firm Leigh Day and the Kenya Human Rights Commission, this groundbreaking case, the first of its kind against the former British Empire, was also an example of history on trial. During proceedings, historians David Anderson (2005), Huw Bennett (2012) and Caroline Elkins (2005) served as expert witnesses for the elderly Kikuyu claimants who were subjected to torture and abuse in the detention camps of Emergency Kenya during the 1950s. Their testimonies starkly called into question the validity of the traditional COIN narrative of the use of 'minimal force' and population-centric strategy that still exerts its potency in the British popular and military imaginations. The most comprehensive response to date by historians to the 'Hanslope disclosure' is a special edition of the *Journal of Imperial and Commonwealth History*, published in 2011. Further contributions by Mandy Banton (2012), senior research fellow at the Institute of Commonwealth Studies and a Colonial Office records expert who worked at National Archives at Kew for over twenty years, have shed much light on the various British approaches for the removal of sensitive records of colonial administrations during the era of decolonisation.

THE HISTORIOGRAPHY OF BRITISH POST-WAR COIN

Within the complex web of empire, COIN operations consisted of multi-layered contributions by the colonial police, military, Special Branch and the administration (of which the colonial judiciary was an integral part), each with its own unique identity and institutional memory, each with its own complex legacy. In Kenya, 1090 sentences of execution, passed in the Supreme Court, were carried out by the British administration in Kenya between October 1952 and March 1958 (Anderson, 2005: 353). For Elkins this was a 'startling number of executions, given the often slim evidence offered by the prosecution' (2005: 88). While the emergency regulations from the time of the declaration of emergency on 21 October 1952 were those that were handed down by the Emergency Powers (Colonial Defence) Order-in-Council, 1939, there was, as Anderson notes, 'something compellingly distinctive about the institutional bureaucratisation of war in Kenya' that set it apart from other examples, 'except perhaps for South Africa' (2005: 6). As Anderson expands: 'the war against Mau Mau was fought not just by the military, or by the police, but by the civil administration, in a pervasive campaign that sought to strip the rebels and their sympathisers of every possible human right, while at the same time maintaining the appearance of accountability, transparency and justice. With over 30,000 convicted and sentenced during the Emergency Period, nowhere was this more apparent than in the Mau Mau trials' (2005: 6).

The time period of the Kenya Emergency (1952-60) has played a factor in stimulating these debates as it corresponds with the height of British post-war COIN, a period of vigorous imperial action with a 'revivalist empire' geared towards maintaining its role in the post-war global empire rather than deconstructing it (Jackson, 2007). Aims to initiate what John Darwin (2006) termed the 'fourth' British Empire partly explain the costly counter-insurgency campaigns fought during this era. Conducted, as Jackson has argued, 'most successfully in Malaya...most controversially in Kenya,' and, as the present author has argued elsewhere, 'most forgetfully in Cyprus,' and facilitated by national service in Britain until 1963, it is clear that the advancement of decolonisation was often absent from the intentions of those in British officialdom (Jackson, 2005:

1358; O'Shea, 2015: 5). Though decolonisation, both as a process and an event, would ultimately be influenced by a combination of metricentric, pericentric and international forces, it has also: proved something of a false scent when attempting to chart Britain's relations with the world in the post-Second World War decades, leading to some awkward anomalies. If empire is defined as the dispensation of power through military, economic, political and cultural means along with juridical control of overseas territory, it might indeed be argued that empire never really ended. Between 1968 and 1984 when, supposedly, Britain had no empire, independence came to Aden, Mauritius, Swaziland, Nauru, Tonga, Fiji, Bahrain, Qatar, the United Arab Emirates, the Bahamas, Grenada, the Seychelles, Dominica, the Solomon Islands, the Gilbert and Ellice Islands, St Vincent and the Grenadines, St Lucia, the New Hebrides, Belize, Antigua and Barbuda, St Kitts and Nevis and Brunei. Hong Kong, with its six million inhabitants, remained British until 1997. Though the use of the term 'British empire' ended, there was no sudden termination of the factors that have conventionally been regarded as imperialism, including the possession of colonies (Jackson, 2005: 1353).

Furthermore, within the historiographies of British decolonisation and COIN that deal extensively with the immediate aftermath of the Second World War until the end of the 'east of Suez' policy in 1968 (Darwin, 2009; Bayly and Harper, 2007; Lynn, 2006; Hyam, 2006; Sinclair, 2006, Newsinger, 2006), accounts of the colonial legal service remain markedly scant, in contrast to the police, military and political dimensions, despite its central role in emergency law and order. This void also stymies inter-imperial comparative work on the various emergency legal systems employed during the decolonisation era. How, say, does the British colonial legal service's derogation from English common law compare with the equivalent shift from continental civil law in the post-war emergencies of the French and Portuguese empires? While valuable comparative approaches to decolonisation exist, these gaps in our understanding remain (Shipway, 2008).

In recent years, with in the context of human rights, the multifaceted impacts of the continuities between pre- and post-independent judiciaries are receiving due attention. There is evidence, according to one working paper exploring the relationship between domestic legal systems, colonial legacies, and human rights to suggest that such comparative attempts might pay dividends:

...there is an interesting puzzle that emerges in recent studies of the legal dimension of human rights. Theoretically, common law states might be expected to have better human rights practices on average than civil law or Islamic law states because common law states tend to have stronger, more independent judiciaries, more powerful lawyers, and more detailed constitutions, all of which create more effective checks against government repression. However, some empirical analyses are at odds with this theoretical prediction, showing that civil law states have better human rights practices than common law states, at least in some contexts such as Sub-Saharan Africa (Keith and Ogundele 2007)...We argue that the relationship between characteristics of domestic legal systems and government repression varies depending on a state's colonial legacy. Using a global cross-national analysis from 1976-2006, we find that among states with colonial legacies, the common law legal system consistently leads to better human rights practices than other legal systems, even when controlling for standard explanations for states' human rights practices. Additionally, although the civil law system can also lead to better human rights practices, its effect is strongest in the subset of states with no colonial legacy. We also find

that states with French colonial legacies have better human rights records than states with other or no colonial legacies (Ring, Mitchell and Spellman, 2009).²

In addressing the extent to which the ‘colonial imposition of an external legal culture upon a conquered or dominated nation or region continued after twentieth-century political independence,’ Shmidhauser has found that:

The persistence of economic penetration and legal imperialism after independence is perhaps the most striking characteristic of the post-World War II era. Several indicators of the persistence of legal imperialism are tested utilizing virtually the total universe of nations in existence (or recently in existence) in the 1980s - 142 judicial systems and legal professions. While 115 (81 percent) of a universe of 142 nations have indigenous law schools or their equivalents, 74 (52 percent) provide legal training similar to that of the former colonial nation and 11 (8 percent) have their legal professionals trained in the former colonial nation. Similarly, 106 (74.6 percent) have adopted a legal system similar to that of their colonial nation (2001: 331).

These observations are not intended to downplay the value of security-focused contributions, for instance, recent revisionist interventions suggest that, ‘the dominant paradigm in studies of British small wars positing a central role of minimum force in doctrinal guidelines for counterinsurgency needs to be even more fundamentally revised than has been argued in recent debates... minimum force is nowhere to be found in British doctrine during the small wars of decolonisation’ (Reis, 2011: 247). As Reis outlines, any ‘significant revision of the dominant analysis of British counterinsurgency during this period therefore has important implications not only for the historical record regarding doctrine in specific decolonisation campaigns but also for our understanding of counterinsurgency...[and] should make us question whether present attempts to emulate past British successes in counterinsurgency have a solid historical basis’ (2011:247).

THE KENYAN COMPENSATION CASE AND REPARATIONS DEBATE

Moreover, this has potentially much wider implications in light of the successful Kenyan compensation case. If, as French has argued (2011), this force was legitimised by what he terms the ‘veneer of legality’ then to effectively understand the former, we also need to understand the latter despite the tendency within the historical and legal disciplines to treat as independent each of these arms of the COIN machinery. This is nothing new. Mark Mazower, writing on the ‘strange triumph’ of human rights between 1933 and 1950, has claimed historians ‘have allowed the vagaries of intellectual fashion, and a perhaps well-founded fear of treading on lawyers’ toes, to turn the history of law into a ghetto in historical studies while the history of how law has been deployed in international politics remains a ghetto within a ghetto’ (Mazower, 204: 380). Arguably, these sentiments could be extended to include British imperial historiography of the latter half of the twentieth century in its treatment of issues surrounding emergency law and its use, impacts and legacies in COIN operations. The key exceptions here in the context of post-war COIN in Kenya include the work of David French, David Anderson and Caroline Elkins. Elsewhere, historical and legal scholarship has focused on the ramifications of the Devlin Commission Report (1959) on the handling of law and order in Emergency Nyasaland (Simpson, 2002).

² In the economic sphere, recent work has shown that the identity of the former imperial power is a better predictor of post-colonial growth rates than legal origin. See D. M. Klerman et al. (2011) Legal origin or colonial history. *Journal of legal analysis*, 3, 379-409.

While it is widely accepted that the criminal law of nearly all of the states that were once part of the British Empire, and for its remaining overseas territories, remains based on colonial law, the evolution and legacy of emergency legislation, and its implications for the future, have yet to be comprehensively explored in twentieth century colonial and post-colonial judicial systems.³ A survey of the existing body of scholarship shows that this can be contrasted with the substantial body of legal historical and theoretical work focusing on the role of legal interpretation, local understandings, judicial biography and legal cultures in regional, national and transnational legal dimensions of the British imperial project that has come to fruition in recent years (Smandych, 2010; Foster, Berger and Buck, 2008; Wiener, 2009; Kostal, 2005; Hussain, 2004; Benton, 2002; Chanock, 1985). While many of these contributions have predominantly focused on the long nineteenth century in the white settler colonies and South East Asia, more recent collections highlight the utility of a wider geographical investigative reach (Dorsett and McLaren, 2014; Benton and Ross, 2013; McLaren, 2012).

Many of these valuable works underscore the crisis of liberal imperialism during the latter half of the nineteenth century, exposing the tensions and paradoxes between the centrality of the 'civilising mission' with its ideal of equality under law and the reality of racial inequality. These themes continued to resonate in the latter half of the twentieth century with the contradictions between the increasing prominence of the rhetoric of universalism and human rights on the international stage (following from the United Nation's Universal Declaration in 1948, the 1949 Geneva Conventions and the European Convention of Human Rights in 1950) and the expedient realities of COIN in British colonial hotspots. However, legal histories of this latter period remain relatively scant (though their potential ramifications, in the context of the Cyprus Emergency, were to be pursued by the Greek government at the European Court of Human Rights).⁴ It remains to be seen if the Kenyan case will pave the way for other success stories or will indeed reflect Hague's assertion of it constituting a 'full and final settlement' despite the contention of human right campaigners, such as Peter Tatchell, that Britain has a duty to compensate all victims of colonial repression (Tatchell, 2013).

The Kenyan case was clearly a bellwether. In Malawi, the families of over thirty anticolonial protesters killed in March 1959 during the Nyasaland Emergency have reportedly said their decision to sue was inspired by the Kenyan success of legal action (Mapondera, 2015). While this case is ongoing, on 25 November 2015, campaigners calling for a judicial review challenge to the verdict of earlier official investigations into the alleged massacre of twenty-four Malaysian rubber plantation workers by British troops during the Malayan Emergency in December 1948, otherwise known as the 'Batang Kali massacre,' lost their battle at the Supreme Court (Bowcott, 2015). However, the majority decision by the court that 'the duty to investigate dates to only a 10-year grace period before 1966, when the right of individual petition to the European court of human rights was introduced,' may have profound consequences for inquiries into Northern Ireland's Troubles (Bowcott, 2015). Despite the force and fear used as part of British post-war COIN tactics, similar claims, even where the claimants are still alive, have a low chance of success. While the Kenyan case may have set a precedent, the watermark for overcoming the statute of limitations is set extremely high, as is the expert forensic analysis required while the depth and breadth of

³ One contribution that indirectly acknowledges the links between colonial and postcolonial emergency powers is V.V. Ramraj and A.K. Thiruvengadam (eds.) (2009) *Emergency powers in Asia: exploring the limits of legality*. Cambridge: Cambridge University Press.

⁴ Both of these inter-State applications (176/56 and 299/57) were wound up due to the London-Zurich Agreement in February 1959. For more on these test cases, see A.W.B. Simpson (2004) *Human rights and the end of empire: Britain and the genesis of the European convention*. Oxford: Oxford University Press, 924-1052.

revisionist scholarship on Kenya documenting the violence at the end of empire is not currently matched elsewhere.

The legal claims go further than the field of reparations however. Further investigations following the ‘Hanslope disclosure’ of 8,800 files led to the eventual acknowledgement of what the government has termed the ‘special collections’ which consists of over 1.2 million historical files that remain unlawfully held at Hanslope Park in Buckinghamshire, home to the Her Majesty’s Government Communications Headquarters (GCHQ). In light of this discovery, Leigh Day is now pursuing a case against the Foreign and Commonwealth Office on behalf of some of Britain’s most distinguished historians - Professors David Anderson, Richard Drayton, Margaret MacMillan, Richard Evans and Christopher Bayly - for allegedly failing to comply with their statutory obligations under the Public Records Act (1958) and the Freedom of Information Act (2000). Their aim is to secure guarantees from the government that fully address how they plan to make the documents public and to ensure the provision of an appropriate timescale for their release that comply with the statutory obligations. As Professor Anthony Badger has noted, ‘it is difficult to overestimate the legacy of suspicion among historians, lawyers and journalists’ resulting from the attempted suppression of the 8,800 files used in the Kenyan case, now known as the ‘migrated archive’ and held at the National Archives since declassification. It has been estimated that the ‘special collections,’ if declassified at the same rate as the ‘migrated archive,’ could take up to 340 years, ironically longer than the existence of the modern British Empire itself (Cobain, 2013). While the content of these documents may or may not be of potential value to other reparation claims, nonetheless, as Elkins has observed, ‘Britain has said sorry to the Mau Mau. The rest of the empire is still waiting’ (Elkins, 2013).

While it is clear that the Kenyan case has stimulated British journalistic interest in the turbulent endgame of empire, it remains doubtful if this has been matched by increased public interest or historical awareness of this period.⁵ Perhaps it is too soon to tell. The anachronistic use of British imperial history and, until very recently, the largely uncritical acceptance of the post-war COIN narrative has stymied informed debate in the past. However, at the time of writing, over 100 academics in Britain had signed up to support a letter to Prime Minister David Cameron calling for the launch of a Commission of Inquiry into the Teaching of British Colonialism and the British Empire in UK Schools and Universities. Elsewhere, activist groups such as History Matters, the Black and Asian Studies Association and Justice2History continue to campaign for a more inclusive history curriculum. The debate surrounding the ‘Rhodes Must Fall’ campaign at the University of Oxford and campuses elsewhere may also lead to further reassessments of the longer imperial past and its legacies.⁶

⁵ The most recent YouGov poll, conducted on 17-18 January 2016 with a sample size of 1733 British adults, found that attitudes towards the British Empire tended to be positive. 43% of respondents considered the British Empire ‘a good thing’ and 44% felt that Britain’s history of colonialism was ‘something to be proud of.’ 19% of respondents felt that the empire was ‘a bad thing’ and only 21% regretted historic colonialism. A full breakdown of the YouGov results are available at <https://yougov.co.uk/news/2016/01/18/rhodes-must-not-fall/> [Accessed 14 February 2016].

⁶ The longer historical period too is also receiving increased attention in Britain the context of slavery reparations as can be seen by the invitation of Professor Sir Hilary Beckles, chairman of the Caribbean Community (Caricom) Reparations Committee (CARICOM) to present his model for reparations at the University of Oxford on 26 January 2016 and previous to this at the Repairing the Past, Imagining the Future: Reparations and Beyond Conference at University of Edinburgh on 6 November 2015.

FUTURE DIRECTIONS

Two groundbreaking collections of recent interdisciplinary scholarship in empire studies bridging the fields of history, politics and international relations include *Legacies of Empire: Imperial Roots of the Contemporary Global Order* (Halperin and Palan, 2015) and *Echoes of Empire: Memory, Identity and Colonial Legacies* (Nicolaidis, Sebe and Maas, 2015). Other promising indications, reflected by the topics covered in recent, though yet unpublished, theses may be indicative of a greater shift in interest on the socio-legal and historical aspects of emergency law in the post-war British Empire (Reynolds, 2011; Feingold, 2011; Swanepoel, 2010). It is the contention of this author that a similar approach, combining empirical historical research of British colonial emergency law with socio-legal studies, under a broad church would also prove fruitful for academics, practitioners and citizens interested in the burgeoning debates about emergency powers, the evaluation of their moral, political and legal considerations and fears surrounding their assimilation into liberal constitutional democracies today (Gross and Ní Aoláin, 2006; Wilde, 2005). Given that specific legal structures, such as emergency law, emerge from socio-political contexts, they cannot be understood as simply the application of legal theory just as the power of the emergency colonial state cannot be properly understood without including local perspectives and experiences. We still know relatively little about the interconnections between the ‘force of law’ and the ‘law of force’ in the post-war British Empire. Rethinking emergency colonial legal histories in these ways might also contribute to potentially beneficial joined-up thinking in the context of present and future reparation developments. If anything, the Kenyan reparations case has shown the importance of the interconnections between Britain’s ‘small wars’ in particular historical settings and their potential impact on the revision of Britain’s imperial master narratives.

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THE EXECUTIVE PRESIDENT, THE 19TH AMENDMENT AND THE FUTURE OF CONSTITUTIONAL DEMOCRACY IN SRI LANKAMS. AYESHA WIJAYALATH¹**ABSTRACT**

Curbing the executive powers and strengthening democratic governance was a decisive factor in President Maithripala Sirisena's victory in January 2015. This paper analyses the undemocratic nature of the executive presidency in Sri Lanka and how the 19th Amendment defined its scope with special reference to its process and content.

The principal argument advanced in this paper is that the 19th Amendment is a provisional solution to the overpowering executive presidency that overrides the powers of the legislative and the judiciary. Even though it does not ensure a total abolition of executive presidency as promised, it dismantles, or at the minimum, dilutes the powers of the current executive presidency. It can, thereby, be regarded as a significant step towards achieving a more balanced system of governance. Keywords: The executive president of Sri Lanka, executive powers, the 19th Amendment, constitutional governance.

INTRODUCTION

One principal theme that acted as an impetus for the unexpected regime change in January 2015 Presidential Elections in Sri Lanka, was the political exigency to reform the excessive powers vested in the Executive President. People of Sri Lanka were apprehensive to the authoritarian executive presidential system, and the corruption and nepotism that was led by one-family centric governance during the Mahinda Rajapakse regime.

With the war victory, Rajapakse further strengthened himself 'constitutionally' by passing the 18th Amendment. The 18th Amendment perpetuated the office of the executive presidency and abrogated the operation of the independent commissions.

After the unexpected regime change in January 2015, Sirisena government, proposed the 19th Amendment Bill as a solution to curb the powers of the president and to empower the prime minister. However, this paper analyses how politics in the process of the 19th Amendment whittled down the actual content of the 19th Amendment Bill, which ultimately preserved the status quo with only several procedural restraints. The crux of the paper analyses how the 19th Amendment restructured Sri Lanka's 'Executive Presidency'. Though 19th Amendment brought forth a balanced system of governance, this paper concludes by briefly discussing what lies beyond the 19th Amendment in strengthening constitutional democracy in Sri Lanka.

The 1978 Executive Presidency; its undemocratic characteristics

Sri Lanka's shift from a parliamentary democracy to a semi-presidential system was quite a swift transformation. There was no long standing debate over this transformation within the then ruling United National Party (UNP) nor amongst the political activists, journalists or public at large (Venugopal, 2015 p. 676). Whilst a Select Committee of Parliament was deliberating, Prime Minister J.R.Jayawardhane introduced the executive presidency by passing the Second

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Amendment to the 1972 constitution, which consequently provided for him to assume office as the First Executive President in the island.

The rationale forwarded by Jayawardhane pivoted on two main concerns; a need for rapid economic growth through political stability, inspired by the policies followed by Lee Kuan Yew in Singapore (Coomarswamy, 2015, p.32) and the empowerment of minorities (Edirisinghe 2015, p.937). Jayawardhane stressed on the point that a strong executive once elected by a national election will receive much room and liberty to proceed with his development goals (Coomarswamy, p. 32) and by electing the president by a nation-wide poll, it requires the presidential candidate to appeal to all the constituencies including the minorities in the country.

However, the unique model of presidency invented by President Jayawardhane threatened the democratic structure in the country. Under the 1978 constitution, the President enjoyed sweeping powers and privileges with minimal measures for accountability. He/She is the Head of State, Head of the Executive, Head of Government, and Commander-in-Chief of the Armed forces. He/she holds office for a term of six years and enjoys immunity from suit both in personal and official capacity.

The President appoints the Prime Minister and other Ministers of the Cabinet, the Chief Justice and other Judges of the Supreme Court. The President can also remove any Minister at his will. As Ministers of Sri Lanka must necessarily be Members of Parliament, this leaves room for the President to manipulate them. This was the very reason why the President could allure the opposition MPs to cross – over in the promise of a ministerial post. This was a mechanism adopted by both President Chandrika Kumaratunga and President Rajapakse to form two thirds majority in parliament (Wickremeratne 2014, p.106).

In respect of the President's power over the parliament, he may from time to time, summon, prorogue and dissolve Parliament. When a general election is held consequent to a dissolution of Parliament by the President, he shall not thereafter dissolve Parliament until the expiration of a period of one year from the date of such General Election unless requested by Parliament by resolution. In other words, if the Parliament continues for six years without premature dissolution, the new Parliament can be dissolved at any time by the President as the one year limitation only applies if the parliament was dissolved prematurely. A classic instance where the President's unfettered power over the Parliament was exercised was during President Kumaratunge's and Prime Minister Ranil Wickremesinghe's co-habitation in 2001-2004. PM Wickremesinghe whose party won the general election in 2001, distanced President Kumaratunge during the peace process between the Sri Lankan Government and the LTTE. In 2003 whilst PM Wickremesinghe was abroad, President Kumaratunge swiftly removed the Ministers of Defence, Foreign Affairs and Media. And in February 2004 she dissolved Parliament. At the general election that followed, Wickremesinghe's coalition faced defeat (Wickremeratne , p.106). This shows, as Dr. Jayampathy Wickremeratne (2014) points out, 'how pernicious and anti-democratic the executive presidency in Sri Lanka is'.

Though the 1978 constitution provides for a mechanism for checks and balances, the concentration of power on the president is far greater. An apt example is the impeachment process, a vital check on the executive by the legislature and the judiciary. The impeachment of a president under the 1978 constitution requires 2/3rds majority vote in parliament at nearly every stage of the process. This is of such a cumbersome nature that an incumbent president is in fact irremovable. This was illustrated when an impeachment process was initiated against President Premadasa in 1991. Before the Speaker could decide on the allegations, the President prorogued Parliament and the Speaker had to finally reject the motion due to severe political pressure (Wickremeratne,

p.108). Consequently, Sri Lanka's executive presidency can be identified as 'presidential-prime ministerial executive' with a constitutional structure of wider powers vested on the President, instead of a 'premier-presidential executive' with a balance of power between the two offices (Edirisinghe, p.935).

Subsequent constitutional amendments materially shaped the powers of the executive president, at times inordinately exceeding the powers of the 'already too powerful' president. The constitution amendment that brought forth a drastic effect on Sri Lanka's constitutional governance was the 18th Amendment in 2010. The aftermath of the civil war in Sri Lanka did not see a commitment nor an intention to introduce constitutional reforms to address Sri Lanka's national question on power sharing and reconciliation. Instead, an 18th Amendment to the constitution was presented by way of an urgent bill fully empowering the executive president. It repealed the safeguards that were provided under the 17th Amendment and replaced the Constitutional Council with a Parliamentary Council. The president only has to seek 'observations' of the Parliamentary Council. This undermined the obligation of the president as he may totally disregard such observations. The president's untrammelled power to appoint those who are loyal to him, including to the judiciary and the Attorney General, offered limited opportunity for citizens to assert their rights and seek redress (Jayakody, 2011, p.47). This vast control by the executive eroded the conviction of equality, citizenship, meritocracy and protection of human rights - the essentials of a democratic state.

The most radical change that was brought forth by the 18th Amendment is the removal of the two-term limit of the President, a fundamental safeguard against authoritarianism. The original 1978 constitution is responsible for an extremely powerful executive president but even then, it too, had its limitations; i.e. a president holds office for two six year terms and a president who has been twice elected is prohibited from contesting a third time. By removing term limits, the 18th Amendment eroded the balance of power and weakened the roles of the judiciary and the legislature.

Thus, the executive presidency and the 18th Amendment are instances where the constitutional framework was altered to serve the political purpose of concentrating power on one individual.

ANALYSING THE 19TH AMENDMENT: A DEMOCRATIC RENAISSANCE

The overpowering executive power was a recurrent subject of discussion and manifestations throughout a period of time in Sri Lanka. The 18th Amendment enabled President Rajapakse to seek an unprecedented third term in November 2014. Despite growing authoritarianism, nepotism, extrajudicial abductions and killings, the opposition UNP was too weak a competitor against Rajapakse as he still reaped popularity from the majority Sinhala-Buddhists. It is under this backdrop, a platform for a common candidate emerged. Amidst various speculations, Maithripala Sirisena, Minister of Health defected from the Rajapakse government and was announced as the common opposition candidate. Sirisena during the January 2015 presidential election, promised constitutional reforms in his '100 Day Programme' towards good governance.

With the unexpected victory at the presidential polls, President Sirisena and Prime Minister Ranil Wickremesinghe then worked towards the 19th Amendment (19A) to the constitution to address the undemocratic characteristics of the executive president and to repeal the 18th Amendment.

Politics and Process of 19A

The initial mention of constitutional reforms to the executive presidency appeared in the Concept Paper (Welikala, 2015 b, p.6). This proposed a framework where the Cabinet will be presided by the Prime Minister, thereby proposing to establish a parliamentary executive.

The 19A Bill was then published in the Gazette on 13th March 2015 and it included *inter alia* that although President would remain the Head of the State, the Executive and the Commander-in-Chief of the Armed Forces including the Police, the *Prime Minister shall be the Head of the Government* and that *he/she will decide on the number of Cabinet Ministries, the Ministries and their assignments and functions*.

Thirteen petitions were filed questioning the constitutionality of the Bill. The petitioners argued that the Bill altered the basic structure of the Constitution by diminishing the final discretionary authority of the President.

The Supreme Court, disagreed with the petitioners' argument. It held that the executive power is part of people's sovereign powers and that it is not exclusively vested in the office of the president. The Supreme Court, nevertheless, determined that "there's no doubt that the executive power can be distributed to the others via the president. However, if there is no link between the president and the person exercising the executive power, it may amount to a violation of the mandate given by the people to the president. If the inalienable sovereignty of the people which they reposed on the president in trust is exercised by any other agency or instrument *who do not have any authority from the President*, then such exercise would necessarily affect the sovereignty of the People" (Supreme Court Determination, 2015, p.9)

Thus, the Supreme Court held that as per the proposed 'Prime Minister's status' under the 19A Bill, it would be acting in excess of authority and is violative of Article 3(i.e. sovereignty is vested on the people) and Article 4 (the executive power of the people is exercised by the president), an amendment of which requires not only a 2/3rd in Parliament but also approval of the people at a referendum.

However, President Sirisena's and PM Wickeremesinghe's National Democratic Front (NDF) government could only advocate constitutional amendments that would not require a referendum. A referendum was too risky for the NDF as it could lead to a rallying point of the anti-reformists, mainly the 'Rajapakse faction', and, thereby, create a favourable political platform for them to return to power.

And securing 2/3rds in the House was itself problematic as NDF had to form a minority government post-January elections 2015. Therefore, President Sirisena-PM Wickeremesinghe led government, with their promise for constitutional reform, not only had to limit themselves to avoid amendments that required a referendum, but also to struggle for a 2/3rds in Parliament. For the survival of this coalition government PM Wickremesinghe announced that those clauses requiring a referendum would be removed. This move - a move made purely on political reasons, significantly cut down the extensive commitment and promise of the Sirisena-Wickremesinghe coalition in curbing presidential powers (Welikala, 2015 b., p 9).

Moreover, the Gazetted Bill underwent various changes at the committee stage in Parliament, details of which the public were completely unaware of. President Sirisena also ran into opposition with his own party members in the Opposition over the initial plan of appointing independent members to the Constitutional Council. The original composition of the Constitutional Council proposed to comprise largely by civil society members. However, this was debated in Parliament where the Opposition raised the objection that majority civil society members in the Council cannot be held accountable. The Sirisena government had to hard bargain

with the Opposition, who attempted to delay the passage of 19A. Finally, the parties reached a consensus to include seven Members of Parliament (including the three ex-officio Members - Speaker, Prime Minister and the Leader of the Opposition) and three independent members. This necessarily hindered the independent body that the 19A sought to achieve.

The 19A was passed in Parliament on 28 April 2015 with 212 votes out of 225 and was endorsed as law by the Speaker on 15 May 2015.

The pledge for democracy by the new government, however, lost its significance in the way it handled the process of passing 19A. Not only did it lack transparency and public consultation during the process, it drastically diverged from the initial promise to the people in establishing a parliamentary system.

It was rather surprising to see how an amendment to the supreme law of the country was debated and passed in such a short span of time; a hastened method adopted prior to the dissolution of Parliament at the end of 100 days. Yet, hasty amendments could result in ambiguous, imprecise and conflicting Articles that will present myriad of interpretations in future. The Sirisena Government, thereby deviated from their prime promise and took to a closed and opaque path of constitutional reform.

The Content

Despite the initial commitment to promulgate changes in the direction of a ‘premier-presidential’ system, subsequent changes to 19A Bill retained the Sri Lankan constitution’s presidential character.

Welikala (2015 a., p.7) observes that the constitutional reform process sought to reduce the scope of the president’s unilateral action by reducing or removing substantive presidential powers and by introducing procedural requirements on the exercise of presidential powers.

Accordingly, the salient features of the President under the 19A merit analysis under: a) changes in the *structural framework* of the office of the president, (b) changes in the *procedural requirements that limit the substantive powers of the president* and (c) changes on the *substantive powers of the president*.

Structural Changes

Changes in the *structure* of the president’s office was implemented by reducing the president’s term from six to five years (Clause 3 of the 19A, Article 30(2) of the Constitution) and restoring the two-term limit (Clause 4 of the 19A, Article 31(2) of the Constitution). However, the incumbent president can still seek early elections for a second term after the expiration of four years in his first term as stipulated under the 3rd Amendment. Restoration of term limits nevertheless is a crucial safeguard against executive authoritarianism which the 19A successfully achieved. This also bars all prospects of the former President Rajapakse contesting a presidential election.

Under structural changes, the disqualifications for presidency, too, underwent amendments. The 19A changes the minimum age limit of a presidential candidate from thirty years to thirty-five; a measure that disqualifies Rajapakse’s son who was twenty-nine years at the time, to contest the next presidential election in 2020 (Welikala, 2015b, p.5). Another significant disqualification is dual citizenship. Persons who are dual citizens are disqualified from being elected as Members of Parliament (Clause 20(4) of the 19A, Article 91 (1)(d)(xiii) of the Constitution). Consequently, this disqualifies a dual citizen to be elected as President as it is a pre-requisite for a presidential candidate to be qualified to be elected as Member of Parliament. The structural changes, therefore,

not only sought to offer safeguards to the term of the executive power but also seem to have been designed to block the revival of the Rajapakse family in the political arena (Welikala, 2015b, p.5).

Procedural requirements limiting substantive powers

The most notable change where the president's substantive power limited by procedure under 19A, is the Prime Minister's advice clause. Under the 19A, although the president continues to be the Head of the Executive and the Government, he is *required* to act on the prime minister's advice when identifying Members of Parliament to appoint as Ministers and when removing them from office (Clause 9 of the 19A, Articles 43(2), 44(1), 45(1) and 46(3)(a) of the Constitution). Thus, though the president's substantive power to appoint Ministers remains unchanged, its procedure is faced with an additional limitation – a mandatory requirement to act on the prime minister's advice.

Yet, when deciding the number of Cabinet and Non-Cabinet Ministers, subjects assigned to them, the president is required to consult the prime minister *only* if he/she considers such consultation is necessary (Clause 9 of the 19A, Articles 43(1), 44(2) of the Constitution). The president may at any time change the subject and functions of the Cabinet and Non-Cabinet Ministers and decide on the composition of the Cabinet Ministers (Clause 9 of the 19A, Article 43(3), 44(3) of the Constitution). Therefore, the 'Advise Clause' is less expansive and only secures a minimal effect on the much wider powers of the president over the Cabinet. However, the president no longer has the power to remove the prime minister at his/her discretion (Clause 9 of the 19A, Article 46(2) of the Constitution).

Another procedural limitation was imposed with the restoration of the Constitutional Council and the Independent Commissions. The Constitutional Council primarily recommends appointments that are to be made by the president to the independent commissions (Clause 8 of the 19A, Article 41B(1) of the Constitution). It also approves the appointments that are to be made by the president to higher posts in the country including the Chief Justice and judges of the Supreme Court and Court of Appeal, the Attorney General and the Inspector General of Police (Clause 8 of the 19A, Article 41B(3) of the Constitution). This procedural requirement significantly limits the powers of the president when making key appointments to the public service.

The crucial lacuna in the 17th Amendment that resulted in a deadlock during both President Kumaratunga's and President Rajapakse's regime was that there was no mechanism to ensure the implementation of the Constitutional Council. This caused delay in the appointment of the members for the Constitutional Council. The 19A remedies this defect by imposing a time frame of fourteen days for the president to make the necessary appointments, failing which, such nominations will be deemed to have been appointed (Clause 8 of the 19A, Article 41A(6) of the Constitution). Similarly, even if the president refuses to act on the Council's recommendations, such recommendations shall be deemed as appointments after the lapse of fourteen days (Article 41B(4)(a)).

Thus, the 19A succeeds in re-introducing the independent commissions to monitor the public service, the judiciary, the police and human rights. The 19A includes guidelines issued for the Constitutional Council when making recommendations such as taking into account the pluralistic character of the Sri Lankan society, including gender.

The president's substantive power to dissolve parliament, faced procedural limitations under 19A. The Parliament's term is reduced from six years to five years (Clause 15 of the 19A, Article 62(2) of the Constitution) under 19A and the President can only dissolve Parliament upon the

expiration of four and half years of its term (Clause 17 of the 19A, Article 70(1) of the Constitution), unless parliament requests by a 2/3rd resolution to do so. Though this measure avoids arbitrary executive dissolutions of parliament experienced in the past, it nevertheless will create a deadlock situation during hostile relationships under a co-habitation.

A pronounced change was initiated under 19A in respect of ‘presidential immunity’, an exception to the substantive right to equality under Article 12(1). Prior to the 19A, ‘*no proceedings*’ shall be instituted or continued against the President, this was replaced by the new clause which specified that ‘*no civil or criminal proceedings*’ shall be instituted or continued against the President (Clause 7 of the 19A, Article 35 of the Constitution). This enables the Supreme Court to exercise its fundamental rights jurisdiction against official acts of the President (Clause 7 of the 19A, Article 35 of the Constitution), thereby, making fundamental rights applications more meaningful. Thus, the president’s substantive right to immunity now encounters a procedural limitation where it can only be exercised in limited circumstances.

Changes on the substantive powers

Though there was consensus over changes on the structure and procedural limitations, the longstanding debate revolved over the pruning of the *substantive* powers of the president (Welikala, 2015a, p.7). The President continues to be the Head of the State, Head of the Executive and the Government, and the Commander-in-chief. Consequently, the President prevails as the ultimate authority except for some changes under the 19A.

The significant change in substantive powers of the president under 19A is that it repeals the provision for the President to assign to himself any subject or function not assigned to any Cabinet Minister (Clause 9 of the 19A). This prevents earlier experiences of the inability to question the president on issues pertaining to his ministerial positions, as the President does not sit in Parliament. However, 19A provides for a provisional clause for the person holding the office of President on the commencement of 19A to assign to himself ministerial functions (Clause 50 (a) and 51 of 19A).

In respect of the President’s law making powers, the 19A removes the power of the President to submit to the people at a referendum, any Bill (which is not a constitutional amendment) which has been rejected by Parliament. This provision puts an end to the arbitrary executive action of circumventing the legislature (Clause 19 of 19A).

Another striking feature towards democratization is that 19A repeals the provision of ‘Urgent Bills’. Prior to 19A, the President could refer to the Supreme Court, any Bill certified by the Cabinet as ‘urgent in the national interest’ which abused the scope of pre-enactment challenges available for citizens. (Clause 30 of 19A).

The 19A also imposes additional duties on the President, such as ensuring that the Constitution is respected and upheld, and to promote national reconciliation and integration (Clause 5 of the 19A, Article 33(1) of the Constitution).

19th Amendment and the way forward

Though the 19A failed to change the status quo to a parliamentary democracy, it nevertheless attempted to address some of the issues of the overpowering executive. However, with the recently concluded Parliamentary Elections, the political landscape has now changed. Now the Sirisena-Wickremesinghe led National Unity Government not only has the people’s mandate for another five years but also the required 2/3rd in Parliament. In this formidable ground for constitutional

reforms, a cabinet paper to abolish the executive presidency was approved in November 2015 (Sirasa News First, 2015). On the first year anniversary in office, President Sirisena announced the adoption of a new constitution and Prime Minister Wickremesinghe officially inaugurated the process by presenting a resolution in Parliament on 9 January 2016 (The Economic Times, 2015). The rationale forwarded by Jayawardhane in favour of executive presidency, had failed with time in providing stability and in protecting minority rights. Thus, it is now vital to work towards an abolition *in toto* of the executive presidency. The inability to hold the president accountable is a significant defect in the current system. In a parliamentary system, executive power will be exercised by a Cabinet of Ministers responsible and answerable to parliament. Moreover, the experience since 1978 proves the rise of authoritarianism under a presidential system. Even if a president becomes extremely unpopular, the impeachment is an extreme and impractical measure to resort to as opposed to a vote of no-confidence against the prime minister in a parliamentary system.

Another key feature in a parliamentary system is that with no clear majority, there is an institutional incentive for power-sharing and coalition forming between parties (Freeman, 2000, p. 266) which facilitates multiparty democracy, whereas, mutual dependency in a co-habitation creates a deadlock situation, thereby, disrupting the smooth functioning of the government.

The more grave fundamental difficulty in a presidential system, in a society with strong ethnic cleavages like Sri Lanka, is that the president will necessarily belong to one ethnic group. In a divided society, seeking peaceful coexistence among the contending ethnic groups, a presidential system is particularly inimical to ethnic power sharing (Lijphart, 1991 p.81).

Nevertheless, a change in the system of government in Sri Lanka alone will not suffice as enhancing democracy is intrinsically linked to other vital constitutional matters including the devolution of power to the provinces, the electoral system, structure of the legislature (whether unicameral or bi-cameral), a mechanism of judicial review of legislation, and the independence of the judiciary.

The most pressing issue on the path to the new constitution making will lie on formulating an effective mechanism for the devolution of powers. On the issue of devolution, the government will have to take unpopular decisions and work towards a constructive power sharing mechanism if it is to build bridges with the North and the East.

CONCLUSION

The 19A is a watershed moment in Sri Lanka's constitutional history in replacing presidential authoritarianism with a more balanced system of governance.

As Savithri Goonesekere (Sri Lanka BRIEF, 2015) observed, the adoption of the 19A is, a commendable effort in attempting to connect "the people's sovereignty and people's rights through the establishment of some of the key norms of democratic governance associated with the democratic process". It is also symbolic of Sri Lanka's re-integration with the mainstream democratic countries in the world (Ceylon Today, 2015). The 19A was equally instrumental in convincing the UNHRC and the international community to loosen their stance on the international inquiry into the alleged human rights violations during Sri Lanka's civil war and to agree on a domestic investigation.

Thus, the overarching point that this paper aims to highlight is that the 19A brings about progressive institutional reforms for democratic governance. Yet, it is not entirely devoid of shortcomings. Instead of the promised shift to empower the prime minister, it still retains the president dominant constitutional system with a nominal enhancement of the prime minister's role.

Nonetheless, the 19A signalled a possible solution towards a democratic constitutional structure that was practically viable amidst disparate political forces.

In conclusion, 19A is a creation of the *nouvelle vague* in Sri Lanka's political culture towards good governance and rule of law and in turn, 19A began the democratic future of the country. And it is now imperative to proceed towards the much needed constitutional democracy after years of armed conflict. A new constitution, a fresh start, is what is now needed. But a fresh start that is carefully reviewed and open to public discourse which will bring about a lasting commitment towards democratic values in Sri Lanka.

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CRIMINAL PROFILING OF PSYCHOPATHS: THE INDIAN SCENARIODR. PRIYA SEPAHA¹**ABSTRACT**

Criminal Profiling is an important investigative technique for identifying the psyche of offenders who commit heinous offences. It not only resolves the crime but also assists in revealing the causation of crime. Psychopathy is considered the most dangerous of all mental diseases and therefore it is necessary to recognise it. This study aims to explore the common traits of the psychopaths by reviewing ten case studies from India and outside. The most common features in criminal profiling which help us to judge any psychopath are *modus operandi* and psychological factors. An attempt has been made to identify these traits through these case studies. It is a common practice in UK and USA to use criminal profiling for scrutinizing psychopaths. Special Laws have been enacted to deal with the emerging problem. There is an urgent need in India also to use criminal profiling in the investigation of crimes committed by psychopaths.

Keywords: Criminal profiling, psychopaths, Law, modus operandi, psychological factors.

INTRODUCTION

Criminal Profiling is the identification of specific characteristics of an individual committing a particular crime by a thorough systematic observational process and an analysis of the crime scene, the victim, the forensic evidence and the known facts of the crime. The profiling technique has been used by behavioural scientists and criminologists to examine criminal behaviour, and to evaluate as well as possibly predict the future actions of criminals.²

To understand the nature of any crime it is necessary to identify the causation of crime. There are many investigating modes which are used to identify the exact reason behind any crime, for instance, social, economic, anthropological and psychodynamic. Psychodynamic is one of the most accurate approaches to understand the psyche of any criminal.

Whenever any crime is committed by any mentally ill criminal it becomes more difficult to identify the reason of the crime and the category of mental disease. There must be different punishment for every mentally ill criminal according to the severity of the crime and their disease. Psychopathy is very dangerous disease among mental illness.

In U.K. and U.S.A. various procedures are used to make a diagnosis of psychopathy. The Behavioural Analysis Unit (BAU), is a part of the United States Federal Bureau of Investigation. California enacted a 'Psychopathic Offender Law' in 1939 which was amended in 1941. In 1939, Minnesota enacted a "psychopathic personality" (PP) law that provides for indefinite civil commitment of dangerous sex offenders to the Department of Human Services for treatment. In the United Kingdom, "Psychopathic Disorder" was legally defined under Section 1 in the Mental Health Act (UK) 1983 as, "a persistent disorder or disability" of mind. With the subsequent amendments within the Mental Health Act, 2007, the term 'psychopathic disorder' has

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²What Is Criminal Profiling and Why It Is Important, [online], *Psychological Disorders*, Available from: <http://twistedminds.creativescapism.com/psychological-disorders/profiling/>, [Accessed on 4 January 2016].

been abolished, with all conditions for detention (e.g. mental illness, personality disorder, etc.) now being contained within the generic term of 'mental disorder'. In England and Wales, Dangerous Severe Personality Disorder (DSPD) individuals are although kept in the prison system but are under the supervision of expert health service professionals. These procedures indicate that psychopathy is recognised and accordingly changes have been made in the sentencing policy in these countries. Indian society is generally unaware about this disease, and there are no special provisions to identify them and accordingly formulate appropriate sentencing policy.

Procedures used to make a diagnosis of psychopathy have included offender responses to self-report personality tests, and rating scales or checklists that are completed by investigators. The latter two procedures are probably the most promising methods for diagnosing psychopaths. A good example of this type of tool is the Psychopathy Checklist, developed by the University of British Columbia psychologist Dr. Robert Hare, which was first introduced in 1980. Since then a number of improvements have been made in the scoring procedures.³

PSYCHOPATH'S TRAITS

Psychopathy, also known as Antisocial Personality Disorder (APD or ASPD), is a psychological personality disorder. Not only do psychopaths lack emotions of conscience and empathy, but research has shown that these individuals consistently display certain aspects of temperament including a lack of fear, lack of inhibition and a stimulus seeking behaviour, physiological idiosyncrasies, such as a reduced physical response to negative stimuli, and indifference to the threat of pain and punishment⁴.

It was Hare and his associates who made the greatest impact on assessment and treatment. In their work with a large prison population, and influenced by Cleckley's observations, they clarified a set of diagnostic criteria that offers a practical approach, and which also influences how juvenile antecedents are identified and measured. Hare devised a list of traits and behaviours for his Psychopathy Checklist (PCL). He listed twenty-two items, each of which was to be weighted from 0 to 2 by clinicians working with potential psychopaths. Psychopathy has been described as the *prime* criminogenic personality trait⁵, the most important psychological construct in the criminal justice system⁶ and as perhaps the most important forensic concept in the early 21st century⁷.

