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Contents

I PLENARY SESSION

Session Chair: Graeme Lockwood, Kings College London, UK

05

Graeme Lockwood, Kings College London, UK - *Harassment in the workplace: the legal context*

Muzaffar Syah Mallow, Universiti Sains Islam, Malaysia - *Child Marriage: An Issue of Legal Concern in Malaysia*

Khodr Fakhri, Lebanese American University, Lebanon - *The Lebanese Judicial System: The Role of the Judiciary to Protect and Stabilize the National Security*

Ashgar Ali Ali Mohamed, International Islamic University Malaysia, Malaysia - *Mediation in the Native Courts in Malaysia*

II PLENARY SESSION

Session Chair: Christoforos Ioannidis, King's College London, UK

41

Christoforos Ioannidis, King's College London, UK - *Are the Conditions of Statehood Sufficient? An Argument in Favor of Popular Sovereignty as an Additional Requirement for Statehood, on the Grounds of Justice as a Moral Foundation of International Law*

Hossein Yousefi, Islamic Azad University, North Tehran Branch, Iran - *Protection of privacy with regard to the European Court of Human Rights*

Mahmoud Mohamed EL-Sheikh, University of Tripoli, Libya - *Islamic Law and Privacy Protection*

Ghassen Ben Hadj Larbi, Nagoya University, Japan - *Libya, Responsibility to Protect and UN Security Council Resolution 1973*

Mohd. AkramvShair Mohamed, International Islamic University Malaysia, Malaysia - *Implied Terms by the Court in UK, Australia and Malaysia in a Comparative Appraisal*

III PLENARY SESSION

Session Chair: Daniel Silander, Linnaeus University, Sweden

88

Ioana Gelei, University of Bucharest, Romania - *European Certificate of Succession*

Masoud Raei, Mohammad Mahdi Sadeghi, Islamic Azad University, Iran - *Prohibition of nuclear weapons production according to Shiite religion*

Makedonka Radulovic, European University RM, Republic of Macedonia - *The Effectiveness of the European Union Measures for Reconciliation of Work and Family Life*

IV PLENARY SESSION

Session Chair: Bruno Surdel, Zirve University, Turkey

115

Angie Clocheret and Sibylle Van Belle, University of Ghent, Belgium - *Towards a more neutral income tax system*

Christian Alexander Haro, Technological University of Juarez City, Mexico - *The Foreign Investment Law of Mexico and its conflict with the North America Free Trade Agreement*

Ghasemali Sabouri, Asghar Rostami, Azad University, Firouzkouh Branch, Iran - *Futures Contract From the Perspective of Islamic law and Establishment of Muslim Countries Stock Markets*

V PLENARY SESSION

Session Chair: M. Ehteshamul Bari, Macquarie University, Australia

133

M. Ehteshamul Bari, Macquarie University, Australia - *The Unjust Exercise of Emergency Powers in Bangladesh and Their Consequent Impact on the Fundamental Rights: A Critical Appraisal*

Stellina Jolly, South Asian University, Delhi, India - *Protection of Indigenous Peoples Rights Under REDD Mechanism: A Legal Analysis*

Erinda Duraj, University of Tirana, Albania - *The victims before the International Criminal Court;*

Mahyuddin Ismail, Abd Jalil Borham, Sharifah Intan Safina Syed Zubir, Universiti Malaysia Pahang, Malaysia - *Bewitchment As A Defence In Divorce Cases: An Analysis From Islamic Law Perspective*

Radhika Chitkara, National Law University, India - *Between Choice and Security: Irretrievable Breakdown of Marriage in India*

VI PLENARY SESSION

Session Chair: Rosaan Krüger, Rhodes University, South Africa

168

Rosaan Krüger, Rhodes University, South Africa - *The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign*

Kimberley Pérukel, Vrije Universiteit, Netherlands - *Why Do We Wage This War? Researching the Link between Party Ideology and Foreign Policy Decisions by United States Presidents*

Mohammad Mahdi Sadeghi, Masoud Raei, Islamic Azad University, Iran - *The Reservation of Islamic Countries on Human Rights Treaties: Roots of Political and Religion*

Mohammed Saleem Tariq, BPP University College, London, UK - *An International Answer to Capturing Corporate Criminality*

PARTICIPANTS LIST

204

I PLENARY SESSION

Session Chair: Graeme Lockwood, Kings College London, UK

Harassment in the Workplace: the Legal Context*

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Abstract

This article analyses harassment cases arising in the employment context brought in the English tribunals and the courts.