The international standard for its assessment is the Psychopathy Checklist-Revised⁸. The PCL-R and its direct derivatives the Psychopathy Checklist Screening Version⁹ and the Psychopathy Checklist Youth Version¹⁰ form the basis for the majority of the research and applications.

³Can Criminal Psychopaths be Identified? (2001), [online], *Criminal Profiling Staff* on Oct 31'2001, Available from : <http://www.criminalprofiling.com/can-criminal-psychopaths-be-identified/>, [Accessed on 4 January 2016].

⁴Hare, R.D.(1999), *Without Conscience: The Disturbing World of Psychopaths Among Us*, Guilford Press, 25

⁵Wilson, J. Q., & Herrnstein, R. J. (1985). *Crime and human nature*. New York: Simon & Schuster.

⁶Harris, G. T., Skilling, T. A., & Rice, M. E. (2001). The construct of psychopathy. *Crime and justice: An annual review of research*, Chicago: University of Chicago Press. 28, 197- 264.

⁷J. (2006). Tarasoff at thirty: How developments in science and policy shape the common law. *University of Cincinnati Law Review*, 75, 497-521.

⁸Hare, R. D. (2003). *The Hare Psychopathy Checklist-Revised* (2nd ed.). Toronto, ON: Multi- Health Systems.

⁹Hart, S. D., Cox, D. N., & Hare, R. D. (1995). *The Hare Psychopathy Checklist: Screening Version*. Toronto, ON: Multi-Health Systems.

¹⁰Forth, A. E., Kosson, D., & Hare, R. D. (2003). *The Hare Psychopathy Checklist: Youth Version*. Toronto, ON: Multi-Health Systems.

The instrument, with items grouped around two factors narcissistic personality and antisocial behaviour was tested extensively. In support of Kernberg, but refocusing APD towards personality traits, psychopathy was defined as a disorder characterized as¹¹

- lack of remorse or empathy,
- shallow emotions,
- manipulativeness,
- lying,
- egocentricity,
- glibness,
- low frustration tolerance,
- episodic relationships, parasitic lifestyle,
- the persistent violation of social norms,
- need for stimulation and criminal versatility.

According to Hare, "Psychopathy is one of the best validated constructs in the realm of psychopathology." Another group of researchers used the instrument on 653 serious offenders.¹² They noted evidence to suggest that psychopathy emerges early in life and persists into middle age. The "prototypical psychopaths" were responsible for particularly heinous offences. They concluded that psychopathy appears to be a distinct personality disorder, with childhood behaviour problems serving as good indicators especially when they manifest at an early age. These indicators include drug abuse, theft, aggression, truancy, general problem behaviour, lying, and poor educational achievement. Yet not all children who exhibit these behaviours go on to commit adult crimes, suggesting that:

- 1) not all psychopaths are criminals,
- 2) some behaviour changes with age, and
- 3) some intervention may help to redirect behaviour.

Using the childhood indicators, researchers began to identify psychopaths in the non-criminal community, in support of Cleckley's belief that many either do not commit crimes or they commit them too cleverly to be caught. It also became increasingly clear that APD, which requires criminal misconduct for diagnosis, was indeed a poor label for psychopathy¹³.

The voluminous literature on psychopathy focused primarily on males, which oriented it toward narcissism. Recent estimates indicate that severe psychopathy among women is rare, about one-third of the estimated prevalence for men. Based on some case studies, a few clinicians proposed that female psychopathy shows more traits of hysterical personality disorder than narcissism. It may be that female psychopaths are being misidentified because the criteria slant toward male manifestations.¹⁴

The present study attempts to investigate several ways in which psychopathy is associated with variable behaviours, events, decisions that presumably are influenced by impression

¹¹Hare, R. D.(1985),Comparison procedures for the assessment of psychopathy. *Journal of Consulting and Clinical Psychology*, 53, 7-16.

¹²Offord, D. R., Boyle, M. C., & Racine, Y. A.(1991), The epidemiology of antisocial behaviour in childhood and adolescence. *The development and treatment of childhood aggression*, Hillsdale, NJ: Lawrence Erlbaum Associates, 31-54.

¹³Cleckley, H.(1976), *The Mask of Sanity* (5th ed). St Louis, MI: Mosby.

¹⁴Nesca, M., Dalby, J. T., & Baskerville, S.(1999), Psychosocial profile of a female psychopath. *American Journal of Forensic Psychology*, 17,63-77.

management.¹⁵ These variables include post-offence behaviour, the offender's self-reported reason for the crime, the outcome of appeals of a lower level Court's decision, and the final sentencing decision. The association between individual traits like the denial of charges and the sentencing decision needs to be examined in detail. On the basis of these outcomes it is proposed that criminal profiling is always needed in cases related with psychopaths.

CRIMINAL PROFILING

Criminal Profiling is a behavioural and investigative tool that is intended to help investigators accurately predict and profile the characteristics of unknown criminals. It helps the law enforcement agencies with a social and psychological assessment of the offender by providing with a 'psychological evaluation of belongings found in the possession of the offender'. It also helps in giving suggestions and strategies in interviewing process. If a lot is known about the offender, one can also know when and where they will repeat their crimes. When there is not much physical evidence, psychological evidence proves useful.¹⁶ Profiling involves the psychology-trained experts using their knowledge in human behaviour, motivation, and patterns of pathology to create a multidimensional report¹⁷.

The term criminal profiling also called investigative criminal profiling is a very important tactic in targeting certain offender types such as those who commit serial homicide, serial rape, or serial arson. Profiling is a method used in some unusual cases where it is believed that one person is committing the same crime repeatedly¹⁸.

Criminal profiling is not used in all cases; it is most commonly used when there is an extremely violent homicide.¹⁹ The practical issue with profiling is whether it leads to an increase in successful police investigations. A more limited study that might be possible would be to make available all profiles from solved cases. A less obvious problem might be the publication of too much information that could be useful to offenders who stage crime scenes. For instance, objective scales for categorizing crime scenes could be developed. Relationships between crime scenes and offender characteristics should be cross-validated on new samples of offenders.²⁰

In U.S.A. profiling is done by FBI's Behavioural Science Unit. However, it is also used by police departments all over the country especially those with officers trained at the National Academy as a tool in their crime-fighting arsenal. The basic idea for a profile is to gather a body of data yielding common patterns so that investigators can develop a general description of an UNSUB (unknown suspect). Profiling involves the psychology-trained expert using his or her knowledge in human behaviour, motivation, and patterns of pathology to create a multidimensional report²¹.

Experience in the investigation of crime is typically brought into each new crime scene investigation. Statistics based on data from reported crimes are reviewed and used to build a profile of the offender.

¹⁵The variables in this study were scored from archival data and therefore did not have direct measures of impression management.

¹⁶Veerraghavan, V. (2009). Handbook of Forensic Psychology. (1st Ed.). Selective & Scientific Books.

¹⁷What Is Criminal Profiling And Why It Is Important, [online], *Psychological Disorders*, Available from: <http://twistedminds.creativescapism.com/psychological-disorders/profiling/>, [Accessed on 4 January 2016].

¹⁸ John Susan (2000), The Process of Criminal Profiling when Applied to a Serial Killer [online], *Youngstown State University*, Available from: http://www.adherents.com/misc/hsk_CriminalProfiling.html, [Accessed on 24 January 2016].

¹⁹Ibid.

²⁰Ibid.

²¹What Is Criminal Profiling And Why It Is Important, [online], *Psychological Disorders*, Available from: <http://twistedminds.creativescapism.com/psychological-disorders/profiling/>, [Accessed on 4 January 2016].

The investigator goes through the following steps or phases in the profiling process²²:

- The evaluation of the crime and the criminal act or acts itself
- Comprehensive evaluation of the specifics of the crime scenes
- Comprehensive analysis of the victim
- Evaluation of preliminary police reports
- Evaluation of the medical examiner's autopsy protocol
- Development of a profile with critical offender characteristics
- Investigative suggestions predicated on the construction of the profile
- Possible apprehension of the suspect

Within the past two decades, there has been increased use of profiling, although it remains a controversial tool. Not everyone believes that devising a hypothetical portrait of a suspect makes a contribution to solving crimes, but some profiles have been surprisingly accurate. The problem is that it's difficult to know when you're working with a good one until the suspect is caught and compared against it²³.

In India, criminal profiling is absent in many cases where it is needed the most, for instance in the crime committed by psychopaths. There is hardly any way to understand the disease of mentally ill criminal. If criminal profiling will be used as a compulsory tool of the investigation process, especially with cases where crime is committed by the mentally ill criminals then it will become easy to understand the seriousness of crime and criminals.

PSYCHOPATHS AND JUDICIAL RESPONSE IN INDIA AND OTHER COUNTRIES

In this research paper ten cases²⁴ have been discussed, in which five cases are from India and rest out of India. Remarkable similarity of modes operandi and psychological factors of criminals is observed in these cases. After analysing these cases there is a clear indication of psychopathy among the criminals, which has been identified in countries like U.K. and U.S.A but in India even though these traits can be identified but they are still not sufficiently diagnosed. Some of the prominent cases are discussed below:-

Jack The Ripper²⁵

Every roster of history's notorious psychopaths mentions Jack the Ripper. In 1888, he terrorized London's Whitechapel district by stalking and murdering a string of prostitutes under the cover of fog. This psychopath became famous, in large part, because his identity remains unknown.

The name "Jack the Ripper" originated in a letter, written by someone claiming to be the murderer, which was disseminated in the media. The letter is widely believed to have been a hoax and may have been written by a journalist in a deliberate attempt to heighten interest in the story. Other nicknames used for the killer at the time were "The Whitechapel Murderer" and "Leather Apron". Attacks ascribed to the Ripper typically involved female prostitutes from the slums whose throats were cut prior to abdominal mutilations. The removal of internal organs from at least three of the victims led to proposals that their killer possessed anatomical or surgical knowledge. The "From Hell" letter, received by George Lusk of the Whitechapel Vigilance Committee, included half of a preserved human kidney, supposedly from one of the victims. Mainly because of the

²²Ibid.

²³Ibid.

²⁴All cases are from secondary data.

²⁵Ten Most Famous Psychopaths in History[online], *PositiveMed*, Available from: <http://positivemed.com/2014/09/30/10-famous-psychopaths-history/>, [Accessed on 20 January 2016].

extraordinarily brutal character of the murders and because of media treatment of the events, the public came increasingly to believe in a single serial killer known as "Jack the Ripper".

An investigation into a series of brutal killings in Whitechapel up to 1891 was unable to connect all the killings conclusively to the murders of 1888 but the legend of Jack the Ripper solidified. As the murders were never solved, the legends surrounding them became a combination of genuine historical research, folklore and pseudo history. The term "ripperology" was coined to describe the study and analysis of the Ripper cases. There are now over one hundred theories about the Ripper's identity, and the murders have inspired multiple works of fiction.²⁶

In addition to the contradictions and unreliability of contemporary accounts, attempts to identify the real killer are hampered by the lack of surviving forensic evidence. DNA analysis on extant letters is inconclusive; the available material has been handled many times and is too contaminated to provide meaningful results.

Zodiac Killer²⁷

With the Zodiac Killer, northern California was held hostage by a psychopath's weird game. The Zodiac Killer murdered a series of women and enjoyed taunting the public with cryptic messages. The case remains unsolved.

He operated in Northern California in the late 1960s. The Zodiac killer's identity remains unknown. The Zodiac killer coined the name "Zodiac" in a series of taunting letters sent to the local Bay Area press. These letters included four cryptograms (or ciphers), three of which have yet to be solved. The Zodiac murdered victims in Benicia, Vallejo, Lake Berryessa, and San Francisco between December 1968 and October 1969. Four men and three women, between the ages of 16 and 29, were targeted. Numerous suspects have been named by law enforcement and amateur investigators, but no conclusive evidence has surfaced. He was well known for his cleverly dark facade, used to instil terror in his victims. This was the inspiration for many future films based on the events, as well as the many less reputable sequels.²⁸

Jeffrey Dahmer²⁹

No list of famous psychopaths would be complete with a cannibal. Eating other people is a definite sign someone has crossed into the dark side. 1980's serial killer Jeffrey Dahmer's, a handsome and well educated man, homosexual, he tortured and killed young boys, made sex with their bodies, dismembered them and collected several parts. He also cannibalized several of them. Twenty-one victims were his probable tally. Jeffrey Dahmer was arrested by the police who found several human skulls and corpses in his house. He captured and killed 15 young men, some of whom he would rape and then store in containers filled with acid. It was also discovered that Jeffrey practiced cannibalism and would eat the flesh and organs of his victims. He was considered as being sane and was thus found guilty of 15 murders. He was consequently sentenced to life imprisonment.

²⁶Haggard, Robert F. (1993), Jack the Ripper As the Threat of Outcast London, *Essays in History*, vol. 35, Corcoran Department of History at the University of Virginia.

²⁷Ibid.

²⁸The Zodiac Killer biography [online], *Bio.*, Available from: <http://www.biography.com/people/zodiac-killer-236027>, [Accessed on 20 January 2016].

²⁹Famous Psychopaths [online], *enkvillage*, Available from: <http://www.enkvillage.com/famous-psychopaths.html>, [Accessed on 20 January 2016].

Ted Bundy³⁰

Bundy (Theodore Robert Cowell), a handsome man with an attractive personality, who was initially a Grocery clerk and later a Stocker, later turned out that he had killed at least 30 women by the time he was finally executed at 43 years of age. This was a sad case because Ted began his series of murders of young women immediately after he broke up with his girlfriend. Most of these women shared one thing in common: they resembled his ex-girlfriend in one way or another. Ted, too, was a necrophile who abused the bodies of his victims until they began to rot.

Bundy was regarded as handsome and charismatic by his young female victims, traits he exploited to win their trust. He typically approached them in public places, feigning injury or disability, or impersonating an authority figure, before overpowering and assaulting them at more secluded locations. He sometimes revisited his secondary crime scenes for hours at a time, grooming and performing sexual acts with the decomposing corpses until putrefaction and destruction by wild animals made further interaction impossible. He decapitated at least 12 of his victims, and kept some of the severed heads in his apartment for a period of time as mementos. On a few occasions, he simply broke into dwellings at night and bludgeoned his victims as they slept.

In July 1979, Bundy was convicted for the two Chi Omega murders. The most damning evidence came from his viciousness. The bite marks on one of the bodies was a definitive match for Bundy. He was given the death penalty twice for those crimes. Bundy received another death sentence the following year in the murder of Kimberly Leach³¹.

Elizabeth Bathory³²

Elizabeth Bathory is perhaps amongst the most infamous female psychopaths as far as females go. She is notoriously known for the brutal serial killing of hundreds of girls and women. She was a countess that belonged to the Bathory noble family of Hungary during the late 1500s. Atrocities include severe beatings; burning or mutilation of hands, faces and genitalia; freezing of victims; biting of flesh of faces and other body parts; surgery on victims; starving of victims; and rape and molestation of victims.

Though unconfirmed, it is said that she killed up to 650 women, who she would also mutilate and torture, she believed that blood from virgin can keep her skin forever young. There were more than 300 witnesses who were willing to testify against her. She was eventually sentenced to home arrest, where she died in 1614.

The Nithari killer³³

Surinder Koli was the domestic help of Moninder Singh Pandher, a wealthy businessman from Noida. Initially in 2006, they were both arrested in connection with the discovery of skulls of missing children in Nithari village on the outskirts of Noida. The case took many twisted turns and there was a huge media furore over what was really going on. There were accusations of rape, cannibalism, pedophilia and even organ trafficking - some of these had substance, while others

³⁰Ibid.

³¹Ten Bundy [online], *Bio*, Available from: <http://www.biography.com/people/ted-bundy-9231165#last-years>, [Accessed on 15 January 2016].

³²Ten Most Famous Psychopaths in History [online], *PositiveMed*, Available from: <http://positivemed.com/2014/09/30/10-famous-psychopaths-history/>, [Accessed on 20 January 2016].

³³16 Indian Serial Killers in India you'll shock to know About. And Yes, One of Them is Just a Child, [online], *Scoopwhoop*, Available from: <http://www.scoopwhoop.com/inothernews/gruesome-indian-serial-killers/>, [Accessed on 22 January 2016].

were mainly rumours. As of now, Surinder Koli has been found guilty of 5 homicides and is on death row while Pandher awaits his fate as there are 11 other unsolved murders under the same investigation.

Auto Shankar³⁴

Born Gowri Shankar, he quickly established a name for himself as a transporter of illegal arrack (coconut liquor) who was also involved in the local flesh trade. But what gets him on this list as one of India's most notorious serial killers is his killing spree in the 80s. He abducted and murdered 9 teenage girls from Thiruvanniyur, Chennai. Though initially he blamed all of it on the influence of cinema, a month before his execution, he confessed to committing the murders for some politicians who had raped the abducted teenage girls. After his arrest, he managed to escape from Chennai Central Prison but was then later apprehended in Rourkela, Odisha. Shankar was hanged to death in Salem Prison in 1995.

Cyanide Mohan³⁵

Mohan Kumar aka Cyanide Mohan used to lure unmarried girls into having sex with him and then trick them into taking contraceptives which were actually cyanide pills. Throughout 2005-2009, he killed 20 women. Before he went on this murderous rampage, he used to be a teacher of Physical Education at a primary school. He was also rumoured to have been involved in bank frauds and other financial forgeries. He was sentenced to death in December 2013.

Devendra Sharma³⁶

Devendra Sharma was a fairly successful doctor of Ayurvedic medicine but he also had a dark side. He wanted to make a quick buck boosting cars and he didn't mind the bloodshed that came with it. From 2002-2004, he stole cars and killed car drivers from many areas in and around UP, Gurgaon and Rajasthan. According to his own confession, he killed about 30-40 men, all drivers. He was sentenced to death in 2008.

Raja Kalinder-The brain eater³⁷

Raja Kalinder was a low-level employee at the Central Ordnance Depot (COD) in Naini who was convicted nearly 12 years after Kalinder's nefarious activities including killing people on the slightest pretext, dismembering their bodies and keeping their skulls in his house came to light in 2000. He admitted to killing at least 11 other people following his arrest, including two persons from Lucknow. During the course of investigation, the police found that he killed people almost without reason, or if he got angry. He behaved "as a king", who would "hand out punishment" to anyone who crossed his path. In one case, he killed a person belonging to the Kayasth community, and ate parts of his victims brain, on the belief that people from that community had sharp brains. He was sentenced for life imprisonment.

³⁴Ibid.

³⁵Ibid.

³⁶Ibid.

³⁷ Psycho' killer, kin convicted in journalist murder case(2012), [online], *Express News Service*, Allahabad, Fri Nov 30 2012, Available from <http://archive.indianexpress.com/news/-psycho--killer-kin-convicted-in-journalist-murder-case/1038416/>, [Accessed on 25 January 2016].

ANALYSIS

After analysing the above cases it is apparent that criminal profiling is an essential part of a crime investigation. This technique has already been used in many countries, especially while dealing with the case of heinous crimes, and ideally it should be applied in India also. Criminal profiling includes many things, for instance, crime scene, the victim, the forensic evidence, the known facts of the crime, *modus operandi* and the psychological factor behind the crime. All these are effective to identify and analyse psychopaths effectively. This paper emphasises that the *modus operandi* and psychological factor of the criminal are the key factors to assess psychopathy in criminal profiling.

The *modus operandi* is a method of procedure; especially a distinct pattern or method of operation that indicates or suggests the work of a single criminal in more than one crime³⁸. In the above cases it is observed that psychopaths always commit multiple crimes, each crime is gruesome in nature. Torture, abuse and finally killing the victims by multiple stabs are the key traits, for instance in Jack the Ripper, Zodiac Killer and Nithari case. The offender spends a lot of time at the crime scene, even after the crime. The offenders were fully aware of the crime scene; they generally operated at night and preferred secluded places as in Jack the Ripper case and Ten Bundy case. They have a particular pattern of commission of crime, which they follow in every subsequent crime like Zodiac Killer and Cyanide Mohan case. They usually have good position in the society; a good example is Devendra Sharma, who was a Doctor and Ten Bundy who happened to be a Stocker.

The second point is psychological factor which is the most prominent and integral technique to identify psychopaths. It is pertinent to mention that most of the offenders had lack of remorse which is inherently associated with psychopathy as observed in each of the cases discussed in this article. Other factors by which they can be correlated as psychopaths are shallow emotions (as in Elizabeth and Nithari case), manipulateness, lying, glibness, low frustration tolerance(Raja Kalinder case), episodic relationships (e.g. Ten Bundy and Cyanide Mohan case), parasitic lifestyle, the persistent violation of social norms, need for stimulation and criminal versatility are also manifested in varying degrees. All these psychological factors are discussed in Dr. Hare's Psychopathy Checklist revised (PCL-R) and his contributory works on psychopaths discussed above which provides a reliable data to assess them.

CONCLUSION

I would like to conclude my article with certain observations, firstly, it is essential that for any heinous crime committed by apparently mentally ill criminal it is necessary to identify the disease through a systematic observational process and by using multidisciplinary approach. The identification of psychopathic traits during early phase of investigation is essential as it is possibly the most dangerous type of mental disease.

Secondly, criminal profiling plays a significant role in providing an accurate insight about the psyche of the criminal and reveals actionable information about the causation of crime. It is perhaps the most powerful tool as it can even help predict the possible place and pattern of repetition of crime by profiling the characteristics of unknown criminals. By disclosing the severity of the crime and the type of mental illness it assists in appropriate judicial response in criminal

³⁸Merriam Webster Dictionary, [online], Available from: <http://www.merriam-webster.com/dictionary/modus%20operandi>, [Accessed on 26 January 2016].

cases supposed to be committed by individuals suffering from narcissistic personality and antisocial behaviour traits.

Thirdly, the technique has consistently improved over the years, but generally, the two main approaches of criminal profiling helpful to diagnose psychopathy are analysis and investigation of *modus operandi* and psychological factors.

Lastly, criminal profiling is widely used in U.K. and U.S.A but it is still an unexplored area in the criminal investigation process in India. There is an urgent need to initially, make an understanding of this dangerous disease in India and subsequently, promote criminal profiling of all heinous crimes committed by mentally ill criminals.

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8-N39-2491**CRITICAL ANALYSIS OF 'LAW OF ADULTERY' IN INDIA**DR. RAVINDER KUMAR¹**ABSTRACT**

Adultery generally means a consensual sexual relationship between a married person and a person of other sex, who is not the spouse of the married person. However, legal definition varies from place to place and statute to statute. All the legal system invariably does recognise it as a ground for seeking divorce from the errant spouse. Section 497 of Indian Penal Code (IPC), 1860 perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman without the consent or connivance of her husband as an offence of adultery. However, the provision makes only men having sexual intercourse with the wife of other men without the consent of their husbands punishable and women can't be punished even as abettors. Thus, the law relating to adultery is being criticised on the ground of gender equality and equal protection of law being envisaged under the provisions of Indian Constitution.

Key words: Adultery, Gender Equality, Sexual Intercourse

INTRODUCTION

Adultery means voluntary sexual intercourse by a married person with another married or unmarried individual. Thus adultery is the indulgence in voluntary sexual intercourse of a married person with someone other than his /her spouse. However, legal definition of the term adultery' and its consequence varies between religion, cultures and legal jurisdictions, but the concept is similar in Judaism, Christianity, Hinduism and Islam.²

Adultery is considered as an invasion on the right of the husband over his wife. It is an offence against the sanctity of the matrimonial home and an act which is committed by a man. Almost every religion on the earth condemns it and treats it as an unpardonable sin. Even though, it is not reflected in the penal laws of countries. Nevertheless, all the legal system invariably does recognise it as a ground for seeking divorce from the errant spouse.

In India the offence of adultery is punishable under section 497 of Indian Penal Code (IPC), 1860. The provision makes only men having sexual intercourse with the wife of other men without the consent of their husbands punishable but women can't be held liable.

Therefore, the law on adultery in India has been subject to controversy on the ground of gender equality enshrined under the provisions of Constitution. Therefore, it is proposed to examine the present law on adultery in the light of above stated controversy regarding concept of equality and other constitutional norms in India.

GLOBAL SCENARIO

The criminal law of adultery is not uniform and varies from country to country. It differs according to the religious norm, attitude of the people and many other factors. The law related to adultery vary from statute to statute as at some places adultery is considered a crime and the adulterer may even have to face death penalty while at some places it is not punishable. In few statutes, if either individual is married to someone else, both parties to an adulterous liaison are capable to the crime.

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² Encyclopaedia Britannica, available at, <http://www.britannica.com/EBchecked/topic/6618/adultery>(Last visited February 12, 2016)

Law must keep pace with changing social needs. Law relating to adultery in other countries is different from India. In United States of America, the law relating to adultery differs from one state to another. The law relating to criminal adultery prevailing in different states in United States reveal that three major formulations of adultery exist under state laws in the United States.viz:-

- 1) The Common Law view
- 2) The Canon (a law or body of laws of a church)
- 3) The Hybrid view

According to the Common law view, adultery takes place only when the woman is married and both husband and wife are held liable.

Under the Canon law (law of church) view, adultery is the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife and only the married person is held guilty.

According to the Hybrid rule, followed in twenty states in the United States, if either spouse has sexual intercourse with a third party, both transgressors are guilty of adultery.

Finally, eight states held both transgressors guilty, if woman is married, but if the woman is single only the man is guilty. Six states do not punish adultery at all.³

Adultery is not criminal offence in United Kingdom, but is punishable, though mildly, in some of the European countries. For example, in France a wife guilty of adultery is punishable with imprisonment for a period of three months to two years. The husband however, may put an end to her sentence by agreeing to take her back. The adulterer is punishable similarly.

In Germany, if marriage is dissolved as a result of adultery, the guilty spouse as well as the guilty partner, is punishable with imprisonment for a term of not less than six months, but prosecution has to be initiated by the aggrieved spouse by means of a petition. In Malaysia, Singapore and Hong Kong adultery is not punishable in law.

In Pakistan, adultery is viewed as a heinous offence and both the man and woman are subject to punishment, which may extend to the death sentence. In Islamic countries, such as Saudi Arabia, Iran, Egypt, etc. also like Pakistan adultery is punished severally.⁴

In this regard, the Jammu and Kashmir state Ranbir Penal code, 1932 is more progressive. It makes the errant wife punishable along with her paramour.⁵

CURRENT INDIAN LEGAL POSITION

It is important to note that original draft of IPC prepared by First Law Commission was silent about the offence of 'adultery'. Lord Macaulay, the architect of Indian Penal Code, 1860, was unwilling to add the provision criminalising the adultery as an offence. He observed "There are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives."⁶ The main objective of keeping 'adultery' out of the penal statute was the social norms which take care of such instances like child marriage and polygamy. So, according to Lord Macaulay, it advised that it would be enough to

³ 42nd Report of Law Commission of India, Indian Penal Code Report, 326-327(1971) available on <http://lawcommissionofindia.nic.in/1-50/Report42.pdf> (last visited February 10, 2016).

⁴ In Pakistan & other Islamic countries, adultery is an offence called 'Zena' for which the punishment of stoning has been prescribed by putting a married adulterous woman under the ground up to shoulder.

⁵ KD Gaur, The Indian Penal Code, Fourth edition, Universal Publication, Delhi (2010), page 801.

⁶ Comment on the draft of First Law Commission Report, Gaur KD, Indian Penal Code, Eastern Law Publication, 2nd Edition, page 388.

treat it as a civil injury. Thus, framers of the code, did not include adultery as a crime, it was only after the recommendation of the Second Law Commission it was added to the Code.⁷

The Second Law Commission, after giving mature consideration over the subject, came to the conclusion that it was not advisable to exclude this offence from the Code.⁸ The Commission was of the opinion that it would not be proper to leave the offence out of IPC and suggested that only the man be punished, again keeping in mind the condition of women in the country.

However, to know the true objective of 'adultery' it is essential to understand the modality of legislative framework. It is placed under chapter XX of IPC describing "Of Offences relating to marriage". Thus, the four sections, 494 to 498(including 498A) are related to marriage. However, the close scrutiny of these provisions clearly revealed that the provisions are so drafted to preserve the sanctity of marriage institution. The provisions of bigamy, adultery, cruelty or criminal abduction of wife, are drafted keeping in mind of marriage institution, its preservation, protection and promotion of harmony. Therefore, the object of section 497, IPC is to preserve the sanctity of marriage.⁹

"497. *Adultery*.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor."

This section provides punishment for adultery. Adultery is considered as an invasion on the right of the husband over his wife. It is an offence against the sanctity of the matrimonial home and an act which is committed by a man. It is an anti –social and illegal act. It consists in having carnal knowledge of a married woman with knowledge of the fact, without the consent or connivance of her husband.¹⁰ To constitute adultery, sexual intercourse is a necessary ingredient.¹¹

The scope of the offence under the section is limited to adultery committed with a married woman, and the male offender alone has been made liable to be punished with imprisonment which may extend upto five years, or fine or with both. The consent or the willingness of the woman is no excuse to the crime of adultery.¹² Analysing the definition of adultery under the provision reveals that the phrase 'wife of another man' shows the sign of gender discrimination. The phrase gives an idea that a married man having sexual relations with an unmarried will not be guilty of committing adultery.

Thus, adultery is an offence committed by a man against a husband in respect of his wife. It is not committed by a man who has sexual intercourse with an unmarried or a prostitute woman, or with a widow, or even with a married woman whose husband consents to it or with his connivance. Connivance" is a figurative expression, meaning a voluntary blindness to some present act or conduct, to something going on or before the eyes or something which is known to be going on with no protest or desire to disturb or interfere with it.

A close examination of Section 497, IPC, 1860 reveals that to constitute an offence of adultery, the following ingredient must be established, viz:--

1. One must have a sexual inter-course with the wife of another man

⁷ Rattan Lal and Dhiraj Lal, Law of Crimes, at 2710 (Bharat Law House, 26th edition, 2007) CK Thakker and MC Thakker , eds.

⁸ Rattan Lal & Dhiraj Lal, Indian Penal Code (Enlarged Edition) 29th ed. 2002, page 2305.

⁹ See, recommendation of Mallimath Committee, "The Report of the Committee on Criminal Justice Reforms," 2003, Para 117.

¹⁰ M. Clarence v. M. Raicheal , AIR 1964 Mys 67.

¹¹ Munir v. Emperor, (1925) 24 ALJR 155.

¹² Gul Mohammad v. Emperor, AIR 1947 Nag 121.

2. Woman must have a valid marriage- a pre requisite for the offence of Adultery
3. The person must have knowledge or has reason to believe that the woman is the wife of another man;
4. Such sexual intercourse must be without the consent or connivance of the husband;
5. Consent of the female is necessary ingredient --Such sexual intercourse must not amount to the offence of rape.

The phrase 'without the consent or connivance of that man' clearly indicates that adultery is not an offence per se but is an offence only when the husband of the adulterer did not consent to it and also that the consent of the wife of person convicted of adultery is not considered in deciding whether her husband has committed adultery or not. This once again discriminates between the two sexes by not considering the consent of the wife of the person convicted of adultery in deciding whether her husband who had sexual relation outside marriage is guilty of the offence of adultery or not.¹³

In this regard the opinion of court in V. Revathi case¹⁴ that 'the law permits neither the husband of the offending wife to prosecute his wife nor does the law permit the wife to prosecute the offending husband for being disloyal to her' seems not to be justified as the consent of the husband and not of the wife is given importance in deciding the offence.

The last part of the provision mentions 'in such case the wife shall not be punishable as an abettor'. The honourable Supreme Court in this case held that woman is neither the seducer nor the author of the crime but the victim.¹⁵ But, this view also does not hold correct in the changed scenario.

The provision of adultery under Indian Penal code has several characteristics features that make it special provision. First this section is gender sensitive and can only committed by man and not by the woman. Thus, the offence cannot be levelled against the woman. Secondly, such offence must be committed by the offender with the knowledge or with any reason to believe that the woman with whom he is undergoing a sexual intercourse is the wife of another man. In short, the offence has been committed while the marriage of the woman with whom the sexual relationship has been established shall be in force. Thirdly, the consent of the wife shall be free and without any force. In case the consent of the wife is not free consent, it will amount to be rape, which is more serious. Fourthly, the section has demarcated that who can prosecute and who can be prosecuted. Under Section 497, only the husband of the wife who has been involved in adulterous act can only file complaint and only against the adulterous. The section also protects the wife against adulterous act and complete protection under the section even as abettor.

Section 497 unequivocally conveys that the adulteress "wife" is absolutely free from criminal responsibility. She is also not to be punished (even) for "abetting" the offence. Section 497, by necessary implication, assumes that the "wife" was a hapless victim of adultery and not either a perpetrator or an accomplice thereof. Adultery, as viewed under IPC, is thus an offence against the husband of the adulteress wife and, thereby, an offence relating to "marriage".¹⁶

It is in consonance with this approach that Section 198 CrPC mandates a court not to take cognizance of adultery unless the "aggrieved" husband makes a complaint. It runs as under:

¹³ Nidhi Khare, Gender Biasness in the Law of adultery in India, available at <http://www.legalserviceindia.com/article/adultery-in-india-413-1.html> (last visited on February 10, 2016).

¹⁴ V. Revathi v. Union of India, AIR 1988 SC 835

¹⁵ Sowmithri Vishnu v. Union of India, AIR 1985 SC 1618.

¹⁶ KI Vibhute, 'Adultery' in the Indian Penal Code: Need for a Gender Equality Perspective, (2001) 6 SCC (Jour) 16.

"198. *Prosecution for offences against marriage.*—(1) No court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code (45 of 1860), except upon a complaint made by some person aggrieved by the offence:

2) For the purposes of sub-section (1), no person other than the husband of the woman shall be deemed to be aggrieved by any offence punishable under Section 497 or Section 498 of the said Code: Provided that in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed may, with the leave of the court, make a complaint on his behalf."

Thus, in India, a wife is not punished as an adulterous or an abettor for the offence of adultery. It is only the man who has such unlawful sexual intercourse with married woman will be punished under section 497, IPC. Moreover, the wife of the adulterer has no locus-standi to file a complaint against her deviated husband. It is only the husband of the (adulteress) wife, who can file a complaint and upon whose complaint the court can take cognizance of the offence. This position of law regarding making complaint has been clearly provided under Cr.P.C, 1973.¹⁷ Section 198(2) of Cr.P.C. treats the husband of the (adulteress) wife an aggrieved party and not the wife of the adulterer husband.

ADULTERY & GENDER EQUALITY—JUDICIAL APPROACH

Law of adultery as it stands in India punishes only man, and assumes that in all cases 'man is the seducer' and the women, who is an equal participant is viewed as a victim. There have been numerous debates about the discriminatory stance of the provision, The insistence of the National Commission for Women and the Report of the Madhav Menon Committee & the 42nd Report of the Law Commission of India, have breathed a new lease of life in the dying controversy. The law relating to adultery as existing in the Indian Penal Code under section 497 has been criticized ever since it's commencement. Its validity both on the constitutional grounds as well as philosophical grounds has been challenged time and again. But the law still stands as it is.

In 1951, one Mr Yusuf Abdul Aziz, charged with adultery, contended before the Bombay High Court that Section 497 IPC is unconstitutional as it, in contravention of Articles 14 and 15 of the Constitution¹⁸, operates unequally between a man and a woman by making only the former responsible for adultery. It, thereby, he argued, discriminates in favour of women and against men only on the ground of sex.

Recalling the historical background of Section 497 and the then prevailing social conditions and the unequal status of women, the High Court of Bombay upheld the constitutional validity of the provision. Chagla, C.J., observed:

"What led to this discrimination in this country is not the fact that women had a sex different from that of men, but that women in this country were so situated that special legislation was required in order to protect them, and it was from this point of view that one finds in Section 497 a position in law which takes a sympathetic and charitable view of the weakness of women in this country."¹⁹ The Court also opined that the alleged

¹⁷ Section 198(2), Cr.P.C, 1973.

¹⁸ Article 14 of the constitution mandates the State not to deny any person equality before the law and the equal protection of the laws within the territory of India. It mandates that every law that the State passes shall operate equally upon all persons. While Article 15, inter alia, prohibits the State from making discrimination on grounds only of sex.

¹⁹ *Yusuf Abdul Aziz v. State of Bombay*, AIR 1951 Bom 470 at 472, para 5

discrimination in favour of women was saved by the provisions of Article 15(3) of the Constitution which permits the State to make "any special provision for women and children".

In appeal, the Constitutional Bench of Supreme Court observed that section 497, IPC is not ultra vires under articles 14, 15 and 21 of the Constitution on the ground that it is only the man, who is held liable for adultery and not the wife with whom adultery is committed. It does not offend articles 14 and 15 of the Constitution on the ground that the wife with whom adultery is committed is saved from the purview of section 497 and is not punished as an abettor. Held sex is a reasonable and sound classification accepted by the Constitution, which provides that State can make special provisions for women and children vide article 15(3) of the Constitution.²⁰

The constitutional validity of section 497, IPC once again was in question in *Sowmithri Vishnu v. Union of India*.²¹ It was contended that Section 497, being contrary to Article 14 of the Constitution, makes an irrational classification between women and men as it:

- (i) confers upon the husband the right to prosecute the adulterer but it does not confer a corresponding right upon the wife to prosecute the woman with whom her husband has committed adultery,
- (ii) does not confer any right on the wife to prosecute the husband who has committed adultery with another woman, and
- (iii) does not take in its ambit the cases where the husband has sexual relations with unmarried women, with the result that the husbands have a free licence under the law to have extramarital relationship with unmarried women.

The Supreme Court rejected these arguments and ruled that Section 497 does not offend either Article 14 or Article 15 of the Constitution. In defining the offence of adultery, so as to restrict the class of offenders to man only, it was held that no constitutional provision has been infringed. It is commonly accepted that it is the man who is the seducer and not the woman. The position might have undergone some change over the years, but it is for the legislature to consider whether section 497, IPC should be amended appropriately so as to take note of the transformation which society has undergone.²²

The court further observed that the fact that a provision for hearing the wife is not contained in section 497, IPC cannot make that section unconstitutional as violating article 21 of the constitution. True, section 497, IPC does not contain a specific provision for hearing the married woman, but that does not justify the proposition that she is not entitled to be heard at the trial, if she makes an application to the court to that effect.

However, one may find it difficult to convince himself about the rationale of the disability of the "wife" of the adulterer to prosecute her unfaithful husband. In *V. Revathi v. Union of India*²³ this disability was relied upon by a wife to challenge the constitutional propriety of Section 198(2) read with Section 198(1) CrPC, which, as mentioned earlier, empower the husband of the adulteress wife to prosecute the adulterer but does not permit the wife of an adulterer to prosecute her promiscuous husband. Upholding the constitutionality of Section 497 IPC and Section 198(2) CrPC, which according to the Court "go hand in hand and constitute a legislative packet" to deal

²⁰ *Yusuf Abdul Aziz v. State of Bombay*, AIR 1954 SCR 930 at 932.

²¹ AIR 1985 SC 1618

²² Supra note 16.

²³ *V. Revathi v. Union of India*, (1988)2 SCC 72

with "an outsider" to the matrimonial unit who invades the peace and privacy of the matrimonial unit, Thakkar, J. of the Apex Court observed:

"The community punishes the 'outsider' who breaks into the matrimonial home and occasions the violation of sanctity of the matrimonial tie by developing an illicit relationship with one of the spouses subject to the rider that the erring 'man' alone can be punished and not the erring woman. ... There is thus reverse discrimination in 'favour' of the woman rather than 'against' her"²⁴ The court further held that the law permit neither the husband of the offending wife to prosecute his wife nor does the law permits the wife to prosecute the offending husband for being disloyal to her. Thus, both the husband and the wife are disabled from striking each other with the weapon of criminal law. So, there is no discrimination against the woman insofar as she is not permitted to prosecute her husband under section 198(1) & (2), Cr. P.C. A husband is not permitted because the wife is not treated as an offender in the eye of law. In the ultimate analysis the law has meted out even – handed justice to both of them in the matter of prosecuting each other or securing the incarceration of each other.²⁵

It is true that adultery cannot be committed unless a woman is a consenting partner. The judicial perception that only a man can be "an outsider", who has potential to invade the peace and privacy of the matrimonial unit and to poison the relationship between the unfaithful wife and her husband, therefore, seems to be, less convincing and unrealistic. "An outsider woman", can, like "an outsider man", be equally capable of "invading" the matrimonial peace and privacy as well as of "poisoning" the relationship of not only her own matrimonial home but also that of her paramour. Similarly, the judicial opinion that Section 198(1) read with Section 198(2) CrPC, disqualifying the wife of an unfaithful husband for prosecuting him for his promiscuous behaviour, seems to be unconvincing and illogical.²⁶

Such judicial reasoning, in ultimate analysis, unfortunately conveys that a man is entitled to have exclusive possession of, and access to, his wife's sexuality, and a woman is not eligible to have such an exclusive right and claim over her husband! She is, therefore, not entitled to prosecute either her promiscuous husband or the "outsider woman" who has poisoned (or helped her promiscuous husband to do so) her matrimonial home.²⁷

ADULTERY AND GENDER EQUALITY— COMMITTEE REPORTS AND SUGGESTIONS

The various proposals have been rooted for reforms in law of adultery by various sections of legal society in view of the transformation, which the society has undergone, but unfortunately the legislature has not realised its responsibility, and thus this archaic law is still retained as it is without any progressive changes.

The Fifth Law commission of India in its 42nd Law Report suggested that Section 497 should not be removed from the penal code; rather both the man and the wife should be made guilty.

It also felt that an imprisonment for a term up to five years, to be scaled down to two years as the existing punishment under section 497, IPC is 'unreal and not called for in any circumstances'. The recommended section is as follows:

"497. *Adultery*.—If a man has sexual intercourse with a woman who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or

²⁴ Id. at 76-77, para 5.

²⁵ Ibid.

²⁶ Supra note 16.

²⁷ Ibid.

connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."²⁸

However, the Indian Penal Code (Amendment) Bill, 1978, provided for amendment to section 497, but was not passed by the legislature. Clause 199 of the draft bill provides:

"Whoever has sexual intercourse with a person who is, and whom he or she knows or has reason to believe to be the wife or husband as the case may be, of another person, without the consent or connivance of that other person, such sexual intercourse by the man not amounting to the offence of rape, commits adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."²⁹

The clause 199 of the draft bill differs from the suggestion of the 42nd Law Commission Report in two ways; the draft provided for punishment of the adultator irrespective of gender and has retained the maximum punishment for the offence up to five years.

The Fifth Law Commission, 1971 and Joint Select Committee, 1978 seems to be inspired by the spirit of equality have thus shown their inclination to the equality of sexes by recommending equal culpability for the 'man' as well as 'woman' for committing adultery.

The Fourteenth Law Commission in its 156th Report on the Indian Penal Code also endorsed the reformation of the criminal law of adultery of the Joint Select Committee with minor modifications. It also suggested that changes must be made in section 198(2) of Cr.P.C., 1973.

The Committee on Reforms of Criminal Justice System, 2003 headed by Justice Malimath suggested that section 497 of Indian Penal Code should be amended as to give effect that "whosoever has sexual intercourse with the spouse of any other person is guilty of adultery..."³⁰ The committee viewed that as the very objective of this provision is to preserve the sacred relationship of marriage, adultery is abhorred by the society so there is no justification that the wife who has sexual relationship with a man is not treated equally.³¹ If it is to accepted would make a man and woman be treated equal as an adultator.

Decriminalising of Adultery to make it as a civil offence

It has been argued that any crime under section 497 is a matter of mutual consent between two mature persons. That is not a crime at all in changed social scenario. Thus, section 497 dealing with adultery should cease to be a criminal offence as it is only a civil wrong between married couples and not a criminal offence at all.

In the present scenario, most of the European countries have decriminalized adultery. Adultery is not a crime in most of the European Union, including Austria, Netherland, Belgium, Finland, Portugal, Italy, Spain, Greece, and Sweden.³² In United States, laws vary from state to

²⁸ Supra note 3, para 20.18 at 327.

²⁹ Clause 199. Both the Law Commission and Joint Select Committee tried to ensure equality of the sexes. The Amendment Bill (1978) lapsed due to dissolution of the Lok Sabha then.

³⁰ See Ministry of Home Affairs, Government of India, Committee on Reforms of Criminal Justice System, 2003, at 190 available on <http://www.mumbaiipolice.org/%5Carchives-report%5Cmalimath%20committee%20report.pdf> (last visited February 08, 2016).

³¹ Ruth A. Miller, *The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective* at 122-23 (Ashgate, 2007)

³² Ibid.

state, however after the US Supreme Court decision in *Lawrence v. Texas*,³³ the validity of adultery law is under debate.³⁴ However, in Islamic countries like Afghanistan, Nigeria, Pakistan, Yemen, Sudan, Saudi Arab, Iran have provisions for death penalty as the maximum punishment for adultery, but concept is deeply rooted in the traditional, religious view of *Shariah*.³⁵

The United Nations Human Rights Commission has also expressly mentioned that, “it is undisputed that adult consensual sexual activity in private is covered by the concept of privacy.”³⁶ The Committee suggested the member states to follow the Article 17 and 26 of the International Covenant on Civil and Political Liberty.³⁷

India being a party to this Covenant should think about decriminalizing adultery. The Amnesty International has also expressly criticised and opposed those laws which criminalise sex between two consenting adults in private place.³⁸

Very recently, the National Commission for Women has made recommendation, that the issue of adultery should be viewed as a breach of trust and treated as a civil wrong rather than a criminal offence but this should be done only after working out a national consensus in this matter. The NCW member on the issue of prosecution of wife by the husband for adultery under section 497, IPC observed, that we think that adultery should not be treated as a criminal offence but a civil wrong.