* Full article will be published in research journal “*Jurisprudence*”, Mykolas Romeris University, Lithuania

Marriage: An Issue of Legal Concern in Malaysia

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Abstract

Malaysian children especially young Muslim girls under the age of 16 can legally get married, and are increasingly doing so. Malaysia, along with over 90 other countries, adopted a United Nations resolution to end child, early or forced marriages, at the Human Rights Council in 2013. However, data shows that child marriage is very much rampant in Malaysia. Many Malaysian Non-Governmental Organizations (NGO's), said it was shocking that child marriage still existed in the country because of loopholes in the marriage laws and a continuing belief that girls should be married off once they reached puberty. This paper will examine all the relevant laws & regulations under the Malaysian civil and Shariah law about the issue, highlighting the concern put forward by the Malaysian non-government organizations (NGO's) on the issue as well as proposing suggestions to solve the problem from legal point of view.¹

1.0 Introduction

Child marriage² is one of the most pernicious manifestations of the unequal power relations

¹ The author would like to send his deepest appreciation to the co-researcher of the project Mr Aizat Shamsuddin, Undergraduate Bachelor of Syariah and Law (Hons.), Universiti Sains Islam Malaysia (USIM)

² The term "child marriage" is meant in this paper only to cover marriages of those under the age of 18. The minimum age of marriage has been prescribed by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee as being 18 years of age.

between females and males (A.A. Ali, August 2001 [1]). Begun as a practice to protect unwelcome sexual advances and to gain economic security, child marriage has undermined the very purposes it was meant to achieve. Sadly, child marriage often means for the girl a life of certain sexual and economic servitude. The subordination in particular of women is both a cause and consequence of child marriage. Child marriage is defined as a formal marriage or informal union entered into by an individual before reaching the age of 18.³ While child marriage is observed for both boys and girls, the overwhelming majority of those affected by the practice are girls, most of whom are in poor socioeconomic situations.⁴ It is related to child betrothal and teenage pregnancy. In many cases, only one marriage-partner is a child, usually the female, due to importance placed upon female virginity. Child marriages are also driven by poverty, bride price, dowry, cultural traditions, laws that allow child marriages, religious and social pressures, regional customs, fear of remaining unmarried, illiteracy, and perceived inability of women to work for money. Child marriages were common throughout human history. Today, child marriages are still fairly widespread in some developing areas of the world, such as parts of

³Please refer to the United Nations Children's Fund (UNICEF) 2011 report on child protection from violence, exploitation and abuse at <http://www.unicef.org/protection>

⁴ United Nations Children's Fund (UNICEF) 2012 notes on child marriage at page 3.

Africa⁵, South Asia⁶, Southeast and East Asia⁷, West Asia⁸, Latin America⁹, and Oceania¹⁰. The incidence rates of child marriage have been falling in most parts of the world. In 2012, it was stated that the five nations with the highest observed rates of child marriages in the world, below the age of 18, are Niger, Chad, Mali, Bangladesh and Guinea¹¹. According to the International Women's Health Coalition the top three nations with greater than 20% rates of child marriages below the age of 15 are Niger, Bangladesh and Guinea.¹² As many as 1 in 3 girls in developing areas of the world are married before reaching the age of 18, and an estimated 1 in 9 girls in developing countries are married by age 15. One of the most common causes of death for girls aged 15 to 19 in developing countries was pregnancy and child birth.¹³ To protect vulnerable children from exploitation, various age of consent and marriageable age laws have been made by countries.

2.0 The causes and consequences of child marriage

The underlying causes of early marriage are many and include poverty, parental desire to prevent sexual relations outside marriage and the fear of rape, a lack of educational or employment opportunities for girls, and traditional notions of the primary role of women and girls as wives and mothers. Poverty is one of the main determinants of early marriage. In many countries in the Middle East, South Asia and Sub Saharan Africa, poverty drives families to give their daughters in marriage in the hope that this will alleviate the family's poverty and secure the family's honour when it is at stake.¹⁴ A sense of social insecurity has also been a cause of child marriages across the world. For example, in Nepal, parents fear likely social stigma if grown-up adult girls (past 18 years) stay at home.¹⁵ Other fear of crime such as rape, which not only would be traumatic but may lead to less acceptance of the girl if she becomes victim of a crime. In other cultures, the fear is that an unmarried girl may engage in illicit relationships, or elope causing a permanent social blemish to her siblings, or that the impoverished family may be unable to find bachelors for grown up girls in their economic social group. Such fears and social pressures have been proposed as causes that lead to child marriages. Although child marriage is seen as a way to escape the cycle of poverty, child marriage in fact worsens the cycle of intergenerational poverty. Although poverty is one of the underlying causes of child marriage as parents see this as an opportunity to receive money or save money, child marriage is not restricted to poor families. Child marriage is also one way of preserving wealth in families of a higher socio-economic class.

Social upheavals such as wars, major military campaigns, forced religious conversion, taking natives as prisoners of war and converting them into slaves, arrest and forced migrations of people often made a suitable groom a rare

⁵Anthony Kamba, Africa: Child Brides Die Young, 1ST August 2013 at <http://allafrica.com/stories>

⁶Early Marriage, Child Spouses, United Nations Children's Fund (UNICEF), Refer to section on Asia, page 4 (2001).

⁷Southeast Asia's big dilemma: what to do about child marriage?, 20TH August 2013 at <https://www.plan.org.au/News/2013/08/20/Child-Marriage-in-Southeast-Asia.aspx>

⁸Joel Brinkley, Child marriage still an issue in Saudi Arabia, 14TH March 2010 at <http://www.sfgate.com/opinion/brinkley/article/Child-marriage-still-an-issue-in-Saudi-Arabia-3270366.php>

⁹Child Marriage: What we know? Public Broadcasting Service (United States), 2010 <http://www.pbs.org/now/shows/341/facts.html>

¹⁰Early Marriage, Child Spouses, United Nations Children's Fund (UNICEF), Refer to section on Oceania, page 5.

¹¹Child Marriage is a Death Sentence for Many Young Girls, United Nations Children's Fund (UNICEF), 2012.

¹²Child Marriages: Girls below age 14 at risk, International Women's Health Coalition, at <http://iwhc.org/priorities/end-early-forced-marriage/>

¹³Jenifer Ludden, Five Things You May Not Know About Child Marriage, 1ST December 2013 at <http://www.npr.org/blogs/parallels/2013/12/01/247843225/5>

¹⁴Thapa, S. (1996). Its Prevalence and Correlates. Contributions to Nepalese Studies, 23(2), pages 361-375.

¹⁵Ibid.

commodity. Bride's families would seek out any available bachelors and marry them to their daughters, before events beyond their control moved the boy away. Persecution and displacement of Roma and Jewish people in Europe, colonial campaigns to get slaves from various ethnic groups in West Africa (Boyden, J., Pankhurst, A., & Tafere, Y, 2012, [4]) across the Atlantic for plantations, it even stated that the Islamic campaigns to get Hindu slaves from India across Afghanistan's Hindu Kush as property and for work, (M.A. Khan, [13]) were some of the historical events that increased the practice of child marriage before 19th century.¹⁶ The laws in many countries also allow child marriages, that is the marriage of girls and boys less than 18 years of age. The minimum legally approved age of marriage is less than 15 in some countries. Such laws are neither limited to developing countries, nor to state religion. In Europe, for example, Catholic canon law sets 14 as the minimum age for the marriage of girls¹⁷, as does Spain with a legal guardian's permission.¹⁸ In North America, girls can be legally married at age 15 in Mexico. Canada and many states in the USA permit child marriages, with court's permission. In Islamic nations, many countries do not allow child marriage of girls under their civil code of laws. But, the state recognized Sharia religious laws and courts in all these nations have the power to override the civil code, and often do. The 2012 United Nations

¹⁶ S.D. Goitein (1978), *A Mediterranean Society: The Jewish Communities of the Arab World*, Vol. 3, University of California Press. Please refer also to Andre Wink (1997), *Al-Hind: the Making of the Indo-Islamic World*, vol. 2, *The Slave Kings and the Islamic Conquest, 11th-13th Centuries* (Leiden); M.A. Khan, *Islamic Jihad: A Legacy of Forced Conversion, Imperialism, and Slavery*, ISBN 978-1-4401-1846-3, pages 253-255; and Assaf Likhovski (2006), *Law and Identity in Mandate Palestine*, ISBN 978-0-8078-3017-8; University of North Carolina Press, pages 93-103.

¹⁷ Section 1083 §1 of the Canon Law states "A man before he has completed his sixteenth year of age and a woman before she has completed her fourteenth year of age cannot enter into a valid marriage".

¹⁸ "Los hijos de maltratadas serán considerados víctimas de violencia de género". *El Mundo (Spain)* (in Spanish). May 4, 2013.

Children's Fund (UNICEF) report entitle "Child Marriage is a Death Sentence for Many Young Girls", reports that the top five nations in the world with highest observed child marriage rates — Niger (75%), Chad (72%), Mali (71%), Bangladesh (64%), Guinea (63%) — are Islamic majority countries.