On the similar lines the draft National Policy on Criminal Justice by the Madhava Menon Committee, has also suggested de-criminalizing adultery by recommending that it should be treated as a social rather than a criminal offence.³⁹

The Supreme Court has already said that the philosophy behind this law is to that social good is promoted that the husband and wife is allowed to ‘make up’ or ‘break up’ the matrimonial relation rather than prosecuting and dragging each other to the criminal courts.⁴⁰ They can live together in the spirit of ‘forgive and forget’ or get separated from each other by approaching a civil court for divorce.⁴¹ Moreover, law is in the interest of children by not sending one of the parents in jail.⁴²

Taking into consideration the development in other part of world and the suggestions from the Committees and Reports it can be suggested that it is the right time to de-criminalise adultery by making it only a civil wrong.

CONCLUSION

In the light of the above analysis it can be concluded that there has been a huge change in the Indian society: women are no longer considered to be chattel of her husband. However, the present law of adultery violates the Indian constitution that includes equal justice for every citizen and

³³ 539 U.S.558.

³⁴ Supra note 3.

³⁵ Daniel Ottosson, *Legal Survey On the Countries in The World Having Legal Prohibition On Sexual Activities Between Consenting Adults in Private* (2006) available at <http://www.ilga.org/tatehomophobia/LGBcriminallaws-Daniel-Ottoson.pdf> (last visited January 21, 2016).

³⁶ *Death by stoning/flogging*, (Amnesty International, 2006) available at <http://www.amnesty.org/en/library/info/MDE25/006/2006> (last visited January 21, 2016)

³⁷ Concluding observations of the Human Rights Committee: Egypt, (United Nations, 2002) available at [http://www.unhcrh.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcrh.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument) (last visited January 23, 2016).

³⁸ Supra note .31.

³⁹ Madhava Menon Committee, *Draft National Policy on Criminal Justice*, 2007, available on <http://www.mha.nic.in/hindi/sites/upload-files/..files/DraftPolicyPaperAug.pdf>. (last visited February 12, 2016)

⁴⁰ *V. Revathi v. Union of India*, (1988)2 SCC 72.

⁴¹ *Ibid.*

⁴² *Ibid.*

would not discriminate on the ground of sex. The “special provision” clause under Article 15(3) for women cannot be extended to create arbitrary discretion for such discrimination by the legislature. The section 497, IPC dealing with adultery needs to be declared unconstitutional. The various Law Reform Committees and Reports also recommended to suitable amend or repealed the existing provisions of adultery. Further, in the present scenario, the marriage is more considered to be a civil contract between two consenting adults; therefore, it is better to be placed under civil law rather than criminal law. Taking this consideration and policy of international law, number of western and developed countries has de-criminalised adultery or has made it a civil wrong; therefore, there is immediate need to de-criminalise adultery in India as well and making it only a civil wrong.

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THE IMPACT OF PLURALISTIC ADAT INHERITANCE LAW ON MEN AND WOMEN'S STATUS FROM AN INDONESIAN LAW PRESPECTIVEDR. SONNY DEWI JUDIASIH¹ AND PROF. EFA LAELA FAKHRIAH²**ABSTRACT**

Customary in adat inheritance law in Indonesia illustrates the pattern of a particular and unique law that reflects the way of thinking and the traditional spirit of Indonesia, being based on a collective and communal culture. There are three *adat* inheritance systems: patrilineal, matrilineal and parental. Each system is distinctive. The differences between these systems often cause problems and disputes, especially because there are differences in the status of men and women within patriarchy and matriarchy system of kinship. Inheritance dispute settlement is carried out by means of discussions, agreements, or through the judiciary. Court rulings indicate that there is a renewal of kinship system whereas men and women stand equal opportunity to serve as heirs for their parents.

Keywords: *adat*, customary, inheritance law, pluralism, Indonesian law.

INTRODUCTION

Inheritance law is system for negotiation the transition of wealth from one generation to the next generation. In Indonesia, the system of inheritance law that has been in force since the Dutch colonial era (after more than 60 years of Indonesian independence) remains pluralistic. It has not yet been unified, as had been mandated by the principle of unity in the Preamble to the Undang-Undang Dasar 1945 (UUD 1945, Constitution 1945). This principle mandates that Indonesian law should be a national law that applies to the entire nation of Indonesia (Salman and Damian, 2002, p. 19).

Inheritance law is a branch of law that is deeply problematic, given its association with the beliefs, religions, traditions, and culture in general. This kind of law, as well as other areas of family law, is referred to by experts as sensitive and not neutral law. Due to this fact, it is rather difficult to rush the setting up for unification of law. (Salman and Damian, 2002, p. 19).

There are three systems of inheritance law and practice in Indonesia, past and present. These systems are inherited from the Indische Staatsregeling (IS, Colonial Constitution 1925) Article 163.(R. Soepomo,1991, p. 25–105), namely civil-western inheritance law, *adat* inheritance law, and Islamic inheritance law (Tutik, 2006, p. 281). They are also adopted to classify citizens.

The civil-western inheritance law is contained in Book II Kitab Undang-Undang Hukum Perdata (KUHPerdata, Indonesian Civil Code), Article 830 to Article 1130. Meanwhile, *adat* inheritance law is a distinctive system of inheritance law that is applicable in *adat* law areas, and which prevails in each of the *adat* environments. Therefore, it is known by several different names, depending on the area or the *adat* environment concerned. For example, it is known as *adat* Minangkabau inheritance law, *adat* Batak inheritance law, *adat* Jawa inheritance law, and so forth (Titik Triwulan Tutik, 2006, p. 282).Islamic inheritance law is a system of inheritance law that

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used to be called Faraidh, and is contained in studies of fiqh (Islamic jurisprudence). After the Kompilasi Hukum Islam was made (KHI, Islamic Law Compilation), based on Instruksi Presiden (Inpres, Presidential Instruction) of the Republic of Indonesia No. 1 of 1991, Islamic inheritance law is codified in the Book II KHI Inheritance Law, from Article 171 to Article 214.

There is a striking difference between each of the three systems of inheritance law set out above, related to the position of women, both in their capacity as heirs and in the number of portions of proprietorship that will be received. Civil-western inheritance law does not differentiate between men and women in their capacity as heirs and in the number of portions of proprietorship received. This is because civil-western inheritance law only considers heir classification by blood ties (Volmar, 1996, p. 24). Islamic inheritance law does not distinguish between the position of women and men as heirs. Widows, daughters, mothers or sisters are recognized as heirs as well. Those differences particularly lies in the number of the portions or parts of the proprietorship received. Daughters obtain half of the sons' portion, based on Surah an-Nisaa verse 11 in the Qur'an. In addition to this, KHI regulates the same matter in its Article 176.

While civil-western inheritance law makes no distinction between women's and men's positions and number of portions of the proprietorship, *Adat* inheritance law does. *Adat* inheritance law, in particular the family system, prioritises the difference between women's and men's positions as heirs. *Adat* law recognizes three kinship systems: patrilineal (patriarchal), matrilineal (matriarchal), and bilateral or parental (Soerjono Soekanto, 2008, p. 284).

Observing the provisions contained in *adat* inheritance law and Islamic inheritance law related to the position of women as heirs and the difference in the portion of proprietorship received, between women and men, many current problems related to the position and rights of women as heirs can be identified (Zamzami, 2013, p. 6).

Based on the elaboration aforementioned, the authors specifically shall review:

1. the provisions of *adat* inheritance law in Indonesia; and
2. a comparison of the status and position of men and women in *adat* inheritance law, based on jurisprudence in Indonesia.

DISSCUSSION

The provisions of *adat* inheritance law Indonesia

Adat law is a living law that is developing along with the society in Indonesia. It is also an actualisation of individual or social community's behaviour, being in line with their view and philosophy of life. In the social context, *adat* law is a crystallisation of living values and becomes a source of guidance for members of the *adat* society. This is in accordance with the view that law cannot be separated from social and cultural contexts (Rato, 2011, p. IX).

Adat law has several distinctive characteristics, namely: (Soekanto and Usman, 1986, p. 11)

- a. A strong sense of togetherness, in which, according to *adat* law, individuals have strong bonds in every possible aspect of life with the society itself. Thus the rights and obligations of every person are compatible with the public interest.
- b. Magical-religious qualities: the law involves occult elements, such as animism, and reference to the supernatural, etc.
- c. A concrete way of thinking: Every aspects in *adat* law always signified in a concrete physical form.
- d. A visual nature: any issues shall only be settled by a concrete action.

- e. The regimes encompass within the *adat* law mostly relate to the living aspects of society. These can be specified as follows (Soekanto, 2008, p. 118):
 - a. the form of *adat* societies;
 - b. individuals/persons;
 - c. families;
 - d. marriages;
 - e. succession;
 - f. land law;
 - g. debts;
 - h. *adat* offenses.

This article will focus on the specification of succession among those specifications of *adat* law, and will consider problems that frequently occur in its implementation.

In general, the law of succession in Indonesia is governed by several provisions enshrined in the Civil Law Code, Islamic law and *adat* law. This reveals the pluralism that exists in Indonesia's laws governing succession. Succession law itself is divided into several parts that are related to the social structure within each society. This is due to the fact that in *adat* society there are three different common principles in regards to descendants, and thus all discussion regarding succession in Indonesia is confronted with three kinds of provisions in the *adat* law of succession, namely: the patriarchal *adat* law on succession, the matriarchal and the parental.

The Definition of Adat Law on Succession

Definition from Soepomo (R. Soepomo, 1980, p. 81):

In his book "Bab-Bab Hukum *Adat*", Soepomo elaborates:

"Adat law on succession contains provisions regulating the continuation process of properties, assets, and immaterial belongings of batches or generations of people towards their descendants."

"In a succession in a family, the entitlement process of succession shall be initiated even before the death of the inheritor, to prevent the possibility of serious impacts that might occur upon their death, despite the fact that the death itself is one of the important events in the succession process."

Definition from Soerojo Wignyodipuro:

According to Soerojo Wignyodipuro's definition, *adat* law on succession covers the legal norms relating to personal assets: whether they are material or immaterial; and which assets can be inherited by descendants. These legal norms also regulate the moment, methods, and the process of the transfer of the rights and obligations over such assets.

As a matter of fact, the transfer process itself can be started before death of the original owner of the assets. The transfer process continues until each of the owner's descendants is able to build a new independent family. In the future, these families continue the same process in regard to the next generation.

Definition from Wirjono Prodjodikoro:

Wirjono Prodjodikoro elaborates that the law on succession is a way of settling rights in society in consequence of a person's death, where this person has assets that can be inherited.

This review of the definitions of the law on succession given by the three experts mentioned above suggests that their definitions are quite similar. It can be concluded that the law on

succession comprises legal act by a person, which will transfer his rights and obligations towards his successor.

The Subject of *Adat* Law on Succession

In order to determine subjects or those who are governed by the *adat* law, it is necessary to review the system of kinship in the local society. The kinship system in Indonesia is divided into three kinds: namely, the patriarchal, the matriarchal and the bilateral. Upon the death of a person, the successor shall be determined by the aforementioned three systems of society. However, not all descendants can legally inherit a person's wealth.

Inheritor

The term inheritor used to indicate that the dead person had an amount of wealth which could be transferred to his successors or descendants.

In the patriarchal system, men have a rather more important status than women: the line of descent always follows men: for instance, in *Batak* society. Legally born children acquire their legal status from their father and their father's family. In this kinship system, the father acquires a title as the inheritor who owns the right to transfer their belongings upon their death to their descendants.

In the matriarchal system (for instance, the *Minangkabau*) the line of descent follows the women: children born in these families only have legal ties with their mother and the mother's family. Upon the death of every mother, daughters have the right to be successors. However, upon the death of fathers, those who have rights as successors in regard to certain sacred heirlooms are the brothers and sisters, as well as the nieces, of the mother.

In the parental society, children who are legally born always have legal ties from the line of descent from both their father and mother. For instance, in Java there are no differences between men and women. Thus, whether upon the death of a father or a mother, children acquire rights as successors.

Successor

The term successor is used to indicate persons entitled to wealth or an heirloom from the inheritor. In the *adat* law on succession, determining the successor is also based on the kinship system.

A pure patrilineal society, such as *Batak*, differentiates between the status of sons and daughters, influenced by the kinship system, where the line of descent is from men or fathers. Thus, in *Batak* society the successors are all men. Boys have the responsibility for continuing the clan. As for women, after marriage their rights and obligations are transferred to the responsibility of their husbands' family. Daughters cannot become successors. However, they can receive their parents' given wealth or heirlooms prior to their marriages.

In the matrilineal society of the *Minangkabau*, only daughters can become successors upon the death of their mother, by the influence of the kinship system, in which the line of descent is via women. The succession rights are granted in relation to all wealth, whether ordinary assets or heirlooms that are owned collectively. In recent practice, upon the death of every father, every son and daughter can acquire the right to inherit their father's assets from work, marriage or other ordinary wealth, while heirlooms are inherited by the brothers and sisters of the fathers or their descendants.

Parental society in Java is basically viewed as an ideal model of *adat* society. There is no differentiation between sons and daughters. Thus, upon the death of a parent, every child is a successor.

The transfer of wealth or inheritance (Wignyodipoero, 1983, p. 162).

The laws of succession enacted in Indonesia are compound and plural. They consist of various legal systems, which have grown and developed separately, and which have their own history. In general, the legal system in Indonesia until presently is made up of *adat* law, *Islamic* law, and western-civil law as composed in the Civil Law Code. Each system has different sense and significance towards the output of the succession itself. This means that there is as yet no uniformity in regard to the definitions and meanings of the law of succession in Indonesia.

The *adat* law on succession represents a distinctive and unique pattern of law that reflects the way of thinking and traditional spirit, based on a collective or communal culture. Prioritizing family, togetherness, mutual assistance, and being deliberative and consensus-oriented in dividing inheritance are cultural codes that tinge the system. The *adat* law on succession shows Indonesian's traditional way of thoughts arising from prevailing principles upon their communal society, it also derives from the concrete way of thinking they have. (Soepomo, 2007, p. 83).

In the *adat* law on succession, there are three succession systems, namely: an individual succession system, a collective succession system and the *mayorat* system (Soekanto, 2008, p. 260). In the individual succession system, the successors inherit separately from one another. The distinctive characteristic of this system lies in the allotted inheritance. With the private ownership of each successor, each successor takes charge of the inheritance for their free use in daily life, and is not influenced by other family members. However, unfortunately, on the other side, this may lead to conflicts over inheritance and can cause breaches between family members. The successors might ended up avariciously dominate the inheritance. This system is currently applied in Batak, Java and Sulawesi.

The collective succession system is a system in which the successors inherit collectively, without the possibility of dividing the inheritance. The main feature of this system is the undivided and whole transfer of the inheritance from the inheritor to the successors. Each successor has the right to acquire shares of the inheritance. The benefit of this system is clear when the inheritance is used to sustain the wealth of one family. Upon inheritance the *mayorat* system places rights, as a whole or in part, on a sole successor. The system is divided into two kinds: the *mayorat* system for men and the *mayorat* system for women.

As has been said the three kinship systems in *adat* society are patriarchal, matriarchal and parental. The formation of the *adat* law on succession cannot be separated from these three systems, and has a very strong connection with the characteristic of the society in concern. There are three forms of law on succession in Indonesia: the patriarchal in *Batak*, *Manado* and *Ambon*; the matriarchal in West Sumatera; and the bilateral in Java.

The patriarchal system prioritises men, placing them in a higher position, as the successor who will continue the name of the family, as the descendant, as the member of the *adat* society, and as having the most important role in decision-making within the family or the society. In this system, women have a rather low position: they do not have rights as successor, or as a descendant. Upon a legal marriage, women shall follow their husbands and leave their original society.

In contrast, women have a high position in the matriarchal system: they have the right to be a successor and a descendant.

In the parental system of kinship, the positions of men and women are equal as regards the matter of succession. Every man and woman has the right to become a successor.

A comparison of the status and position of men and women in *adat* inheritance law based on jurisprudence in Indonesia

Breakthroughs in *adat* law can occur as a result of the will of the society, particularly through the actions of the courts. This can be seen, for instance, in the change in the position of daughters in the *Batak Toba* society: currently they can be regarded as successors, but originally they could not. This is emphasised in the Decision of Indonesian Supreme Court No. 179 K/Sip/1961, dated 23 October 1961, which stated:

“... not only based on humanity and common justice, but also based on the equality of rights between men and women, the Indonesian Supreme Court hereby, in several decisions, taking demeanor and regarded as living law in every corner of Indonesia, that daughters and sons from an inheritor, are having rights upon wealth as of equal, and that every daughter shall be regarded as successor along with every son, as well as having the same shares.”

The spirit for enacting the pure *adat* law on succession consequently changed, due to the fact that there are incoherency between existing circumstances and the need of change in the rapid development of the civilization. Hence, on 1 November 1961, the aforementioned fundamental breakthrough was established. This is commonly known as “the New *Adat* Law on Succession”. It is clearly elaborated in the consideration of the Decision of the Supreme Court:

- a. Sons and daughters have an equal position in regard to their parents’ inheritance;
- b. They shall have the same shares;
- c. They are entitled to the same amount of shares, based on humanity and common justice;
- d. And also based on the awareness of the living law in every corner of Indonesia.

Subsequently, the new law of succession was born. Its core is that it gives rights to every daughter to become a successor, and gives them the same shares as are given to sons. In the enactment of common public jurisdiction, the new *adat* law was ground-breaking and has been used to settle disputes in regard to the allotment of inheritance from 1961 up until now. The judges in the public jurisdiction have enacted these provisions as a conception of *nusantara*, without prejudice to the kinship system of both parties, regardless of whether they are from Batak, Java, Minang, or elsewhere.

The new provisions were made as neutral as possible, to be applied in all *adat* surroundings. They do not question one’s religion or the origin of the dispute, whether it happens in a village or in urban areas. The jurisprudence sets the *adat* law free from territorial boundaries, the kinship system, and religion. The values usually directing the jurisprudence had being reformed as several common principal (Zamzami, 2013, p. 194), namely:

- a. The principal of rights and position;
- b. The principal of properness and justice;
- c. The principal of humanity;
- d. The principal of consciousness of the living law.

The settlement of succession disputes in *adat* law is based on four key factors (Tamakiran, 1987, p. 73):

- a. The prevailing legal system in the surroundings;

- b. Reality of the law, considering changes in the law, the impacts of the law upon the society, and changes in assessment;
- c. The sense of justice on the part of judges, and their knowledge as members of the society;
- d. Judges have to investigate thoroughly prior decisions, whether at the same judicial level or not: for example, investigations conducted by the judges in the High or Supreme Court.

It is to be hoped that a standard procedure or provisions concerning inheritance divisions and the equality of positions both for sons and daughters can be produced for dispute settlement under the *adat* law on succession.

Before the emergence of the new provisions, the Interim People's Representatives Body made decision Number II, dated 03 December 1960, which was followed by the National Law Construction League, currently called BPHN, in a decision made on 28 May 1962.

In regard to the law of kinship particularly, it was decided that the main principles in the Indonesian Law of Kinship are:

- a. In Indonesia as a whole, the most prevailing kinship is the parental system which governs under Indonesian Acts, this principle prevails since it can adjust with other kinship systems within the *adat* law;
- b. The law of succession for the whole population is to be governed in a bilateral individual manner, with the possibility of a variation for Muslims if needed;
- c. The priority and exchanging system in succession law is the same for the whole of Indonesia, in principle, with small changes for the Islamic law on succession;
- d. *Adat* law and jurisprudence specifically elaborating the law of kinship admitted as a complementary sources in Indonesian law.

In regard to the development of the *adat* law on succession, there is an opinion which states that currently there is an equal position between men and women since Indonesian Act Number 1 of Year 1974 concerning Marriage come to an existence, as a unification in the regime of law of marriages. This Act is also governing law principles on family, and wealth of the marriages in parental-individual demeanor. There is a strong connection between the equality of gender and the law of succession, mainly in practice. By this development, it is shown that there is coherency between the *adat* law on succession, as un-codified law developed by jurisprudence, with the provisions in the Marriage Act aforementioned. Efforts to make real the equality of rights and the equal position of men and women in the regime of law of succession have been made by the courts (Purwoto Gandasubrata, 1998, p. 584). The aforementioned decision of the Supreme Court played a huge role in this regard, as did some of the decisions concerning succession disputes (Zamzami, 2013, p. 329–330):

- a. Decision Number 284 K/ Sip/ 1975 dated 2 November 1976 stated that based on the development of *adat* law, daughters in *Simalungan* shall be deemed as legal successors of their parents;
- b. Decision Number 1589/Sip/1974 dated 9 February 1978 stated that based on the development of *adat* law towards parental kinship in correlation with the Supreme Court Jurisprudence towards the daughters in *Tapanuli*, it is justified if in *Lombok* daughters are regarded as successors;
- c. Decision Number 2662 K/Pdt/1984 dated 30 November 1985 stated that the *adat* law on succession in *Sasak* has undergone some rapid changes and developments. The traditional *adat* law is worn out and outdated. The original position of daughters, who were excluded from being successors, has changed: their rights to inherit their parents' wealth have emerged;

- d. Decision Number 1141 K/ Pdt/ 1985 dated 30 August 1986 stated that according to the Indonesian Supreme Court, a widower shall have the right to succeed her late husband. It is unfair, just because she did not bear any child, for her to have nothing in return, after she invested her time to cultivate land with her husband;
- e. Decision Number 375 K/Pdt/1988 dated 31 January 1990 stated that the right over cultivated land transfers to a wife and an only child upon the death of a husband, after the enactment of the Basic Regulations on Agrarian Principles. However, if the child is deceased before entering into marriage, the right shall fall upon the mother as his successor;
- f. Decision Number 3792 K/Pdt/1989 dated 30 March 1991 stated that according to the *adat* law on succession in Central *Sulawesi*, sons or daughters are both successors of their parents and shall have equal shares of the inheritance;
- g. Decision Number 298 K/ Sip/1958 dated 29 October 1958 stated that in a case where the deceased inheritor left a widow without any children, the widow shall inherit all of his wealth;
- h. Decision Number 387 K/Sip/1958 dated 11 February 1959 stated that the allotment manner *sepikul segendong* (2:1) in regard to inheritance is no longer in use in Central Java: a widow shall have a right to half of the inheritance;
- i. Decision Number 140 K/Sip/1961 dated 22 June 1961 stated that if the successors consist of a widow with five children, each shall have an equal right over the inheritance;
- j. Decision Number 179 K/Sip/1961 dated 1 November 1961 stated that daughters and sons shall have the same shares in the wealth of the inheritor;
- k. Decision Number 100 K/Sip/1967 dated 14 June 1968 stated that noting the growth of the society towards the equality, in *Kaban Jahe* a widow shall have the right to half of the marital property as a whole, and the rest shall be equally shared between the widow and her two children: each shall have one-third of the inheritance;
- l. Decision Number 415 K/Sip/1970 dated 16 June 1971 stated that the *adat* law in *Tapanuli* is currently developing towards equally given rights towards daughters and sons.
- m. Decision Number 320/K/Sip/1958 dated 17 January 1959 stated that in *Tapanuli* wives and children shall inherit husband's wealth upon his death, though before this decision, patriarchy system in *Tapanuli* prohibits widow and daughters to acquire inheritance at all.

CONCLUSION

Court rulings have reflected changes in the status of men and women in terms of inheritance in Indonesia, so that both parties have the same status as heirs. This is in accordance with the principles of national inheritance law, that inheritance law is based on parental/bilateral principles, whereby a fair and balanced distribution between men and women as heirs is established

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COMPARISON STUDY BETWEEN INDONESIA AND UNITED STATES LAW IN REGARD TO THE IMPLEMENTATION OF STRICT LIABILITY PRINCIPLES FOR PRODUCT LIABILITY WITHIN INDONESIAN CONSUMER PROTECTION LAW.

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ABSTRACT

In Indonesia, consumer protection law is based on principles that apply both for consumers as well as producers. Our study finds that there are big opportunities for a change of liability based on fault principle into principle of strict liability, but prominent obstacles exist. Furthermore, this finding suggests that even though Indonesian has started to adopt strict liability principles within its consumer protection law, it has a slight interpretation bias within its actual practice, especially in the law enforcement system. This can be inferred from the fact that “reversal burden of proof” is still used in many law practices. This is different if we compare it to what exists in the United States. The United States fully uses strict liability principles within its consumer protection law system. As a matter of fact, the United States uses strict liability with the extension of intentional torts, which give more favour to consumers.

Keywords: Consumer Protection Act (UUPK), Product Liability, Strict Liability, Consumer Protection Law, Law Comparison Indonesian and United States of America

INTRODUCTION

The advancement of industry and technology has led to a contrast between the ways of life of traditional and modern societies (Zaid, 1979-1980). In traditional society, commodities are produced through a much simpler process. The relationship between consumers and producers are much simpler when consumers can directly interact with the producers. Meanwhile, in modern society, goods go through a process of mass production and mass consumption.

There is a much more complex relationship between consumers and producers since the interactions between consumers and producers are often conducted indirectly. Often the distance between the two are states apart. This phenomenon shows that consumer protection law is deeply connected with trade globalization and the economic activity of a state. Because of this, consumer protection has to be given more attention, mostly because foreign investment is a central element of Indonesia’s economic development as a part of global economy. If better attention is not given to consumer protection, international trade competition may have a negative impact on the consumers (Syawali and Imaniyati, 2000, p.2)

Article 33 and 34 of the 1945 Constitution is the juridical foundation of Indonesia’s economic development. It considers economic trade development as a prioritized sector of national development, with the goal of hastening an economic recovery that is based on democratic economy. In the most common form, this democratic economy comes in promoting the interest of consumers, (Shofie, 2003, p2) which requires the formulation of laws that can be widely implemented and are capable of integrative and comprehensive consumer protection.

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Law no. 8 of 1999 on Consumer Protection (hereinafter referred to as the UUPK) is a legal foundation intended to make the consumers more independent and more aware of their own rights and obligations.

It has been mentioned before that technology and industry has developed rapidly, leading to a more complex economic system that reconstructs the legal relationship between consumers and producers. This change of system actually started with a paradigmatic shift in the consumers-producers interaction, marked by the dismissal of caveat emptor principle in favor of caveat venditor principle. The former principle signifies an awareness of consumer to protect themselves, while the latter assigns producers the responsibility to guarantee the safety of their own consumers.

Such shift requires a legal instrument with the intention to guarantee consumers' rights—specifically rights to safety, health, and compensation (Reich, 1992, p25) since quality control and trade regulations are inadequate in protecting consumers from injury, property damage, or pure economic loss. This legal instrument is the product liability law, which can guarantee that the consumers of a defective product receive compensation for their loss.

As a term, product liability is still considerably new; currently it is universally applied on liability of company and sellers indirectly involved with a product which inflicts damages or injuries to consumers, properties owned by the consumers, or any other affected third parties (Davis, 1987, p12)

Black's Law Dictionary gives three formulations of product liability:

“(1) A manufacture's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product. Products Liability can be based on a theory of negligence, “strict liability,” or breach of warranty. (2) The legal theory by which liability is imposed on the manufacturer or seller of a defective product. (3) “Refers to the legal liability of manufactures and sellers to compensate buyers, users and even bystanders, for damages or injuries suffered because of defects in goods purchased.” (Black, 1983, p840)

Any claims for compensation should be based on three legal concepts: negligence, breach of warranty, and strict product liability. Among the three, strict product liability is the most recent theory. The change in system of liability from the concept of negligence to the concept of risk, according to Rudiger Lummert, is caused by the developing industrialization that has yielded bigger risks and more complex cause-effect links. (Harjasoemantri, 2002, p386)

The main purpose of product liability law that implements strict product liability is to ensure that the tort liability of a defective product is weighed upon parties with the liability to compensate for the loss. The implementation of this principle has affected the number of filed claims as well as the amount of compensation ruled by the court in several states such as the U.S. which implements strict liability product. (Polinsky and Shavell, 2012)

Traditional theories on consumer protection, such as negligence, breach or express, and implied warranty are still applicable, though they are more difficult for the consumers to employ compared to strict liability. (Moller and Indig, 1996, p882) As an example, a negligence-based lawsuit requires the victims (consumers) to prove that the sellers or producers fail at making the best efforts at producing and marketing their products. This is really difficult for the consumers to do. Similarly, for consumers utilizing the breach of warranty theory, they are tasked with referring to a part in the contract that specifies a certain compensatory mechanism. In contrast, strict product liability reduces or may even remove such burden of proof from the consumers.

In the Indonesian legal system, product liability is actually regulated by the Indonesian Civil Code. However, under the Indonesian Civil Code, if a consumer suffers from loss and wishes to

file a claim of compensation in relation to a business actor (trader, seller, distributor, or agent), it is difficult for the consumers to receive compensation since the consumer has the burden of proving the negligence on the part of the business actor. If they cannot, the consumer's claim will be rejected. However, if a state implements strict liability for product liability in its consumer protection regulations, consumers suffering from loss because a defective product should be able to demand compensation without having to prove negligence on the part of the business actors.

THEORY

The Implementation of Liability Principle in Indonesia's Consumer Protection Law

Economic development in general has led to the availability of many goods or services to consume. Globalization and free trade has also allowed more room for transaction of goods across national borders. Such condition calls for consumer empowerment through the formulation of a widely implementable law capable of integrative and comprehensive protection of consumer's interest.

In regard to consumer protection, legal protection for consumers is achieved through respecting consumers' rights; realization of business actors' obligations; regulations for business owners that prohibit violations, misconducts, and the inclusion of certain standard clauses; business owners' liability to compensation; and dispute resolution for consumer protection.

The United Nations Resolution no. 39/248 of 1985 on Consumer Protection (The Guidelines for Consumer Protection) also formulates several interests of consumers that need protection:

1. Protection from hazards/dangers to health and safety.
2. Promotion and protection of socio-economic interests of the consumers.
3. Availability of information to assist consumers in making the best choice based on personal interest.
4. Consumer education
5. Effective compensatory mechanism.
6. Freedom to form a consumer body or other organizations relevant for voicing opinion in the process of making the best decision based on personal interest.

The following principles of consumers' position would better demonstrate their vulnerability and weakness. Principles of consumers' position in legal relation with business actors are derived from famous doctrines in the history of consumer protection, which are: (Shidarta, 2000, p61-64)

1. Let the Buyer Beware;
2. The Due Care Theory;
3. The Privity of Contract;
4. Non-Condition Contract

Legal protection is inseparable from the liability of business owners to fulfil the demands of consumers. Generally, the liability principles in law are (Gunawan, 2000, p45)

- a. Liability based on fault
According to this principle, business owners that conduct fault in conducting business are liable to compensate for any damages or loss caused by the fault.
- b. Presumption of Liability
According to this principle, business owners are always liable for every loss caused by their business activities.
- c. Presumption of Non-Liability

In contrast with the second principle, presumption of non-liability is only applicable to a very limited context of consumers' transaction; this limitation is often justified by common sense

d. **Strict Liability**

This principle is often considered to be identical with absolute liability principle. Absolute liability is a principle of liability without fault and without exception.

e. **Limitation of Liability**

This principle is employed by business actors through the inclusion of exonerated standard clauses in the contracts they formulate.

The concept of liability is an essential element of the legal obligation concept. Legal obligation is derived from a transcendent norm which serves as the foundation of every regulation. The norm assigns obligation to obey the legal regulations and to be liable in following those regulations (Huijbers, 1995, p281)

The Regulation of Liability Principle in the Consumer Protection Law of the United States of America

Consumer protection law began with the consumer protection movement in the U.S. during the beginning of the 19th century. The U.S. government then started to acknowledge the direness of consumer protection during the reign of Kennedy, who, in his presidential speech before the congress, formulated four basic rights of consumers: (Troelstrup, 1974, p23)

1. Right to security and safety
2. Right to information
3. Right to select and
4. Right to be heard

President Lyndon B. Johnson then further reinforced the four consumer rights by adding product warranty and product liability principles, which are implemented in the government policy regarding lending charges and packaging practices. The consumer protection law continued to develop onto the presidential reign of Richard M. Nixon who introduced the concept of consumer protection covering these following rights (Siahaan, 2005, p94):

1. The right to make intelligent choice among products and services
2. The right to accurate information
3. The right to expect that sellers have considered the health and safety of the buyer
4. The right to make intelligent choice among products and services
5. The right to register his dissatisfaction and have his complaint heard and weighed.

There is no uniformity in the consumer protection law of the U.S., since each state is given the authority to regulate its own law. In the U.S., consumer protection law can be a part of state law that is formulated based on the Uniform Commercial Code; or it can be part of the federal law which includes the regulations formulated by the Federal Trade Commission; or part of the common law (which covers torts and contract), in which the U.S. Constitution does not specifically regulate consumer rights or consumer protection. (deLisle & Trujillo, 2001, p1)

Generally, the U.S.' law defines consumer as "buyer" of goods/services who use it privately or for family or household needs, but this definition is expanded with the introduction of warranty law to cover remote purchasers and remote consumers—parties indirectly involved with the

purchase from business actors and who are not bound by the privity of contract. According to the UCC, there are three categories of consumers granted with consumer protection, apart from the regular “buyers” (UCC, 2008):

- a. Family member, occupants and guests in the house of the buyer.
- b. Natural person who uses, consumes, or is affected by the consumption of the product; or
- c. Every individual who suffers from loss due to the breach of warranty by the sellers.

From the above explanation, it is clear that the purpose of implementing consumer protection law in the U.S. is to achieve a fair and equal social welfare, in which the general public are recognized as consumers. The consumer protection law in the U.S. develops based on the respecting of human rights and the efforts to avoid unhealthy trading competition, thus ensuring economic stability.

The term of product liability was only introduced around 60 years ago in the U.S.’ field of insurance, to respond to the booming food productions. Both manufacturers and distributors insured their goods for risks of defect that could inflict loss to consumers.

In general, a product is defined as tangible goods, either movable or immovable. However, in the case of product liability, products can also come in intangible forms, like electricity, natural products, writings, or fixtures of real estate. Furthermore, the definition of product also recognizes not only goods as a whole, but also its component parts.

According to Hursh, product liability is “the liability of manufacturer, processor or non-manufacturing seller for injury to the person or property of a buyer third party, caused by product which has been sold.” Perkins Coie also states that product liability is “the liability of the manufacturer or others in the chain of distribution of a product to a person injured by the use of product.”

Meanwhile, Article 3 of the Convention on the Law Applicable to Products Liability (The Hague Convention) states that:

“This convention shall apply to the liability of the following persons:

1. Manufacturers of a finished product or of a component part
2. Producers of a natural product
3. Suppliers of a product
4. Other persons, including repairers, and warehousemen, in the commercial chain of preparation or distribution of a product

It shall also apply to the liability of the agents or employees of the persons specified above.”

Therefore, product liability means a legal liability of a person/body that produces and manufactures a product, legal liability of a person/body that takes part in the processing and assembling of a product, or legal liability of a person/body that sells or distributes the product.

Even by reviewing the above conventions of product liability, the implementation is expanded to cover any person/body involved in the commercial processes of production and circulation; this include businessmen, repair shops, and even storages. It even applies to the agents and workers of the aforementioned commercial processes. This liability is concerned with defective product that causes damages, material/property loss, or injuries to consumers.

METHODS

This research is a Normative Legal Research and Analytical Descriptive nature. This study will depict on how opportunities will exist if the substance of Indonesian consumer protection law system changed from fault based liability into strict liability on its application for the product liability. Secondly, the study also will go further on the comparison between the application of product liability within practical terms as well as the application of consumer protection law system between Indonesia and United States.

DISCUSSION

The Comparison of Implementation of Strict Liability Principle on Product Liability between the Consumer Protection Systems in Indonesia and in the United States

The general consumer protection principle is internationally regulated by the UN in its United Nations Guidelines for Consumer Protection of 2003—which applies for goods and services. Its contents have been agreed upon to be implemented in the legal system of all UN's state members, including Indonesia, which cover:

1. Physical safety
2. Promotion and protection of consumers' economic interests;
3. Standards for the safety and quality of consumer goods and services
4. Measures enabling consumers to obtain redress
5. Education and information programs
6. Promotion of sustainable consumption
7. Measures relating to specific areas

In Indonesia, the implementation of the above principles are partly contained in the UUPK, specifically in Article 4 on consumer rights, and Article 7 on the obligations of business actors. Some principles yet to be accommodated by the UUPK are to be included in the bill for the UUPK Amendment; these cover:

- a. The availability of a more conceptual elaboration and more specific regulations for services; since the UUPK refers to it in unity with goods as “goods and services.”
- b. The inclusion of strict liability principle to replace the previously implemented presumed liability.
- c. The amendment of some regulations on standard clauses.
- d. The availability of more specific regulations on Consumer Dispute Resolution Body (BPSK), along with an effective implementation that can promote the effectiveness of the body.
- e. The reform in the structural authority of National Consumer Protection Body (BPKN), a currently independent body, later intended to be under the government's supervision.

Indonesia's Consumer Protection Law has specifically regulated the liability of business actors. Article 19 of UUPK regulates liability as:

“The liability to compensate for damage and loss inflicted to consumers due to the consumption of goods/services produced or sold. The compensation comes in form of a refund, or a replacement of new goods/services of the same type or exchange value, or healthcare and/or assistance as instructed by the law”

The liability of business owners can be categorized as:

1. Liability to compensate for damage;
2. Liability to compensate for pollution;
3. Liability to compensate for consumers' loss.

This means that the liability of business owners cover every form of loss suffered by the consumers. The proper response to the liability is to provide compensation as regulated in Article 19 chapter 2 of the UUPK.

A consumer can make a claim for compensation based on three theories of liability; which are liability based on negligence, liability based on breach of warranty, and strict product liability. Among the three, strict liability is the most recent theory. Law on product liability is derived from torts, but is imbued with strict liability, regardless of whether or not there is an element of intention. In such condition, it is clear how the caveat emptor (consumers' liability) principle is dismissed in favor of the caveat venditor (producers' liability) principle.

According to the theory of strict liability, product defect is considered to be caused by the negligence of business actors. This implies that the element of negligence no longer requires proving before the court. (Oughton and Lowry, 1997, p153) Article 22 and 28 of the UUPK explicitly mention about the implementation of reversed burden of proof, where business actors as defendants are assigned the burden of proof to prove their innocence before the court. This also implies that the consumer protection system in Indonesia still necessitates the proving of negligence in the court. Because of that, it can be said that the current UUPK applies the strict liability principle, since it basically does not require the proving of negligence. According to the development of legal theory, it can be said that the UUPK still adopts the principle of liability based on fault with reversed burden of proof.

In Black's Law Dictionary, product liability is defined as "a manufacturer's or seller's tort liability for damage or injuries suffered by a buyer, user, or bystander as a result of defective product."

Product liability can also be understood as:

"The liability of any or all manufacturers of any product for damage caused by the product. Product containing defect that cause harm to consumer of the product, are the subjects of product liability suit"

Some other literature considers the definitions of strict liability and product liability to be similar. Some examples are Restatement of Torts and EC Directive on Product Liability. Both employ the term strict product liability, though it is clear that there is still a slight difference between the two terms. While it is clear that they both belong to the area of torts liability, product liability is limited as liability on "goods," while strict liability covers a broader scope of product as both goods and services. Thus, it can be said that product liability is a part of strict liability.

As mentioned above, superficial observation makes it clear that the provisions of product liability have actually been regulated by the Indonesian Civil Code. However, in using the Indonesian Civil Code, consumers suffering from loss who want to sue the producers (including seller, grocery, distributor, and agent) will face obstacles that make it difficult for them to receive compensation.

Among the obstacles, the most notable one is that the consumer will be assigned the burden of proof to prove the fault/negligence of the producers. Otherwise, the claim of the consumers will be rejected. Because of the steep difficulty in such burden of proof, by the 1960es the U.S. implemented the strict liability principle which has continued to be relevant for around 30 years

now—with its current development adopting the intentional torts principle to better benefit the consumers. With the implementation of strict liability principle, every consumer who suffers from loss due to a defective product can file a claim for compensation without having to prove the negligence of the producers.

The reasons why the strict liability principle is implementable in laws on product liability are:

- a. Among consumers/victims and producers, the party who produces and circulates defective products in the market should bear the greater risks in business.
- b. By circulating products in the market, the producers thus guarantee that those products are safe for consumption. Thus, if the products are found to be defective, the producers should be liable to compensate for any loss caused by the products.
- c. Actually, without even implementing strict liability principle, negligent producers can be reached via a streak of lawsuits—of consumer to retailer, retailer to grocery, grocery to distributor, distributor to agent, and agent to producer. The implementation of strict liability serves an additional purpose of shortening such long-winding legal process.

Whatever the reason, business actors are liable if their products are discovered to be hazardous or defective. After all, accurate and complete information is among the rights of the consumers; and the failure of the producers to fulfil this right means that they should be held accountable for it.

The purposes of the implementation of strict liability vary among the initial decisions on its formation, but primarily it is to guarantee that consumers will receive compensations from the business owners for producing defective or hazardous products; and that the compensation is the liability of the business actors instead of the consumers for being powerless and vulnerable without protection. (Davis, 1987, p15)

As mentioned before, the U.S.' consumer protection law is regulated by the Federal United Commercial Code (UCC) and the Magnuson Moss Warranty Act. However, legal liability belongs in the scope of torts regulated by the Restatement (Third) of Torts: Product Liability, formulated by the American Law Institute.

Another interesting aspect in the development of tort law in the U.S. is that despite the departure of most universal legal system from the obsolete element of negligence in the case of product defect, the Restatement (Third) of Torts returns the once abandoned concept of negligence into the tort law (Ausness, 2006, p3) The legal development of the U.S. acknowledged that the concept of negligence cannot be fully abandoned, and saw its return in the Restatement (Third) of Torts as: "A product defective in design when foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warning by the seller or other distributor." The traditional theory of product defect is then slowly abandoned in favor of a theory that better emphasizes on legal liability which does not require any proof of defect like misrepresentation, civil conspiracy, malfunction doctrine and negligent marketing.

In the practice of misrepresentation, legal liability arises when a false statement is made by the business actors to the consumers. Because of that, this theory returns the element of negligence to the liability system while putting aside the element of product defect.

In malfunction theory, legal liability arises when there is a malfunction of a product regardless of whether or not there is actually a defect in the product. In this case, the consumers only need to prove the malfunction of the product without having to prove its defect. In quite similar fashion, negligent marketing emphasizes on the marketing practices, and not the element of product defect

These four new theories in the U.S.' tort law presents a new shift of paradigm in its new system of intentional torts. (Simmons, 2006, p1097) Intent is defined as "an intent to produce a consequence means either the purpose to produce that consequence or the knowledge that the consequence is substantially certain to result." The intentional torts return the subjective element in legal liability, no longer completely relying on objective elements such as product defect.

CONCLUSION

1. Articles 22 and 28 of the UUPK explicitly refer to the implementation of a reversed burden of proof, where business actors as defendants must prove their innocence before the court. This stipulation implies that the consumer protection system in Indonesia still requires that the element of negligence be proved in the court. The UUPK is not implemented the strict liability principle since doing so would mean that the element of negligence would no longer need proving. Based on legal theories' development, the UUPK is still adopting the concept of liability based on the fault principle with the reversed burden of proof.
2. The U.S. implements strict liability with an expansion to intentional torts which is really beneficial for consumers. The intentional torts return the subjective elements into the legal system, which means that it no longer completely relies on objective elements such as product defect.

SUGGESTIONS

1. With the implementation of strict liability, every consumer who suffers from loss due to a defective or hazardous product may file a claim for compensation without having to prove the negligence of the business actors.
2. The inclusion of strict liability principle in the Bill of the UUPK Amendment in order to supplant the liability based on fault principle while still preserving the reversed burden of proof.

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CONSUMER DISPUTE SETTLEMENT THROUGH CONSUMER DISPUTE SETTLEMENT BODIES (BPSK) IN RELATION TO TRADE TRANSACTIONS IN INDONESIADR. SUSILOWATI SUPARTO DAJAN¹ PROF. DR. EFA LAELA FAKHRIAH S,H., M.H²**ABSTRACT**

Consumer protection law is closely related to the trade and industrial globalisation of a country's economic activities. In this context, consumer protection needs to be given more attention seeing that foreign investment has become a part of Indonesian economic development, which relates to the world's economic situation. With the Indonesian business situation growing by leaps and bounds, there are many new businessmen active in various market segments. Foreign investors have started to notice Indonesia. Business segments which before the reformation era were undeveloped have now become a new gold mine. In consequence, problems have started to arise in the form of consumer disputes.

Generally, consumer disputes can be settled through court adjudication or alternative settlements based on the parties' own accord, including settlement through Consumer Dispute Settlement Board (Badan Penyelesaian Sengketa Konsumen, BPSK). In the last option, the parties have to choose one of the settlement methods applied by BPSK: conciliation, mediation, and arbitration. If conciliation is chosen and it is still not possible to resolve the dispute, the dispute cannot be settled in another way (through mediation or arbitration). If conciliation or mediation are chosen, settlements are fully in the parties' hands with regard to the form and amount of compensation paid to the party who has suffered the loss. BPSK only acts as a facilitator and is obligated to give advice and reassert the rules contained in the Consumer Protection Act. If the parties agree to settle the dispute through arbitration under BPSK the form and amount of settlement compensation is fully handed by BPSK.