Child marriages impact a range of women's rights such as access to education, freedom of movement, freedom from violence, reproductive rights, and the right to consensual marriage. The consequence of these violations impacts not only the woman, but her children and broader society.¹⁹ Although child marriage most often stems from poverty and powerlessness, it only further reinforces the gendered notions of poverty and powerlessness stultifying the physical, mental, intellectual and social development of the girl child and heightening the social isolation of the girl child. Evidence shows that child marriage is a tool of oppression which subordinates not just the woman but her family. Not only does child marriage perpetuate an inter-generational cycle of poverty and lack of opportunity; it reinforces the subordinated nature of communities that traditionally serve the powerful classes by giving a girl child in marriage to an older male. Child marriage often partners young girls with men who are much older. Girls find themselves in new homes with greater responsibilities, without much autonomy or decision-making power and unable to negotiate sexual experiences within the marriage. Economic dependency and the lack of social support also expose young married girls to other kinds of violent trauma during marriage.²⁰ A child bride is often regarded as a wife-in-training and is considered to be docile and malleable. This assumption exposes child brides to the greater risk of domestic violence and

¹⁹ Clark, Shelley, Judith Bruce, and Annie Dude. 2006. Protecting young women from HIV/AIDS: the case against child and adolescent marriage. *International Family Planning Perspectives* 32(2): 79-88.

²⁰ Innocenti 9 and 12 (citing data on young girls who are married being exposed to domestic violence in Bangladesh, Egypt, India, Jordan, Lebanon, Pakistan, Turkey and elsewhere).

sexual abuse by her in-law's family. (Chowdhury, F. D., 2004, [5]). Domestic and sexual violence from their husbands has lifelong, devastating mental health consequences for young girls because they are at a formative stage of psychological development. Young married women are also more vulnerable to sexual exploitation which leads to economic abuse and psychological violence. Child brides are also forced into household labour in their husband's families which result in the exploitation of the girl child. Since child marriages are contingent upon large amounts of money exchanging hands, child marriage amounts to trafficking in girls (Warner, E., 2004, [18]). Child marriage often facilitates the trade in women as cheap labour and has led to a rise in trafficking in women and children. Child marriage is also used as a means to conduct prostitution and bonded labour. Child marriage also reinforces the incidence of infectious diseases, malnutrition, high child mortality rates, low life expectancy for women, and an inter-generational cycle of girl child abuse. Pregnancy-related death is a leading cause of death for girls between 15 and 19 years of age. The dangers of early marriage affect not only the girl child but the child born to her as well. Premature birth, low birth rate, and poor mental and physical growth are some characteristics of babies born to young mothers. The real costs associated with women's health and infant mortality are enormous. (D. Nancy, 1994, [6]). Child marriages can have devastating consequences on the sexual and reproductive health of girls increasing the risk of maternal mortality²¹ and morbidity and contracting

²¹ The roots of maternal mortality have been linked to infancy or even prior to birth. At these stages the pregnant girl experiences calcium, vitamin, or iron deficiencies which continue throughout her life leading to several health and malnutrition problems such as stunted growth, contracted pelvis, iron deficiency anemia, all of which make pregnancy an even more life threatening endeavor for the girl. Underdeveloped and inadequately developed bodies, which are the result of unfulfilled nutrition needs and skeletal growth, lead to obstructed labor due to the disproportion between the pelvis size and the baby's head. Labor becomes a trying and frequently fatal undertaking because the pelvis has not fully developed for up to two years after menarche. Askari,

sexually transmitted diseases, particularly HIV/AIDS. Young girls, particularly those below 15 years of age, face serious reproductive health hazards, sometimes losing their lives, as a result of early pregnancies. Those under age 15 are five times as likely to die as women in their twenties. In addition to their lack of power in relation to their husbands and in-laws, girls are further exposed to sexual and reproductive health problems because of their lack knowledge, information and access to sexual and reproductive health services, in particular, family planning, ante-natal, obstetrics, and post-natal care. Countless studies have proven that early marriage is universally associated with low levels of schooling.²² After marriage, young married girls' access to formal and even non-formal education is severely limited because of restrictions placed on mobility, domestic burdens, childbearing, and social norms that view marriage and schooling as incompatible. Since in most cultures girls leave their parental home upon marriage, parents tend not to invest in the education of daughters because the benefits of their investment will be lost. Child marriage, early childbearing, and lack of access to continued educational opportunities also limit young women's access to employment opportunities. Without education, girls and adult women have fewer opportunities to earn an income, financially provide for herself and her children. This makes girls more vulnerable to persistent poverty if their spouses die, abandon, or divorce them.²³ Child marriage is also been associated with early widowhood, divorce and abandonment, which often results in "feminization of poverty".