In order to be final and binding, BPSK judgements need to request a recognition (fiat execution) by local courts. Furthermore, the judgement itself can be appealed before the district court. For the sake of legal certainty and to ensure the strong enforcement of settlements previously achieved by parties through BPSK, there needs to be a regulation concerning the implementation of BPSK judgements, as well as implementation of the settlements achieved. In this way, BPSK would no longer need to ask for court recognition or even be subject to appeal before the district court. BPSK would have more influence as a consumer dispute settlement body, with legally binding power. This would create greater legal certainty.

Keywords: Dispute settlement, consumer law.

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INTRODUCTION

Development and growth of the national economy, especially industrialisation, produces various kinds of goods and services: in other words products. These products can be acquired, owned, used, and consumed by the public (consumer) through trade transactions such as trading, tenancy, purchase by instalment, etc. Trade transactions are legal relations between businesses and consumers. However, in consumer protection law, the relation between businesses and consumers are not only based on commercial legal relations but can occur through non-commercial legal relations, such as a consumer receiving a product from a business as a donation or gift.

In a society which is heading towards the modern era, the trade distribution system is very complex: the circulation of domestic goods not only involves domestic producers (businesses) but also overseas producers. These conditions create a challenge for both consumers and producers, especially for consumers who will require more legal protections from incessant goods production by producers. While for producers, consumers are a key part of the object or business goal of their products, to produce maximum profits. Different goals and interests on the part of consumers and businesses have encouraged the emergence of consumer disputes. Consumer disputes according to the Decree of the Minister of Industry and Trade of Republic Indonesia Republik Indonesia No. :350/MPP/Kep/12/2001 on Duties and Authority of Consumer Dispute Settlement Board (BPSK) (Kepmenperindag No. 355/12/2001) are: "disputes between businesses and consumers who demand compensation for pollution damage or suffering from consuming goods and or using the services." Shidarta defines consumer disputes as disputes concerning the violation of the rights of consumers. So the parties in dispute are the businesses and consumers: consumers are users/buyers while the businesses are producers/sellers. Issues of consumer disputes are generally based on the rights of the consumers not being fulfilled as stated in the agreement between the businesses and the consumers, as well as the existence of an offence under the Law of Consumer Protection (UU Perlindungan Konsumen or UUPK) either intentionally or unintentionally by businesses.

Settlement of consumer disputes under Law No. 8 of 1999 regarding Consumer Protection (UUPK) can be through the courts or through a nonlitigation or dispute resolution process outside the court. The UUPK provides an alternative way for consumers to resolve disputes outside of the courts, through conciliation, mediation and arbitration. According to Gary Goodpaster, as quoted by Susanti Nugroho, not all disputes can be effectively resolved through the mediation process (Nugroho, 2011, p.13).

The Consumer Dispute Settlement Board (BPSK) is an institution formed by the government that is responsible for handling and resolving consumer disputes between businesses and consumers. However, this institution is not a judicial body: it is not an institution under the judicial authority. BPSK only handles civil cases. It generally decides the amount of indemnity suffered by the consumer for any business errors / omissions in small amounts. In practice there is no limit on the value of a lawsuit, so BPSK handles consumer lawsuits ranging from small claims to the largest value lawsuits. Based on the UUPK, a decision of BPSK is final and binding. In these terms, final refers to the dispute resolution that has been completed, and binding means that the parties are obliged to carry out what the decision.

In practice there are several cases in which enforcement of the decision of BPSK cannot be executed / implemented by the parties: because one of the parties is not satisfied with the verdict, because the court did not give a determination of execution (fiat execution), or it is contrary to the principles of the Law of Consumer Protection. This raises several problems, such as:

1. How is a consumer dispute resolution implemented through the Consumer Dispute Settlement Board?
2. What are the constraints that arise in the execution of a decision of BPSK?

THEORY

The issuance of Law No. 8 of 1999 on Consumer Protection (hereafter referred to as the UUPK) is the Indonesian Government's effort to protect the interests of consumers and to encourage producers to enter into competition in the provision of good-quality products. Under the UUPK a consumer is "every user of goods and / or services that are available in a society, either for themselves, their families, other people and other living creatures and the goods and/or services are not for sale again." Under the UUPK, a business "is every individual or business entity, whether a legal entity or not a legal entity that is established and domiciled or conducting business in the territory of Indonesia, either individually or jointly by agreement for business activities in various fields of the economy". Under the UUPK a product can take the form of goods and services. From the definition of the consumer, we can conclude that the consumers that are regulated in the UUPK are the final consumers, while businesses are producers that produce the products.

The UUPK regulates the rights and obligations of consumers. Under the UUPK consumers are entitled to amenities, security and safety in the consumption of goods and services, the right to truthful, clear and honest information about the condition of the goods and services, the right to advocacy, protection and attempts to resolve consumer disputes appropriately, the right to consumer development and education as well as to receive compensation, indemnity or replacement, if the received goods or services are not in accordance with the agreement or not as they should be. The obligations of the consumer are to read and follow the instructions or information and procedures for the utilisation of the goods and services, for security and safety, as well as to act with good faith in making purchases of goods and services.

Broadly speaking, consumer rights are divided into three basic principles, that is: 1. rights that are intended to prevent consumers from disadvantage, whether personal or involving the loss of wealth; 2. they have the right to obtain goods and services at reasonable prices, and the right to appropriate settlement of disputes (Muru and Yodo, 2000, p.47). These three basic principles of consumer rights are absolutely essential and are the foundation for protecting consumers.

The rights and obligations of businesses are regulated in UUPK Article 6-7. The rights of businesses are to receive payment according to the conditions and exchange rate of traded goods and services, to be paid a reasonable price. They have the right to obtain legal protection from customer actions that are not in good faith and the right to rehabilitation of their reputation if it is proven that consumer loss is not caused by the product producers concerned. Meanwhile, the obligations of businesses include businesses being required to act in good faith in their activities, from when the product is designed until the goods are in the hands of consumers. They are also obliged to give the correct, clear and honest information about the condition and guarantee of the products, compensation, indemnity or other compensation agreed by the consumer if the goods and/or services received or used do not accord with the agreement. Businesses are prohibited from producing goods and services, as well as to trade in goods and services, that are not in accordance with the standards required by legislation, or that do not comply with the label or violate the ethics and/or legal provisions on advertising and others. Basically, this prohibition focuses on the products of businesses. It is designed to ensure that consumers are not disadvantaged in terms of the quality of goods.

Janus Simbolok has stated that consumer disputes can be based on two things (Sidabolok, 2010, p.143): 1. businesses do not implement their legal obligations or abide by the restrictions that are imposed by the law (disputes like this are referred to as a dispute that come from the law); 2. businesses and consumers do not abide by their obligations as stated in the contract they have made (this dispute is referred to as a dispute that is sourced from the contract).

According to Article 45 paragraph (1) in conjunction with Article 47-49 of the UUPK the resolution of consumer disputes can be done in two ways: through the institution in charge of resolving disputes between consumers and businesses, or through the courts, within the scope of the general courts. The institution in charge of settling disputes between consumers and businesses under the UUPK is BPSK. But not close the possibility of the court that are in the scope of the general court can be a resolution of dispute between consumers and businesses. This means that the settlement of consumer disputes can be resolved in litigation or through a non-litigation process.

BPSK is a non-structural institution that is located in districts or municipalities. Until now there are 64 BPSK that exists and located in every province. The duties and functions of BPSK are to settle consumer disputes outside the court. BPSK's presence is expected to simplify, speed up and give a guarantee of legal certainty for consumers in regard to retaining their rights of businesses action or conduct that are not good BPSK is also expected to provide access to information and guarantee equal legal protection for consumers and businesses. BPSK's role in the implementation of consumer protection in the first place for the consumers who suffered losses or sick. BPSK's form of protection is to resolve disputes between consumers and businesses in a proper and fair way, as well as to remove standard clauses in agreement between consumers and businesses that harm consumers.

Judging from its duties and functions, the BPSK has judicial authority when settling disputes, and executive authority when conducting monitoring on the inclusion of standard clauses are made by businesses.

The basic principles of dispute resolution conducted by BPSK are (*Compilation of Consumer Protection Rules*):

1. Consumer dispute resolution through BPSK should be based on the voluntary choice of the parties. This means that if the parties have agreed to choose BPSK, the parties at the same time must choose the process of resolution, whether by means of conciliation, mediation or arbitration.
2. If during one of the selected ways of resolution, for example by conciliation, the dispute cannot be resolved, mediation or arbitration cannot be proposed for the settlement of the dispute. This means the settlement of dispute by BPSK is not tiered (there is no hierarchy).
3. If the parties have chosen the settlement of the disputes by means of conciliation or mediation, then the settlement of the dispute is entirely in the hands of the parties. This means the determination of compensation, the amount and the follow-up on other decisions is based on the agreement of the parties. BPSK is only a facilitator that is required to provide feedback, suggestions and to explain the content of the UUPK.
4. If the parties agreed to resolve the dispute by arbitration, the dispute settlement is entirely under authority of BPSK, which makes the decision.
5. Basically the settlement of disputes in BPSK is implemented without help from lawyers. This is because the focus from process of a settlement disputes is based on

deliberation and fellowship principle, because the decision that expected from BPSK is a win-win solution.

6. The settlement of disputes under BPSK is free of charge, both for consumers and on businesses. It is relatively quick: at the latest 21 days after the process starts.
7. The consumers who can make a complaint about a business are the end consumers. This includes foreigners who are located in Indonesia.
8. Businesses who may be sued by consumers either individuals or an entity, a legal entity or otherwise, including BUMN and BUMD, but not government institutions.
9. A decision of BPSK is final and binding.

The UUPK ideally seeks the resolution of consumer disputes through BPSK. However, under the UUPK it is possible to bring consumer disputes to court.

Consumer dispute resolution process under BPSK:

The disputes settlement stages under BPSK areas follows:

Filing a lawsuit

A consumer submits a written application to the secretariat of BPSK, and the secretariat will register the application in a special form and give a date and registration number. If the application does not fulfil the requirements, the BPSK chairman will reject the request, and if it fulfils the requirements, the application will be followed up by calling the business and issuing them with a written summons and copies of the complaint from the consumer. The calling can be conducted three times. When the business attends the first trial, the parties choose the method of dispute resolution, whether by conciliation, mediation or arbitration. If the parties choose conciliation or mediation, the chairman of BPSK immediately appoints assemblies, in accordance with the terms to set assemblies as a conciliator or a mediator, and if the parties choose arbitration the parties choose the arbitrator from among the members of BPSK, businesses and consumers, and a third arbitrator from the member of BPSK (the government) as chairman of the council.

Trial stage

Conciliation

Consumer dispute resolution through conciliation is conducted by the conflicting parties by themselves, assisted by a BPSK panel which in this case acts passively. This means the process of dispute resolution fully devolved to the parties, either the form and amount of compensation for the consumer loss.

The result of the deliberations is an agreement between the consumer and business, made in writing and signed by the parties to the dispute, then submitted to the panel to corroborate the agreement through a decision of the BPSK panel.

Mediation

Dispute resolution through mediation is conducted by the conflicting parties assisted by the mediator.

Mediator's task:

The mediator only facilitates the parties: it does not provide solutions and the agreements that are reached are purely the result of the parties' agreement.

The BPSK's role in mediation is limited to summoning the parties, summoning witnesses and expert witnesses, providing a forum, actively reconciling the parties, and actively giving advice or recommendations according to the laws and regulations. The agreement of the parties is made in writing, and signed by the parties, and then submitted to the panel to corroborate the agreement by a BPSK panel decision.

Arbitration

Arbitration is a form of non-litigation dispute resolution that is more formal than conciliation and mediation. Arbitrators are selected by the parties and led by arbitrator from the government. In the first trial the panel chairman is required to reconcile the conflicting parties. If there is peace, then the panel will make a decision reconciliation stipulation. At the first trial, before businesses convey response to the lawsuit, the consumer can revoke the complaint by making a statement of revocation of the case and the panel would then declare that the suit be revoked. If the consumer does not attend the second trial, the lawsuit will be disqualified by law. If businesses are not present, then the consumer's lawsuit will have granted by the panel without the presence of the business.

Decision

BPSK panel decisions, by the chairman and members of the panel, as far as possible are based on deliberation to reach consensus, but if the panel has strived earnestly to this end but has not succeeded then a decision can be taken by majority vote. Decisions of the panel in conciliation and mediation do not contain administrative sanctions, while the decision of the arbitration can lead to sanctions.

A decision of BPSK can be either: peace (reconciliation); the lawsuit is rejected; or the lawsuit is granted.

Enforcement of decision

The BPSK decision only determines and establishes whether there is any harm to consumers, and determines the amount of compensation that should be paid by a business. BPSK does not have the authority to execute the decision itself. In order for the BPSK decision to have the executorial power to be enforceable, the implementation must be requested via fiat execution by the district court where the consumer resides.

From the field data obtained, the settlement of consumer disputes by BPSK commonly takes place through mediation. Problems in the process of resolving consumer disputes generally occur at the stage of implementation of the decision: often one of the parties requests the cancellation of the decision that has been handed down, arguing that the decision is a mistake based on the evidence submitted by the parties. Objections are also filed, arguing that the decision is not in accordance with the wishes of the parties. All these matters must be submitted to the district court. For example, the South Jakarta District Court, which receives objecting applications relating to BPSK –DKI Jakarta arbitration decisions. And several objections filed to the district court as the sources said in areas where field data obtained, that are in Bandung, Tasikmalaya, Cirebon, and Padang (Academic Research Report Leadership Grant, 2015).

METHODS

This research uses the normative juridical research method. The research emphasises secondary material, being laws and regulations, especially related to the settlement of consumer disputes through BPSK. The research uses descriptive analytical method, which illustrates and describes the

settlement of consumer disputes in Indonesia, especially resolution of dispute performed by BPSK.

DISCUSSION

Based on field data obtained, generally consumer disputes are filed by consumers who have a legal relations agreement. This means that the intended consumers are consumers who acquire or use a product based on an agreement. In fact according to Article 1 point 2 of Decree of the Minister of Industry and Trade of Republic Indonesia Republik Indonesia No. 350/MPP/Kep/12/2001 on Duties and Authority of Consumer Dispute Settlement Board (BPSK), a consumer is "every user of goods and / or services that available in a society, either for themselves, their families, other people and other living creatures and not for sale". This definition of the consumer is very comprehensive, and doesnot question where the goods are obtained – the important thing is that the goods are used and are not re-trafficked or known with the end consumer.

The definition of businesses according UUPK and KepMenDagri is "every individual or business entity, whether a legal entity or not a legal entity that is established and domiciled or conducting business in the territory of Indonesia, either individually or jointly by agreement for business activities in various fields of economy".

This definition of businesses encompasses domestic businesses and foreign businesses. This is important: businesses that conduct business outside of Indonesia are not included in the definition of businesses as referred to in the statutory provisions.

So based on the definition of consumers and businesses mentioned above, it can be understood that any final consumer who feels they have been disadvantaged by using or consumption of a product, or feels they are the victim of a product this means not only the consumer who is binding to agreement between consumers and businesses. Consumers can sue businesses for damages. The lawsuit can be filed against sellers, wholesalers, suppliers, retailers, and the producers of the product, who are all included under the definition of businesses.

The existence of a claim of consumers against businesses is based on the existence of a dispute between consumers and businesses. It is what was later called a consumer dispute. So the object of consumer disputes is very comprehensive, not just limited to the object of the agreement, but also the products that bring harm to consumers or the object of consumer disputes, if consumers feel their rights are violated. In practice, the object of consumers disputes not just limited to the object agreement is not fully understood by the public.

Consumer disputes can be filed in litigation in district court and can take place through a non-litigation process: that is, outside the court. The UUPK provides a forum for consumers and businesses to resolve a dispute, namely with BPSK. It should be understood that the dispute resolution outside the court can only be taken by consumers as plaintiffs individually, not as a class action or a lawsuit by the government.

BPSK was established by the government based on the mandate of the law, and established in the areas of municipal government and / or the district. The presence of BPSK is intended to handle and resolve disputes between consumers and businesses, at first BPSK only resolving consumer disputes in a small and simple scale. This meant the government formed BPSK in order to fulfil distributive justice: because consumer disputes are usually nominal – if they were represented to the district court, the court fee would exceed the compensation that would be received by consumers. Therefore, BPSK, resolves consumer disputes rapidly, meaning within 21 days the

dispute must be decided. The administration and decision-making process is very simple and can be done by the parties without legal advice. The cost charged to consumers is affordable.

The principle of resolving disputes in a fast, easy and inexpensive way generally has been applied and implemented. In some cases under BPSK, consumer disputes are free of charge and are completed with less time than resolution disputes in district court.

To cover their operating costs each BPSK receives help from the municipality / county where the BPSK located, but of course each city / county provide a different amount of funds. This provides an opportunity for members of BPSK to seek money by charging the parties a fee, especially businesses.

The establishment of BPSK was also intended to ease the workload of the district court. Therefore, BPSK only handles civil cases, which generally requires compensation for losses suffered directly by the consumer for any business mistakes or omissions. So, basically, BPSK, in resolving consumer disputes, only establishes types and amounts of compensation and determines the actions to ensure that losses suffered by consumers will not happen again.

The means of dispute resolution under BPSK include conciliation, mediation and arbitration. If conciliation is pursued, the dispute is resolved by the parties in deliberation and BPSK just specifies what the parties agreed. The decisions of BPSK only corroborate what has been agreed between the parties. In mediation, a member of BPSK is appointed as a mediator, and helps to provide feedback and suggestions to the parties. BPSK issues a decision. Together with the parties, the mediator also signs the decision. The arbitration decision is a decision made by the three assemblies that are designated by the parties, the chairman of assemblies is from government representatives.

A BPSK decision is final and binding. "Final" means that the decision is a final verdict of a process and binding means that the decision applies to the parties. However, if the parties find the settlement had been reached and already have a decision, but the parties not satisfied with the decision, then the UUPK give the right to the parties to file a lawsuit before the court.

The fact that provisions of the UUPK give the right for parties to submit a case to the court against a decision by BPSK has a negative impact on the force of law that arises from the decision of BPSK. It gives the impression to consumers, businesses and the public that the decisions of BPSK do not have the force of law and do not create legal certainty, because in the end the consumer dispute resolution is ultimately resolved in the courts. These provisions also give rise to the interpretation that the BPSK roles in consumer dispute resolution only exaggerated.

The weakness of BPSK decisions, which are the decision made outside the court, is that the decision made by BPSK are not made with the principle of "For The Sake Of Justice Under The One Almighty God" in mind. Thus, the decision are deemed as a decision that did not possess any executorial powers. The principle itself are crucial in the regard of making a decision. This is because according to the Law No. 4 of 2004 regarding Judicial Authority, if a decision does not contain the principle of "For The Sake Of Justice Under The One Almighty God" in the headnote made by any judicial authority, the result judgement becomes null and void. However, there are no regulation related to BPSK which requires that any decision made by BPSK have to include the principle itself in the headnote.

Consumer dispute resolutions through non-litigation through BPSK and based on the principles adhered to by BPSK give priority to deliberation; are completed quickly; are cheap and easy; and bring legal protection for consumers.

Then, the parties have chosen BPSK as a dispute resolution forum they should be acting in good faith to accept and implement the decision with no attempt to appeal the objection to the court. Additionally, BPSK should encourage the parties to resolve the dispute by mediation or conciliation because both methods will result in an agreement that arise from the will of the parties in dispute, and that the desire to implement what they want is very likely compared to resolved by arbitration. That is, because an arbitration decision involves interference by others, even if the arbitrator is neutral. With the the existence and the decision of BPSK adhered to and executed by the parties involved. BPSK must return to the original purpose of the establishment, that the aim of dispute settlement for damages and to specify that consumers does not get the loss again in the future.

CONCLUSION

Based on the results of the literature review that has been conducted and the discussion, it can be concluded as follows:

1. The dispute settlement process performed by BPSK, conducted by way of conciliation, mediation and arbitration, involves various stages (filing a lawsuit, the trial stage, the decision stage and stage of the implementation of the decision). In practice, the decision BPSK does not always final and binding.
2. The obstacles faced in the implementation of a decision of BPSK lie in the fact that the decision does not have executorial power: to have executorial powers, determination of execution must be requested from the court. Also, objections to decisions of BPSK may be made when the parties are not satisfied.

The suggestions that can be made based on this conclusion are as follows:

1. The parties should be still based in a good faith, either in the way of the electoral process, until the process of the implementation of decisions.
2. BPSK decisions should be granted executorial power, so there is no need to ask for decision of the court.

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THE IMPACT OF POLITICAL POLICY OF THE LAND LAW ON THE OWNERSHIP OF LAND BY FOREIGN CITIZENS IN INDONESIA - CASE STUDIES IN BALIDR. NIA KURNIATI¹ PROF. DR. EFA LAELA FAKHRIAH S.H., M.H.²**ABSTRACT**

The political policy on the land law in Indonesia has a great tendency to rely on the provisions in the Indonesian Act No. 5 year of 1960 concerning the Basic Agrarian Law (hereinafter referred to as the UUPA). These provisions regulate legal connections between the people and the land, either for Indonesian or foreign citizens, along with their conduct in correlation with the land. The nationality principle underlying such correlations, giving an entitlement of the right to own land under the provision “right of ownership” (*hak milik*) only relates to Indonesian citizens, whereas for foreign citizens there is “right to use properties” (*hak pakai*). Nonetheless, there are numerous cases of unauthorised use of land by foreign citizens through illegal agreements. As a result, the agreements in concern are null and void, thus the land should be owned by the state.

Keywords: politics of the Land Law, the ownership of land by foreign citizens, Bali, Indonesia.

INTRODUCTION

Indonesian independence was proclaimed on 17th August 1945. This marked the establishment of the Republic of Indonesia as a state and obliged the state to take enact effective regulations and control over its nationals under the provisions of the 1945 Constitution of the Republic of Indonesia (‘the Constitution’). In its Article 33 Clause (3), the Constitution stipulates: “*the land, the waters, and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.*”

The resources stated in the article above are further elaborated in the UUPA. Article 1 Clause (1) of the UUPA stipulates: “the entire territory of Indonesia is a unified motherland of the whole of the Indonesian people who are united as the Indonesian Nation.”

Article 1 Clause (2) further stipulates: “the entire earth, water and airspace, including the natural resources contained therein, in the territory of the Republic of Indonesia as the gifts of God Almighty, belong to the Republic of Indonesia and constitute the wealth of State.”

As stipulated in Article 33 Clause (3) of the Constitution, the land is collectively owned by Indonesian people. However, the regulation of it lies within governmental power. This does not mean that the land itself is owned by the government. The words “within governmental power” mean that the state is authorised to:

1. organise and distribute the allotment, the use, the supply and the cultivation of the earth, water and space;
2. determine and manage the legal relations between the people and the earth, water and space;
3. determine and manage the legal relations between the people and legal acts concerning the earth, water and space.

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In order to regulate legal relations between persons and the land, the UUPA specifies several types of entitlement towards land that can be granted to individual or legal persons, in its Article 16 Clause (1):

1. The right of ownership
2. The right of exploitation
3. The right of building
4. The right of use
5. The right of lease
6. The right of opening-up land
7. The right of collecting forest product
8. Other right not included in the above mentioned rights which shall be regulated by law and rights of a temporary nature as mentioned in Article 53.

Among the types of rights abovementioned, the right of ownership holds the strongest position, there is no limit in its validity, and it might entail other rights within itself such as the right of use, and the right of building.

In the national land law arrangement, the legal relation between Indonesian or foreign citizens with their land is regulated in UUPA. One of the leading principles that forms the basis of such legal relations is the “nationality principle” which is clearly stipulated in Article 1 Clause (1) and Article 2 of the UUPA.

As a consequence of the enactment of the “nationality principle” there is a restriction under the law on land ownership by foreign citizens. The focus of this paper are cases that occurred in Bali in the practice of land law, wherein a foreigner revoked the nationality principle and the applied law on land ownership. This issue will be addressed in this paper. These issues are:

1. The political policy of the land law on the ownership of land by the foreign citizens in Indonesia
2. The legal consequences of the implementation of the political policy of the land law for the ownership of land by foreign citizens in Indonesia

DISCUSSION

The Political Policy of the Land Law Concerning the Ownership of Land by Foreign Citizens in Indonesia

The Definition of the Political Policy of the Land Law

The term political policy is defined as the direction of law that shall be enacted by the state in order to achieve its purposes (MD Mahfud, 2001). Definitively, these purposes are stipulated in the 4th fourth paragraph of the Preamble of the Constitution, namely:

“to protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace and social justice”.

Other experts have defined a “political policy” as a base policy underlying the direction, shape as well as the content of a law that shall be produced in the land law (Limbong, 2012, p.134). It can be concluded that the political policy concerns the direction of the legal policy in the regime of the land law. Indonesian land law experts have elaborated that the political policy of the land law mainly provides answers to the questions “what shall the government do towards the existing land in its territory, what is the purpose that wants to be achieved by such providence and what kind of

medium that shall be used?” (Harsono, 2003, p.30). The political policy of the land law is elaborated in regulation consisting of principles and norms in the land sector (Harsono, 2003, p. 136).

There are three main conceptions used in Indonesia in order to elaborate the political policy of land law in the UUPA. Namely, “the conception of rights of control by the State”, “social function”, and “rights over land” (Limbong, 2012, p. 116). In the conception of rights of control by the State” the government has the authority to control the land in a normative manner based on Article 33 Clause (3) of the Constitution, which is further elaborated in Article 2 Clause 2 of the UUPA. The term “under the authority” simply means that the state can makes regulations for the sake of its citizens.

The conception of the “social function” of the land is included within Article 6 of the UUPA, which stipulates that “all rights on land have a social function”. This underlines the human nature of relying on the land, either as a place to live, to conduct activities, or as the source of life. There are also principles enshrined in this conception that the use of land shall be in accordance with the condition and the characteristic of the right attached to the land concerned, to ensure that it shall give benefits both for the prosperity and happiness of the holder of the right as well as for the society and the state (Limbong, 2012, p. 126).

Meanwhile, the “conception of rights over land” derives from the state’s right to exercise control over the land. Thus such rights can be given to individual, either Indonesian or foreign, group of people, and legal persons, either private or public. The forms of authority entailed in the right over a land are (Limbong, 2012, p. 128):

- a. Common authority: the owner of land has the authority to use his land and the body of the earth, water and air space only for his interest, correlated directly with the use of the land in accordance with the boundaries enacted in the UUPA and other related legal instruments;
- b. Special authority: the owner of land has an authority to use his land in accordance with the type of right entitled to him, for instance the authority vested upon the right of ownership can be utilised for the interest of agriculture, plantation, fishery or ranch, while it is used for the establishment of buildings in the utilisation of the right of building.

Political Policy of the National Land Law (Indonesia)

The birth of the UUPA aimed to make a fundamental change in the Indonesian land law, including a change in the structure of the legal instruments, the basis conceptions, and the coherency of its contents with the interests of Indonesia as a nation. Moreover, it sought to fulfil the needs of the ever changing era.

One of the fundamental changes in the UUPA is the enactment of the nationality principle, which differs from the prior system of *Domein Verklaring* in the Dutch Indies era that utilised the overt principle, giving the possibility for every person without exceptions to acquire rights over land. The UUPA strictly revoked this provision by its Article 9 Clause (1) stipulating: (Kolopaking, 2013, p.217) “*only Indonesian citizens may have the fullest relation with the earth, water, and air space....*”

The plain interpretation of the text regulates that currently only Indonesian citizens can acquire the right of ownership of Indonesian land. However, in practice, within exceptional conditions and after a certain lapse of time, solely based on humanity, The UUPA provided the possibility for foreign citizens or Indonesian citizens with multi-citizenship to be granted the right of ownership (Kolopaking, 2013, p. 217).

Among other characteristics, the one mostly discussed is the provision that the right of ownership is only applicable to individual Indonesian citizens and certain legal persons. In regard to the occurrence of the right of ownership by subjects not entitled to it, Article 21 Clause(3) of the UUPA regulates that: “any foreigner, who after the coming into force of this act has obtained the right of ownership through inheritance, without a will or through communal marital property and any Indonesian citizen too, having the right of ownership and losing nationality after coming into force of this law, are obliged to relinquish that right within a period of one year after the obtaining of that right or after losing that nationality.” This provision is also in force in relation to Indonesian citizens granted the right of ownership who, after 24th September 1960, the date of enforcement of the UUPA, have lost their nationality. In this regard, in order to fulfil the provision under the Article 21 Clause (3) of the UUPA, the right of ownership over land will be transferred to any other person who fulfill the requirements of a holder of the right of ownership.

The time span of one year aforementioned is counted from the moment of the loss of nationality, and in the event that the right is not relinquished within one year, that right shall automatically vanish and the land in question will fall into the direct control of the state. However, the previous owner, and foreign citizens particularly, is given the chance to reclaim his right, through the right of use. The purpose of the provisions stipulated under Article 21 Clause (3) of the UUPA is to end the ownership of land that is contrary to the principle entailed in the Article 9 Clause (1) and the provisions under the Article 21 Clause (1), that is that: “*only Indonesian citizens are entitled to have right of ownership.*”

On the other hand, this provision provides the chance for the foreign owner to end his ownership in a manner that suits his interest.

Parties with foreign citizenship or foreign legal persons having a representative in Indonesia can fulfill their needs in relation to land by asking permission to have a right of use.

This right of use is regulated under Article 41 of UUPA, which stipulates:

“The right of use is the right to use and/or to collect the product, from land directly controlled by the State, or land owned by other persons which gives the rights and obligations stipulated in the decision upon granting this right by the authorized official, or in the agreement to work the land, as far as it is not conflicted with the spirit and the provision of this law”.

The granting of this right of use can be based on (Article 41 Government Regulation No.40 Year of 1996):

- a. The land directly controlled by the state, which is granted in a form of decision by the authorised official;
- b. The land under the right of ownership, which is granted through agreements with certain people owning the land concerned. However, this agreement should differ from a leasing agreement or a land cultivation agreement.

The right of use over land owned by the state or by the right of ownership is created in order to accommodate the interests of foreign citizens or foreign legal persons domiciled in Indonesia, particularly if they are in need of land to conduct various activities. This is regulated by Article 42-44 of the UUPA.

Further provisions regulating the execution of Article 41 of the UUPA are emphasised in Government Regulation No. 40 of the year 1996 concerning the Right of Exploitation, the Right of Building and the Right of Use (“Regulation No. 40/96”).

The main characteristics of the right of use summed up in this regulation, are:

- a. The right of use over the land owned by the state can become a debt-assurance by attaching a mortgage to it (Article 53 Clause (1));
- b. The right of use granted over the land owned by the state can be transferred to another party by the authorisation of the official concerned (Article 54 Clause (1));
- c. The right of use over the land owned by the holder of the right of ownership can only be transferred if made possible in the agreement to give the right of use over the land (Article 54 Clause (2));
- d. The transfer of the right of use occurs through the legal action of buying, selling, exchange of value, attachment as capital, or simply giving it away (*hibah*), or through succession (Article 54 Clause (3));
- e. The maximum time period for which the right of use can be granted is 25 years, with a maximum extension of 20 years, or indefinitely if the use is for certain purposes (Article 45 Clause (1));
- f. If the right of use has reached the end of this time limit, the holder of the right can ask for a rejuvenation of the right of use over the same land (Article 45 Clause (2));
- g. The aforementioned extension or rejuvenation can be acquired through an application submitted by the holder of the right, with the following prerequisites: a. the land is still used for the same purposes, with the same condition and characteristics and in a good manner; b. the aforementioned requirements are well-fulfilled by the holder of the right; c. the holder of the right is still fulfilling the requirements as is supposed by Article 39 (Article 46 Clause (3));
- h. The deadline for the application of the extension of the right of use or the rejuvenation is two years before the right of use in concern comes to an end (Article 47 Clause (1));
- i. Whether the extension or the rejuvenation of the right of use shall be noted in the book of land in the land registry office (Article 47 Clause (2));
- j. The provision in regard to the exact procedures of application to extend or rejuvenate the right of use along with their requirements is further regulated under Presidential Regulation (Article 47 Clause (3));
- k. The application of extension and rejuvenation of the right of use of foreign citizens can only be executed as long as they have permission to be domiciled in Indonesia (Article 8 of Government Regulation No. 103 year of 2015);
- l. The application of extension and rejuvenation of the right of use in regard to investment of capital interest as mentioned in Article 47 can be done at the same time, with payment of cash-in allocated for it when the application is first made (Article 48 Clause (1));
- m. If the cash-in has already been paid, any extension or rejuvenation of the right of use shall only need payment of an administration fee, the amount of which shall be determined by the Minister after having authorisation from the Ministry of Finance (Article 48 Clause (2));
- n. Authorisation to grant any extension or rejuvenation of the right of use shall be mentioned in the decision of the granting of the right of use (Article 48 Clause (3));
- o. The right of use over the land previously acquired by the right of ownership shall only be given for the maximum period of 25 years and cannot be extended (Article 49 Clause (1));
- p. Based on the agreement between the holder of the right of use and the holder of the right of ownership, any right of use over land acquired by the right of ownership can be

rejuvenated by granting a new right of use by the conclusion of deeds by the official land deeds certifier, and that right must be enlisted (Article 49 Clause (2)).

The right of use, including its extension and rejuvenation, must be enlisted, taking into account the provision under Article 47 of the Government Regulation No. 24 year of 1997 concerning the Enlistment of Land, which stipulated as follows:

‘The enlistment of the extension of lapse of the rights over land is conducted by recording it in the land registry and land certificate in accordance with the decision of the authorised official giving such extension’.

This enlistment aims to give legal certainty and protection towards the holder of the right. To this end they are given a certificate of right over land as proof of enlistment. The certificate is recognised as strong evidence, which means that the truthfulness of the juridical and physical data recognised by the judges unless it can be proven otherwise.

By the characteristics mentioned above, the right of use in its development should be enlisted and can be transferred, in order to fulfil the “publicity principle”, the same with other rights over land, namely the right of ownership, the right of exploitation and the right of building. Currently, there is no doubt regarding the position of the right of use giving legal certainty towards its holder. This right has been enhanced in order to satisfy the development needs of the society, and in order to fulfil demand, most notably from foreign citizens, so that there is no need to conduct illegal acts.

The ownership of land by the right of use is becoming the basis for foreign citizens to own a house in Indonesia, as stipulated in Government Regulation No. 103 of 2015 concerning the Ownership of House or Residence by Foreign Citizens Domiciled in Indonesia. This regulation gives permission to foreign citizens to have a house or residence based on certain types of right over land. In that particular regulation, in Article 1 Clause (1), the term “foreign citizen domiciled in Indonesia” is strictly confirmed:

“foreign citizens domiciled in Indonesia are persons who are not Indonesian citizens, however their existence gives benefits, by conducting business, work or investment in Indonesia.”

These foreign citizens are authorised or permitted to domicile in Indonesia in accordance with the prevailing regulations. Those are the requirements for extending and rejuvenating the right of use over the land of Indonesia, including for the buildings that exist on that land.

The Impact of the Political Policy of the National Land Law on the Ownership of Land by Foreign Citizens in Indonesia - Case Studies in Bali

The focus of this paper is elaborating cases of violations of certain regulation by foreign citizens from various countries who are domiciled in Indonesia, particularly in the district of Kuta, in the regency of Badung, Bali province, Indonesia. These cases concern the acquiring ownership of land by foreign citizens through an illegal right of ownership. The occurrence of this illegal land-smuggling, whether direct or indirect, is an implication from the political policy of the national land law, particularly the principle of nationality that prohibits foreign citizens from acquiring the right of ownership over land.

Most foreign citizens who have an interest over lands have acquired that interest by the right of ownership, since this is the strongest and fullest right which can be inherited, and it is one that has no limitations regard to time. However, foreign citizens are restricted in this regard by Article 21 of the UUPA.

This paper will elaborate the control of land acquired by the right of ownership in Bali by foreign citizens that are clearly prohibited from, having this control of land, but who, in practice, have illegally obtained it.

Two cases will be elaborated, to represent many that have occurred in Bali.

First case: the case is as follows: land certified with Certificate of Right of Ownership Number 11887, in accordance with Survey Certificate dated 14-01-2008, Number 2506/Kerobokan/2008, as broad as 486 m², located in the Subdivision of Kerobokan, district of North Kuta, regency of Badung, Bali province. This land, under the name of an Indonesian citizen, is the object of an agreement that aims to transfer the land ownership of land by the name of Indonesian citizen to foreign citizen. The amount of the transaction this case is 4 Billion Rupiahs. There have been several variants of agreements over the land in question:

- a. The agreement of authority: this agreement positioned the Indonesian citizen so as to give his authority over the land to the foreign citizen and to allow that foreign citizen conduct every possible legal act originally prohibited by law;
- b. Leasing agreement: the foreign citizen given was the right to lease the land for more than 100 years. The parties agreed to give 25 years as the lapse of time to lease the land, counted from 10 August 2011 and ending on 10 August 2036. However, they included a clause to automatically extend the lapse of time until three times 25 years. Hence, in sum, it shall be terminated on 10 August 2111. This clause encroaches decent principles and is not in accordance with the conception of the social function of the land under Article 6 of the UUPA;
- c. The agreement of debt-insurance: in this agreement the foreign citizen in concerned acts as a “creditor” while the Indonesian citizen acts as a “debtor”. The debtor is granted a certain amount of loans from the creditor for the purpose of buying a portion of land within an ongoing process of ownership entitlement transfer towards the debtor. The parties agreed to recognise the existence of a debt between them, and this debt can only be repaid through disposal of land and properties over the land concerned from the debtor to the creditor. Only then shall the creditor recognise that the debt is being paid.

All of these agreements were concluded in front of a notary/official land deeds certifier as the public officer authorised to sign legal acts transferring rights over land.

Second case: the act of controlling land under the right of ownership by a foreign citizen through disposal of this right by an Indonesian citizen, as its original owner, to the foreign citizen in question, which was concluded in agreements signed in front of a notary/official land deeds certifier. In that agreement, it was accepted by both parties:

- a. That foreign citizen is the real owner of the lands certified with Certificate of Right of Ownership Number 1319/Buduk village, as broad as 1.650 m², Number 1860/ Buduk village, as broad as 665 m², and Number 1861/Buduk village, as broad as 298 m². The three portions of land are located in Bali province, regency of Badung, district of Kuta, Buduk village;
- b. That the three portions of land were bought by the Indonesian citizen with the amount of money determined by the foreign citizen as elaborated in the Buying and Selling Certificate dated 14 January 2000 Number 4/2000, 2/2000 and 3/2000 concluded in front of notary/official land deeds certifier;
- c. The aforementioned lands are in practice owned by the foreign citizens despite the fact that the certificates of the land in questions concern are made and signed by the Indonesian

citizen. The Indonesian citizen tried to evade this by stating that the foreign citizen only uses his name to buy those lands, thus the Indonesian citizen originally did not have any right whatsoever over those portions of land, and he disposed those lands from his list of inheritance.

- d. To the above agreements, the parties added clauses to give authority by the Indonesian citizen to the foreign citizen, to use and conduct any legal acts correlated with the portions of land, including to build any kind of property, to meet face to face with public officials in order to give reports and information regarding the portions of land, deciding matters regarding their maintenance and cultivation, receiving payments and issuing relevant receipts, concluding and signing deeds and other important documents, and to taking any necessary action in any situation, without any exception.

Taking into account the two examples introduced laborated above, the agreements between the Indonesian citizens and the foreign citizens were concluded in a notarial manner. At the first glance they might not show any signs of transfer of the right of ownership from the Indonesian citizens to the foreign citizens. However, if we take a closer look it is clear that the content of the agreements aims to do so.

These kinds of agreement, using Indonesian citizens as trustees or nominees, represent a smuggling of the law because they have an opposite substance to that contained in the UUPA, particularly Article 26 Clause (2), which stipulates:

“each sale and purchase, exchange, gift, bequest by will and other acts which are meant to transfer the right of ownership directly or indirectly to a foreign, to a national possessing a foreign nationality in addition to his/her Indonesian nationality in addition to his/her Indonesian nationality, or to a corporation, except those which have been by the Government as meant in Article 21, Clause (2) are not valid by law the provision that rights of another party incumbent therein remain valid and that all payments which have been received by the owner may not be reclaimed.”

There are several legal cases concerning “The Prohibition of Land Property Ownership by Foreign Citizen” and “The Prohibition of Legal conduct of Buying and Selling with a Foreign Citizen”:

1. Supreme Court Decision No. 1025 K/ Sip / 1980 on April 8, 1982, Lo Tjioe vs Sumiyati (Lo Tjoe Lan);
2. Supreme Court Decision No. 76 K/Sip/ 1973 on September 14, 1974, Lay Jung Jit vs Surabaya Property and Heritage Chamber

The legal status of the foreign citizens in the abovementioned agreements concluded is weak, because (Sumardjono, 2007, pp.18 - 19):

- Even though both parties are legally capable and competent to express their consent to be bound by an agreement the “*causa*”/cause is fake, since it was made to hide their true purpose to violate provisions in acts, particularly Article 26 Clause (2) of the UUPA;
- In regards to the principle *pacta sunt servanda*, whereas agreements shall serve the function of acts for the parties concerned, Indonesian doctrine developing from Article 1338 of the *Burgelijk Wet Boek* stipulates that “*not all agreements have a binding power as acts. Only agreements concluded legally shall bind the parties concerned*”. Hence, any sham agreement concluded in an illegal manner shall have no binding force.

Article 1320 of the *Burgelijk Wet Boek* obliges parties to fulfil the objective requirements of legal agreements, one of which relates to the “permissible *causa*/cause”. Subsequently the codes

in the Indonesian civil law should regard these agreements as null and void since they have violated Article 26 Clause (2) of the UUPA (Setiawan, R, 1994, pp. 4 - 5).

CONCLUSIONS

The political policy of the national land law in Indonesia prohibits the granting of the right of ownership over land to foreign citizenship. However, foreign citizens may be granted the right of use. Any grant of the right of ownership to them violates the basis of the Constitution of the Indonesian Republic both philosophically and ideologically.

The impact of Political Policy of National Land Law is the illegal ownership of land by foreign citizen, by using “illegal contract” which is made notarially, aimed to transfer the right of ownership indirectly, which is a smuggling of law.

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16-N38-2335**LEGAL PERSPECTIVE ON BANKING FRAUD IN INDIA AND OTHER COUNTRIES:
A COMPARATIVE ANALYSIS**MR. ZUBAIR AHMED KHAN¹**ABSTRACT**

The continual presence of frauds in the banks is not a recent observable fact. Frauds in Indian banks only prove that financial flexibility exacerbate trend of shallow markets to cherish excessive speculation and deteriorate growth of the market in such way that recovery seems difficult. Revelations of fraud, evidence of insider trading and a ensuing debacle of investor interest have led to an almost insuppressible decline in Indian banks. The paper will also discuss different kinds of fraud and remedial measures. The paper will highlight recommendation of AK Ghosh committee dealing with fraud check & control. The paper deals with different kind of preventive, detective mechanism required for fraud investigation.

Keyword: Dishonest intention, Forgery, Computer fraud, Default, Inspection

INTRODUCTION

Banking system has a very crucial role in shaping a strong Indian economy. A banking institution has a significant role and indispensable in a modern society. It plays as a driving force in the economic development of a nation and forms the main crux of the financial sector as per the need of advanced economy. The traditional banking practice as followed in Banking sectors has gone a paradigm shift altogether with the passage of time in India. Corrupt practices in banking sector due to lack of transparency, inefficiency due lack of supervision deteriorated the goodwill and common good principle of banking business. In the pre-independence era starting from 1770 to 1920 onwards, maximum profit in disproportionate way & illegal financial transaction was given priority even at the cost of exploiting the social, economic rights of other without any scrutiny. Even after independence, banking industry was very much adversely affected by many internal & external factors like Zamindari practice; physical insecurity due to poverty, increasing crime rate; financial insecurity due to natural calamities, war with neighbouring countries, improper implementation of public welfare schemes, etc. But, Indian government has realized the importance of banking sector reforms, that is why they have undergone drastic transformation especially after nationalization of banks in the year 1969 and 1980 which resulted in adoption of socialistic pattern of banking sector, improved efficiency, effective depository system with transparency.

The transitional phase came with liberalization & globalization of Indian economy in the year 1991. Radical changes were brought by giving huge opportunities to private sector to stimulate the growth of financial sector. Keeping in tune with the fast growing economic policies and its implementation, many structural changes were brought in banking sector via Narasimham Committee to bring strong stability, like inclusion of prudential norms, direct lending practice should be controlled, reduction over priority sector lending due to ambiguity, internal assessment of balance sheet & audit of banking institution for bringing transparency, direct control of banking institutions by Reserve Bank of India, etc.

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While the functioning & instrumentality of the bank have become more important for exponential growth, many minor and major discrepancies including banking fraud have also increased simultaneously and with the passage of time, fraudsters are becoming more and more experienced, insightful and resourceful as well. The manifestation and existence of frauds in the banks is not a frequent evident phenomenon, in fact the transgression & wrongdoing of forgery is may be as old as writing itself.

The concept of fraud is not specifically defined under Indian Penal Code. Though Indian Penal Code includes and mentions punishment, which leads to perpetration & execution of fraud through various means. Even section 17 of Indian Contract Act, 1872 provides an inclusive definition of fraud. It means a kind of agreement in which one of the party is inducing other with deceitful intention to suggest certain facts which is not true but make it believe other to be true. It is kind of arrangement in a legal relationship where deliberate non-disclosure of facts exist by adopting chicanery & tricks. There is an element of dishonest advantage and disproportionate profit in every case of fraudulent activity.

The phenomenon of financial fraud is matter of grave concern in global market. Sometimes it is difficult to establish criminal liability in the case of financial fraud because of lack of specific definition and provision in law irrespective of the fact that banking & non-banking financial institution suffers huge monetary losses either in collusion with bank personnels or with employees of other financial institutions. Persistent rise of monetary losses take the shape of unfettered commercial disadvantage resulted into many complicated cases of scam. There is no doubt about the fact that financial fraud is very vulnerable issue which needs to be tackled with due care & diligence with much scrutiny, since it affects goodwill and public faith in the overall market structure. Social & economic dependence of customers exist on the sustainability & stability factor of the any financial institution. In fact, public faith & confidence are the main basis for the growth of banking business in banking institutions. Consistent market frustration & collapse, unexposed & undetected frauds deteriorate financial institutions to such a level that it hampers the basic doctrine of good governance.

Bank fraud is kind of manoeuvring action by using deceptive methods to obtain illegal money & financial assets which was owned or kept in possession by a financial institution. Nowadays, the misappropriation can be done in many ways, sometimes difference also arise with respect to factors like presence of certain unauthorized methods, complication due to jurisdiction issue. There is a possibility where the extent of fraudulent action resulted into higher degree of serious offence like theft, dacoity, burglary and robbery in professional manner. It can be a part either organized crime or white-collar crime also in certain situation action was done in a more strategic and pre-concerted plan. It is quite obvious that any enterprise which deals with huge amount of financial assets is very vulnerable to frauds and it become more common in the case of enterprises or persons which are heavily indebted to banks at large. So, it is clear that the cases of banking frauds are also escalating very abruptly.

Historically, while looking closely, though there many advantages of nationalization of banks but it resulted into increase of multiple branches in various part of country without any effective supervision and control. Unfortunately, corruption also arose in banking sectors due to reduced efficiency in providing services and undesired political interference & monopoly. Banking sectors has also deficient number of experienced & trained banking personnel for handling complicated cases. It is also clear that the government were overburdened with multiple tasks especially after taking the responsibility of looking into priority sector lending which is major tool

to boost the agricultural & industrial economy in the country. So, efficient supervision was not possible due to lack of specific legislation and guidelines. The paradigm shift from traditional way of lending where security issues are given priority to modern style of banking where lending process is considered as promotional strategy for expansion and development of banking business.

Uncertainty & speculation in the market plays a very crucial role in the growth of business of financial institution. But fraudulent cases in Indian banks can increase the extent of financial flexibility to such a level that it can lead to excessive uncertainty with unreasonably high risk involved in doing business, resulting into disintegration of the market. Sometimes, banking fraud issues along with insider trading and ensuing downfall of investor's interest have generated into unmanageable slump in Indian banks. Disproportionate gain and low stake along with manipulative tactics leaves a weak position against which offenders exploit it for doing fraudulent activities. There are many dimensions of fraud that occurred in banking activities like manipulative practices adopted in the utility of cheque, deposit account fraud where there is existence of illegal transfer of money, dubious & misrepresentation wrt movable assets in the case of hypothecation fraud, high extent of default with deliberate intention in the case of loan fraud, etc. There are three aspects by which bank frauds are engendered & organized namely,

1. Machination with active collusion among banking staffs either in involvement with internal or external factors.
2. Willful misconduct and dereliction of duties of bank staff to follow guidelines as formulated by Reserve Bank of India.
3. Extrinsic factors proliferating frauds by doing mischievous acts like forgery, illegal alteration of cheques or misappropriation of drafts; non-observance of Know your customers (KYC) Norms.

There is a presence of financial pressure to exploit business opportunities among banking & non-banking financial institutions. Related factors like consistent economic downturn, intensely cutthroat commercial atmosphere has compelled banking companies to overlook the security issue, thereby deviating from normal existing processes. With the objective to achieve maximum profit, all possible kind of anti-competitive measures has been adopted to get their highly expected business targets by flouting bank norms.

ADVERSE EFFECT OF FRAUD

There are various instances of fraudulent act happening in banks on consistent basis that go overlooked & inconspicuous. Monetary loss and damage to the reputation & goodwill of the bank are most direct impact of frauds. Serious aberration & misapplication resulted into fraud will definitely raise question over tenability & utility of secured technological capabilities of the institution and their traditional method of protection.

Frauds related to Internet banking, mobile banking, ATMs dent the morale of customers resulted into lack of trust & reliability over these services. Fraudulent activity will also subvert the profit & overall efficiency of banking services. It can corrode the productivity and adversely affect the interest of investor resulting into unexpected increase in operational & capital risk of the bank. It can become a great impediment in the growth of banking business while bringing instability in liquidity and mismanage capital adequacy norms. Even, the extent of default in lending process has become so serious that it overburdened the securitization company.

RECOMMENDATION OF A K GHOSH COMMITTEE ON BANKING FRAUDS

Reserve Bank of India is very much concerned with the meteoric rise of instances of banking fraud. So Reserve Bank of India has organized & set up a high level committee to introspect the grim situation of fraud and related malpractice in banks under the chairmanship of A K Ghosh.²

There are certain objectives of the committee to ensure transparency in banking services namely,

1. Security of assets with no legal objection
2. Complete adherence of existing policies and procedures without any dereliction.
3. Clarity with respect to accounts and related records
4. Systematic delegation of duties and obligations of staff towards customers and bank
5. Timely thwarting and tracking down of frauds and malpractices

The committee emphasized that the banks should take obligation of safeguarding cash and other valuables. It should reflect a dual aegis on the part of bank. Rotation of staffs for better functioning of the bank with proper division of financial and administrative powers. Banks needs to formulate safety measures against cash theft and frauds in case of guarantees.

A sincere responsibility is expected from banks to get for scrutiny and surveillance in credit, investment sector and balance sheet. So far as portfolio inspection is concerned in this regard, the approval of Reserve Bank of India is important. Specific procedural formalities should be followed like vigilance officer in those cases should refer chief vigilance commission where there is presence of vigilance factor. The committee raised few apprehensions by explaining that shrewd customers can take undue advantage in those cases where bank staffs are relatively careless in obliging their well established duties and safety measures.³

POSSIBLE TYPES OF FRAUDS OCCURRING IN BANKS

Frauds occurring in case of deposit accounts

Sometimes, it is possible that that while opening an account of customer in a bank, certain precautionary principle was not adopted like proper identification of the person, his origin resulting into misuse either through fictitious or kind of impersonation. In those cases, chances of theft & deliberate alterations of cheques are (either removing words or change in name or amount mentioned) there for payment purpose. It is possible that huge amount of money has been withdrawn from dormant account of a customer by a fraudster using forged signature. Under the same category of fraud, it is also possible that bank staff has also malicious involvement to get illegal money by withdrawing it from the account of a customer without any authority. It can be done either through manipulating passbook in an unscrupulous manner or bankers take the position of joint account holder without the explicit consent of customer, thereby withdraw the money.

There are some misappropriate practices which can be used to create embezzlement in banking services. It becomes easy for a fraudster or imposter to withdraw money by an unauthorized possession & use of chequebook with fake signature. Counterfeiting cheques and bank drafts are also common practice to deceive and swindle customers. Even in a traditional method of banking practice, fraudulent activity occurs in case of illiterate customer whose banking service directly depends on their thumb impression on the concerned papers. Forged fingerprints have become sham trick to delude & cheat customers.

²Nitant P. Trilokekar, Audit in Computerized Environment, Reporting in Jilani Ghosh Committee Recommendations, WIRC on Bank Audit, available at: <http://tnkpsc.com/Image/JALANI%20GHOSH%20RECOMMENDATIONS.pdf>

³ Ibid.

Fraud arise in case of lending process

One of the utmost recommendations of nationalization is to achieve success in commercial lending and priority sector lending. But, banks are overburdened with the responsibility of providing best services from priority sector lending. A huge amount of loan was withdrawn from customers under the priority sector lending scheme in various sub-sectors. Multiple cases of defaulter list came into picture. Though the scheme was adopted for improving economic status of customers belonging to small & medium scale industry, agricultural sectors and growth of agricultural economy, but it resulted into failure due to financial incapability of customers in returning the loan, sometimes absconding from their own place of residence or business. Bank staff for sake of personal monetary benefit as bribe, does not do proper scrutiny of documentation for lending process or bank staff are misrepresented directly or indirectly by other immaterial facts deliberately.

Fictitious & unregistered firm doesn't hold any integrity & accountability in the market, somehow they convinced banks to provide loans. There are certain complicated situations where customers succeeded to manipulate with securities provided to banks for loans & advances. The most common manipulation is when customers misrepresented the facts related to value of collateral securities in lending process and it turned out to be disproportionate in correspondent to the money lent by bank or sometimes valueless. Foreclosure as remedy (i.e., compulsory sale of collateral securities in case of default in lending process) won't be sufficient enough as preventive measure due to inadequate value of security.

In lending process, some customers deliberately use those kind of hypothecated goods whose price are relatively very fluctuating with the passage of time and banks are kept ignorant of the same initially in a very tactful manner. In few cases, banks are also kept ignorant or wrongly informed about the legal status of security used in loans. For example, those securities are used whose title is already in question like

- i. Title deeds of securities are forged
- ii. Title deed is subject matter of legal dispute, i.e. not free from any encumbrances.
- iii. One particular asset is used as security for lending process with multiple banks by hiding relevant information.
- iv. Securities, which are used for loans, are not of same quality (worse) or quantity which are promised earlier.
- v. Fraudulent disposition of securities by customers either through collusion with bank staff or recklessness on the part of bank staff.

Another instance of fraud in lending process occur where there is direct involvement of a corporate body. Banks provide huge amount of investment loans to these rich corporate bodies on the basis of their strong financial capability, impregnable market structure, robust goodwill in the competitive market and strong influence or commercial relationship with Government. These corporate bodies kept banks under delusion that they repay the debt amount. It does not result only into failure to repay the debt and but also create the situation of non-performing assets.

Fraud arise in the era of modern technology

The transitional change from traditional banking practice (mainly on papers) to modern practice has brought radical change in efficiency of banking service. The biggest advantage from this transformation is that banking service is working efficiently and in a speedy manner without any discrepancy. Today, almost all branches of the banks have been computerized to introduce paperless service wherever feasible. But the extent of increasing cyber crimes is alarming and matter of grave concern. There are few kinds of fraud that are very vulnerable.

1. **Spy-software:** This activity is used by fraudster to decode passwords and enter into system for misappropriating data for malice interest and get the money illegally. Hacking is another sinister type of mechanism adopted by criminals to access the information in computer system in an unauthorized manner by purloining password. This act is done not only for illegal monetary profit but also to cause irreparable damage to the system of the other person.⁴
2. **Wire tapping** is also kind of unscrupulous act whereby fraudster records signals & steal the password to withdraw the money. This act is possible by tapping the wire of ATM machine when a customer uses the same to get money.

There is one specific legislation which deals with penalty for fraudulent acts related to computer system. Section 43 of the Act provides compensation upto 10 lakhs to the aggrieved person. It is applicable in the case of unauthorized access to copy and download certain sensitive information.

3. Though online banking is very efficient due to less complication, speedy process and reduced costs, but there is always a serious apprehension related to security and level of risk, which is involved. There are some fraudulent tactics adopted by cyber criminals who entice their customers by asking them to visit their websites and click something to download or to read and accordingly they get trapped. They introduce themselves to offer profit-making schemes for customers so that customers get interest and follow the same, and they steal all sensitive information stored in the computer system of the customer. There can be another way out for fraudsters to get personal & financial details like credit card information, passwords, etc from customers by allowing them to do any kind of online trading through unsecured websites. It can be done either through Phishing or any kind of Identity theft.

Credit or debit card frauds took place in systematic manner by which the card is used by fraudsters so that they can withdraw money illegally. Duplication of credit card is the most common method used by fraudster. Theft of the card and disclosure of sensitive information like (Personal Identification number (PIN) number) to another are also part of credit/debit card.

LEGAL CONCEPTS RELATING TO BANK FRAUDS

Forgery is a crime where the accused person creates a false record or credential with a specific intention to cause harm or injury. A record must be in existence where contents of the same should be explained & interpreted well through words, marks, figures so that it can be used for illegal purpose.⁵ It is not relevant though where such marks, figures or letters were made. The most important element of offence of forgery is the presence of deceit, improbity and criminality. Though it is not always necessary for the offence of forgery that document has to be in writing or it has signature as a part of formal procedure. Any record or document can lead to fabrication even by expunging signatures or any particular figure. It is important to understand different conceptual nuances of intention to remove ambiguity. There is a difference between two particular acts which involve intention to do fraudulent manipulation and intention to get wrongful gain to himself & wrongful loss to other. If a person gets disproportionate profit by an action at the cost of other person's loss, then it is only considered as dishonest act. Whereas, a fraudulent act always involves intention to deceive for getting illegal advantage.

⁴Nitant P. Trilokekar, Frauds relating to Computers, Audit in Computerized Environment, Reporting in Jilani Ghosh Committee Recommendations, WIRC on Bank Audit, pg.7, available at: <http://tnkpsc.com/Image/JALANI%20GHOSH%20RECOMMENDATIONS.pdf>

⁵ Section 463, Indian Penal Code, 1860.

Whenever the question of determination of offence of forgery comes, it is clear the act should be completed with intention to defraud, though actual damage or harm may not be necessary. It is also not necessary that a fraudster have certain relative power to defraud or certain circumstantial chance to do the same. In fact, any kind of previous engagement or relationship between people committing forgery and aggrieved person is also not necessary. So whenever, a person claims his authority or title over the forged document, it is important to introspect & verify the documentation. Since forgery of signatures is one of the most prevalent fraud occurring in daily basis commercial transaction. Verification can be done in this regard either with the help of expert opinion⁶ or someone who is acquainted with handwriting & signature by comparing the same with any previous existing record.⁷ It is expected from the bankers to due care & diligence while performing their duties meticulously.

It is important to understand the meaning of cheating in the context of criminal law. A dishonest act with the presence of deception to get a property or to do an act can be termed as cheating. So, bank staff can prevent the offence of cheating or cheating by personation⁸ by proper identification of the concerned person (for quashing the possibility of fictitious or anonymous customer) and so far as authenticity of documents is concerned, it is important to scrutinize the legitimacy and veracity of documents either related to place of residence, business or nature of security.

A bank staff holds a very responsible task in performing his job. His service depends on principle of trust and confidence. He needs to perform his job in the instruction or direction of his superior authority and in accordance to the procedure established by terms of employment and recommendation as banking norms given by Reserve Bank of India. Where a banker misuse or misappropriate the security lodged with bank for loan provided to the customer even before the expiry of term of loan or before existence of default. This kind of action will definitely result criminal breach of trust because criminal breach of trust involve a dishonest action where improper & inappropriately use of the property in an unauthorized manner violating direction of law prescribing the procedure and thereby resulting into disproportionate loss of another.⁹ So, it is necessary to scrutinize the overall functioning of the bank. Periodic inspection of actions and vigilance over particular issues should be taken into consideration seriously. The extent of vigilance & precautionary principle will have to follow on a different platform in those suspicious transactions where vicarious liability can exist.

Every bank needs to be accountable for their every activity & transaction to the superior bank. It is one of the foremost duty of bank to prepare annual report on timely basis and to prepare balance sheet without any discrepancy & ambiguity. It is true that rendering true accounts require a meticulous approach. But if a bank staff fabricate certain important data & make false entry in the record with will to damage or deceive, those actions attract falsification of accounts.¹⁰ Where proper diligence is required staring from application form to the procedure how accounts are maintained.

There are certain relevant legal provisions from section 489A to 489E in Indian Penal Code, which is related to utility of counterfeiting currency notes and related things. The objective of these

⁶ Section 45 , Indian Evidence Act, 1872

⁷ Section 47 , Indian Evidence Act,1872.

⁸ Cheating by Personation, Section 416 , Indian Penal Code,1860

⁹ Criminal Breach of Trust, Section 405 , Indian Penal Code,1860.

¹⁰ Falsification of Accounts, Section 477 A ,Indian Penal Code,1860.

sections is to provide security for careful & protective use of currency notes without the presence of any duplicity, forgery and spurious content.

So, it is clear that fraudulent activity in banks is not only incessant but unfolded threat to financial market. It is required that vigilance mechanism should be evolved in every step of every banking transaction. An audacious approach is important for stimulating the growth of anti-fraud programme for meticulous monitoring for every action. Two precautionary principles like control measures related to fraud & detection of fraud should be utilized simultaneously to diagnose the problem on timely basis.

There are two possible categories of procedural techniques which is very much related with vigilance system namely:

1. Preventive method – It is important to understand (without any ambiguity) on the obligation and different roles according to transaction. Proper assessment of risk is required to check suspicious transaction, which may result into fraud. This practice of assessment requires internal inspection & proper audit of bank activities to ensure transparency. Minor discrepancy and error occurring in any action should be examined without wastage of time and the issue should be timely decided. Banking Ombudsman Scheme, 2006 was introduced with same purpose to hear the complaints & resolve the dispute related to deficiency in banking service.
2. Detective method- This is traditional practice followed to check in the minor or major discrepancy occurring in banking transaction. Role of a supervisor (to put a surveillance), auditors or any external agency (sensitive information collected through Intelligence Bureau) is important in fulfilling this task. Normal investigation like checking into previous business affairs of customers (history of consistent minor or major discrepancy), financial background of customer, nature of commercial transaction dealing with third party, particular task done by committed forensic experts or tools. It has now become imperative for Reserve Bank of India to provide financial as well as administrative support for the creation of a fraud-monitoring cell in every type of public or private sector bank. It will definitely help in reducing the time gap in investigation initiated at internal level in banks and reports to be made as soon as possible so that police take over the matter. There are certain matters involving highest degree of fraud, can face administrative or jurisdictional complication to determine the investigation. These cases should be taken seriously Crime Bureau of Investigation without kind of financial or undue political pressure.

CONCLUSION

Time is ripe now that our banking financial institutions require a vigorous mechanism which specifically deals with fraud identification & broad diagnosis; because this kind of system can easily compatible with complex fast growing market as well as it has become very necessary for the survival & growth of the banks. This assessment & high-risk management can prevent persistent financial loss and somehow it secures the goodwill & bring positive prominence and credibility of the bank. It provides exhaustive & far-reaching security against all possible kinds of fraud from different avenues like online banking, ATM, utility of credit card, etc.

Since, modern day fraudsters are using new technology to do mischievous act for an unauthorized transaction, it's time for banks to play a vigilant role in detection of fraud well before any determination of fraudulent transaction and thereby blocked it without any hindrance. This can only be done with active involvement of fraud management technology. So, banks and other

non-banking financial institutions can execute their business for expansion & maximum profit without any deceitful hassle.

Though, it is unfortunate to note that only few banks are serious in tackling the issue in a well planned comprehensive manner. It is important for banks to set their priority as prevention for fraud without wasting time. They should not be selective in finding solution only for particular complicated issues related to credit card or retail loans, etc. Their action plan & execution should be in compatible with rules established as per existing banking norms. It is equally important to update their rules and standard banking practices for efficacy and better productivity in the competitive market.

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REGULATING COPYRIGHT VIOLATION IN SOCIAL MEDIA: INDIAN LEGAL RESPONSEDR. GURUJIT SINGH¹**ABSTRACT**

Information Technology has modified the notion of communication and human behavior. Social media is the more pertinent example of it. It has emerged as the most influential platform of sharing ideas, disseminating information, uploading, downloading, connect to the society. It has benefited the society, but on the other hand opened Pandora box of new legal and ethical issues. Copyright infringement of third party material on social media is most debated currently. In the absence of international uniformity on the issue, the national legislation has to resolve the problem. The Copyright Amendment Act, 2012 has introduced variety of new provisions to address the information technology related copyright issues. The Information Technology Act, 2000 has refined the rules and regulations relating to Internet Service Providers. The current paper attempts to analyzed the Indian legal (legislature and judicial) response to deal with the copyright infringement in social media. Part I of article deals with the nature of Cyberspace and Copyright, Part II discuss the copyright issue of fair dealing, infringement, exception of the social media. Part III elaborates the private international response to the copyright issue.

Key Word: Social Media, Copyright, ISP, Private International Law, Jurisdiction, Applicable law.

PART I**Nature of Social Media**

The advent of Internet has revolutionized the mode of communication from the traditional mode to digital mode. It has changed the notion the way information are created, formed and disseminated with speed, accuracy and without diluting the quality and quantity of the information. Social media is a platform which provides the service of sharing, disseminating, creation of the information. In the absence of any recognized definition of the concept it refers to “the means of interactions among people in which they **create, share, and exchange** information and ideas in virtual communities and networks.” From the national perspective the Information Technology Act, 2000 define the concept of intermediary² as;

“Intermediary”, with respect to any particular records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes.

Now the social media allows everyone to create, publish, store, transmit information through their platform and therefore fulfill the ingredients of an intermediary. Various kinds of social media platforms operate on internet like facebook, twitter, instagram, you tube, LinkedIn, Myspace etc..

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² Information Technology Act, 2000, Section 2(h)

The functioning of the social media platforms vary as they perform or address the communication platform to specific kinds of groups which may be region based, religion base, gender based, territorial based, language based etc. Some social media provides platform to international users of every categories across the board. LinkedIn and Myspace are the early social media. While LinkedIn is a professional networking website, the Myspace was for public at large. The gradual development in the technology and introduction of sophisticated tools of communication are the competitive factors in social media.

Nature of Copyright

Copyright is important part of Intellectual Property Right. Copyright subsist in published, unpublished original literary, artistic, musical, dramatic, cinematographic films, sound recordings.³ The concept of copyright provides the economic rights⁴ as well as the moral rights⁵. The Berne Convention on literary, artistic and dramatic work is the landmark convention on this regards. The rights generally assigned under the convention and national laws are territorial in nature. It provides automatic copyright protection to the copyright work as registration is not mandatory. With the change in the technology the concept of copyright has expanded its horizons. Subsequently, new copyright conventions have emerged defining new rights. Attempts were made at various levels to provide uniformity to the concept of copyright protection through Trade Related to Intellectual Property Rights (TRIPs), WIPO Copyright Treaty (WCT) and WIPO Performance and Phonogram Treaty (WPPT).

The TRIPs of World Trade Organization (WTO) for the first time developed the international standard for the copyright protection and enforcement worldwide. It provides uniformity relating to the enforcement mechanism. Copyright violation occurs when someone violate the exclusive rights of the author without his/her authorized permission. The remedies available includes civil, criminal and administrative. The civil remedy includes the injunctions, actual damages and profits, disposition of infringing articles.

PART II

Interface of Copyright & Social Media

Net of networks (internet) creates virtual place i.e, cyberspace for interaction among the computers or users globally. The interface of the technology i.e., social media and the copyright creates unique opportunities as well as the challenges before the law enforcement agencies of any state. While the social media gives wide publicity to stored work, it is also used as a platform for dissemination of unauthorized copyright work. When users/members share his work by uploading the copyright work in social media, it may not be liable for dissemination. However, sharing the third party contents without authority of the right owner invites liability of the social media. Since it is difficult to trace the users responsible for uploading and downloading due to ubiquitous nature of cyberspace, it is easy to trace the social media which facilitate the sharing, publication, reproduction of the third party contents and therefore third party can take action against the social

³ Indian Copyright Act, 1957, Section 13

⁴ Section 14, Indian Copyright Act, 1957, illustrate the economic rights of the nature (1) reproduction rights, (2) public dissemination, (3) performance right, (4) translation rights, (5) adaptation rights, (6) right to transfer through sell, license, assignment, rental rights.

⁵ Section 57, Indian Copyright Act, 1957. Moral rights are with regards to (1) to claim authorship of the work; and (2) to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the said work, if such distortion, mutilation, modification or other act would be prejudicial to the honor or reputation of author.

media. The concept of fair dealing and infringement are important with regards to above discussion.

Fair dealing

The doctrine of fair use/dealing is important in deciding the infringement of copyright as it is used as a defense/exception to copyright infringement. In fact it is a balancing act between the private rights of the right owners and public interest of the society at large. The concept of fair dealing allows the reproduction of copyright righted work in a manner not amounting to violation of copyright. Berne Convention for the first time standardized the limitations and exceptions to the copyright issue in Article 9⁶ by setting up three step test for the fair use.⁷ The Convention provided the member States to define the limits and scope of the fair dealing as per their own discretions. The three step test is followed in various other copyright Conventions such as TRIPs⁸, WCT⁹, WPPT¹⁰ etc.. The test is as follows;

- i. That the exception must be special;
- ii. It must not conflict with normal exploitation
- iii. It must not unreasonably prejudices to the legitimate interests of the right holders.

US Copyright Act, section 107 deals with fair dealing. The US Copyright law allows the fair dealing on the basis of the four points i.e., (i) the purpose and character of the use, (ii) nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as whole, (iv) the effect of the copyright use upon the potential market for or value of the copyrighted work. Depending upon the technicalities in facts and circumstances the tests are to be applied and therefore it is not straight forward. US court while assessing the purpose and character of the use has given importance to whether the use was transformative. Pierre¹¹ in his article says that the first factor is the soul of the fair use concept. “The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. If the secondary use adds values to the original – if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings- this is the very type of activity that the fair use doctrine intends to protect for the enrichment of the society.”¹²

In *Authors Guild v. Google, Inc.*¹³ the US Court of Appeal for the Second Circuit held that Google’s project to scan the book without authority, creating a search functionality and display of snippets from those work, does not amount to infringement. It held that the purpose of copying is transformative as the public display of the work is limited and the revelation of the work does not

⁶ Berne Convention Article 9 : *Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings* - (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

⁷ Three-step test in Article 9(2) of the Berne does not apply to copyright exceptions that are implemented under other parts of the Berne convention that have a separate standard, such as those in articles 2(4), 2(7), 2(8), 1 bis, 10, 10 bis and 13(1), or the Berne Appendix.

⁸ TRIPs, Article 13.

⁹ WCT, Article 10.

¹⁰ WPPT, Article 16.

¹¹ Pierre N. Leval, *Towards a Fair Use Standard*, Harvard Law Review 1990 vol. 103:1105, p.1111

¹² Id.

¹³ Case No. 13-04829 (2nd Circuit October 16, 2015)

provide a significant market substitution for the protected work. Court also held that Google's commercial nature and profit motivation do not justify denial of fair use.¹⁴

The Indian Copyright Act, 1957 deals with the concept of fair dealing under section 52¹⁵. The Act does not define the fair dealing. The section provide exhaustive list of use of work which are allowed under the concept and dealt as fair dealing. Mostly the fair use concept is allowed for research, private or non commercial personal use, judicial proceedings, criticisms etc. In Indian context the court generally follows the three factors in deciding the issue of fair dealing.

The first factor is the amount and substantiality of the portion used in relation to the copyright work as a whole. Supreme Court in the case of R.G. Anand v. Delux Films and Ors,¹⁶ held that there is no copyright in the idea. Copyright is confined to the form, manner, arrangement and expression of the idea. Therefore the same idea can be developed and arranged, expressed in variety of ways without violating the copyright of any work. However similarities are bound to occur with regard to the work when the source is same. In that case Court's will determine the issue based on the similarities which are fundamental or substantial similar to the copyrighted work. Greater the substantial similarity in the work, it is copyright violation.

Second factor is the purpose and character of the use. Section 52 provides an exhaustive list of purpose for which the fair use is applicable. The prominent are the research, private or non commercial personal use, judicial proceedings, criticisms etc. The transient or incidental storage of a work or performance purely of technical process of electronic transmission or communication to public is also fair use.¹⁷ The Apex court in Anand case introduced a principle similar to transformative of USA. Court held that:

“where the theme is the same but is presented and treated differently so that the subsequent work becomes a completely new work, no question of violation of copyright arises”

In the case of Chancellor Master case¹⁸ the deciding the merit of the case on the fair use the court read the transformative use of the work. It held that;

“One crucial test, of the four-factor test, as developed by the American courts, is the transformative character of the use. The Courts should in cases like the present ask whether the purpose served by the subsequent (or infringing) work is substantially different (or is the same) from the purpose served by the prior work. The subsequent work must be different in character; it must not be a mere substitute, in that, it not sufficient that only superficial changes are made, the basic character remaining the same, to be called transformative. This determination, according to the Court is closely knit with the other three factors, and therefore, central to the determination of fair use. If the work is transformative, then it might not matter that the copying is whole or substantial. Again, if it is transformative, it may not act as a market substitute and consequently, will not affect the market share of the prior work.”

Third factor is the test of the effect on the product market. The copyright gives the economic rights to the author. Potential of competition to the original work is test. In the case of ESPN Stars Sports

¹⁴ Id, p. 46

¹⁵ Indian Copyright Act, 1957, Section 52. Certain acts not to be infringement of copyright.

¹⁶ AIR 1978 SC 1613

¹⁷ Section 52(1)(b)

¹⁸ The Chancellor Masters & Scholars Of The University Of Oxford V. Narendera Publishing House And Ors., Delhi High Court, available at <http://lobis.nic.in/ddir/dhc/SRB/judgement/29-09-2008/SRB17092008S16562005.pdf>, accessed on 10 December, 2015.

v. Global Broadcast News Ltd. and Ors¹⁹ it was held that the likelihood of competition in market due to use of similar work may amount to copyright violation.

Infringement

Berne Convention for the Protection of Literary and Artistic work provides the economic²⁰ as well as moral rights²¹ to the author of the work. Correspondingly these rights are also adopted in national legislations. Any violation or unauthorized uses of these rights are termed as infringement of copyright. Copyright laws give the author/owner the exclusive right to file a case for the copyright infringement against the violator of rights. In social media when a user upload the information on the social media his copyright work, there is no copyright violations. However, when the copyright work of a third party are uploaded and shared, reproduced without the permission of the author the users who upload and download are responsible for copyright violations. The third party can generally make to parties liable, first the users uploading or downloading the information, second the social media where the information was stored and available for the sharing without the permission of author /owner of the copyright work. The first case is a matter of primary liability whereas the second issue may amount to secondary liability. It is viable and reasonable to file a case against the social media for the copyright infringement as identifying individual users all over the world is a herculean task.

In US secondary liability was tested in the case of Sony Betamax case²². US supreme court ruled that Sony not liable for contributory liable even if his VCR are used by users for illegal copyright of the television show because the product was capable of substantial non infringing uses. The position was refined in the case of Grokster²³. The Apex Court held that an actor, who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. Taking the analogy forward social media can be contributory liable for the sharing and reproduction by way of downloading the information.

The Indian Copyright Act, 1957 also deals with the primary and secondary liability in section 51 and section 63. There are not many cases as the jurisprudence of social media liability is evolving. However, Super Cassette Industries Ltd.(SCIL) in 2007 was successful in taking the interim injunction against the youtube and google directing them not to reproduce, distribute, transmit and display the exclusive copyright work of SCIL in the form of songs clip, movie clip on their websites.²⁴ The injunction was passed on the grounds youtube and google earned pecuniary benefits by making available the copyrighted work free of cost. Further in the case of Super Cassette v. MySpace²⁵ the Delhi high court granted injunction against defendant for copyright infringement. MySpace was involved in facilitating content sharing by the subscriber of the website.

¹⁹ 2008 (36) PTC 492 (Del)

²⁰ Article 8, 9, 11, 11bis, 11 ter, 12, 14, 15

²¹ Article 6bis

²² Sony corp. v. Universal City Studios, Inc., 464 US 417 (1984)

²³ MGM Studios Inc. v. Grokster, Ltd. 545 US 913 (2005)

²⁴ Delhi High Court Injunction. Available at http://courtnic.nic.in/dhcorder/dhcqrydisp_O.asp?pn=217140&yr=2007, accessed on 10.02.2016.

²⁵ Delhi High Court. Available at <http://lobis.nic.in/dhc/MAN/judgement/02-08-2011/MAN29072011IA157812008.pdf> , accessed on 10.02.2016

Exception of the liability of ISP

The Copyright Act under section 51 and 52 reading together exempt ISPs from some cases of copyright infringement under some conditions as follows:

- i. If the person violating the copyright had no reasonable grounds to believe that such communication to the public would be an infringement.²⁶
- ii. The transient or incidental storage of a work or performance purely of technical process of transmission or communication to public;²⁷
- iii. The transient or incidental storage of a work or performance for the purpose of providing electronic links, access or integration, where such links, access or integration has not been expressly prohibited by the right holder.²⁸
- iv. If the intermediary responsible for such storage has received a written complaint from the owner of work, the intermediary should stop facilitating work for a period of 21 days or until he receives an order from a competent court in this regards.²⁹

Further Section 79 of the Information Technology Act, 2000 creates the safe harbor for the liability of Intermediary/Social Media. According to the above mentioned section social media shall not be liable for third party information data or communication link made available or hosted by the intermediary, if;

1. Intermediary is providing access to a communication system on which the third party is transmitting information; or
2. It is not involved in (a) Initiate the transmission, (b) select the receiver of the transmission, and (c) select or modify the information contained in the transmission.
3. It maintain due diligence while discharging his duties.³⁰

As per section 79, a Social Media or ISP may be liable;

- i. If it is involved in conspiring or abetment or inducement by means of threats to do unlawful act,
- ii. After receiving knowledge of wrongdoing from the authorised agencies fails to remove or disable access.

To elaborate on the procedural part of due diligence by the social media under Section 79, the IT Act framed the Rules i.e., **The Information Technology (Intermediary Guidelines) Rules, 2011**³¹. The Rule instructs the Social Media or ISP to maintain due diligence during its online performance as follow:

1. It list out the information prohibited by the user not to host, display, upload, modify, publish, and transmit any information i.e., if the nature of information infringes or violate the Intellectual Property Rights.
2. ISPs to act within 36 hours to disable the information after being informed and to preserve it for 90 days for investigation purpose.

²⁶ Id., Section 51(a) (ii).

²⁷ Id., Section 52(b)

²⁸ Id., Section 52(c)

²⁹ Id.

³⁰ Id., Section 79(2)

³¹ The Information Technology (Intermediary Guidelines) Rules, 2011 are framed under the power exercised and conferred by the clause (g) of Section 87(2) coupled with Section 79(2).

PART III

Cross Border Violation

The borderless nature of the cyberspace or the social media complicates the legal issues associated with it as they are governed by the various laws. The availability of social media under the cloud computing has its own technical issues. The borderless nature of the cyberspace and social media facilitate the dissemination of copyright work without any hindrance across the border. While copyright remains a territorial issue within the state, the nature of cyberspace and social media is territory less. Therefore there is a fundamental conflict in the nature of the two major concepts which complicates the problem. In the given scenario the cross border copyright violation through the social media has to be resolved by the private international principles. In the absence of any uniformity on the private international law principles in the form of universal convention the issue can be resolved by the private international principles of the states.

Jurisdiction

The issue of jurisdiction is the most controversial at present due to the nature of the cyberspace. Jurisdiction is the right of the sovereign states to prescribe, give effect to and adjudicate upon. Traditionally the jurisdiction of the court are defendant centric i.e., based on the presence of the defendant. However, the dynamic nature of cyberspace has changed the whole notion of traditional principles of jurisdiction which resulted to revolution through judicial activism and the legislative innovations to tackle the problems of cyberspace.

Jurisdiction of the court is fixed in a given case by consent or non consent. In case of no prior consent between the parties with regards to the jurisdiction in a given case the matter has to be resolved with the application of general principles of jurisdiction. In India the general principles of jurisdiction are provided in the Civil Procedure Code, 1908³². As per it the jurisdiction are defendant centric i.e., place where defendant resides, place where the defendant does business and lastly the place where the cause of action arises. The judiciary has added new jurisdiction rules such as jurisdiction on the basis of websites. Delhi High Court in *Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy & Anr.*³³ held that to avail the jurisdiction of the court the plaintiff would have to show that the defendant “purposefully avail” itself of the jurisdiction of the forum court. Nature of activity indulged in by the defendant by the use of the website in an important evidence. The nature of the activity will highlight the intention of the defendant to conclude commercial transaction in the forum state. The nature of website i.e., “active” and “interactive” is also an important ground for establishing the jurisdiction.³⁴

³² Code of Civil Procedure, 1908. Section 20. Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

³³ CS(OS) 894/2008 (High Court of Delhi, 23th November 2009), available at <http://lobis.nic.in/ddir/dhc/SMD/judgement/23-11-2009/SMD23112009S8942008.pdf>

³⁴ Id. P. 56

The cause of action ground of jurisdiction was elaborated by the Delhi High court in the case of *Super Cassette v. Myspace*³⁵. Court held that the commission of the tort in the present case is in India. The website of the defendant is one which is engaged in the online business of providing and exhibiting the songs and cinematograph films worldwide including India. The uploading and downloading of the copyright songs, materials from the website amount to commission of tort in India. The said commission occurs in India and is enough to constitute the cause of action as per section 20 of CPC.

Apart from the general jurisdiction grounds the specific jurisdiction ground is exclusively provided in the Section 62³⁶ of Indian Copyright Act. The above section creates an exceptional jurisdiction rule i.e., plaintiff centric rule i.e., the place of residence of plaintiff or carries on business. In the case of *Myspace*³⁷ the court held that the section 62 is sufficient to deal with the issue of international jurisdiction. Therefore the plaintiff can sue defendant for the uploading or the downloading of the copyright material from anywhere, if it amounts to copyright infringement.

Choice of court agreement

In case of the jurisdiction already decided before hand, the Indian legal system recognizes it. In case of social media generally the terms and conditions of social media membership contain the jurisdiction rules. Social media fix the jurisdiction rule as per their convenience. Majority of social media platforms use the click wrap model of contract to put forth their terms and conditions to user/members. Many of the contracts are of the click wrap³⁸ contracts leaving not many options to the users. The validity of the click wrap contract has not been challenged before the Indian court so far.

Applicable law

Choice of law or applicable law is the second most important part of Private International Law. In case of copyright violation at the cyberspace which law will be applicable in resolving the infringement issue is a major concern? In the current scenario also the parties can decide the applicable law at the time of formation of contract. Generally social media realizing the cross border nature of the transactions maintain the choice of law provisions in their contract. In case of any dispute the matter will be resolved as per the choice of law decided in between the parties. However, this choice law may be applicable in between the member users and the social media. It does not take away the right of the third parties to file a suit against the social media. In that given case the choice of law will be decided as per the choice of law principles under national laws.

In the absence of uniformity on the choice of law principles states apply various choice of law principles to resolve the cross border copyright infringement. The principle of *lex loci protectionis*³⁹ means the law of the country where protection is sought. It gives certainty to the

³⁵ Supra note 24.

³⁶ Indian Copyright Act, 1957. Section 62. (1) Every suit or other civil proceeding arising under this Chapter in respect of the infringement of copyright in any work or the infringement of any other right conferred by this Act shall be instituted in the district court having jurisdiction.

(2) For the purpose of sub-section (1), and "district court having jurisdiction" shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, or any other law for the time being in force, include a district court within the local limits of whose jurisdiction, at the time of the institution of the suit or other proceeding, the person instituting the suit or other proceeding or, where there are more than one such persons, any of them actually and voluntarily resides or carries on business or personally works for gain.

³⁷ Supra Note 24.

³⁸ Click Wrap contracts are the standard form of contracts in the internet.

³⁹ Rome II Regulation, Switzerland, Belgian, French

users of the protected work. The user does not need to look for the foreign law to determine the issue. *Lex fori*⁴⁰ is the other principle implies the law of the forum. Article 5.2 of the Berne Convention supports this principle as it says “the law of the country where the protection is claimed”. The advantage of the principle is that a single law would be applicable to the entire claim which is the law of the forum. *Lex Loci Originis* i.e., the country of the origin of the work. It is the place where the work has been published for the first time. French law for the issue of existence, originality and initial ownership apply this principle. *Lex loci delicti* i.e., the law of the place where the result of damage is felt. Copyright infringement is considered as tort liability. The Private International Law (Miscellaneous Provisions) Act, 1995 of UK introduced this principle for the tort cases. In case of India the choice of law principle are not properly evolved. However, the international copyright order⁴¹ of the Indian Copyright Act, 1957 takes care of the infringement of the copyright work in India relating to Berne member Countries. In the case of MySpace⁴², the Delhi High Court applied the law of the land i.e., Indian Copyright law to resolve the copyright infringement by the MySpace, a social media through their website being head office at USA.

CONCLUSION

Social Media raise important copyright issues relating to third party copyright infringing. Since it is difficult to trace the individual responsible for the copyright violation, the social media has been targeted. Though the legal provisions already exist in Indian legal system to deal with the issue, not enough case laws exist to reflect on. However, the conceptual non uniformity of the private international principles is a matter of concern. In the absence of any uniformity the third party content is difficult to regulate on the social media which has cross border accessibility.

⁴⁰ US court applies this law.

⁴¹ US, French

⁴² UK, Japan

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EXAMINING THE “COPY & PASTE” REGULATION OF BATAM CITY TO COMBAT HUMAN TRAFFICKING IN THE TRANSIT AREA

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ABSTRACT

Batam City of Riau Island Province is a destination and transit area for the embarkation and debarkation of human trafficking victims in Indonesia. The Batam City Government issued Municipal Regulation No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims ('Batam Human Trafficking Regulation'). This regulation raises controversy among the stakeholders related to its effectiveness in combating human trafficking. This research evaluates the Batam Human Trafficking Regulation by utilising the approaches of Soerjono Soekanto's Effectiveness of Law Theory. It adopts a socio-legal research method by using in-depth interviews as the means of data collection. It finds that the Batam Human Trafficking Regulation is merely a 'copy and paste' legislation from the West Java Province Regional Regulation on Human Trafficking. It is suggested that the Batam Human Trafficking Regulation should be revised and preceded by in-depth research and surveying public opinion to involve all relevant stakeholders in Batam City.

Key Words: human trafficking, Batam Regulation, transit area

INTRODUCTION

Batam City is located in the Riau Islands Province of Indonesia with a population of 1,200,000 in 2014. Geographically, Batam City is adjacent to Singapore and Malaysia as shown by Figure 1.

Figure 1: Map showing the location of Batam City



Source: Google Maps

Batam City has become a destination and transit area for the embarkation and debarkation of Indonesian migrant workers to and from Malaysia and Singapore (Nababan, 2007; Pramodharwardani, 2007; Saad, 2005). A number of Indonesian migrant workers who have been deported via Batam City are human trafficking victims (Shahrullah, 2010). *Yayasan Embun*

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Pelangi, a local NGO in Batam City reports that the number of human trafficking victims has fluctuated as shown by Table 1.

Table 1: Human trafficking victims in Batam City

Year	Number of victims
2005	41
2006	143
2007	61
2008	44
2009	11
2010	11
2011	24
2012	111
2013	69
2014	86
2015	57

Source: Yayasan Embun Pelangi

The actual number of human trafficking victims in Batam City remains unknown because many victims are ashamed to report to relevant authorities. Many of them are reluctant to take legal action against their traffickers because of the lengthy legal process (Shahrullah, 2010).

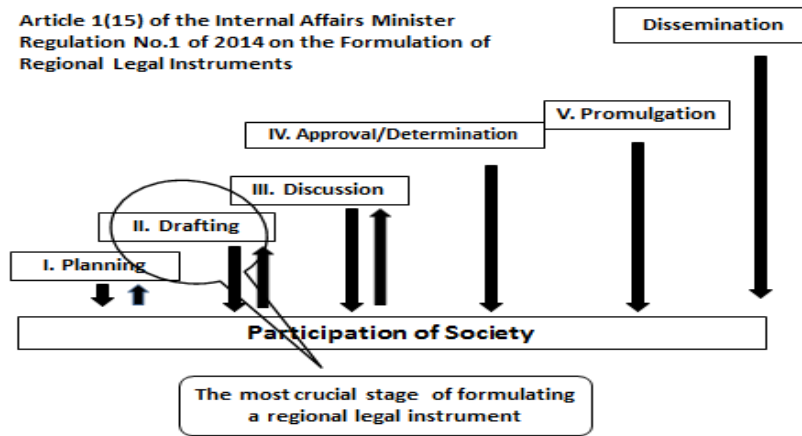
To provide protection to human trafficking victims, the Batam City Government implemented Municipal Regulation of Batam City No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims ('Batam Human Trafficking Regulation'). The issuance of this Regulation was mandated by a law at provincial level, namely Regional Regulation of Riau Islands Province No.12 of 2007 on the Abolition of Trafficking in Women and Children. At national level, the mandate is derived from Law No.21 of 2007 on the Elimination of Human Trafficking Crimes. Although Batam Human Trafficking Regulation was enacted to counter the problems of human trafficking, stakeholders in Batam City claim that it cannot be effectively implemented. The main reason is that the substance of the Regulation does not reflect the conditions and situation of Batam City as a destination and transit area. It is then questioned why the Batam City House of Representatives enacted an unsuitable regulation. This research posits two main questions, as follows:

1. Why is the Batam Human Trafficking Regulation ineffective?
2. What is the solution for the effective implementation of the Batam Human Trafficking Regulation?