Ladan. The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages. *Journal of International & Comparative Law*. Fall 1998.

²² Alan Guttmacher Institute (1998) 'Into a New World: Young Women's Sexual and Reproductive Lives' and Forum on Marriage and the Rights of Women and Girls. (2000) "Whose Right to Choose".

²³ Child Marriage and Violations of Girls' Rights Human Rights Watch, 14TH June 2013 at <http://www.hrw.org/news/2013/06/14/q-child-marriage-and-violations-girls-rights>

3. 0 International human rights norms that address the issue concerning child marriage

In 1945, the United Nations Charter reaffirmed a faith in fundamental human rights and in the equal rights of men and women and encouraged respect for human rights and for fundamental freedoms without distinction as to sex. The Universal Declaration of Human Rights similarly promoted the dignity and worth of the human person and the equal rights of men and women.²⁴ It specified sex as being among the impermissible grounds of differentiation and provided an equal protection clause. Despite the fact that the Universal Declaration does not in and of itself have legal effect on all states, it is morally persuasive and is considered part of customary international law. Provisions for equality of the sexes in the enjoyment of rights are provided for in all the major human rights covenants of the United Nations. The 1979 Convention on the Elimination of Discrimination against Women (CEDAW) provides for the prohibition of Child Marriage in Article 16²⁵. While child marriage per se is not referred to in the 1989 Convention on the Rights of the Child (CRC), the Convention contains a provision calling for the abolishment of traditional practices prejudicial to the health of children²⁶. In addition, child marriage is connected to other children's rights, such as the right to express their views freely, the right to protection from all forms of abuse, and the right to be protected from harmful traditional practices and is often addressed by the Committee on the Rights of the Child. The CRC prohibits States parties from permitting or giving validity to a marriage between persons who have not attained their majority²⁷. In the context of the Convention on the Rights of the Child, "a child means every

²⁴ The Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); Article 7 reads in part: All are equal before the law and are entitled without any discrimination to equal protection of the law.

²⁵ Article 16 (2), states: "The betrothal and the marriage of a child shall have no legal effect, and all"

²⁶ Article 24 (3) of the Convention on the Rights of the Child, 1989.

²⁷ Article 16 (2) of the Convention on the Rights of the Child, 1989.

human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier". (Ladan, A., 1998, [11]).

The Committee on the Rights of Child considers that the minimum age for marriage must be 18 years for both man and woman. Child marriage is among the most frequently addressed issues by both the CRC and CEDAW Committees in their dialogue with State parties and in Concluding Observations²⁸. Both the CRC and CEDAW Committees have emphasized the complementary and mutually reinforcing features of the two Conventions. The call for equality for women and girls applies to all ages, including the girl child. While the CRC does not specifically prohibit child marriage, reading the CRC in light of the CEDAW provides an urgent rationale to abolish early marriage²⁹. The "best interests of the child" principle in the CRC provides a basis for evaluating the laws and practices of States with respect to the protection of children. Since empirical evidence reveals that girls who marry early are often exposed to violence, divorce, abandonment, and poverty, and in light of the best interest of the child principle, States must take legal action to abolish child marriages³⁰. To pursue the best interests of children, parents and governments are responsible for protecting their children's health, education, development and overall well-being to the best of their capacities. Since child marriage harms the girl child's health, particularly her sexual and reproductive health, which often results in maternal mortality and morbidity due to early pregnancies, States are obliged under the CRC "to take all effective

²⁸ Goonesekere, Savitri & De Silva-de Alwis, Rangita (2005). Women's and Children's Rights in a Human Rights Based Approach to Development. Working Paper. Division of Policy and Planning. UNICEF at page 14.

²⁹ Ibid.

³⁰ Article 3 (1) of the of the Convention on the Rights of the Child, 1989 guarantees that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Article 19.1 of the similar also requires States to take all appropriate measures to protect the child from all forms of abuse, neglect, or maltreatment while in the care of parents.

and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children³¹. Inaction on the part of the States to eliminate child marriages also violates the principle of life, survival and development and the girl child's right to the highest attainable standard of health under the CRC³² and the CEDAW³³. Sexual and reproductive health problems linked to early marriage is also a result of general lack of information and education on sexual and reproductive health issues and thus violates CEDAW's entitlements that women shall have access to the necessary information, education and means to enable to decide freely and responsibly on the number and spacing of their children.³⁴

Apart from the violation of health rights, early marriage disrupts girls' schooling opportunities as guaranteed by the CEDAW³⁵ and the CRC³⁶

³¹ Article 24.3 of the Convention on the Rights of the Child, 1989.