LEGISLATIVE AND THEORETICAL FRAMEWORK

The Batam Human Trafficking Regulation is a municipal legal instrument; therefore, the process of formulating it should be referred to Internal Affairs Minister Regulation No.1 of 2014 on the Formulation of Regional Legal Instruments ('Regional Legal Instrument Regulation'). Article 1(15) of the Regional Legal Instrument Regulation stipulates that the formulation procedure of a regional legal instrument (Provincial, Regency or Municipal Regulation) shall consist of 'planning, drafting, discussion, approval or determination, promulgation and dissemination'. The most crucial stage is the drafting process as described by Figure 2.

Figure 2: Formulation of a regional legal instrument



Source: *Badan Pembinaan Hukum Nasional (BPHN)*

The drafting process of a regional legal instrument shall be supplemented by an elucidation and/or an academic manuscript as required by Article 18 of the Regional Legal Instrument Regulation. The academic manuscript components are comprised of ‘introduction, theoretical reviews and empirical studies, evaluation and analysis of relevant legislation, philosophical, sociological and legal analysis, scope of substances, closing’ (Article 20(1)). The Regional Legal Instrument Regulation does not explain their meanings, but the Appendix of Law No.12 of 2011 on the Formulation Procedure for Legislation elaborates them as presented by Table 2.

Table 2: Brief description of an academic manuscript

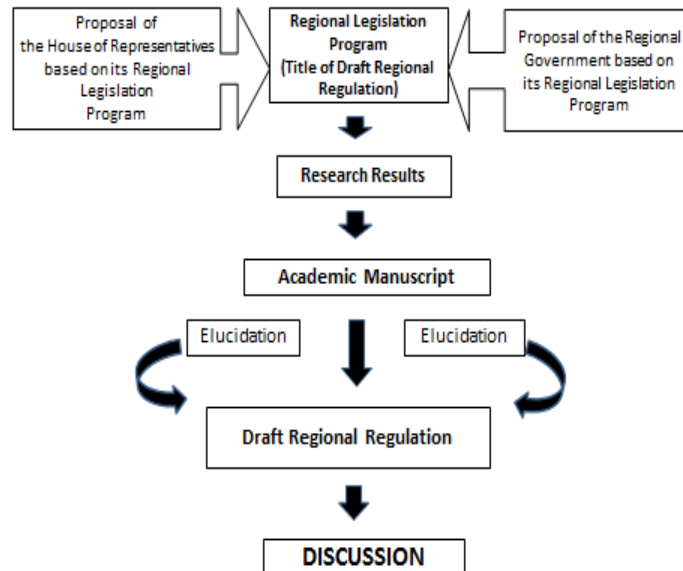
Introduction	Theoretical reviews and empirical studies	Evaluation and analysis of relevant legislation	Philosophical, sociological and legal analysis	Scope of substance	Closing
Containing background, targets, problem identification, objectives and research methods.	Containing reviews of theoretical principles, studies of social, political, economic, and state financial implications.	Containing studies of the relevant legislation. Vertical and horizontal harmonisation of legislation.	Philosophical analysis relates the Indonesian philosophy (<i>Pancasila</i>) and Preamble of the 1945 Indonesian Constitution. Sociological analysis relates	Containing general, substantive, sanction and transitional provisions.	Containing conclusion and suggestions.

			to community needs. Legal analysis relates to legal issues to form the new regulation.		
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Source: Appendix of Law No.12 of 2011 on the Formulation Procedure for Legislation

The process of drafting a regional regulation may be initiated by the House of Representatives (the legislative body) or the Regional Government (the executive body). Figure No.3 shows the flowchart of planning and drafting a proposed regional regulation, initiated either by the legislative or executive body.

Figure 3: Flowchart of drafting a proposed regional regulation



Source: Badan Pembinaan Hukum Nasional (BPHN)

Soekanto (2008) argues that the fulfilment of law-making procedures is not the sole factor to ensure the effective implementation of law. In this regard, he establishes five factors in his Effectiveness of Law Theory, which has been adopted to examine whether the Batam Human Trafficking Regulation is effective in its implementation. According to this theory, the five factors in the effective implementation of law are:

1. The legal substance must contain justice, certainty and utility.
2. Law enforcers must be professional and ethical.
3. Legal facilities and means must be supported by good organisation, equipment and adequate finance.
4. Society must act to achieve harmony among its members.

5. The legal culture must contain the common values of society (e.g. the values of morality, sustainability, security and order).

RESEARCH AIMS AND METHODS

Stakeholders in charge of eliminating human trafficking in Batam City argue that the Batam Human Trafficking Regulation does not reflect the conditions and situation of Batam City as a destination and transit area for human trafficking victims. As a result, this research particularly aims to:

1. Find out the causes of the ineffectiveness of the Regulation
2. Examine the ineffective provisions of the Regulation
3. Provide a solution for the effective implementation of the Regulation.

To meet these aims, this research adopted a socio-legal/empirical research method that considers law as a social phenomenon with a structural approach (Saptoomo, 2009). According to Soekanto (1984), socio-legal research covers research on the identification of unwritten law and the implementation of law, i.e. the effectiveness and impacts of law. This research specifically focuses on the effectiveness of law. At this junction the substance of the Batam Human Trafficking Regulation is evaluated to determine whether it has met the legal, sociological and philosophical requirements. The data used by this research was primary data, collected through in-depth interviews (Amiruddin, 2004; Wignjosoebroto, 2002). The key stakeholders interviewed for this research are shown by Table 3.

Table 3: The key stakeholders dealing with human trafficking problems in Batam City

Institutions	Roles
Head of Commission IV of the Batam City House of Representatives Period 2009-2014	Initiator of the Batam Human Trafficking Regulation
Head of the Women's Empowerment, Child Protection and Family Planning Agency of Batam City	Leading sector to eliminate human trafficking in Batam City
Head of the Legal Department of Batam City Regional Secretariat	In charge of the Regional Legislation Program of Batam City
Members of the Anti Human Trafficking Task Force	Task Force to combat human trafficking in Batam City
Director of Women and Children's Protection of <i>Yayasan Embun Pelangi</i>	NGO and activist against human trafficking in Batam City

Source: Data compiled by the authors

In addition to primary data, secondary data was also used by this research. The secondary data comprised:

1. Primary legal materials (authorised materials) consisting of legislation, official records or minutes in the making of legislation (Marzuki, 2005). The primary legal materials used by this research are:
 - a. Law No.21 of 2007 the Elimination of Human Trafficking Crimes
 - b. Law No.12 of 2011 on the Formulation Procedure for Legislation
 - c. Internal Affairs Minister Regulation No.1 of 2014 on the Formulation of Regional Legal Instruments

- d. Regional Regulation of Riau Islands Province No.12 of 2007 on the Abolition of Trafficking in Women and Children.
 - e. Regional Regulation of Batam City No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims
 - f. Academic manuscript of Regional Regulation of Batam City No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims
2. Secondary legal materials, which were collected from articles, books and other relevant materials on human trafficking (Marzuki, 2005)

All data was analysed based on its content (content analysis) using a qualitative approach. Qualitative research is a type of scientific research that aims to seek answers to the questions ‘what’, ‘how’ or ‘why’ of a phenomenon (Coutin, accessed November, 2015). The qualitative approach was suitable for this research because it aims to find answers and provide solutions pertaining to the ineffectiveness of the Batam Human Trafficking Regulation.

RESEARCH FINDINGS AND DISCUSSION

Causes of the ineffectiveness of the Batam Human Trafficking Regulation

Article 236 of Law No.23 of 2014 on Regional Government (‘Regional Government Law’), which revised the previous Law No.32 of 2004, stipulates that in order to maintain regional autonomy a regional regulation may be enacted. Article 240 of the Regional Government Law further states that a ‘Draft Regency/Municipal Regulation (*Rancangan Perda*) can be initiated by the Regency/Municipal House of Representatives or Head of Regency/Municipality’. This provision gives authority to the Batam City House of Representatives to initiate the issuance of the Batam Human Trafficking Regulation.

The process of formulating the Batam Human Trafficking Regulation referred to the statutory formulation requirements established by Article 1(15) of the Regional Legal Instrument Regulation. The process of issuance of the Regulation has complied with the requirements of planning, drafting, discussion, approval or determination, promulgation and dissemination. The fulfillment of the formal process of making the Regulation was also emphasised by the Head of Batam City House of Representatives and the Head of the Legal Department of Batam City Regional Secretariat in the interviews for this research. No flaw was found in the process of making the Regulation as presented below.

1. Planning stage: The Head of Commission IV of Batam City House of Representatives 2009-2014 initiated the Regulation, which was endorsed by 7 factions of Commission IV and subsequently it was included in the Regional Legislation Program.
2. Drafting stage: The Batam City House of Representatives requested that a higher education institution (academicians) draft an academic manuscript including a draft for the Municipal Regulation (Draft Regulation).
3. Discussion stage: The academic manuscript and the Draft Regulation (*Rancangan Perda*) were discussed in plenary meetings among the legislative members and subsequently the executive body was asked to give input regarding the Draft Regulation.
4. Approval or determination stage: The Draft Regulation was approved jointly by the Batam City House of Representatives and the Batam City Mayor. It was subsequently submitted by the Head of the Batam City House of Representatives to the Batam City Mayor, to be determined as the Municipal Regulation of Batam City No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims.

5. Promulgation stage: The Regulation was promulgated in the *Batam City Gazette* Year 2013 Number 5.
6. Dissemination stage: The Draft Regulation was disseminated from the planning stage until the promulgation stage to the Batam City public and relevant stakeholders to provide information and/or obtain their input (public opinion).

Although the issuance of the Regulation fulfilled the formality of statutory procedures formulation, it should be noted that this does not guarantee its effectiveness. The crucial factor to determine the effectiveness of the Regulation is its substance. The Effectiveness of Law Theory prioritises this factor, among others, to influence the effectiveness of law. This Theory submits that the legal substance must contain ‘justice, certainty and utility’. From the interviews with the Head of the Women’s Empowerment, Child Protection and Family Planning Agency of Batam City, members of the Anti Human Trafficking Task Force and the Director of Women and Children’s Protection for *Yayasan Embun Pelangi*, it was found that the substance of the Regulation does not reflect the conditions and situation of Batam City.

Accordingly, it is imperative to examine the Regulation’s academic manuscript because it was used as a reference to draft the Regulation. Based on the examination, it was revealed that the manuscript contains many flaws. They are, among others:

1. Introduction:
 - a. The background does not specifically elaborate the trafficking situation and conditions of Batam City. It lacks statistical information and authoritative references. Instead, the background merely details the conditions and situation of human trafficking at the national level.
 - b. Targets and problem identification are not clear, nor are they supported by adequate data and references.
 - c. The objectives do not focus on the human trafficking conditions and situation in Batam City.
 - d. The research method states that it combined library and field research. However, it is not clear ‘who the respondents were, how the data was collected, what instruments were used for data collection’.
 - e. More importantly, the academic manuscript drafted in September 2012 does not use the Appendix of Law No.12 of 2011 in the Formulation Procedure for Legislation as a reference. As a result, the writing structure of the academic manuscript is outdated.
2. Theoretical reviews and empirical studies:
 - a. The academic manuscript contains no theoretical reviews and there is a lack of analysis of the conceptual reviews.
 - b. There are no empirical studies on the human trafficking conditions and situation of Batam City.
3. Evaluation and analysis of relevant legislation:
 - a. The academic manuscript simply lists 32 pieces of legislation relevant to human trafficking without making any analyses or examinations of them.
 - b. Regional Regulation of Riau Islands Province No.12 of 2007 on the Abolition of the Trafficking of Women and Children is not listed in the academic manuscript. In fact, it mandates that the regencies and municipalities of Riau Islands Province issue a Human Trafficking Regulation.
4. Philosophical, sociological and legal analysis:
 - a. Philosophical analyses are not included.

- b. The sociological analyses do not focus and provide data on human trafficking in Batam City.
 - c. Legal analyses are not provided.
5. Scope of substance:
- a. The methods of submitting propositions are unstructured.
 - b. No results of empirical studies are provided.
 - c. It is difficult to connect the academic manuscript and the Draft Regulation.
6. Closing:
- a. Conclusions are not clearly stated.
 - b. There is no connection between the conclusions and suggestions.
 - c. There is a lack of authoritative sources in the references.
 - d. The structure of listing the references is incorrect because the regional regulation is listed before the laws at national level.

The academic manuscript of the Regulation had to be very specific because, unlike other regions in Indonesia, Batam City is both a destination and a transit area for human trafficking victims. It is unfortunate that the manuscript fails to discuss this very significant matter. It is obvious that it is inadequate to be the primary material to draft the Regulation. It was further found that 98 percent of the 24 articles of the Regulation are identical with those of the Regional Regulation of West Java Province No.3 of 2008 on the Prevention and Handling of Human Trafficking Victims. Table 4 lists the provisions, which were copied and pasted from the Regional Regulation of West Java Province.

Table 4: The identical provisions of the Batam Human Trafficking Regulation

and the Regional Regulation of West Java Province

Municipal Regulation of Batam City No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims	Regional Regulation of West Java Province No.3 of 2008 on the Prevention and Handling of Human Trafficking Victims
Article 1(1),(2),(3),(4) Article 1(16) Article 1(17) Article 1(18) Article 1(19) Article 1(20)	Article 1(1),(2),(3),(5) Article 1(14) Article 1(15) Article 1(16) Article 1(18) Article 1(19)
Article 2(a),(b),(c),(d),(e)	Article 2(a),(b),(c),(d),(e)
Article 3(a),(b),(c)	Article 3(a),(b),(c)
Article 4(1)(a),(b),(c),(d) Article 4(4)	Article 4(1)(a),(b),(c),(d) Article 4(4)
Article 5(1)(a),(b),(c),(d),(e),(f),(g) Article 5(2)(a),(b)	Article 5(1)(a),(b),(c),(d),(e),(f),(g) Article 5(2)(a),(b)
Article 6(1) Article 6(2)(a),(b),(c),(d) Article 6(3) Article 6(4)	Article 6(2) Article 6(3)(a),(b),(c),(d) Article 6(4) Article 6(5)
Article 7(1) Article 7(2)(a),(b),(c),(d),(e),(f),(g)	Article 7(1) Article 7(2)(a),(b),(c),(d),(e),(f),(g)

Article 11(2)(a),(b),(c),(d),(e),(f),(g)	Article 12(2)(a),(b),(c),(d),(e),(f),(g)
Article 12(1)(a),(b),(c),(d),(e),(f)	Article 13(1)(a),(b),(c),(d),(e),(f)
Article 13(1) Article 13(2)(a),(b),(c) Article 13(3)(a),(b),(c)	Article 15(1) Article 15(2)(a),(b),(c) Article 15(3)(a),(b),(c)
Article 14(1) Article 14(2)(a),(b),(c) Article 14(3)	Article 16(1) Article 16(2)(a),(b),(c) Article 16(3)
Article 15(2),(3)	Article 17(2),(3)
Article 16(1),(2),(3),(4)	Article 18(1),(2),(3),(4)
Article 17	Article 19
Article 18	Article 20
Article 19(1),(2),(3)	Article 21(1),(2),(3)
Article 20	Article 22
Article 23	Article 24

Source: Data compiled by the authors

It should be noted that the issuance of the Batam Human Trafficking Regulation is mandated by a higher law, namely Law No.21 of 2007 on the Elimination of Human Trafficking Crimes (Human Trafficking Law). This Law also mandates that West Java Province issue a regional regulation on human trafficking. Hence, some general provisions from the Human Trafficking Law must be adopted by these regional regulations. However, there is specific content deemed appropriate for each area. The specific content for the Human Trafficking Regulation for Batam City has to be very different from that of the West Java Provincial Regulation. This is because Batam City is not only a destination but also a transit area, whereas West Java Province is a sending area of human trafficking victims. The failure of the academic manuscript to detail the conditions and situation of Batam City as a transit area generates faulty approaches to the Draft Regulation. This was made worse because members of the Batam City House of Representatives visited West Java Province for their comparative study and benchmarked that province's Regulation. It is true that West Java Province is considered to be a best practice in preventing and handling human trafficking victims. However, as has been mentioned previously the human trafficking conditions and situation in Batam City and in West Java Province are completely different.

The inconsistency between the academic manuscript and the Draft Regulation becomes more obvious because the Draft Regulation clearly states in the Consideration Section that Batam City is a destination and transit area. Yet, this matter is not discussed in the academic manuscript. The 'copy and paste' human trafficking regulation paralyses the efforts of Batam City stakeholders to combat human trafficking because many provisions of the Regulation cannot be put into practice. The most criticised provisions are as follows:

1. Provisions, which require recommendation letters to work outside of Batam City, are contradicted by Consideration Point C of the Regulation, which states that Batam City is a transit and destination area for human trafficking. Logically, the requirements of recommendation letters are not necessary because only sending areas require their citizens to get recommendation letters to work outside their areas.
2. Provisions relating to the support for families of human trafficking victims are inapplicable because human trafficking victims will be returned to their hometowns and their families do not live in Batam City.

3. Provisions on data collection and the monitoring of citizens of Batam City who are willing to work outside the city contradict Consideration Point C of the Regulation which emphasises that Batam city is merely a transit and destination area.
4. Provisions pertaining to social integration for human trafficking victims are not needed because they will not live in Batam City.

The contradictory substance of the Batam Human Trafficking Regulation not only shows its ineffectiveness but it may lead to misinterpretation. This can happen if, for instance, the social integration provisions are interpreted to mean that human trafficking victims can be socially integrated in Batam City. This may allow human trafficking victims to stay in Batam City instead of returning to their hometowns. Nevertheless, the rules of the Women's Empowerment, Child Protection and Family Planning Agency of Batam City determine that human trafficking victims are entitled to stay in the government shelter for a maximum of seven (7) days. They may stay longer if they need medical and/or psychological care. Human trafficking victims may stay much longer in the NGO shelters if they wish to take legal action against their traffickers (Shahrullah, 2010).

It is clear that the 'copy and paste' regulation is not effective at all, even if such a regulation has been processed according to the formal statutory procedures. The Effectiveness of Law Theory points out that the formality of enacting a regulation is not a mere factor to determine its effectiveness. The legal substance plays a more significant role for the effective implementation of the regulation. It is unfortunate that this was not realised when drafting Batam Human Trafficking Regulation. The flaws in the Regulation's substance were only apparent when it was about to be implemented. This circumstance occurred because some key stakeholders, such as the Head of Women's Empowerment, Child Protection and Family Planning Agency of Batam City, were not involved or consulted during the drafting process of the academic manuscript. The Director of Women and Children's Protection of *Yayasan Embun Pelangi* revealed that, 'he was not given access to get involved during the dissemination stage of the Draft Regulation Bill even though he was willing to do so'.

Solutions for the effective implementation of the Batam Human Trafficking Regulation

This research has found that the problems of the ineffective implementation of Batam Human Trafficking Regulation are primarily caused by the flaws in the academic manuscript and the Draft Regulation. It is then questioned whether the protection and handling of human trafficking victims in Batam City has to cease because of the ineffectiveness of the Regulation. In relation to this condition, the Head of the Women's Empowerment, Child Protection and Family Planning Agency of Batam City said, 'The Decision of the Batam City Mayor No. Kpts. 29/HK/I/2010 on the Establishment of a Task Force for the Elimination of Human Trafficking, Child Sexual Exploitation and the Batam City Action Plans were still being used until 2015 to handle human trafficking victims, due to the ineffectiveness of the Batam Human Trafficking Regulation. A similar approach has been taken by Members of the Anti Human Trafficking Task Force and the Director of Women and Children's Protection of *Yayasan Embun Pelangi*. They are of the opinion that, 'Since the Batam Human Trafficking Regulation cannot be effectively implemented, task forces and NGOs are left to handle human trafficking victims without reference to the Regulation'.

In the absence of a suitable Regulation, relevant stakeholders still continue to combat human trafficking by using the other legal instrument, namely the Decision of the Batam City Mayor. This approach is not entirely correct from a legal perspective because the Decision was only intended

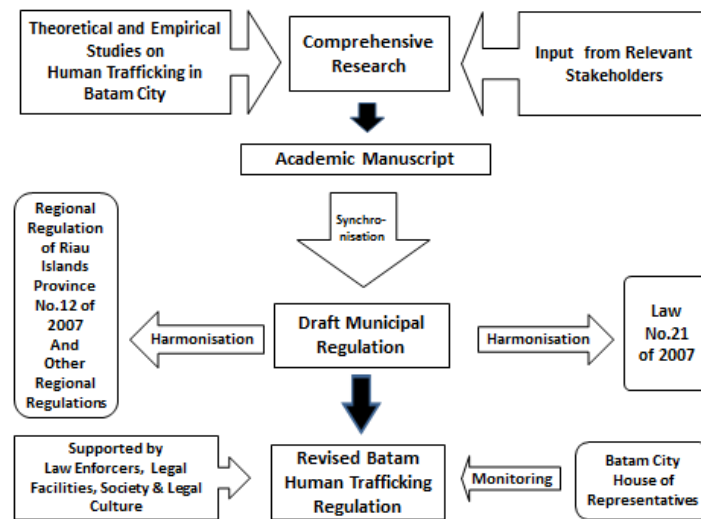
for the period of 2010-2014. It can also be argued that only some provisions of the Regulation cannot be implemented effectively. Consequently, provisions regarding budgeting, trafficking task forces and regional action plans can still be effective for Batam City; therefore, they should remain intact in the Regulation.

To fill the lacunas in the Batam Human Trafficking Regulation, it is proposed that stakeholders from the legislative and executive bodies should evaluate the Regulation and list all aspects relevant to the conditions and situation of Batam City as a transit and destination area. The aspects should cover the facilities for human trafficking victims, such as medical care, psychosocial treatment, safe houses and the process of returning the victims to their hometowns. The evaluation results could be used as a reference for the Batam City Mayor to issue a Batam City Mayoral Regulation on the Regional Action Plan 2015-2020. This Action Plan could be used by all stakeholders as a guideline and reference to deal with the human trafficking problems in Batam City.

Alternatively, it is proposed that the ineffective provisions of the Batam Human Trafficking Regulation, such as those relating to the requirements of recommendation letters to work outside of Batam City, the support for families of human trafficking victims, data collection and the monitoring of citizens who are willing to work outside the City, and social integration for human trafficking victims, should be revised. If this proposal is to be accepted, then several improvements should be made, namely:

1. Comprehensive research needs to be conducted to support the drafting of the academic manuscript and the Draft Regulation if the Batam Human Trafficking Regulation is to be revised.
2. The academic manuscript and the Draft Regulation should be synchronised and harmonised. In this respect, the Legal Department of the Batam City Regional Secretariat needs to establish Standard Operational Procedures (SOP) for this to happen.
3. The Draft Regulation needs to be harmonised with other laws and regulations relevant to human trafficking at both the national and regional level.
4. All relevant stakeholders and the public should become involved at the dissemination stage in order to gain actual data and input regarding the conditions and situation of human trafficking in Batam City.

It is important to note that a merely well-drafted regulation cannot guarantee its effective implementation. Other factors stated by the Effectiveness of Law Theory must support it. Hence, the Revised Batam Human Trafficking Regulation should be supported by professional law enforcers, good legal facilities, and a pro-active society whose legal culture aims to combat human trafficking. In addition, the Batam City House of Representatives should also be proactive in carrying out its monitoring function to examine the effective implementation of the revised Regulation. In brief, this proposed solution is described by Figure 4.

Figure 4: The mechanisms of revising Batam Human Trafficking Regulation

Source: Compiled by the authors

CONCLUSIONS AND IMPLICATIONS

Batam City Government has implemented Municipal Regulation of Batam City No.5 of 2013 on the Prevention and Handling of Human Trafficking Victims. Yet, stakeholders claim that the Regulation cannot be effectively implemented because its substance does not reflect the conditions and situation of Batam City as a destination and transit area of human trafficking victims. After examining the documents used to draft the Regulation, it is concluded that:

1. The causes of the ineffective implementation of the Regulation are derived from the failure of the academic manuscript to detail the conditions and situation of Batam City as a transit area. This flaw has led to the drafting of inappropriate provisions for the Draft Regulation.
2. The Draft Regulation is not consistent with the academic manuscript because most of the provisions were copied and pasted from those of the West Java Regional Regulation on Human Trafficking.

Two solutions are proposed to fill the lacunas of the Regulation. In the short run, the Batam City Mayor should issue a regional action plan against human trafficking for 2015-2020 that can be used as a guideline by stakeholders. In the long run, the ineffective provisions of the Regulation need to be revised.

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DEEPENING PUBLIC TRUST AND CONFIDENCE IN JUSTICE DELIVERY - THE CASE OF GHANAMS. DIANA ASONABA DAPAAH¹**ABSTRACT**

This paper argues that deepening public trust and confidence in any justice delivery system and for that matter Ghana is a collective responsibility of varying stakeholders with the public itself whose confidence is desired playing no mean role in justice delivery. Various stakeholders have varying roles to play which dovetail into each other's roles. Part I examines the relevant stakeholders within the justice delivery system of Ghana, Part II discusses how the actions and inactions of the identified stakeholders contribute to eroding public trust and confidence in justice delivery, Part III makes recommendations in respect of the identified stakeholders and how they can contribute to enhancing the public trust and confidence in the justice delivery system. This paper concludes that the judiciary is not the sole cause of judicial corruption in Ghana nor does it bear sole responsibility to assess and ensure its own competence and integrity. Much is dependent on the general public as a whole in deepening their own confidence and trust in justice delivery in Ghana.

Key words: judiciary, corruption, justice, confidence, integrity, trust.

INTRODUCTION²

The judiciary of Ghana came under tremendous condemnation and scrutiny after the Tiger PI judicial corruption scandal in 2015 where the ace investigative journalist, Anas Aremeyaw Anas, posing as a litigant and through various video and audio recordings exposed about thirty-four judges and over 80 staff of the judiciary allegedly taking various forms of bribes to compromise their work. The release of the videos by the ace journalist culminated in a heated discussion on the integrity of judges and the justice delivery system of Ghana. Indeed, the judiciary suffered and continues to suffer continuous scrutiny as a result of the scandal. As a result of the allegations, various proceedings have been initiated by the President and by the Chief Justice of Ghana respectively in accordance with the Constitution of Ghana. The scandal has brought the judiciary under much scrutiny with a general public call to redeem the image of the judiciary, deepen public trust and confidence in justice delivery in Ghana.

Allegations and/or evidence of a corrupt justice delivery system are neither new nor peculiar to Ghana. On the assertion that corruption generally and for that matter a corrupt justice delivery system, is not new, renowned corruption scholar Robert Klitgaard argues that corruption is as old as organized human life and as old as the government itself³. Traces of corrupt practices among people in a justice delivery role can be found in religious⁴ and traditional books. On the assertion

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² An older version of this paper was presented at the 8th Annual Chief Justice's Forum in Ghana in October 2015.

³³³ Klitgaard, Robert, "Controlling Corruption"(1988)

⁴ 1 Samuel 2:12-17; 2 Peter 2: 19

that corruption is not peculiar to Ghana, corruption within the justice delivery system has bedeviled individuals all over the world as it has nations and continents. Transparency International's 2014 corruption perception index showed varying perceptions of corruption within the public sector of Bhutan to Botswana to USA to UK to Ghana. Similar index by the Ghana chapter of Transparency International, Ghana Integrity Initiative⁵, are available with respect to the level of corruption within the justice delivery system of Ghana. By enumerating these instances of corruption in other jurisdictions, I do not in any way suggest that Ghana is in good company.

A further follow up on corruption in various jurisdictions will rather indicate that, for serious and effective democratic countries, there is a continuing and high sense of commitment to a collective responsibility to eradicating corruption within the public sector and more particularly within the justice delivery system. It is trite knowledge the endemic effect of corruption within the various sectors of every state, from the breakdown of rule of law, to environmental degradation, to mob justice, to breakdown of the health, education and energy sectors just to mention a few.

Discussion on corruption in justice delivery continues to be the focus of recent international discussion trends. At the 2015 International Bar Association conference which took place in September, the report of the International Bar Association's Human Rights Institute carried an extensive work on justice versus corruption. While the report focused on Cambodia, with the title, "Justice versus Corruption, Challenges to the independence of the judiciary in Cambodia", a careful reading showed that the report focused on a rebuilding and rebranding of the justice delivery system in Cambodia by all stakeholders to build and deepen public trust and confidence in the system. The report, especially the recommendations, reflects my personal thoughts on deepening public trust and confidence in justice delivery in Ghana.

My paper is in four parts. Part 1 seeks to identify the relevant stakeholders within the justice delivery system in Ghana. Part 2 considers the various ways in which the actions and inactions of these stakeholders diminish or erode public trust and confidence in justice delivery. Part 3 covers my recommendations in respect of the identified stakeholders on how to deepen public trust and confidence in justice delivery while Part 4 covers my conclusion which is captured in the avid message by Patrick Keuleers, who is Director/Chief of Profession of the UNDP's Governance and Peacebuilding Team in the Bureau for Policy and Programme Support.

PART 1

Who are the stakeholders within the justice delivery framework of Ghana?

A simple answer to this question, in whatever jurisdiction, is everyone. For purposes of particularizing the stakeholders and their specific roles, I have identified the stakeholders within the justice delivery system of every jurisdiction, and Ghana is no exception, to be members of the bench (made up of judges and magistrates), members of the bar association, in the case of Ghana, the Ghana Bar Association, Members of the Judicial Service Staff Association of Ghana (JUSSAG) made up of court officers like clerks, bailiffs, interpreters and so on, prosecutors from both the Attorney General's department and the Police Service, Parliament, government and the general public.

⁵ Ghana ranked 7th in Africa in the 2015 Corruption Perception index.

PART 2

Members of the bench

While the recent Anas scandal in Ghana which exposed, through secret camera recordings, significant amount of corrupt practices among some judges and court officers in Ghana is not the focus of my paper, I concede that the recent scandal follows up on numerous perceptions harboured in the past to confirm that the perception is not only perception but that some of our judges and magistrates are unfortunately corrupt. I hasten to add that, the Anas exposé also underscored in no trivial measure, perhaps even the highest measure, the fact that there are gallant, honourable and conscientious judges and magistrates discharging their sworn duties to admiration. My research, from experience and interviews of identified court users, has identified the following ways by which the actions and inactions of judges and magistrates impact negatively on the public's trust and confidence in justice delivery;

- Growing misconception of the role of judges and magistrates by themselves and the general public that judges are “owners” instead of custodian of justice. Clearly, Justice emanates from the people NOT judges as found in Article 125 of the 1992 Constitution of Ghana. Judges are only to administer justice on behalf of the people. Phrases such as “My court,” “I have the power...” may be misnomers depending on the context in which they are used. Justice and for that matter judicial power emanates from the people and is administered on behalf of the people by the Judiciary;
- Collusion with court clerks, officers and lawyers to obscure justice;
- Inefficiency leading to delays in justice delivery, leaving rooms for speculation by the public and manipulation of the system by court clerks, bailiffs et cetera.
- Incessant adjournments of cases and lack of case management eroding the public trust and confidence in the efficiency of the justice delivery system.
- Delayed and porous judgments leaving room for speculations that judges have been compromised;
- Sense of entitlement; extortion from the public; demi-god postures. In this regard, the unreported decision of the Supreme Court in *Adomako Anane v Nana Owusu Agyeman and 7 others*⁶, speaking through her Ladyship the Chief Justice of Ghana, Justice Georgina Theodora Wood, could not have been more apposite. In the referenced case, her Ladyship underscored the fact that access to justice (and may I add, corrupt-free, efficient and effective justice) is a right not a privilege or courtesy or favour;
- Intimidation, bullying, lack of professionalism by judges and magistrates in handling lawyers and/or clients impact negatively on justice delivery; as much as
- Lack of control of court/ no idea of progress of court dockets, case proceedings do;
- Off-kilter optimum judicial standards coupled with lack of industry are a betrayal to justice delivery and invariably a betrayal of the good people of Ghana;
- Within the judicial service, Proceedings related to appointment and discipline of judges, in my humble opinion are “shrouded in secrecy.” Generally, a seeming paucity of subjective and objective impartiality undermines justice delivery.

⁶ Supreme Court decision, Civil Appeal No. J4/42/2013

Court officers

As mostly the first people the general public come into contact with in accessing the courts, court clerks, bailiffs, interpreters, typists and other court officers have an important role to play in deepening public trust and confidence in justice delivery. The various ways by which their actions and inactions may erode and/or diminish the public trust and confidence are identified thus:

- Lack of meritocracy in appointment;
- Collusion with other stakeholders to hide, destroy evidence and generally manipulate the system;
- Lack of professionalism;
- Initiators and agents of corrupt practices;
- Taking on excessively powerful role in the court are how the actions and inactions of court officials erode public trust and confidence in justice delivery. The semblance and manifestation of demi-god attitudes tend to impact justice delivery negatively in the eyes of the public.

Members of the Ghana Bar Association

My own colleagues at the Bar play a role in eroding public trust and confidence in the judiciary. I have identified the following roles from my colleagues and the bar as a body as:

- Superciliousness or haughtiness and lack of professionalism in relating to the bench, court officials and clients impact negatively on justice delivery as well as;
- Collusion with court officials and judges to manipulate the system;
- Unethical and cunning manoeuvres in court to the knowledge of clients. For such a lawyer, his previous haughty approach to the bench and other officials will only feed into the perception of his client or the other party and/or his lawyer that the judge or magistrate has been compromised. While we cannot use perception as a measuring standard to an efficient justice delivery system, I daresay we cannot equally feed into the perception;
- The unfortunate abandonment of 4-way duties of lawyers, these 4way duties: duty to court, duty to client, duty to profession and duty to the public appear to be lost on some of my colleagues unfortunately.
- Lax Committees of the Bar: mainly the Monitoring and Evaluation Committee charged with monitoring the general performance of judges and magistrates to make requisite recommendations, the Disciplinary Committee and the Legal Outreach Committee.

Prosecutors

Prosecutors, both from the AG's Department and the Police Service contribute to eroding public trust and confidence in justice delivery when they do the following:

- Collude intentionally or unintentionally to delay proceedings
- Take a lackadaisical approach to prosecute and hide relevant evidence
- Inefficiently and unprofessionally handle cases
- Lack of consistent training and retraining by police prosecutors in particular betray any public trust and confidence in the judiciary.

Parliament is a relevant stakeholder whose role in justice delivery cannot be overemphasised. Regarding Parliament, reference is made to the penalties for corruption generally in Ghana. Section 239 of Criminal and Other Offences Act 1960, Act 29 classifies corruption as a misdemeanour. I am aware of the provisions of Section 35 of the Courts Act 1993, Act 459 as amended which reads:

“Where a person is charged with an offence before the High Court or a Regional Tribunal, the commission of which has caused economic loss, harm or damage to the State or any State agency, the accused may inform the prosecutor whether the accused admits the offence and is willing to offer compensation or make restitution and reparation for the loss, harm or damage caused.”

I am aware of a similar provision in the Financial Administration Act passed in 2003, Act in Section 69⁷.

These statutory provisions notwithstanding, it is my humble submission that our laws focus on fines and custodial punishments without recovery by the State of the illegal gains from corrupt practices. In this regard, I wish to respectfully make reference to the Malaysian Anti-Corruption Commission Act 2009, Part IV on Offences and Penalties which include **Fines five times the sum or value of the gratification**. It leaves no room for persons convicted of corruption to serve their sentence and later come back to enjoy their booty.

Government

The government of Ghana plays no mean role in either eroding or deepening public trust and confidence in justice judiciary. How does government cause this erosion? Through

- Pressure- political and financial. Coercion and manipulation of judges and other court actors
- Moot endorsements/ Lack of meritocracy in the appointment and promotion of judges

The Public

Much as the title of my paper suggests that trust and confidence in justice delivery is to be deepened for the benefit of the public, my position is that the public itself plays no mean role in deepening public trust and confidence in justice delivery. The public itself contribute to the erosion of trust and confidence in justice delivery by:

- Being nonchalant and/ or unresponsive to the justice delivery framework. Lack of strong civic sense of duty contributes to an ineffective public generally to country’s development. It is my humble submission that there ought to be a general overhaul in the thinking of the public as regards the justice delivery system by. The public ought to know that justice emanates from them; they ought not to buy justice, they must themselves do justice and avoid feeding into corrupt practices either as instigators or givers.
- The public ought to “own” the process, take particular concern to actors within the justice delivery system, rather than engage in whispers on the sidelines, be it on founded or unfounded allegations of a corrupt justice delivery system. Congruent to my proposal for transparency within the appointment, elevation and promotion procedures of judges and magistrates, a responsive public will assist in the process where they approach and access the requisite bodies and individuals with founded complaints, petition or recommendation all with a view to sanitising the justice delivery system. The role of the public itself in deepening public trust and confidence in justice delivery, I must respectfully emphasise, is as invaluable as is needed.

⁷ Under this Section, a person adversely affected by an audit report may accept liability and offer to pay compensation or make restitution. The Section titled “Compensation and Reparation” appears not to make compensation and restitution mandatory but a choice, at the election of the affected person.

PART 3 RECOMMENDATIONS

Members of the bench

With respect to our honourable judges and magistrates and how their actions and inactions erode or diminish the public trust and confidence in justice delivery, I would make recommendations follows:

- A general sensitisation and self-evaluation of our judges and magistrates on their roles as gatekeepers of rule of law, “agents of the people of Ghana” to deliver justice per their oath.
- Fulfilment of utmost responsibility as custodians of rule of law and justice by ensuring personal integrity, procedural integrity and access to justice. In this regard, personal and process integrity is key and all judges and magistrates must conscientise themselves to uphold the tenets of integrity in their work.
- Efficient use of case management to leave no room for delays, speculation and manipulation of the system
- Respecting professional boundaries in dealing with court officials, prosecutors, lawyers and the public.
- Exercising high sense of commitment to fundamental human rights especially access to justice by accused persons, the marginalised and the poor in society.
- Technology compliance to ease the loads of the court, deliver swift justice leaving no room for manual manipulation of evidence, proceedings and general justice delivery by court officials.
- Further, the process of appointment of judges must undergo rigorous scrutiny based on merit and high proven character involving the public. Publication of details of proposed magistrates and judges to elicit factual evidence of corrupt and unscrupulous behaviours of person seeking appointment to the bench is highly essential if public trust and confidence in justice delivery is to be deepened.
- A Self- appraisal system during the tenure of judges and magistrates. By this self-appraisal system, which is found in most academic institutions, an obligation should be placed on judges and magistrates every three years to undergo a self appraisal to substantiate their elevation based on merit and integrity. The self-appraisal document must form significant part of the considerations for promotion. I am aware that by the current systems, judges and magistrates submit returns on judgments delivered within the month to show efficiency. I propose that beyond these monthly returns which go to the root of hard work, the self-appraisal should focus on the integrity of the judge or magistrate, confirming that within the period of the proposed 3 years, she has not compromised her values nor undermined the justice delivery system.
- A rigorous and transparent working of disciplinary proceedings for stated misbehaviour. Again, Complaint procedures against judges and magistrates should be publicised and made easily accessible available to the public.
- Finally, a call on our honourable judges and magistrates to commit to hard work, scholarship and industry to vindicate their positions. Incidental to this, the recent increase in graduate studies among judges and magistrates through the efforts of the Lady Chief Justice is highly commended.

Court officers

I make the following recommendations as regards court clerks, bailiffs, officers accordingly;

- Certain, exact, transparent and responsive disciplinary sanctions for recalcitrant officials
- Professional training and retraining on their duties.
- Meritocracy: rigorous selection process prior to appointment.
- Rigorous appraisal system to prune out bottlenecks

Members of the bar

My recommendation as regards lawyers and the bar in deepening public trust and confidence in the judiciary are as follows:

- Increased Continuing Legal Education and Professional Development for lawyers
- A call to my colleagues to exercise utmost respect and professionalism for the bench, court officials and the public
- A revisit to duty: our 4 fold duty⁸ and our general commitment to serve as guards of a transparent and accessible justice delivery system.
- Active Monitoring and Evaluation Committee. A Replica IBA Judicial Integrity Initiative Survey⁹ in conjunction with Judicial Council is recommended which is a survey of general assessment of the judicial system.
- Responsive Disciplinary Committee of the Bar to prune out “corrupt” lawyers detracting from the ideal justice delivery system and bringing the system into disrepute. Certainty, transparency and publication of disciplinary sanctions to the public to serve as deterrence and deepen public trust and confidence in justice delivery.
- Finally, an appeal to the Legal Outreach committee of the bar to play their designated role in reaching out to the public on their civic rights and duties particularly in relation to justice delivery.

Prosecutors

As curative and preventive measures, our prosecutors can deepen public trust and confidence in justice delivery through the following:

- Where certain, exact, transparent and responsive disciplinary sanctions for “corrupt” prosecutors.
- Through vigorous Professional training and retraining
- Meritocracy: rigorous selection process especially of Police prosecutors prior to appointment.
- Rigorous appraisal system to prune out bottlenecks

Parliament

As regards Parliament, the following recommendations are proposed:

- Amendment of law on corruption with higher deterrence basis in mind. With this I propose a Replica of the Malaysian Anti-Corruption Commission Act which also focuses on recovery of value or gratification.

⁸ Ghana Bar Association, Code of Ethics

⁹ http://www.ibanet.org/Legal_Projects_Team/judicialintegrityinitiative.aspx

- Responsive and rigorous approach to the appointment procedures of judges i.e. the need to avoid politically influenced endorsement of proposed appointments to the bench without consideration of merit.

Government

As a rebuilding, re-energising proposal, I would urge government to do more to show a general strong commitment to eroding corruption generally and particularly within the justice delivery system of Ghana by:

- Committing strongly to cease political manipulation of judges and magistrates, court officials, lawyers and other court users
- Exhibition of a high sense, support and actualisation of an accessible, efficient, effective and corrupt- free justice delivery system through, among other things, a robust Legal Aid Scheme.
- Creation of awareness and education of public on the workings of the justice delivery system.
- Anti-corruption Day: Day of retrospection and introspection of our achievements and shortcomings generally as a nation and particularly within the justice delivery system.
- Set up of an Anti-Corruption Commission, similar to Kenya, charged with a specific duty to identify and erode corruption within all sectors, both private and public, with investigative and prosecutorial functions.

PART 4

CONCLUSION

I wish to reiterate the point that deepening public trust and confidence in justice delivery is the collective responsibility of all citizens and foreigners within Ghana. By my presentation, I have sought to provoke reflections and discussions on the theme. I am sure through the pragmatic, monitored and collective interventions suggested by this paper, the public trust and confidence in justice delivery in Ghana would be enhanced and sustained.

As rightly pointed out by *Patrick Keuleers*¹⁰,

“The message is simple: “Taking back what was lost to corrupt practices is everyone’s responsibility”. It is the responsibility of our governments and civil society organizations, of the private sector and the media, the general public, and of the youth, who must play a pivotal role in seeing this agenda through so that their future is built on solid and honest foundations. I encourage all readers to stand up and join forces to break the corruption chain... As the UN Secretary General Ban Ki-moon said in his message, ‘this is a call to come together for global fairness and equity. The world and its people can no longer afford, nor tolerate corruption.’”

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¹⁰ <http://www.undp.org/content/undp/en/home/blog/2014/12/9/Breaking-the-corruption-chain-is-our-collective-responsibility.html>

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Courts Act of Ghana 1993, Act 459
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THE NIGERIAN ARMY VERSUS THE ISLAMIC MOVEMENT OF NIGERIA (IMN; SHIITES): IS THIS ANOTHER BOKO HARAM STORY?

MR. SOLOMON TIMOTHY ANJIDE¹

ABSTRACT

From 2009 to the present date, Nigeria's security and stability has become increasingly worrying, both nationally and internationally, particularly due to the existing violent and rebellious activities of the Boko Haram radical Islamists and the upsurge of the Biafra separatist movement. This paper focuses on the December 12th extra-judicial killing of members of the Islamic Movement of Nigeria (IMN) by the Nigerian Army, which has provoked reactions within Nigeria and the international milieu from religious and human rights groups, and other countries. The IMN is an Iranian-sponsored Shiite movement in Nigeria which in the period from the 1970s to the 1990s had several violent confrontations with the Nigerian security forces. Moreover, the IMN is also known for its decades of radical theological stance within Nigeria. This paper seeks to explain how a mix of history, ideology, Islamic schism and grievances can motivate the IMN to engage in violence as a resistant/revivalist movement. I conclude that the failure of the Nigerian government to resolve the IMN's grievances may lead to the emergence of another violent movement. I also conclude that the extra-judicial killing of IMN members by the Nigerian Army has further shown the culture of violating the human rights of dissident groups that exists within the Nigerian security forces and in doing so make particular reference to the killing of the leader of Boko Haram, which escalated that movement's campaign of violence. From a broader perspective, this paper seeks to contribute to the study of political violence, particularly in regard to the neglected role of governmental agencies in the extra-judicial killing and torture of individual(s), which leads to violent extremism within groups.