³² Article 6 of the Convention on the Rights of the Child, 1989 states (1) States Parties recognize that every child has the inherent right to life (2) States Parties shall ensure to the maximum extent possible the survival and development of the child. 24 (1) of the CRC states that States should "recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

³³ Article 12 of the Convention on the Elimination of Discrimination against Women 1979 (CEDAW) guarantees non-discrimination on the grounds of sex in the field of health care and access to health care services, including those related to family planning and pregnancy.

³⁴ Please refer to Article 16 (e) of the Convention on the Elimination of Discrimination against Women 1979 (CEDAW).

³⁵ Article 10 (a) of the Convention on the Elimination of Discrimination against Women 1979 (CEDAW) guarantees that equality in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training.

³⁶ A minimum age for completion of compulsory education is not mentioned in the CRC, however, CRC Committee's Guidelines for Periodic Reports require States to "indicate the particular measures adopted to make primary education compulsory and available free for all, particularly children, indicating

and employment rights including vocational training affirmed in the CEDAW.³⁷ In light of early childbearing that mostly follows child marriage, the CEDAW Committee has cogently emphasized the negative effects child marriage has on the education and employment of girls, stating that "the responsibilities that women have to bear and raise children affect their right of access to education, employment and other activities related to their personal development. They also impose inequitable burdens of work on women." The rights to marry and found a family are the rights of adults and not children and adolescents.³⁸ The CRC endorses both the principle of the "best interest of the child"³⁹ and the "evolving capacity" of the adolescent.⁴⁰ Reading these two articles together implies that children incapable of judgment are entitled to

the minimum age for enrolment in primary school, the minimum and maximum ages for compulsory education..." In Article 28 (1) (b) the Convention on the Rights of the Child, 1989 provides that States should encourage the development of different forms of secondary education, including vocational education, make them accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance. Similarly, CEDAW clearly guarantees the equal access to education for girls and women.

³⁷ Please refer to Article 11.1 (c) of the Convention on the Elimination of Discrimination against Women 1979 (CEDAW).

³⁸ Cook, Rebecca. (1994). *Women's Health and Human Rights: the Promotion and Protection of Women's Health through International Human Rights Law*. Geneva: WHO at page 32.

³⁹ Accordingly, early marriage also being regard to have violates the principle of no discrimination (Article 2), as it fall disproportionately on girls; the adverse consequences of early marriage violates the principle of the child's maximum survival and development (Article 6); thus, early marriage will not be in the girl's best interest.

⁴⁰ Article 5 of the Convention also requires that: "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

appropriate direction and guidance from parents or guardians. The social pressure on young brides to bear a child immediately after marriage is enormous. It is often a way of establishing their worth as wife, daughter- and sister-in-law. Child brides do not have the autonomy to negotiate with their spouse, nor the information and services to delay the birth of their children. This results in the denial of the right to decide freely and responsibly on the number and spacing of their children which is recognized in the CEDAW. Other international agreements related to child marriage are the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the African Charter on the Rights and Welfare of the Child, and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. Child marriage was also identified by the Pan-African Forum against the Sexual Exploitation of Children as a type of commercial sexual exploitation of children.

4.0 The issue of child marriage in Malaysia

In Malaysia, it is irony that a young girl under the age of 16 cannot legally drive or buy cigarettes. They can't even watch certain movies or go clubbing but they can marry lawfully. And many are increasingly doing so, according to statistics given from the Malaysian Syariah Judiciary Department (JKSM)⁴¹. In 2012, there were around 1,165 applications for marriage in which one party, usually the bride, is younger than the legal marrying age. The Syariah Courts approved 1,022 of them. This is an increase from the previous year of 2011 record, when some 900 marriages involving at least one Muslim minor were approved. As of May 2013, JKSM received 600 marriage applications, of which 446 had been approved. In Malaysia, the legal minimum marriage age is 18, but it is 16 for Muslim girls. Those aged below 16 can marry with the consent

⁴¹ Jabatan Kehakiman Syariah Malaysia (JKSM) (In English Malaysian Syariah Judiciary Department) was established by the Malaysian Federal Government in 1996 and headed by the Syariah Chief Justice of Malaysia. Its a central agency that allow the realization of the standardization of the Islamic legal system in the country.

of the Syariah Court. Malaysia, along with over 90 other countries, adopted a United Nations resolution to end child, early or forced marriages, at the Human Rights Council which have taken place in mid of 2013. .