Keywords: Nigeria, Shiite, violent extremism, Boko Haram, and extra-judicial killing

INTRODUCTION

Nigeria's security challenges have become a topical issue within and across Africa, particularly with the violent activities of Boko Haram terrorists and the resurgence of the Biafran secessionist movement, otherwise known as the Indigenous People of Biafra (IPOB). The recent killing of Shiites by the Nigerian Army, in December 2015, highlights another security threat that might be added to the existing security challenges faced by Nigeria. This is because the IMN, which has in the past been a radical movement, had been subject to a series of human rights abuses, in 2009, 2014 and, 2015.

The majority of scholars who have focused on Boko Haram argue that the extra-judicial killing of the founder of Boko Haram led to the escalation of the movement (Agbibo, 2013; Maianguwa 2013). In recent months (2015/2016), the arrest and long detention without trial of the leader of IPOB has generated extensive protest by his supporters within Nigeria and Nigerian embassies abroad. It is notable that most radical or dissident groups in Nigeria tend to mobilise towards, and justify, their goals by leveraging their identity, religion, ethnicity and political inclinations. Moreover, their radicalism is further escalated, and motivated, by a claim regarding

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social injustice and various human rights abuse by the institutions of the state, particularly the security agencies, with the military often being accused of such abuses.

Although the Nigerian military and the country's security agents have a remarkably successful record in terms global peacekeeping (Hamman et al. 2014), one of their major weaknesses is gross human rights abuse. Specific examples include Liberia and Sierra Leone (Miller 1999). This weakness is also evident locally: dissident groups are being subjected to disproportional use of force and, in some cases, innocent people are caught in between the violence. Examples include the Odi (Ibekwe 2013) and Zaki biam (Onishi 2013) massacres.

The Nigerian government has also shown some weaknesses in regard to its ability to efficiently resolve internal conflicts. Some of its key decisions over the years have formed the narratives that justify the emergence or upsurge of rebelling groups. The death sentence of Ken Saro-wiwa and his cohort, who were activists agitating against environmental degradation and abject poverty in the oil-rich Niger Delta region of Nigeria in 1995 (BBC 1995), is always part of the narrative for the reawakening of militant activities in the region. Nigeria's style of fighting radical groups has chiefly involved the use of conventional force, as opposed to the use of preventive diplomacy or the countering of the narratives regarding why people engage in violent extremism. This changed in 2014, with the introduction of the National Counterterrorism Strategy (NACTEST). NACTEST not only refers to the use of intelligence in the fight against terrorism but it also refers to counter-violent extremism (CVE) (Premium Times 2014). Accordingly, the Nigerian government, in collaboration with international agencies, and religious and traditional institutions, has embarked on executing policies aimed at countering the narrative regarding why people become extremely violent. De-radicalisation programmes have been initiated in prisons, which are seen as major incubators of extremism. Religious leaders have also been used in countering narratives about radical ideology (ibid.) and the issue of the increase in abject poverty has also been considered as one of the causes and motivations of violent extremism (ibid.). CVE is a contemporary concept or practice relating to terrorism and violent conflict. The extant literature on CVE mostly focus on ideology, poverty and lack of education as causes of radicalism. However, the role of extra-judicial killings and state torture are often neglected in accounting for the rise and motivation of violent groups (Schmid 2013). This is also applicable in the case of Nigeria, where the state often undermines itself by engaging in human rights abuses that are capable of triggering organised violence by sub-state groups, which are volatile due to their ideologies, grievances, self-interest, and ethnic chauvinism.

It is important to note that Boko Haram is a clear example of the unintended consequences of the role of the state in relation to the strategic use of violence by groups. Hence this paper seeks to answer the following questions:

How did the IMN emerge?

Has the Nigerian Army violated the human rights of the IMN, and how?

What are the grievances of the IMN?

Will the IMN become a violent group like Boko Haram?

Will the killing of members of the IMN cause sectarian clashes in Northern Nigeria?

RISE OF THE IMN, ISLAMIC SCHISM AND STATE CONFRONTATION

The birth of the IMN can be traced to the division of the Muslim Brotherhood movement of Nigeria (Loimeier 2012). This movement, which was headed by El-Zakzaky, splintered into the Izala

movement and the IMN. This division was caused by a dispute between the leadership of the movement and by contact of El-Zakzaky with key Iranian Shiite leaders (ibid.).

The Izala movement is a Salafist movement sponsored by Saudi Arabia (Global Security). It is the largest Salafist movement in the world, known for its wide evangelism of orthodox Islam within and across Nigeria, and also in Cameroon, Chad, and Niger. From a theological perspective, it rejects innovations in Islam and is bitterly opposed to the Shiites and Sufi forms of Islam (Loimeier 2012). Over the years, the Izala movement had been plagued by internal conflict as a result of leadership crises, generational conflict between new and old scholars, and conflicting doctrinal interpretations (Loimeier 2012). This infighting has led to its fragmentation into several groups (Loimeier 2012) that are undocumented. Notably, Boko Haram is also part of these fragmentations (Loimeier 2012). It is, however, important to note that Izala does not share the same radical ideology as that espoused by Boko Haram.

The new IMN movement emerged as a Shiite group under the leadership of El-Zakzaky (Global Security). The movement is highly influenced by the individual leadership of its leaders. In other words, El-Zakzaky enjoys a cult-like following among his Shiite members (Baba-Ahmed 2015). He is the spiritual leader of the movement. El-Zakzaky's home town is Zaria, an ancient city in Kaduna state in Northern Nigeria. This is the headquarters of the movement, where the Shiite spiritual centre (Husainiyyah Baqiyyatullah) is located – close to El-Zakzaky's house. The IMN has several branches spread across Nigeria, particularly in Northern Nigeria (IMN Website).

The Shiite and Sunni divide that exists in the Middle East also extends to Nigeria, where most Sunni-oriented sects receive funding and moral support from Saudi Arabia, while the Shiite movement has the strong backing and support of the Iranian government, particularly in recent time. The Sunni Muslims are the most populated Muslims, followed by the Sufi (*Tariqa*) and the Shiite, who are a growing population ((Baba-Ahmed 2015). It is important to point out that the Shiite in Nigeria are criticised not only by the Sunni (their major critics) but also by Sufi sects. In a widely circulated audio broadcast Sheikh Dahiru Bauchi, a senior Sufi cleric, criticised the Shiite creed as un-Islamic (Bauchi 2015). The major criticism raised by those antagonistic to the Shiite branch of Islam is that the Shiite do not respect Aisha, the wife of Prophet Mohammed and, as well as his companions; Umar and Abubakar (Bauchi 2015). However, the major argument raised by certain Sunnis – particularly the Izala movement – against the Shiite is that they are major facilitators of innovations in Islam (Nigerian Watch 2014). These theological arguments have over the years given rise to mutual suspicion. While El-Zakzaky and his followers are seen as a potentially violent group due to their history of violent campaign El-Zakzaky, on the other side, has accused the Sunnis of plans to attack him and his followers (Baba-Ahmed 2015).

Apart from this aged-old divide, El-Zakzaky has been involved in several violent confrontations with Nigerian security agents. His violent activities marked the introduction of Islamic radicalism in post-colonial Nigeria. His activities were aimed at establishing an Islamic state in Nigeria. This quest was inspired by the success of the 1979 Iranian revolution (Isa 2010), which coincided with the debate between capitalism and socialism (Global Security). His worldview is anchored in a rejection of Western secularism. Hence, he rejected the secular nature of the Nigerian state and has seen it as an un-Islamic system. This led to numerous confrontations with the Nigerian security forces, which saw him imprisoned in nine different prisons (Isa 2010). Given the history of these face-offs, Sheikh Kabiru Gombe, a senior and revered Izala cleric sees Shiites clashes with successful governments as a plan to distort any Muslim-led government, claiming that there has never been any Shiite attack against a Christian-led government (Gombe 2016).

With the advent of democracy in Nigeria after three decades of military rule, El-Zakzaky was released and Ahmed Makarfi the former governor of Kaduna state co-opted him into government by appointing him as a Special Adviser (1999–2007) (Isa 2010). Since then he has remained peaceful. His peaceful approach, anti-Israel stand and solidarity with Palestine, as well as his anti-Boko Haram stand, gained him more support (Baba-Ahmed 2015). Iran helped him to establish a more organised system of Shiite evangelism, which saw him establish schools and charity organisation for the members of the IMN. Some members of the IMN come from the margins of the society (ibid.).

The growing number of Shiites in Nigeria is remarkably noticeable given their series of rituals. Their festive or spiritual events, such as *Al Quds day*, *Arba'een*, and *Maulud Nabi*, involve long processions (IMN website). These events have caused traffic log-jams and have made movement for people within Zaria city, difficult due to the high number of Shiites involved in the processions (Gumi 2015). This has caused difficulties for the indigenes of Zaria. Moreover, during these events even influential citizens have been forced to wait for such processions to pass, or have had to find a way out of the area. A former governor of Kaduna state, during a visit to Gyallesu, had to leave his convoy and walk on foot to where he was going (Zaria 2015). It is fair to say that all religions in Nigeria are guilty of causing public nuisance by way of blocking roads during religious functions or placing their worship centres in residential areas and using disturbing loudspeakers. However, the Shiite procession causes particular difficulties for indigenes of Zaria (ibid).

ZARIA MASSACRE AND ITS AFTERMATH

The Zaria Massacre occurred in two phases: one in 2014 and one in 2015. Before these events there was a clash in 2009 between the police and Shiite individuals, in which four Shiites were killed during an *Al Quds* procession (Islamic Human Rights Commission (IHRC) Report 2014). On July 2014, during a similar *Al Quds* procession, the Army killed 33 Shiites, including three of El-Zakzaky's sons. He claimed that his children and some others were taken by the military and tortured to death. Several human rights organisations, both local and international, including IHRC, condemned the Nigerian Army for gross human rights violations. The Nigerian military constituted an investigative panel but its reports were not released to the public. After the event Sheikh Ahmed Gumi, son of the veteran leader of the Izala movement, wrote a letter to El-Zakzaky offering him condolences for the deaths of his children and the members of his organisation, and at the same time blaming him for his "un-Islamic practices" (Ejiofor 2015). Gumi stated that El-Zakzaky's activities were against the tenets of Islam and caused suffering to the poor and ill-educated people, and that what happened to him was due to these "un-Islamic" activities.

On 27th 2015 Boko Haram was reported to have attacked a procession of Shiites on the outskirts of Kano, a city close to Zaria. El-Zakzaky suggested that it was not Boko Haram that carried out the attack, saying it was an "imaginary Boko Haram" (Lere 2015). This statement, Gumi's letter and, the previous killings of members of his group suggest that the Shiites suspect a conspiracy between other Muslim groups and the institutions of the government.

Given the chronology of events, the 12th December 2015 killing of Shiite individuals attracted wide local and international reactions and highlighted a turning point that may cause increased security problems for Nigeria. The event started during the traditional procession of Shiites around their spiritual centre in Gyallesu Zaria. The procession clashed with the convoy of the Nigerian Chief of Army Staff (COAS). The scene degenerated into a situation in which the

Army fired bullets at the Shiite group and proceeded to invade their spiritual centre. It is not clear who instigated the violence: both the Army and the Shiites have accused each other. The Army accused the Shiites of attempting to assassinate the COAS while the Shiites claim that the Army attacked them during their peaceful religious gathering (Human Rights Watch (HRW) 2015). However, after the incident some videos of the scene went viral on social media. One video shows Army officers trying to calm some angry Shiite youth who are yelling at the officers (Ahmed 2015). Some audio-visual material is also in circulation in the media that shows that the Army attacked both El-Zakzaky and the Husseinyya (Shua'ibu 2015), and that shows some youths robbing the dead bodies of Shiite victims (Report Afrique 2015). Other material shows pictures of the severely injured El-Zakzaky.

As a result of the incident over 300 Shiite individuals were reported killed, including El-Zakzaky's wife and deputy. While the whereabouts of El-Zakzaky are unknown still about a week after the event the police announced that he is in their custody, and being given medical treatment (HRW 2015).

After the incident, reaction swelled within Nigeria. There were mass protests by Shiites in the northern cities of Bauchi, Kaduna, Kano, Kastina Niger, Sokoto and Zamfara (BBC 2015). There were also several reactions from human rights organisations, senior Muslim clerics and organisations, concerned citizens, governments and key officials. Popular human rights lawyer and activist Chidi Odinakalu described the situation as one of gross human rights abuse and expressed his worries about the passive attitude of the Nigerian President in responding to the killings (ibid.), as it took the President more than two days to respond to the event (Odinakalu 2015).

There have also been deficiencies on the part of the Nigerian government, in terms of reacting to the crisis. These deficiencies were aptly noted by a Shiite spokesman when he set out the grievances of the Shiite community to the media on 16th December 2015. The IMN rejected the first committee of investigation constituted by the Federal Government of Nigeria (FGN) under the leadership of a Police Area Commander, saying that the Commander was a "junior officer compared to the perpetrators of the attack on their members" (Channels TV 2015). The IMN called for the establishment of an investigative body that includes members of human rights bodies. They are also dissatisfied with the Interior Minister's failure to visit their members in hospital during his fact-finding mission on the event. In addition, they demanded that they be shown where their members have been buried: it is alleged that they were subjected to a mass burial (ibid). After these statements, the Kaduna state government, under governor Nasir el-Rufai, further complicated the situation. He claimed that the spiritual centre of the Shiite is an illegal structure built without the approval of the government and he ordered the demolition of Shiite structures. On 24 December 2015 the centre was demolished. During the demolition some local residents took advantage of the situation to loot the properties of the movement (SaharaReporters 2015). Also, el-Rufai banned all Shiite processions in Kaduna state, and said that El-Zakzaky must face prosecution. These actions gave the Shiites evidence for their belief that el-Rufai is against the Shiites. In addition to these actions el-Rufai constituted a second committee of investigation but the Shiites rejected the committee saying that there were anti-Shiite individuals within the committee (NewsRescue 2016). During his maiden presidential media chat, when asked about the attack on the Shiites, the Nigerian President said: "I cannot draw conclusion on a matter which is yet to be investigated, but I saw a video of some excited teenagers beating the chest of generals and carrying weapons, how can a state exist within a state?" (Olalekan 2015). This statement by the President shows that the FGN, even without investigating the incident, has exonerated the military.

There were several international reactions to the events. The IHRC alleged that there is evidence of a mass burial, with dead bodies taken away by the military and buried secretly (Press TV 2015a). HRW also claims that about 300 people were killed by the Army. Both institutions condemn the killing, describing it as a mass human rights abuse. There were also mass protests in India, Iran and Pakistan by Shiites in these countries, accusing the Nigerian government of killing innocent Shiites and demanding the whereabouts and release of El-Zakzaky (ABNA 2015). While the United States (US) urged the Nigerian President to investigate the killings (PremiumTimes 2015), the Iranian parliament accused the US of conspiring with Nigeria against Shiites (Press TV 2015b). The Iranian foreign ministry summoned the Nigerian ambassador in Tehran and delivered to him a letter of protest to the Nigerian state (The News 2015), while the Iranian President urged the Nigerian government to launch an investigation into the incident (Tehran Times 2015). These reactions from Tehran clearly show that there is a strong ideological bond between Iran and the IMN. On the part of Saudi Arabia, King Salman declared his approval of the action by the Nigerian state saying; that the action of the Army was part of a fight against terrorism (The Herald 2015). This statement is not surprising because history has proved that Saudi Arabia and Iran are battling for supremacy not only in Nigeria but in Africa more wildly. This assertion can be corroborated by the cutting of diplomatic ties with Iran by Djibouti, Somalia and Sudan after the burning down of the Saudi embassy in Tehran (Oladipo 2016).

SECURITY IMPLICATIONS/CONCLUSION

Shiites have major grievances against other Muslim sects and against the Nigerian state. They suspect that there is a conspiracy between other Muslims or Izala and the military to annihilate them, even though the Nigerian Supreme Council of Islamic Affairs (NSCIA), the umbrella body of Nigerian Muslims, condemned the attack. They also believe that the Nigerian government is insensitive to the injustice perpetrated against them by the Nigerian Army. They also have grievances against governor el-Rufai for his "perceived anti-Shiite stand". These grievances could easily transform the IMN into a full-blown militant group, motivated by a desire for revenge and ideological revivalism.

These grievances have the ability to provoke the establishment of a violent Shiite movement because in the past the IMN has adopted a violent strategy. They have a great number of lumpens who rely on the charity outreach of the movement. These people can easily be turned into perpetrators of atrocities. They have overwhelming international support from other Shiite across Nigeria, and major support from Iran. Moreover, Iran has a policy of supporting, and protecting the interest and wellbeing of, its fellow Shiites in other countries. This is clear from its support for the Houthi group in Yemen (Middle East Monitor (MEM) 2015), and its face-off with Saudi Arabia over the execution of Nimr al-Nimr, a Shia cleric sentenced to death and executed for terrorism by the Saudi authorities (Fisher 2016).

There is also the possibility that this may spark sectarian violence across Sub-Saharan Africa, due to the sharp divide between Sunni and Shiites in Africa, which is facilitated by Saudi Arabia and Iran (Oladipo 2016). There is no gainsaying the fact that the rivalry of these two countries in the Middle East has encouraged numerous violent clashes.

The perpetrators of extra-judicial killings of members of other groups, as well as the previous killing of Shiite individuals, were not brought to justice. This encouraged the occurrence of further killing. If all necessary legal, political and, diplomatic channels to address the Shiite grievances fail, then Nigeria should expect the reincarnation of a violent IMN.

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SMALL BANKS: A TOOL FOR FINANCIAL INCLUSION IN INDIAPROF. SUBHRANGSHU SEKHAR SARKAR¹**ABSTRACT**

For the last decade, Indian economy has seen a fast rate of growth that has remained largely indefinable in nature because majority of marginalized and deprived section of society could not be benefited from this growth, which can be attributed to the financial exclusion of deprived section. Thus, it can be said that for inclusive growth of the country, financial inclusion is the prerequisite. Financial inclusion includes banking, insurance, investment and credit facility to each and every section of society. It is the need of time to extend the banking services to un-served sections of the Indian population through expansion of ‘small banks’ in unbanked and under-banked regions of India. To meet this objective, the concept of Small Finance Banks comes up. This paper discusses the concept of Small Finance Banks and Reserve Bank of India (India’s Central Bank) and its guidelines for licensing them in the private sector.

Keywords: Small, Finance, Bank, RBI, Guidelines.

INTRODUCTION

Small Finance Bank is a type of niche bank in India which can provide basic banking services like acceptance of deposits and lending. The aim of a Small Finance Bank is to provide financial inclusion service to the economic sections of the country not being served by other banks; such as small business units, small and marginal farmers, micro and small industries and unorganised sector entities.

The Reserve Bank of India has recognized the need for extending banking services to the underserved and un-served sections of the Indian population through expansion of small banks in unbanked and under-banked regions of India.

In the Union Budget 2014-2015 presented on 10th of July, 2014, the Finance Minister of India announced that:

“After making suitable changes to current framework, a structure will be put in place for continuous authorization of universal banks in the private sector in the current financial year. RBI will create a framework for licensing small banks and other differentiated banks. Differentiated banks serving niche interests, local area banks, payment banks etc. are contemplated to meet credit and remittance needs of small businesses, unorganized sector, low income households, farmers and migrant work force”.

In line with the Union budget presented and acknowledging the fact that Small Finance Banks can play an important role in providing credit to micro and small enterprises, agriculture and banking services in unbanked and under-banked regions in the country, the RBI has decided to grant licence new “Small Finance Banks” in the private sector.

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LITERATURE REVIEW

The Reserve Bank of India (RBI) had published a policy discussion paper on “Banking Structure in India – The Way Forward” on its website in August, 2013 (Reserve Bank of India, 2013). One of the main findings of this discussion paper is that providing banking services to un-served sections of the Indian population is a challenge and this challenge can be achieved through expansion of Small Finance Bank networks in un-banked and under banked regions of India. Subsequently, the draft guidelines for licensing small banks were formulated and released for public comments on 17th of July, 2014. Comments and suggestions were received on the draft guidelines and the actual guidelines for licensing Small Finance Banks in the private sector have been finalised on 27th of November, 2014. It is worth mentioning that Government of India earlier tried the concept of small banks following the union budget in 1996 and the RBI issued guidelines for setting up of Local Area Banks (LABs). The LABs were considered as low cost institutions which would deliver efficient financial support services primarily in rural and semi-urban areas. The minimum capital requirement for LAB is Rs. 5 crore and an area of operation includes three adjoining districts. (Reserve Bank of India, 2013)

From the above reviews it is observed that the RBI has taken up meticulous steps to formulate the guidelines for licensing Small Finance Banks and the crucial aim of RBI is to provide basic banking services like acceptance of deposits and lending to the unbanked and under-banked regions of India. Further, it is a challenge for RBI to achieve the ultimate aim of licensing Small Finance Banks through innovative new-aged technology.

OBJECTIVES OF THE STUDY

This paper aims to study the following:

- The guidelines set by RBI for licensing Small Finance Banks.
- The License evaluation process by RBI for Small Finance Banks.
- The Approach for launching a Small Finance Bank effectively.

METHODOLOGY

The study is undertaken by reviewing secondary data which are collected exclusively from publications issued by Reserve Bank of India.

MAJOR FINDINGS

The Reserve Bank of India has set some guidelines for licensing Small Finance Banks. The small finance bank shall be registered as a public limited company under the Companies Act 2013 and it will be licensed under Section 22 of the Banking Regulation Act, 1949. These Small Finance Banks will be governed by various Acts and provisions such as:

- Banking Regulation Act, 1949
- Reserve Bank of India Act, 1934
- Foreign Exchange Management Act, 1999
- Payment and Settlement Systems Act, 2007
- Credit Information Companies (Regulation) Act, 2005
- Deposit Insurance and Credit Guarantee Corporation Act, 1961
- Other relevant Statutes and the Directives, Prudential Regulations and other guidelines/instructions issued by RBI and other regulators from time to time.

Once Small Finance banks commence their operations and they are found suitable as per Section 42 (6) (a) of the Reserve Bank of India Act 1934, they will get the ‘Scheduled Bank’¹ status.

The main objective of Small Finance Banks is to provide banking services to un-served and underserved sections of the Indian population by facilitating credit to small business units, small and marginal farmers, micro and small industries and other unorganised sector units; through high technology-low cost operations. The basic banking services of Small Finance Banks include acceptance of deposits and lending to un-served and underserved sections including small business units, small and marginal farmers, micro and small industries and unorganized sector units. It is expected that the small finance bank should primarily be responsive to local needs.

Some of the other services which can be provided by Small Finance Banks are as follows:

- With the prior approval of RBI, Small Finance Banks may offer non-risk sharing simple financial service activities such as distribution of mutual fund units, insurance products, pension products etc.
- The Small Finance Bank can offer service as a Category II Authorized Dealer in foreign exchange business for its clients’ requirements.
- A scheduled bank, in India, refers to a bank which is listed in the 2nd Schedule of the Reserve Bank of India Act, 1934. Banks not under this Schedule are called non-scheduled banks. Scheduled banks are usually private, foreign and nationalised banks operating in India. However, cooperative banks are allowed to seek scheduled bank status if they satisfy certain criteria. A scheduled bank is eligible for loans from the Reserve Bank of India at bank rate. They are also given membership to clearing houses.

RBI has set-up guideline for Eligible Promoters in case of Small Finance Banks. Resident individuals/professionals with 10 years of experience in banking and finance sector; Companies and Societies owned and controlled by residents; existing Non-Banking Financial Companies (NBFCs), Mutual Fund Institutions (MFIs), Local Area Banks (LABs) owned and controlled by residents, are allowed as Promoters for Small Finance Banks. But joint ventures by different promoter groups, large public sector entities and business houses including NBFCs promoted by them are not allowed as Promoters for Small Finance Banks.

The Promoter’s minimum initial contribution to the paid up equity capital shall be at least 40% and in case, it is in excess of 40%, then it will be brought down to 40% within 5 years. The promoter’s stake should be brought down to 30% of the paid-up equity capital within a period of 10 years and to 26% within 12 years from the date of start of business by the Small Finance Bank. Once the net worth reaches Rs. 500 crore (approx. 77 million USD), listing is compulsory within 3 years of reaching the net worth. For Small Finance Banks not reaching the net worth cut-off Rs. 500 crore, listing is voluntary subject to fulfilment of the requirements of the capital market regulator.

As per Government of India’s Foreign Direct Investment (FDI) policy for the private sector banks, foreign shareholding in the Small Finance Bank is restricted up to 74% of the paid-up capital of the bank (49% under automatic route and 25% under approval).

In Small Finance Banks, any shareholder’s voting rights is limited up-to 10% which can be raised to 26% in a phased manner by the RBI. Prior approval from RBI is required for any acquisition of 5% or more of paid-up share capital.

The Reserve Bank of India also set up the Capital requirement for a Small Finance Bank. The minimum paid-up equity capital is Rs. 100 crores (app. 15 million USD) and it is required to maintain a minimum Capital Adequacy Ratio (CAR) of 15% of its Risk Weighted Assets (RWA) on a continuous basis, subjected to change by RBI from time to time.

The RBI has set some prudential norms for Small Finance banks. Under it, these small banks will have to take care of 75% of Adjusted Net Bank Credit (ANBC) in Priority Sector Lending (PSL) due to its objective. Out of 75% of ANBC, 40% is to be assigned to various sub-sectors as per existing PSL recommendations and balance 35% can be assigned to any one or more sub-sectors under the PSL where these small banks find competitive advantage. Only 10% and 15% of its capital funds can be provided as maximum loan to single and group borrowers respectively. To ensure that loans are being primarily provided to small borrowers, 50% of loan portfolio of Small Finance Banks should constitute loans of size up-to Rs. 25 lakh. These small banks are constrained from giving loans and advances to Directors and to companies where its Directors have interest.

For setting up a Small Finance Bank, the applicants will be required to furnish their Business Plan, which will state how the bank aims to achieve the prime objectives of small banks. This submitted business plan should be realistic and viable. After issuance of license, if the bank deviates from its submitted business plan, then RBI may restrict the bank's expansion and may impose strict measures as the case may be.

To promote Corporate Governance, Board of Directors should be constituted with majority of independent Directors. These small banks should comply with the corporate governance guidelines including 'fit and proper' criteria for Directors as issued by RBI from time to time.

A comprehensive technology plan of the Small Finance Bank is to be furnished to RBI. New approaches in banking operation such as data storage, security and real time data updates are generally encouraged which conform to accepted standards and norms. There should be a high powered Customer Grievances Cell to deal with customer's complaints.

If a Small Finance Bank wishes to transit into a universal bank, then for this transition path, following conditions are to be fulfilled:

- The bank should apply to RBI after fulfilling minimum paid-up capital / net worth requirement as applicable to universal banks.
- The bank should show satisfactory performance for a minimum period of 5 years.
- All norms including Non Operative Financial Holding Company (NOFHC) structure as applicable to universal banks are to be fulfilled.

While setting up a Small Finance Bank, the step-wise application procedure is as follows:

- Applications shall be submitted in the prescribed form III to the RBI in reference to Rule 11 of the Banking Regulation (Companies) Rules, 1949.
- Additionally, the applicants should provide the business plan and other requisite information.

After receiving application for Small Finance Bank by RBI, the procedure for RBI decision is as follows:

- An initial assessment of the applications will be conducted.
- An External Advisory Committee (EAC) involving distinguished professionals like bankers, chartered accountants, finance professionals etc. will evaluate the applications.
- EAC may call for more information as well as may have deliberations with any applicant/s and may seek explanation on any issue as per requirement. The EAC will submit its recommendations to RBI for further consideration.

- Then RBI will take final decision to issue an in-principle approval for setting up of a Small Finance Bank. The validity of such in-principle approval is 18 months from the date of issue.
- The applicants' names for Small Finance Bank license will be placed in RBI's website to maintain the transparency of the procedure.
- The licence is generally issued on a very selective basis to those who are likely to imitate main objectives of Small Finance Bank by following best standards of customer service.

License evaluation process by RBI for a Small Finance Bank can be shown in 3 categories of filters as follows:

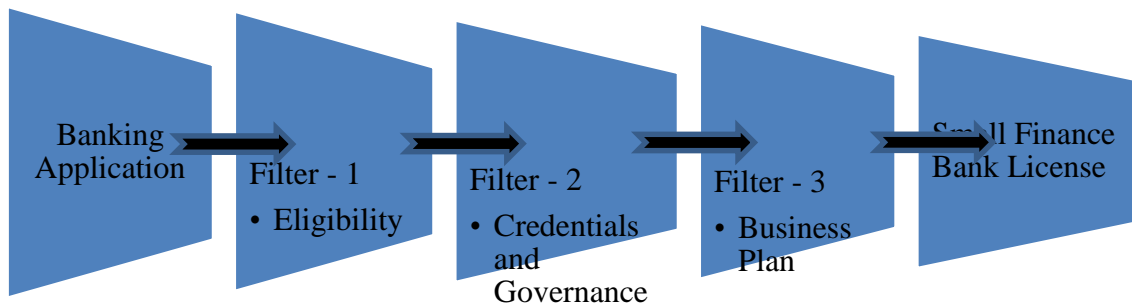


Fig 1 License evaluation process

In filter-1 category; Promoter's Eligibility is checked, such as promoters should have minimum 10 years of experience in banking and finance, 5 years successful business running track record, if applicants are existing NBFCs, MFIs, LABs, then they should be owned and controlled by residents and promoter's minimum capital contribution is Rs. 40 Crore etc (app 6 million USD) .

In filter-2 category; Promoter's credentials and governance pattern are checked. Promoter group should have sound credentials and source of promoters' equity should be transparent and confirmable. Board of Directors should be constituted with majority of independent Directors and these small banks should comply with the corporate governance guidelines including 'fit and proper' criteria for Directors as issued by RBI from time to time.

In filter-3 category; Business plan is evaluated which is to be realistic and financially viable. It should focus on economic sections of the country which are deprived from banking service from other banks. The business plan should also emphasise on adoption of modern technologies to lower the banking operational costs.

The effective approach to launch a Small Finance Bank may be divided into 5 stages as follows:

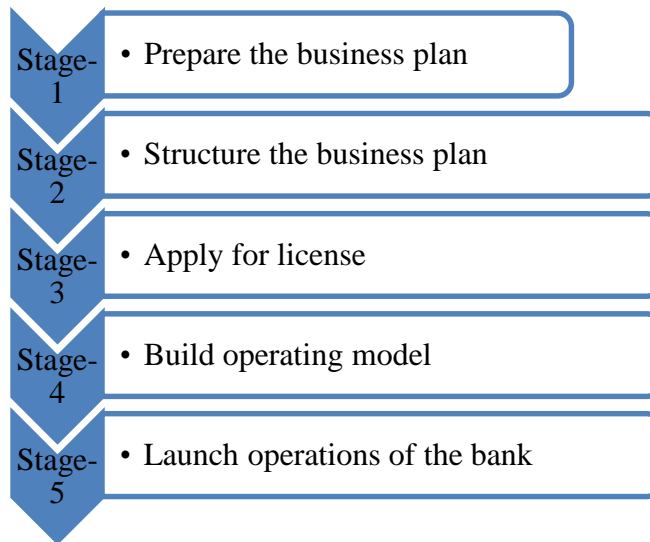


Fig 2 Approach to launch a Small Finance Bank

In stage-1, internal and external environments are to be analysed and based on findings, the business plan for the Small Finance Bank is to be developed. Some basic internal questions are to be analysed during preparation of the business plan such as how much capital is to be raised, whether eligibility criteria is met for applying license for small banks, implication of tax and regulatory structure, ideal mix of debt-equity and requirement of corporate restructuring etc.

In stage-2, the business plan is to be structured based on planning premises determined. The structure is to be developed in terms of key markets, products, channels, risks etc. The key elements of strategy and required financial structure are established in this stage. The best corporate, legal and tax structure is also finalised in this stage.

In stage-3, the license for Small Finance Bank is applied as per guidelines set by RBI. The responsiveness test set by RBI and liaisoning requirements with RBI are to be ensured. Along with the application all other necessary documents are to be submitted at RBI's end within specified timeframe.

In stage-4, the design of the bank's operating model is to be built. The organization structure, staffing profile, IT structure and product features are to be developed in this stage. Also the risk, compliance and treasury function of the bank are to be determined.

In stage-5, the operation of the bank is to be launched based on already designed operating model. The key elements of this stage are important policies for business process, branch expansion plans, recruitment and training of employees, developing and testing operating system, preparation of regulatory reporting and establishing alliance need etc.

CONCLUSION

As on date, RBI has granted 10 small finance bank licences which include applicants viz. Au Financiers (India) from Jaipur, Capital Local Area Bank, Disha Microfin Pvt Ltd from Ahmedabad, Equitas Holdings, ESAF Microfinance and Investments from Chennai, Janalakshmi Financial Services, Ujjivan Financial Services based in Bengaluru, RGVN (North East) Microfinance based in Guwahati, Suryoday Micro Finance from Navi Mumbai and Utkarsh Micro Finance from Varanasi. The names of license holders for Small Finance Bank are also uploaded in official website of RBI. Thus, the impact of functioning of Small Finance Bank is in nascent stage. There is necessity of a detailed to find out the challenges faced by RBI in achieving the main

objective of setting a Small Finance Bank; which is to provide basic banking services to un-served and underserved sections of the Indian population.

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24-N43-2755

WOMEN'S RIGHTS AND FAMILY LAW AMENDMENT IN IRAN: CORRELATION OF ISLAM, NATIONAL IDENTITY AND THE OTHERNESS OF THE WESTMRS. ZAHRA MILANI¹**ABSTRACT**

This paper examines how conceptualising 'family' in post-revolutionary Iran, in connection with the concepts of sanctity and Islamic nation, makes family law amendment challenging. It argues that how other-making of the West by post-revolutionary Islamic state makes conservatives reluctant to accept CEDAW. The paper discusses that CEDAW opponents concern about devaluation of family role in the society if Iran joins CEDAW because they assume that CEDAW clauses are influenced by the Western culture. Although the supporters advocate Iran joining CEDAW, the compatibility of Islam and CEDAW is their concern as well, so they suggest 'reservation right' and '*ijtihad*' as solutions. Based on the relevant theories, this paper argues that reforming family law is more problematic in Iran because in addition to traditional status of family as a sanctified entity, likewise other Muslim societies, family gained significant role by Islamic state for shaping and preserving Islamic nation of Iran.

Key Words: CEDAW, family law, nation, Islam, Iran

INTRODUCTION

The subject of women's rights in family law has been an important debate between women's rights activists inside and outside the government and Islamic hardliners in the post-revolutionary Iran. Since the empowerment of Islamic revolutionary forces and establishment of Islamic Republic of Iran (IRI) by 1979 revolution, broad amendments have been elicited for the socio-political and individual rights of women. According to the emphasis of the Islamic state on implementing Sharia law in socio-political and legal areas of the society, family law was one of the first realms that was commanded by Ayatollah Khomeini, the leader of the revolution, to be Islamised. Therefore, since the first year after the formation of the Islamic state, Ayatollah Khomeini denounced Mohammad Reza Shah's 'Family Protection Law' (FPL²) and commanded conversion to Islamic family rules. Following the emergence of intense debates over the issue of 'Iran joining CEDAW' from 2000 to 2004 during the Reform era in Iran, the compatibility of CEDAW's clauses and Islam was one of the most controversial subjects between opponents and supporters of Iran joining CEDAW. Through a critical examination of the representation of CEDAW in reformist and conservative publications in IRI, 'family law' was identified as one of the dominant themes around which the discussions around compatibility of Islam and CEDAW were articulated by CEDAW opponents and supporters. The matter of amending family law based on CEDAW that is mainly discussed by CEDAW opponents' articles - published in the conservative publications - is regarded mostly in a strong connection with the dichotomous relationship of Islam and the West. The conservative publications underlined the contradictions of Islamic based family law in Iran and CEDAW clauses to warn about marginalisation of Islamic identity of Iranian society concerning what they assume

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² Family protection law (FPL) was established in 1967 in the reign of Mohammad Reza Shah Pahlavi, former Shah of Iran. According to this law, some Sharia-based family laws were annulled in favor of women.

as the aim of CEDAW - replacing Islamic values with the Western ones. Moreover, by picturing the Western family as a fragile unit that is being undervalued in the Western culture, CEDAW opponents argue that implementing CEDAW's Articles will result in the collapse of family in Iran, similar to what happened in the West. On the other hand, CEDAW supporters whose ideas are mostly reflected in reformist publications attempted to justify that CEDAW and Islamic family law are not intrinsically in contradiction. They proposed the use of 'reservation right' and '*ijtihad*' as vehicles to resolve conflict of some CEDAW clauses with Islamic family codes.

Family can be regarded as a theme that is dominantly considered by CEDAW opponents' articles rather than the supporters in the addressed publications. Therefore, there is no wonder that the discussions in this paper are typically around the claims of CEDAW opponents on the subject of family law. The aim of this paper is to describe how CEDAW opponents and supporters perceive family law amendment in Iran and how problematic this amendment is by analysing the sacredness of family in the Middle East, and strong correspondence of 'family' issue with safeguarding of the Islamic nation.

CONTEXT AND METHOD

There are two main camps in the political scene of Iran, conservatives and reformists. The former camp is dominant and in support of IRI's leadership and the latter camp has more tolerance, compared to conservatives, to modern and democratic ideas, and advocate improving the relationship of Iran and the West (Mehran, 2003).

The presence of reformist in the political sphere was boosted when Khatami - a moderate Islamic cleric - was elected in 1997's presidential election. He was the first presidential candidate with specific plans in his electoral campaign for developing Iranian women's social and political participation and amending the laws so that women enjoy fair legislation as equal Iranian citizens with men (Paidar, 2001). The presidency era of Khatami is known as the reform era in Iran (1997-2005). What makes reformist era important for this study and in connection with today's Iran is the importance and potential role of reformists to gain power again in Iran (regarding winning of Hassan Rouhani who was supported by reformists in 2013 presidential election), although they have been almost marginalised from top political positions in recent years. The publications of reform era are the only fortune to address and compare the ideas of the two sides, opponents and supporters, about CEDAW because many of these publication were shut down since the end of Khatami's presidency when Ahmadi-Nejad (2005-2013) became president.

In 1999, the reformist government of Khatami referred the bill of 'Iran joining CEDAW' to the fifth *majlis* (parliament). This bill was considered more seriously by the next *majlis* (2000-2004) with its reformist majority. The discussions around CEDAW are more reflected in the publications between 2000 and 2004, while it was not discussed as much in the publications before and after this period. Thus, this study uses the time frame of 2000-2004.

This study employs a qualitative document-based method - using 61 reformist and conservative publications as the main site for CEDAW supporters and opponents to publicise their ideas in the reform era (Mir-Hosseini, 2002). The publications' articles related to CEDAW were collected regardless of their political attitudes by using relevant key words and searching library resources for electronic and hard copies. The collected publications were categorised as being reformist, conservative, or neutral.

Gidley (2012) states two broad ways of approaching documents in social research. The realist approach to documents involves using texts as evidence and as a representation of reality

by ‘gathering as great a volume of texts as possible and scouring them for details of ‘who’, ‘when’, ‘where’ and ‘what’ (Gidley 2012, p. 271). In this approach, documents are taken as a research resource and as a tool to access social reality. On the other hand, social constructionist approach describes documents as social facts, and considers texts as topic rather than resource, ‘as realities in themselves rather than a way of accessing some other reality’ (Gildey 2012, p. 271). The research approach in this study is a constructionist approach because there is no intention to gather accurate information from authentic documents to understand what happened in the past. Instead, the focus is on the texts and examining various ways in which social realities (like Islam and West) are constructed and represented in reformists and conservative’ ideas.

The collected articles were published in Farsi language; therefore, for serving this paper the extracts of these articles are translated to English by attempting to preserve both the exact content of articles and the words and terms used in their language.

FAMILY NOTION: CONTRADICTION BETWEEN ISLAM AND CEDAW IN CEDAW OPPONENTS’ PERSPECTIVE

CEDAW opponent authors are mostly in agreement, at least in cultural spheres, with dominant conservative discourse of Islamic state in terms of criticising the Western culture and concerning about marginalisation of Islamic culture in Iran by influence of the Western culture. As one of the main subjects of their focus, CEDAW opponents consider CEDAW’s clauses in strong contradiction with Islam in terms of definition of family institution, and gender relations within it, especially women’s role in the family. In line with official conservatives in Iran, CEDAW opponents emphasise that gender equality does not mean constituting exactly equal rights and duties for men and women in family province; however, it means considering men and women’s rights and duties in conformity with their natural and inherent characteristics and abilities. CEDAW opponents’ discourse in Iran represents motherhood and wifehood as the main roles of women in the society, and identifies key role of women to survive the family institution and preserve authentic cultural values in the family. While motherhood is realised as an exclusive natural role of women in this discourse, CEDAW identifies motherhood as the shared responsibility between women, men and the society. Accordingly, CEDAW asserts that women should not be deprived from other social roles in public sphere for child fostering responsibilities (Article 5 (b)). CEDAW opponents claim that this approach of CEDAW towards motherhood - a shared responsibility - is influenced by the Western culture in which motherhood is not recognised as the prior role of women. They also argue that the Western societies are experiencing several complexities in family and society due to women’s engagement in social roles equal to men.

The following extract from the article ‘*Recognition of the harms of joining to a western convention known as eliminating the discrimination*’ published in a conservative newspaper, Keyhan (2003), is an example which clearly shows the view of opposite discourse of CEDAW on priority, specificity, and benefits of motherhood for women:

In this convention, motherhood as the specific dignity of ‘woman’ that is the symbol of her exclusive power and effectiveness, and as the most important and complicated type of women’s social participation is ignored and underrated. What CEDAW considers as gender programming in employment and education system, that is aimed to eliminate gender clichés, is developed based on the paradigm of similarity between men and women, and

does not regard any specific education for girls to practice the roles of ‘mother’ and ‘wife’ (Article 10. C³).

In the perspective of those who criticise CEDAW in IRI, family in CEDAW is defined based on a Western model and therefore, in their perspective, changing family law based on CEDAW is equalised with Westernisation of family structure and replacing Islamic family law with Western legislations. The concerns of CEDAW opponents about Westernisation of family in Iran as a consequence of Iran joining CEDAW are reflected in four pivots in their articles. Firstly, CEDAW opponents claim that CEDAW threatens the existence of what they consider as normal family - heterosexual and marital couple-based household - as in their perspective CEDAW, being influenced by the Western culture, legitimises same sex partnership as family. Secondly, CEDAW opponents are concerned about changing the gender relations within family. They argue that CEDAW necessitates alteration in the traditional model of division of labour in family - women for domestic responsibilities and men for outside-home careers to earn money. Thirdly, the opponents believe that compassion between family members in the Western model of family that is pursued by CEDAW is inadequate, and individuality is more respected than collective relationships which can result in lower emotional connection between family members. Finally, the last concern of the opponents which is the main focal point of this paper is contradiction of Iranian family law and CEDAW’s clauses. CEDAW opponents underline the maintaining of Islamic family law as an important tool to stabilise traditional gender relations within family and prevent fragility of family institution as it is in the West according to their interpretation.

Some of the articles among the ones that intend to verify the contradiction of CEDAW’s family-related Articles and Islam are precisely focused on the conflicts of CEDAW and Islamic family laws in Iran. In order to show the incompatibility of Islam and CEDAW, the opponents indicate various Islamic family legal codes and the contents of IRI’s constitution that are different from CEDAW’s Articles on equality of rights between women and men in family domain. CEDAW opponents refer to the following themes, extracted from Iran’s constitution and family law, more frequently to show CEDAW’s view of complete equality and Islamic view of difference on men’s and women’s rights in the family realm:

- Monopolised right of father for the custody of children (for boys above the age of two and girls above the age of seven) after divorce;
- Women’s requirement to receive father’s (or other male guardians’) permission for their marriage in comparison with men’s freedom to choose their spouse;
- Woman’s requirement to have spousal consent to travel outside the country;
- Exclusive right of men to divorce whenever they decide;
- Smaller share of women in inheritance compared to men;
- Monopolised right of man in marital relationship to choose the place of residence;
- Exclusive right of men to transfer their nationality to their children;
- Introducing motherhood as the main role of women in the society, and centrality of women in the family in terms of rearing the children.

³ Article 10 (c) of CEDAW: The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programs and the adaptation of teaching methods (<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>).

The details of contradictions between CEDAW's Articles and Iran's family law and institution is out of the scope of this study. However, it must be noted that by underscoring these contradictions, CEDAW opponents ascribe the troubles that they consider for the Western family to dismissing the Islamic family-related rules in the Western society. The article "The convention of eliminating discrimination against women and the sensitivities" (Anonymous, 2003) published in *Zane-Rooz* journal (02/08/2003) reveals this opinion. This article does not only consider mentioning the contradictions, but it also explains that how the troubles that opponents consider for the Western family are derived from dismissing the Islamic family-related rules:

By looking at the clauses of this convention, one can understand the view the drafters of this document have regarding family. In this view, family is not considered a unified entity in need of management (part 16, articles C and D).

Each couple is free to choose where to live and, therefore, a man and his wife can live in different cities, separately, in complete freedom (part 15, article 4). The convention goes even further and declares the couple independence in choosing nationality. That the couple's consent will be the only requirement of marriage (part 16) means the consent of bride's father will be excluded and, in this way, the couple's independence will have priority over father-daughter relationship and she will be deprived of her father's support.