However, JKSM's data shows that child marriage is very much rampant in the country. Sisters in Islam (SIS)⁴², one of the prominent Malaysian Non – Governmental Organization (NGOs) which have been dealing with the issue of child marriage in Malaysia for many years said it was shocking that child marriage still existed in the country because of loopholes in the marriage laws and a continuing belief that girls should be married off once they reached puberty. The legal officer for the group, Kartina Mohd Sobri has stated that “We stand by the UN findings that child marriage is harmful to children and girls, in particular, are vulnerable to abuse, health problems, difficulty in accessing education and loss of childhood and adolescence”. Given the significant number, the Government needed to review the provisions in secular, customary and Syariah law that currently permitted girls under the age of 18 to marry, said United Nations Population Fund (UNFPA) Malaysia programme adviser Saira Shameem. She further added that “We need to develop alternatives and more progressive options that will allow our young to achieve the fullest extent of their potentials. “There is also a risk to the physical health of girls who marry and conceive too early. “As a result, we have underaged girls in Malaysia today who die of maternal health complications during delivery, this is unacceptable, and efforts must be taken to provide genuine alternatives and life-saving choices to these young people”.

According to the Department of Islamic Development Malaysia (JAKIM) ⁴³ Director-

⁴² Sisters in Islam (SIS) (In Malay: Persaudaraan Wanita Islam) is an Islamic group in Malaysia that advocates for equal rights for women, the issue pertaining to human rights, and justice in Malaysia and throughout the world. The group first assembled in 1987.

⁴³ In 1968, the Malaysian Council of Rulers decided that there was a need for a body that could mobilise

General Datuk Haji Othman Mustapha, getting married at an early age “is not forbidden in Islam but the marrying couple have to be mature enough to understand that with matrimony comes great responsibility”. The couple has to know if they are prepared for married life and if they are equipped with the right knowledge, especially what it means to be a husband or wife in Islam. Most importantly, they need to understand the real reason why they are marrying. He added that “If it is just to satisfy their sexual desires, they need to know that it will not lead to a happy and lasting union”. He pointed out that Section 8 of the Malaysian Islamic Family Law (Federal Territories) Act 1998⁴⁴ stated that the minimum legal age for Muslim boys is 18, and a Muslim girl is 16. Those younger individual are allowed to marry with the written permission from the Syariah Court after both sets of parents put in an application to formalise their nuptials. Marriage and starting a family is a big responsibility, one that is not to be taken lightly. Thus it is important that the Syariah Court to do a thorough assessment of the couple readiness and a thorough check on the parents before giving its approval.

the development and progress of Muslims in Malaysia, in line with the country’s status as an Islamic country which was growing in strength as well as fast gaining worldwide recognition. In realising the fact, a secretariat for the National Council of Islamic Affairs of Malaysia was formed to protect the purity of faith and the teachings of Islam. This secretariat was later expanded to become the Religious Division, Prime Minister’s Department which was later upgraded to become the Islamic Affairs Division (*BAHEIS*). On 1st January 1997, in line with the country’s steadfast Islamic development and progress, the Department of Islamic Development Malaysia (*JAKIM*) was established by the Government of Malaysia to take over the role of *BAHEIS*. Basically, the main objective of the Islamic Affairs Administration is “To ensure that the development plans for the ummah and the development of Islam in the country is implemented in an integrated manner based on effective plans and coordination.”

⁴⁴ Malaysia’s constitution provides for two separate law systems to cater to its non-Muslim and Muslim citizens. The Islamic Family Law (Federal Territories) Act of 1984 (Act 303) established a set of laws concerning Muslim marriage and family rights.

4.1 An overview over the Malaysian legal system

The law of Malaysia is mainly based on the common law legal system. (Abdul Munir Yaacob, 1981 [3]). This was a direct result of the colonisation of Malaya, Sarawak, and North Borneo by Britain between the early 19th century to 1960s. The supreme law of the land is the Federal Constitution of Malaysia.⁴⁵ The constitution sets out the legal framework and rights of Malaysian citizens. (Ibrahim, A., 1995, [9]). Malaysia as a federation country which consists of 14 states, law can be enacted either through federal level or state level. Federal laws enacted by the Parliament of Malaysia and apply throughout the country. There are also state laws enacted by the State Legislative Assemblies which applies in the particular state. The Malaysian Parliament has the exclusive power to make laws over matters falling under the Federal List provided under the Federal Constitution itself (such as citizenship, defence, internal security, civil and criminal law, finance, trade, commerce and industry, education, labour, and tourism) whereas each State, through its Legislative Assembly, has legislative power over matters under the State List of the similar Federal Constitution (such as land, local government, Syariah law and Syariah courts, State holidays and State public works).