Based on this article, a Muslim girl will be allowed to marry a non-Muslim man. This will not only endanger the girl's future religious beliefs, but it will also deny their children of proper religious education.

CEDAW SUPPORTERS' RESPONSE TO CEDAW OPPONENTS' CRITICISM

CEDAW supporters do not specifically and profoundly address the contradictions of CEDAW's clauses and Islamic family laws. They mostly answer the opponents' criticisms around these contradictions in a general way through two main solutions that they typically suggest. The two solutions are a) employing reservation right, which is used by the other Muslim countries which joined CEDAW; b) employing *Ijtihad* (independent reasoning) that allows *Mojtahed* (high-ranking cleric) to re-interpret Sharia law with regard to the contemporary circumstances and issues of Muslims' life. For instance, the article "Clerics' some disapproval - why and how?" published in the reformist newspaper of *Mardom-Salari* (25/05/2002) respectfully mentions the *ulamas* and the significance of their ideas about CEDAW. However, the article finally responds the *ulamas'* opposition by suggesting the employment of new criteria to determine new women's rights in conformity with today's circumstances:

In the new situation of women in which we can see women's presence in the society and their participation in earning family income alongside men, it seems needed to change the right based on the new criteria. Is it possible to apply previous male-centric measures to define women's rights when they are breadwinner of the family?

Ultimately, what is common between the opinions of CEDAW opponents and supporters on CEDAW and family law is that the supporters, likewise opponents, admit the prior role of Islam in defining or reformulating the family laws. They stress on the use of reservation right to preserve the traditional Islamic rules in the field of family or *Ijtihad* to reformulate Islamic family law in conformity with CEDAW's clauses.

THEORETICAL UNDERSTANDING OF INTOLERANCE TO AMENDMENT OF FAMILY LAW IN IRAN

As Bonjour and Hart (2013, p. 61) explain, 'gender and family norms play a crucial role in the production of collective identities, i.e. in defining who 'we' are and what distinguishes 'us' from 'the others''. Moreover, they assert that gender relations are regularly deemed as the "essence" of

cultures, ‘as ways of life to be passed on from generation to generation’ (Bonjour and Hart 2013, p. 63).

As Giddens (1989) argues, although family is pervasively an important social institution in various societies, there are significant differences between the patterns of family and marriage formation in various cultures. Here, my focus is on the significant and determining position of family in Iran that makes reforming the family laws and introducing conceptions alternative to traditional family (Hoodfar, 2000) challenging. In the two following sub-sections, I will address two characteristics of family position in the Middle East and Iran, which can be used here to describe the intolerance to reform of family law in Iran. These two characteristics are defined around the strong connection of religion and Islamic nation with family: 1) sacredness of family in the Middle East, and 2) Otherness and nationalism in association with the concept of family.

Sacredness of family in the Middle East

The importance of family in the Middle East can be perceived from what some scholars describe about the influence of state and religion as the two most powerful institutions on family (Joseph, 2000). As Moghadam (2004, p. 140) argues ‘nowhere is family free of state regulations’; however, in the Middle Eastern societies, the family is known to have a nearly sacred space (Joseph, 2000). Not only have the Middle Eastern states legally privileged family over the individual, but they are in line with the discourses that represent the family as a “pre-political” priori, and as a domain beyond current time and situations that is best defined in domain of the divine (Joseph, 2000).

Charrad (2000) argues that the family is considered as a nearly sacred space in the Middle-Eastern societies and is linked with discourses that represent the family as priori and something engaged to domain of the divine. The connection of family moralities with religious moralities has increased the religious control over family regulations (Joseph, 2000). This is more observable in widespread intervention of the religion in the legal domain of family, and delegation of family laws to the religious courts throughout the Middle East. Such a connection makes amending family codes very challenging in the Middle-Eastern societies (Joseph, 2000).

The matter of contradiction of CEDAW’s Articles and family laws in Iran can be found in numerous articles of CEDAW opponents. In these articles, CEDAW opponents endeavour to present Islamic family laws as the ideal pattern of gender relations that results in preservation of the traditional family in the society.

The influence of religious laws on family law in Iran has a long history, returning to before the Revolution in 1979. Prior to the codification of family law (1931-1935) in Iran in the context of Reza Shah’s modernisation project, *Ulama* (high grade Muslim clerics) had a traditionally important role in judging family-related matters (such as marriage, divorce, child custody, and widows’ inheritance) based on Shi’a *fiqh* (jurisprudence) (Afshar, 1985b). However, in Reza Shah’s era (1925-1944), by establishing new courts and procedural rules for registering marriage and divorce, the influence of *Ulama* was partially lowered. Reza shah announced that all marriages and divorces had to be registered by civil courts, under lawyers’ direction instead of the clerics (Afshar, 1985b; Mir-Hosseini, 2007). Although Reza Shah’s decision broke the monopoly of the clergy on defining family regulations, classical Sharia laws remained almost intact as part of the new Civil Code (Mir-Hosseini, 2007).

Mohammad Reza Shah’s ‘family protection law’ (FPL), established in 1967, was seen a focal point in terms of family law reform in Iran by many scholars (Ebrahimi, 2005; Halper, 2005; Hoodfar, 1999; Mir- Hosseini, 2006; Yassari, 2002). FPL explicitly abolished some Shari’a laws

that were regarded discriminatory against women. For example, men and women were put in same footing in terms of access to divorce and child custody rights, while before these rights exclusively belonged to men (Ebrahimi, 2005).

FPL lasted for a short time; in February 1979, two weeks after the establishment of Islamic regime in Iran, Ayatollah Khomeini declared the FPL to be non-Islamic and ordered the return of family law to Shari'a. Thus, 172 Civil Code articles about family issues turned to Shari'a based ones, in line with Islamisation of the new established constitution and the courts (Mir-Hosseini, 2007). In the 1979 constitution, Islamic rules became the main foundation of the family law in Iran, and only a *Mojtahed* who is an expert in Sharia laws could be Chief of the Supreme Court. Thus, the Prosecutor-General and also the Iranian Parliament became very vigilant on passing bills; the bills had to be in accordance with Islamic principles and norms (Ebrahimi, 2005).

The view of Joseph (2000, p. 20) towards the link of citizenship and family law can be regarded here to explain that family law as 'a critical feature of citizenship laws and practices, has been anchored in religious law in most Middle Eastern countries'. Joseph describes family in Middle Eastern societies as 'a site of contestation in the making of state and nation'. Family law may rightfully be said to be the most critical site in which membership in religious communities has been a venue for constituting the Middle Eastern legal subject. In most Middle Eastern states family law is either directly deferred to different legally recognised religious sects without offering any civil alternatives or 'have incorporated the family codes of the dominant religious sect into the civil code' (Joseph 2000, p. 20). Joseph (2000) points out that the sanctification of the family domain via locating family law in religious law makes the amendment of the family codes, such as changing the gender relation and advancing women's status as equal citizens with men, very challenging in these societies.

Otherness and nationalism in association with the concept of family

The concept of "other", is a key concept to explain the conservatives' resistance to amend family law and making it in accordance with CEDAW. The perception of the West as an "other" turns to the first interconnections of Iranians and the West in 19th century under the Qajar dynasty. It was pictured when first Iranians travelled to the West and Western travellers and diplomats went to Iran (Ghanoonparvar, 1993), during which, portraying the West as an "other" happened by using some terms such as exotic, anti-Islam, the vehicle of modernity, and imperialist (Ghanoonparvar, 1993; Boroujerdi, 1996).

Otherness of the West was strengthened by 1979's revolution in Iran that overthrew the Pahlavi dynasty under Mohammad-Reza Shah, and replaced Shah's regime with Islamic republic under Ayatollah Khomeini. By 1979's Revolution, the other-making of the West that previously was typically found in discourses of non-governmental nationalism was strengthened as an official discourse of Islamic Republic state, and has been accompanied with the Islamic ideas.

The regime of Mohammad-Reza Shah (1941-1979) supported Western modernisation and secularisation in Iran. Hence, many literature (Bruce, 2000; Osanloo, 2012; Ruthven, 2004) have claimed that the 1979 Islamic revolution was happened against the 'Westernisation' because 'Western' elements supported by Shah were perceived as threats to national authenticity of Iranians by the Iranian nationalists and as threats to maintenance and power of Islamic believes by Islamist groups (Tamadonfar, 2001).

In post-revolution era, the West has been represented by the dominant conservative discourse in Islamic Republic as an anti-Islam alien. Osanloo (2012, p. 55) describes the position of the West as an 'other' in Iran's revolutionary movements which ended by the dominance of Islamic groups

and establishment of Islamic state in 1979: ‘This was a revolution in large part against the excesses of Western societies, aimed to turn the country back to some ‘indigenous’ values’.

The constitution will be regarded here as a reliable text to present the socio-political and cultural ideas of leadership of Islamic Republic state. Paidar (1995, p. 256) explains that IRI’s constitution is the ‘formalised expression of the revolutionary transformation from modernization to Islamisation’. A part of opening chapter of the Constitution (Constitution of the Islamic Republic, 1980, Article 3: e, f, g, h, i, n) explains the principles on which the Islamic Republic is based. One of these principles is defined as the ‘complete expulsion of imperialism and the prevention of foreign influence’ (Paidar 1995, p. 257). Resistance against the influence of imperialism and foreign forces that are mostly interpreted as the Western powers is a principal for IRI.

According to Yeganeh (1993, p. 7), the 1979 revolution was the second attempt in 20th century to ‘redefine and change the existing relation between the state and the West, with the aim of establishing independence and democracy in Iran’. However, while in the first attempt, the constitutional revolution of 1906-11, political and economic independence was the main demand and the aim was to achieve this through imitating ‘Western models of modernity, the emphasis in the recent revolution was on achieving cultural independence through construction of an ‘indigenous and ‘authentic’ Islamic model of modernity and progress in Iran’ (Yeganeh 1993, p. 7). Therefore, while liberal nationalism was the theme of the first revolutionary discourse, the latter (or second revolutionary movement?) placed ‘its trust in cultural nationalism’ (Yeganeh 1993, p. 7).

The centrality of Islamic ideology in the discourse of revolutionary leadership was strongly linked to the matter of relationship of Iran and the West; alongside, Shi⁴ modernism and radicalism was essential in revolutionary mobilisation against cultural imperialism (Yeganeh, 1993). Hence, ‘a new ‘revolutionary’ and ‘authentic’ Muslim culture was constructed which appealed to wide sectors of the urban population’ (Yeganeh 1993, p. 7).

In IRI’s constitution, the nation is defined as the “Islamic nation” that is defined as a collective unity and the IRI’s government is responsible of formulating its general policies being oriented to the merging of all Muslims, and it must persistently tend to bring about the political, economic and cultural unity of the Muslim world (Paidar 1995). The 1979 revolution created a new alliance between Islam and nationalism, which became the cornerstone of the IRI’s gender policies, including legislation in the province of family (Yeganeh, 1993). Thus, the contemporary discourses about women’s rights in family laws in Iran can be understood by associating family issue with the phenomenon of Islamic nation - that is defined alongside Other-making of the West in post-revolutionary Iran.

The constitution specifies two main characteristics for the “Islamic nation”. First, the Islamic nation is founded on the family. The constitution asserts in the Article 21 that ‘the family is the fundamental unit of society and the major centre for the growth and advancement of man [human-being]’ (Paidar 1995, p. 260). Article 11 emphasises that since the family is the fundamental unit of the Islamic society, all relevant regulations, and plans must facilitate ‘the foundation of a family and to protect the sanctity and stability of family relations on the basis of the law and the ethics of Islam’ (ibid., Article 11 in Paidar 1995, p. 258). Second, this constitution grants a prominent place to women, defining them as both mothers and citizens, and regards ‘the establishment of an Islamic

⁴ Referred to Shi’a, a branch of Islam that is official religion of the state and people in Iran as more than 90% of Iranians are Shi’a.

nation as dependent on the Islamization of women's position' (Yeganeh 1993, p. 8). The constitution identifies the ideal Islamic woman against what is described as Western values of womanhood through giving women the right to meet their natural and biological instincts and also the right to participate in social life (Yeganeh 1993). The constitution sees women in post-revolutionary era to be freed of oppressed and objectified status they suffered under the 'despotic regime' of Shah. (*ibid.*, pp. 21-2 in Paidar 1995, p. 258).

Correspondingly, Najmabadi (1987) states the emergence of Shiism as a popular political force in the 1970 revolution involved a demand for women to reject 'Westernisation'. The sexual objectification of women was recognised as a product of cultural and economic dependence of Iran on the West. Moreover, Women were encouraged to 'embrace the new Shii model of womanhood which represented 'authenticity' and 'independence' and emphasized women's double role as mothers and revolutionaries' (Najmabadi, 1987 in Yeganeh 1993, p. 7)

The constitution of IRI is 'full of images of women, as political actors, Islamic warriors, agents of construction of Islamic society, mothers, and creators' (Hoodfar 2000, p. 295-296). However, it assumes women primarily as mothers according to the importance of motherhood for 'true women' in Islam. Moreover, it claims that all laws and plans must facilitate the foundation and strengthening of families according to Islamic principles in the service of Islamic revolution. It is worth noting that although the constitution claims that the Islamic society value women as the upholders of the family and nation, it advocates a set of laws that strengthen male control over women in the family (Yeganeh, 1993).

In political discourse of IRI, family is regarded as the principal elements in the identity of the Islamic nation and women are regarded as central to the future of the nation because of their role as 'biological reproducers, educators of children, transmitters of culture, and participants in national life' (Yeganeh 1993, p. 4). Women are introduced as the link between family and Islamic society in twelve chapters and 174 articles of the constitution (Paidar 1995, p. 258). Gender policies and family-related legislation are central in national development and independence plans in Islamic republic as it was vital in two other states which have assumed power in Iran since the dissolution of the Qajar dynasty in 1925 that is the states of Reza Shah Pahlavi and Mohammad Reza Shah Pahlavi (Yeganeh, 1993).

CONCLUSION

In the discussions of opponents and supporters about CEDAW that were reflected in conservative and reformist articles (2000-2004), 'family law' emerged as one of the themes over which the opponents criticised CEDAW broadly and seriously. The opponents emphasised the conflicts of Iran's Islamic family law and CEDAW's clauses to criticise what they represent as the aim of CEDAW for replacing the Islamic values with the Western ones. They represent family in the West as a breakable unit in which familial roles of men and women are not played properly because of cultural and legal actions that trend to equalise men and women. Therefore, CEDAW opponents concern that the same situation happens about family in Iran if joining CEDAW. CEDAW supporters on the other hand support joining CEDAW, although in their articles the necessity of compatibility between CEDAW's clauses and Islam is admitted. Therefore, they mostly suggest using 'reservation right' and '*ijtihad*' in case of contradiction of CEDAW's clauses and Islamic rules to prove that joining CEDAW does not mean elimination of Islam.

By analysing the articles, we can conclude that the sensitivities on preserving family law in Iran are firstly because family law in Iran, similar to other Middle Eastern societies, is sanctified through being defined based on sharia. Defining family law in religious domain increases the

control of clerics and religious powers over family legislation that is tangible in case of Iran in which the influence of religion on the family law and the influence of clerics in judging family-related issues have longer history than the establishment of Islamic state. Furthermore, in the post-revolutionary Iran, family and Islamic family legislations gained more important status because of defining family and traditional gender relations in family as principal foundations of the Islamic nation. The important role of family to protect the Islamic nation against the Western other is underscored by IRI to turn Iranian society back to its 'indigenous values'. Returning to indigenous and Islamic values and criticising Shah's political and cultural adherence to the West is the cornerstone of IRI's discourse to legitimise 1979 revolution and establishment of Islamic state.

The sanctification of family makes it difficult to intervene and bring changes in realm of family legislation by the agents outside the religion domain. Besides, the importance of family and women's familial roles in shaping and surviving the Islamic nation (the favourable collectivity of Islamic state to safeguard its values) makes defining a new family law and more equal rights within it very challenging.

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3-N14-2724**THE ROLE OF THE EUROPEAN COMPANY IN THE FIELD OF CROSS-BORDER REORGANIZATIONS**MR. ALBERTO QUINTAS SEARA¹

The establishment of the European Economic Community after the entry into force of the Treaty of Rome highlighted the need for the companies of different Member States to adapt their size and structure in order to improve their competitiveness and productivity not only within the internal market but also in the international arena, where American and Japanese companies emerged as strong competitors due to the increasingly level of economic globalization.

However, the development of business concentration/cooperation processes (i.e. mergers) was hindered by obstacles of different kind, especially in the field of company law and tax law.

Therefore, it soon became clear that Community institutions had to take action, adopting the appropriate legislative measures to remove such obstacles.

In the eighties, due to the significant increase in cross-border mergers and the growing attention to this problem at Community level, the Commission came up with two proposals of different nature but aimed at achieving the same objective from complementary perspectives, namely: the Draft Directive concerning cross-border mergers of public limited companies (COM (84) 727 final), and the Proposal for a Regulation on the Statute for a European Company (COM (89) 268 final). These proposals, which eventually became in the Directive 2005/56/EC and the Regulation (EC) n° 2157/2001 respectively, shall be regarded as a turning point in the field of European company law that would deepen the degree of economic integration of the Community, facilitating not only mergers between companies from different Member States but also other corporate reorganizations such as transfers of seat, insofar as they contributed to eliminate the barriers stemming from domestic laws, to reduce the costs associated with these operations, and to attain a greater level of legal certainty. These measures, were complemented from the perspective of tax law with the adoption of the Directive 90/434/EEC (now Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States).

Focusing on the European Company (*Societas Europaea*), high expectations were placed on this entity not only by institutions but even by national companies operating at community level, insofar as it was supposed to contribute in a decisive manner to the elimination of legal obstacles negatively affecting the cross-border activity of companies (including SMEs) in the following fields: a) intra-EU mergers; b) transfer of the registered office; or c) establishment of subsidiaries in a Member State other than the Member State of the parent company. Moreover, the European Company could be regarded as an instrument to simplify/unify the structure of groups of companies, improving the management of these groups of companies; or to attract the necessary capital resources (public or private investors) to carry out cross-border projects.

Nevertheless, and despite the above mentioned advantages linked to this type of company, fifteen years after the adoption of the Regulation (EC) n° 2157/2001 the figures show that its impact has been quite limited within the internal market. Therefore, the aim of this paper is, on the one hand, to highlight the defining elements of the European Company, its legal framework, and its potential benefits; and, on the other hand, to provide some thoughts about the reasons behind

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the low number of European Companies existing in the EU and their asymmetrical distribution across the different Member States.

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LEGAL, ETHICAL AND POLITICAL IMPLICATIONS OF US DRONE WARFARE

MS. SANA MIR²

“Everything changed after 9/11” is not a catchphrase anymore, but has become a national security doctrine of states globally. The US use of armed drones against states with which US is not at war with is controversial legally, ethically and politically. Unfortunately to date we do not know precisely which law governs US targeted killing campaign. US justifies its targeted killings with reference to both law of war and law of self-defence this mixing and blurring of legal paradigms makes it extremely difficult to assess the legality of war. No wonder, 14 years after 9/11 we are still going around in circles unable to find satisfactory answers to the most basic questions-Is US operating during the time of war or peace? Does geography matters at all? Who is the enemy? All these questions remain a mystery because secrecy surrounding this war prevents any objective assessment of legality and legitimacy of the war. In early September Pakistan used its own armed drones against militants in FATA region. Pakistan is notorious for human rights abuses and has a history of oppressing citizens particularly in FATA. Pakistan using armed drones against its own citizens sets a dangerous precedent and may encourage other states to develop their own drones in order to suppress their citizens. Recently UK also followed the US model and targeted two British militants in Syria who were fighting alongside ISIS. The power to target militants anywhere in the world without oversight or safeguards is a dangerous policy. Proliferation of drone technology and its frequent use in conflict zones show that they are here to stay. Time has come that UN realise its duty and ensure that states using drone weapons give clear legal justification and secrecy surrounding the war must be ended.

8-N39-2491

CRITICAL ANALYSIS OF 'LAW OF ADULTERY' IN INDIA

DR. RAVINDER KUMAR³

Adultery means voluntary sexual intercourse by a married person with another married or unmarried individual. Thus adultery is the indulgence in voluntary sexual intercourse of a married person with someone other than his /her spouse. However, legal definition varies from place to place and statute to statute.

Adultery is considered as an invasion on the right of the husband over his wife. It is an offence against the sanctity of the matrimonial home and an act which is committed by a man. It is an anti-social and illegal act.

Almost every religion on the earth condemns it and treats it as an unpardonable sin. Even though, it is not reflected in the penal laws of countries. Nevertheless, all the legal system invariably does recognise it as a ground for seeking divorce from the errant spouse.

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In India the offence of adultery is punishable under section 497 of Indian Penal Code (IPC), 1860. Section 497 of IPC perceives a consensual sexual intercourse between a man, married or unmarried, and a married woman without the consent or connivance of her husband as an offence of adultery. This provision makes only men having sexual intercourse with the wife of other men without the consent of their husbands punishable and women can't be punished even as abettors. A sexual action between a married or unmarried man and an unmarried woman or a divorcee / widow, therefore, doesn't come within the ambit of adultery.

However, the law on adultery in India has been subject to controversy with regard to some fundamental issues. It is argued that the Indian law relating to adultery is premised on the outdated notion of 'Marriage' and only based on the husband's right to fidelity of his 'wife' but also treats 'wife' merely as a chattel of her husband. Such a gender discriminatory and proprietary-oriented law of adultery', is contrary to the spirit of the equality of status guaranteed under the Constitution of India.

Therefore, it is proposed to examine the present law on adultery in the light of above stated controversy regarding concept of equality and other constitutional norms in India.

9-N8-2497

USING TORTS LAW TO RESPOND TO GLOBAL TERRORISM -MORALITY OF BENEVOLENCE STATUES THE ANSWER?

MR. KWESI KELI-DELATAA⁴

International terrorism presents an almost existential threat to the world. This risk is amplified by a real possibility of weapons of mass destruction passing into the hands of terrorists especially in nation states where established political authorities have weakened to the advantage of organized terrorist groups. While this represents a frightening reality, world governments continue to struggle in order to keep pace with the constantly evolving terrorist threat.

The seriousness of the threat has forced western governments in particular to re-align their security priorities. The security priority of both the Department of Justice in the United States of America and the Federal Bureau of Investigations (FBI) is to prevent terrorism. This is also the number one priority for state and local enforcement agencies and justifies the expenditure of enormous amount of resources on not just providing solution to terrorist crimes but preventing them.

But the phenomenon has also led to a raft of counter-terrorism legislations across the world. These legislations have sought mainly to widen criminal liability for inchoate terror plots and to enhance already existing prosecutorial powers of law enforcement agencies. These statutes have greatly enhanced the substantial retributive quality of the legal response to terror but fail to address the needs of surviving victims.

This paper explores the possibility of a civil law response to terrorism with a tort law statutory scheme that imposes liability on civilians who fail to report terrorist threats while they are in a position to do so. The imposition of duty of care and liability for non-feasance and with it, a compensation scheme for victims, may be unpopular and unsupportable by prevailing common law conceptions of negligence but does present hope for a change to accommodate an unusual response to an unusual global threat

⁴ Mr. Kwesi Keli-Delataa, Lecturer, Ghana Institute of Management and Public Administration.

11-N30-2711**THE IMPACT OF ADAT INHERITANCE LAW PLURALISM ON MEN AND WOMEN'S STATUS FROM INDONESIAN LAW PERSPECTIVE**DR. SONNY DEWI JUDIASIH⁵ PROF. DR. EFA LAELA FAKHRIAH S.H., M.H
(PROFESSOR)

Inheritance is a way of transitioning right of ownership from a deceased person to another person relates to them either by blood, marriage, and so on. The character of Indonesian inheritance law is pluralistic seeing that it was arranged from several law systems which historically had grown and developed in the country. In general, inheritance law systems applied in Indonesia come from adat laws, islamic law, and common law which embodied in the Indonesian Civil Code. This has caused differences in applying inheritance law for each individual. Concisely, inheritance law in Indonesia is not unified and not yet to become a standardized rule applied throughout Indonesia. Adat inheritance law represents a unique and original complexion of law which reflects the way of thinking and traditional spirit of Indonesian people based on the collective and cooperative culture. Family-oriented, togetherness, mutual cooperation, deliberation in sharing the inheritance are the natures of adat inheritance law. The adat inheritance law shows a very Indonesian-like in its way of thinking which constitutes principles derives from Indonesian communal and concrete Indonesian intellectuality. The formation of adat inheritance law were much influenced from the three kinship law systems. Thus, the adat inheritance law is closely related to the kinship characters which originates from the local law society.

There are three systems of adat inheritance law in Indonesia, which are: patriarchal in Batak, Manado, and Ambon region; matriarchal in West Sumatera; and bilateral in Java region. In patriarchal system, only sons deserves to be the heirs while daughters can not. On the other hand, in matriarchal system, sons could not be the heirs if the deceased leave a daughter. The inheritance will be bestowed to the daughter. In parental system, however, both daughters and sons could be the heirs. The systems applied are often caused problems seeing its impact on the differences of the heir's status in the patriarchal and matriarchal community.

There are already many court breakthroughs in settling the dispute of patriarchal and matriarchal systems. With this, court decisions are expected to reform the status of heirs in the patriarchal and matriarchal community to be the same as the parental or bilateral system which is an equal position for both sons and daughters.

15-N22-2722**CHILD RIGHTS AND THE (DIS)ABILITY OF VULNERABILITY? BUILDING THE LEGAL RESILIENCE OF THE LIBERAL SUBJECT**MRS. SEVDA CLARK⁶

Liberal legal ideology has consistently denied legal agency to children and people with mental disabilities. In an article, just published, I advance a universal norm of legal capacity to sue for violations of human rights, which includes these two longstanding marginalised groups. Here, I will reconsider liberal legal subjectivity, mobilize disability theory and the theory of vulnerability

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to reconstruct the legal subject: to demonstrate how these discourses can contribute to and enhance the existing debates over the rights of children as legal subjects. Here, disability and vulnerability – far from being inherently negative, and justifying the limitation of legal agency to children – are instead employed as enabling concepts: as powerful claims for legal capacity to sue/claim redress for human rights violations. The very disabilities and vulnerabilities of children, when shorn of the negative connotations of this respective terminology, form instead the foundations for the reconstruction of the legal subject, whose incapacities are enabling of this broadened legal personality. Disability Theory has dethroned normalcy and the feminist theory of vulnerability has dethroned autonomy and independence. Looking through these windows to see what landscapes emerge.

19-N2-2134

PERSONAL DATA PROTECTION : HOPE AND CHALLENGES IN THE ERA OF GLOBAL ECONOMY LIBERALIZATION (INDONESIA PERSPECTIVE)

DR. PATRICIA AUDREY RUSLIJANTO⁷

Globalization and technology has brought such enormous leap in many aspect of human life development. The invention of internet follow with electronic commerce has been regard as one of the precious jewel economy development.

Electronic commerce has brought vast development in the practice of trade and gathers buyer and seller from various areas from countries.

Since electronic commerce may gather various person in one borderless cyberspace area, apart from its practicality it also bring challenge, such as the protection of personal data in cyberspace area.

International instrument has regulates the protection of personal data protection in OECD guidelines 1980, APEC privacy framework, Council of Europe Convention 1981 and European Convention for the Protection of Human Right and Fundamental Freedom. Yet these instruments also influence the establishment of regulation in European Union, United States and Asia, since personal data protection has been regard as one of the type of human right elaboration.

Related with this issue Indonesia has established Law number 11 Year 2008 on Information and Electronic Transaction. Though this regulation still provide implicit protection on personal data protection. Therefore this paper attempt to analyze the legal certainty aspect in the protection of personal data protection practice in Indonesia and to find a model of personal data protection related with the use of Law number 11 year 2008 on Information and Electronic Transaction.

Based on the research it is find that the protection of personal data protection practice has not meet the requirement of legal certainty since it is often to bring burden for customer related with personal data protection, meanwhile for the model of personal data protection related with the use of Law number 11 year 2008 on Information and Electronic Transaction will need the revision of related law such as law of telecommunication and law of information technology, supported also with the work of online dispute resolution provider to settle the problem between electronic commerce user.

⁷ Dr. Patricia Audrey Ruslijanto, Lecturer, Faculty of Law University of Brawijaya Indonesia.

21-N17-2478**EXAMINING THE “COPY & PASTE” REGULATION OF BATAM CITY TO COMBAT HUMAN TRAFFICKING IN THE TRANSIT AREA**DR. RINA SHAHRULLAH⁸ DR. ELZA SYARIEF, MS. YAYAK DAHLIA

Batam City of Riau Island Province is a transit area for embarkation and debarkation of human trafficking victims in Indonesia. During the last five years, approximately 600 human trafficking cases have occurred in Batam City. The actual numbers of human trafficking cases remain unknown because most victims are reluctant to report their cases to the relevant authorities. To respond to this condition, the Batam City Government issued the Regional Regulation No.5 of 2013 on the Preventing and Handling Human Trafficking Victims (‘Batam Human Trafficking Regulation’). This Regulation raises controversies among the stakeholders in Batam City due to the inapplicability of the Regulation to combat human trafficking. The Batam City House of Representative claims that the enactment of the Regulation complied with the statutory procedures. The leading sector for human trafficking argues that the Regulation cannot be implemented because its substances do not reflect the condition and situation of Batam City as a transit area of human trafficking. This research aims to evaluate the applicability of the Batam Human Trafficking Regulation by utilizing the approaches of Effective Legal Theory of Soerjono Soekanto. The theory contains five indicators to examine the effectiveness of a legal instrument, namely “legal substance, legal enforcers, supporting facilities for legal enforcement, society where a legal instrument to be implemented, and society’s legal culture. This research adopts a socio-legal research by using depth interviews as the methods of data collection. The research finds that the Batam Human Trafficking Regulation is merely a ‘copy and paste’ legislation from the West Java Regional Regulation on Human Trafficking. As a result, the substance of Batam Human Trafficking Regulation contains many flaws because of the different condition between Batam City and the West Java Province. The West Java Province is a sending region for women and girls who are trafficked internally and internationally for sexual exploitation and forced labor, while the Batam City is the transit area for human trafficking victims from the West Java Province and other areas in Indonesia. This research argues that the compliance of statutory procedures (normative approaches) claimed by the Batam City House of Representative is not adequate for the applicability of the Batam Human Trafficking Regulation in Batam society. The effectiveness of the Regulation had to be taken as a priority by the Batam House of Representatives in the process of making the Regulation. Hence, this research suggests that the Batam Human Trafficking Regulation should be amended and the process of making the revised provisions should be preceded by a depth research and public tests involving all relevant stakeholders in Batam City.

⁸ Dr. Rina Shahrullah, Associate Professor, Universitas Internasional Batam.

23-N20-2743**THAILAND'S APPROACH IN MANAGING IRREGULAR LABOR MIGRATION SINCE 1980S: AN ANALYSIS OF POLICY-MAKING**MS. NUMTIP SMERCHUAR⁹

Since 1970, Thailand was driven to a stage of industrial development's take-off period. With an acceleration of industrial growth, Thai economy was inevitably to absorb labor force migrating from rural sector to work in urban areas like Bangkok and circumferences. During that period there was quite normal to witness numbers of villagers renounced their cultivating lands and took adventures for their better lives in factories. High demand of unskilled workers from rural areas continued while in 1980 there was a competition from Central East Asia and East Asia countries. Because of a rapid growth of those countries, numbers of workers from Thailand decided to change their destination from domestic areas to Central East and East countries due to the fact that they could earn more in newly growth countries. This caused a problem of domestic labor shortage in country. Moreover, with an introduction of new education law that required all Thai people to get compulsory education, some expected labor force had been dissolved to become students and this created a trouble situation to Thai economy since demand of labor force was unachieved. (Supang Chantavanich and Premjai Vungsiriphaisal, 2012: 214) During this circumstance Thailand had no choice but had to invites unskilled labors from neighboring countries.

Due to the fact that international migration plays significance roles in poverty reduction and development, Thailand is one of the destinations for cross-border mobility of people which have been governed by the long history. However, Thai government has launched many measures to deal with migrant people directly and indirectly.

This paper aims to explain the elements of Thai government's approach in dealing with irregular labor migration issues, after the 1980s. Documentary data is a main source of this study at this first stage. Changing of policies causes many opinions from stakeholders in this issue and sometimes creates an unfavorable situation. Nonetheless, Nineteenth and Twentieth century ideals of Democracy were always firmly embedded in the conceptual framework of the nation state, the development of modern border control regimes might be viewed as a form of politics and also influence a policy-making on migrant management in Thailand. With a complexity context of migrant population, Anthony Reid (2008: xxvii) also states that twentieth century was the century of nationalism in Asia. Imperial assumptions of cultural and political plurality gave way to nationalist demands for states that reflected an imagined cultural coherence if not uniformity. This was a difficult period for diaspora minorities, whose loyalty and political identity were now in question.

Summarily, an uncertainly of Thai government mechanism in managing irregular labor migration was on a result of economic growth of the country. Policy formulation to solve this problem was based on three dimensions, namely, national security, economic development and human rights. It can be concluded that if Thailand is still persisting its pattern of economic development based upon labor intensive style, an irregular migration remains unsolved.

⁹ Ms. Numtip Smerchuar, Phd Student, Waseda University.

25-N10-2061**FOR DEAR LIFE: VISUAL AND POLITICAL STRATEGIES FOR FREEDOM AND HUMAN RIGHTS OF INCARCERATED WOMEN**PROF. CAROL JACOBSEN¹⁰

The history of women's criminalization is a history of state violence and injustice. From minor property and drug offenses to murder, women's crimes are produced by their struggle to survive and processed within a regime that imparts harsh, gendered modes of punishment. Drawing on long-term relationships, activism, filmmaking and public education with women on both sides of the prison fence through my roles as artist, educator, political organizer and Director of the Women's Justice & Clemency Project in Michigan, this presentation offers a view of the ways incarcerated women find strategies of resistance and hope for their freedom and greater social justice. Through their own efforts and through partnerships with feminist artists, scholars, attorneys and activists women prisoners have challenged a prison system named by Amnesty International and Human Rights Watch as among the worst in the nation for human rights violations against women in custody including rapes, four point chaining, solitary confinement, medical abuse and other atrocities. This presentation will include short clips from several of my films narrated by women prisoners, nine of whom have been freed from life sentences through the efforts of the Michigan Women's Justice & Clemency Project.

26-27-N27-P9-1902**THE OPEN AND DISTANCE LEARNING AS AN INSTRUMENT OF PROTECTING THE RIGHT TO ACCESS TO EDUCATION: THE NIGERIAN EXPERIENCE**PROF. JUSTUS SHOKEFUN¹¹ MRS. OLUFUNKE AJE-FAMUYIDE

Education is a right. Education is an extraordinary tool of empowerment and it is essential for the promotion and protection of all human rights. Various international treaties, covenants and conventions since 1948 as well as writings of publicists have stressed the importance of the fundamental right to education. The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic and Social Rights (ICESCR), the Covenants on the Rights of the Child (CRC) as well as the African Charter on Human and Peoples' Right (ACHPR) contain provisions which protect the right to education. The International Human Rights Law holds the state primarily responsible for the implementation of the right. Accordingly, it is incumbent on the state parties to ensure the realization of the right to education through policy, administrative and legislative measure. A critical component of the right to education is the right of access to education. Invariably, a denial of the right of access to education is a fundamental violation of the right to education. Lack of access to education is acute in Nigeria and efforts to address the problem have met with limited success. This article therefore seeks to examine the varied ways in which the Open and Distance Learning Education has been used to address the problem of access to the right to education in Nigeria. This article also examines the essentials of Open and Distance Learning (ODL) and in particular, how Nigeria has used the ODL mode of study (through the National Open University of Nigeria) as an instrument of social justice in surmounting the

¹⁰ Prof. Carol Jacobsen, Professor, University of Michigan.

¹¹ Prof. Justus Shokefun, Dean, National Open University of Nigeria.

challenges of accessibility to education in Nigeria. The work examines the successes and failures of using the ODL system in protecting the right of access to education. The writers are of the view that the ODL system has played significant role of addressing the right to education and that other policy and legislative measures are still necessary in achieving right of access to education.

28-N23-2729

INTERNATIONAL LAW AND ENVIRONMENTAL DISPLACEMENT: TOWARDS A NEW HUMAN RIGHTS-BASED PROTECTION PARADIGM

MS. ISABEL MOTA BORGES¹²

This article explores the increasing concern over the extent to which those suffering from forced (or potential) cross-border displacement as a result of environmental change are protected under international law, in particular human rights law. Formally, they are not entitled to admission or to stay in a third state country. This has been identified as an international “legal protection gap” that displaces people and impacts upon their human rights.

The article seeks to provide adequate answers to two basic questions: whether and to what extent existing international law protects cross-border environmental displacement? and whether and how existing formalized regional complementary protection standards can interpretively solidify and (re)conceptualize protection for cross-border environmental displacement? The discussion outlines that the protection of the human person is not

only an ex post facto obligation of states, but must be increasingly

seen as an ex ante one. The analysis further suggests that the European Union’s regionally orientated protection regime can help states to consolidate an evolving protection paradigm of proactive and reactive measures being erected at the international level for environmental cross-border displacement and narrow the identified legal protection gaps. In other words, it helps states to (re)conceptualize protection as a holistic and dynamic enterprise.

30-N16-2065

PUTTING ARCHIVES ON TRIAL: LAWYERS IN SEARCH OF RECORDS

DR. SAMAILA SULEIMAN¹³

The struggle over the production, management and consumption of historical knowledge is not confined to the academy and scholarly texts. They are also embedded in other concrete sites of history such as archives and museums where evidence is created, codified, stored and imbued with “legitimacy” and “authority”. Who are the most regular consumers of archival records? My initial idea of archives, as the prerogative and primary sanctuary of historians, was jolted when I ventured into studying archives as a cultural institution and epistemological organization, rather than a simple database of docile and dusty files waiting to be excavated by expert historians. This led to my discovery of an interesting circuit of archival consumption at the National Archives Kaduna (NAK), located in the northern Nigerian city of Kaduna. With the upsurge of conflicts relating to land, chieftaincy and boundary matters, particularly in areas of the so-called Middle Belt region such as Jos and Southern Kaduna, the NAK became a research hotbed for lawyers and ethnic

¹² Ms. Isabel Mota Borges, PhD Research Fellow, University of Oslo.

¹³ Dr. Samaila Suleiman, Lecturer, Bayero University Kano.

associations. A close examination of the users' register of the archives between 1994 and 2010 reveals that the majority of the users were legal practitioners. Lawyers deploy archives as a legal instrument. They search for corroborative evidence that would support the case of their clients, brushing aside any possible counter-evidence. And since they are usually paid to defend their client, the tendency is to hide contrary evidence from the opponents. Although legal practitioners, like professional historians, are taught to be fair and honest within the canons of legal discipline, in practice they try as much as possible to maximize the chances of their clients in the court of law. This paper examines the linkages between history and the legal profession through an interrogation of the ways in which lawyers use the Kaduna branch of the National Archives of Nigeria.

31-N29-2756

ADOPTION OF U-HEALTH SYSTEM: MODERATING EFFECTS OF USER'S PRIVACY

PROF. MINCHEOL KIM¹⁴

Adoption of u-Health System: Moderating Effects of User's Privacy Mincheol Kim Department of Management Information Systems Jeju National University, Jeju City, South Korea mck1292@jejunu.ac.kr The growth of the senior population has led to a sharp increase of patients with chronic disease, which has become a cause of increasing health care expenditures and welfare needs for seniors and accelerating health-care costs, thereby creating neglected people who receive poor health-care services (Park et al., 2005). A system, as a solution for such issues, is considered important for follow-up management and advanced prevention of diseases - u-health (ubiquitous health) based on smartphone app is one of the solutions (Kratzke & Cox, 2012). However, issues on regulations, safety and privacy are needed to consider before adoption of this system (BinDhim & Trevena, 2015). Based on research background, the purpose of this study is to analyze the adoption intention of the u-health system focused on moderating the effect of user's privacy in personal health information. Basically, the approach of this study is to propose the implications using the theory of reasoned action (TRA; Fishbein & Ajzen, 1975) on ubiquitous health (u-health). This research model through TRA consists of three constructs: self-efficacy (cognitive; Bandura, 1993), perceived usefulness (cognitive; Van et al., 2010) and behavioral intention (affective; Bandura, 1993) with the moderating effect of user's privacy on personal health information. Finally, this research model shows significant statistical levels in proposed hypotheses and the applicability of the TRA model focused on the moderating role of user's privacy in personal health information in the u-health system. This study uses the PLS-SEM (Partial Least Squares-Structural Equation Modeling) method by Hair et al. (2012) for verification of the proposed model. As expected result of the analysis, a path from individual experience to personal health and also, a path from self-efficacy to behavioral intention have the highest influence in the research model. That is, self efficacy and perceived benefits show a significantly positive relationship on attitude toward use of the u-health system with the moderating effect of user's privacy when using the u-health system. However, additional research is needed in that this study needs more clear definition of the u-health system based on smartphone.

¹⁴ Prof. Mincheol Kim, Professor, Jeju National University.

33-N21-2717**USE OF HOLLYWOOD AS A SOFT POWER TOOL IN FOREIGN POLICY STRATEGY OF THE UNITED STATES OF AMERICA**DR. EMRAH AYDEMIR¹⁵

Soft power, benefited to protect and sustain national interests, focuses on attraction. Soft power, which directs administration of other countries with the support of public, based on their own desires, and strengthens the position of a country, strengthens the bonds with other country citizens by cultural studies, and enables winning of hearts, can enable the countries to reach outstanding results in foreign policy targets. Increased use and value of soft power in foreign policy is very important for countries to reach concrete results in international relationships. The United States of America attempts to characterize the world according to its own foreign policy with this consciousness. The United States uses its soft power resources as an ability to achieve its desires based on its targets in foreign policy. Mass communication tools used by the United States are a significant method for reaching the target population directly or indirectly and rapidly and effectively. As changes are experienced in modern world politics every day, the United States follows up this process actively and applies its soft power with mass communication tools and focuses on reaching results in foreign policy. Cinema, which is among mass communication tools, is a utilization to reveal suggestions to encourage the target population as a statement of the United States and at the end to create relative change in the target population. In this context Hollywood's international role of America's soft power tool has been a matter of exquisite debate. Hollywood, producing ideology as a psychological means in the foreign policy of the United States ever since, communicates with its target audience non-stop. Hollywood, which globally engages to inject America's image into the minds of people, is an entertainment vehicle facilitating the transmission of social and political messages of the United States. Hollywood tells the culture of Americans, justifies that democratic values are needed in the world, and attempts to put the lifestyles of foreign public in the social and politics fields into a form that is proper to American values. The United States starts to apply opinions and philosophical arguments making up its soft power through Hollywood in foreign policy. In this study, Hollywood will be examined as a soft power tool in the foreign policy of the United States based on concrete examples, and its significance in terms of American foreign policy will be evaluated.

34-P15/N13-2606**SUSTAINABLE ECONOMIC AND BUSINESS GROWTH IN AFRICA: THE ROLE OF LEGAL INSTITUTION**MR. SAMUEL OLUROTIMI EGBETOKUN¹⁶ PROF. TEMITAYO AKINBOBOLA

During the last two decades, scholars have explored the characteristic features of the language of law, such as overwhelming use of passive voice, nominalization, unnecessary repetition, archaic vocabulary, and unusual syntactic constructions. However, legal linguistics in general and the legislative drafting in particular has largely remained outside the realm of genre-based linguistic analysis in Pakistani context, thereby creating a need for a dedicated analysis of the language of

¹⁵ Dr. Emrah Aydemir, Assistant Professor, Firat University.

¹⁶ Mr. Samuel Olurotimi Egbetokun, Lecturer, Adeniran Ogunsanya College of Education Otto.

legislation as used by Pakistani law professionals. The present study fulfilled this need by analyzing the Muslim Family Laws Ordinance, 1961 (MFLO), taken as a genre, with the help of Bhatia's multidimensional perspective framework (2004: 163-167), which provides seven tools namely (1) Placing the Given Genre-Text in a Situational Context, (2) Surveying Existing Literature, (3) Refining the Situational / Contextual Analysis, (4) Selecting Corpus, (5) Studying the Institutional Context, (6) Textual Analysis and (7) Specialist Information in Genre Analysis. Bhatia (ibid) suggests that these tools may be used in any number and sequence for conducting genre analysis. Therefore, these tools were discretionally employed for this study keeping in view the scope of the study. This qualitative descriptive analysis explored the move structure and rhetorical strategies used in MFLO, along with possibilities for redrafting its provisions for improved rhetorical appeal. It is hoped that the study would prove to be a milestone for initiating the research in the area of legislative drafting, corpus building, and standardization of legal language as used by Pakistani legislative drafters in particular and legal practitioners in general. The findings of this study would promote research in legal linguistics at all appropriate academic and professional forums and open new vistas for (legal) linguists to explore the ways of legislative drafting in particular and legal drafting in general to improve the rhetorical appeal and understanding of legislative as well as other legal texts and provide a potential for application in other countries with similar contexts.

35-N46-209

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