However, the Malaysian Parliament and the State legislatures can share the power to make laws over matters under the Concurrent List (such as water supplies and housing) but Article 75 provides that in the event of conflict, Federal law will prevail over State law. These lists are set out in Schedule 9 of the Malaysian Federal Constitution, where: the Federal List is set out in List I, the State List in List II, and the Concurrent List in List III. There are also supplements to the State List (List IIA) and the Concurrent List (List IIIA) that applies only to the state of Sabah and

⁴⁵ Article 4(1) of the Malaysian Federal Constitution which states that “The Constitution is the supreme law of the Federation and any law which is passed after Merdeka Day (31 August 1957) which is inconsistent with the Constitution shall to the extent of the inconsistency be void”.

Sarawak (Eastern Malaysia). These give the two states legislative powers over matters such as native law and customs, ports and harbours (other than those declared to be federal), hydro electricity and personal law relating to marriage, divorce, family law, gifts and intestacy.⁴⁶ Malaysian Parliament is allowed to make laws on matters falling under the State List in certain limited cases, such as for the purposes of implementing an international treaty entered into by Malaysia or for the creation of uniform State laws. (Ibrahim. A., 1992, [10]). However, before any such law can be effective in a State, it must be ratified by law by its State Legislature. The only except is where the law passed by Parliament relates to land law (such as the registration of land titles and compulsory acquisition of land) and local government. The constitution of Malaysia also provides for a unique dual justice system namely the common law and syariah laws. (criminal and civil) (Abdul Hamid Omar, 1994, [2]). The dual system of law in Malaysia is provided under Article 121(1A) of the Federal Constitution of Malaysia. Looking at the Malaysian legal system as a whole, syariah law plays a relatively small role in defining the laws on the country. It only applies to Muslims. With regards to civil law, the Syariah courts has jurisdiction in personal law matters, for example marriage, inheritance, and apostasy. (Farid Sufian Shuaib, 2003, [8]). In some states there are syariah criminal laws. Their jurisdiction is however limited to imposing fines for an amount not more than RM 5000, whipping not more than 6 strokes and imprisonment to not more than 3 years. (Farid Sufian Shuaib, Tajul Aris Ahmad Bustami & Mohd. Hisham Mohd Kamal, 2001, [7]).

4.2 The applicability of criminal law over the issue of child marriage in Malaysia

Crime, a necessary evil in human society, is a deliberate act that results in harm, physical or otherwise, toward another in a manner prohibited

by law. In every crime there is intention to commit the crime, preparation to commit the crime, attempt to commit the crime, and the completion of the crime. If the perpetrator succeeded in the attempt he would be deemed to have committed the offence. A crime is deemed completed when the requirement of the law concerning *actus reus* (elements of the offence) and *mens rea* (guilty mind) has been satisfied. The maxim *actus non facit reum, nisi mens sit rea* explains the principle that an act does not make a person guilty of a crime unless his mind was also guilty. Where the requirement of the law concerning *actus reus* and *mens rea* has been satisfied, the accused shall be deemed guilty of the offence. But if the distinct ingredients of the offence and the intention of the commission or omission cannot be shown, no crime would have been committed and the accused would be entitled to an acquittal.

Having said the above, it is noted that Malaysia, a country with multi-cultural races and multi-religious society, like many other countries in world, place high regards to good behaviour and morality. The above is clearly spelled out in the *Rukunegara* (National Principles). Further, the Malaysian Court of Appeal in the case of *Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor Utra Badi K Perumal*,⁴⁷ stated inter alia, that it is a fundamental right of every person within the shores of Malaysia to live with common human dignity. The human person's dignity includes the respect and the protection of the physical and moral integrity. The Malaysian Penal Code (Act 574), which deals with almost all the crime happening in the society, is the principal Malaysian statute relating to criminal offences committed within Malaysia and criminal offences committed beyond, but which by law may be tried within Malaysia.⁴⁸ The said Malaysian Penal Code is the primary legislation that consists of 511 sections that encompass the

⁴⁶ Please refer to Articles 73 – 79 of the Malaysian Federal Constitution which provides for the legislative powers for both Federal & State government in Malaysia.

⁴⁷ [2000] 3 CLJ 224.

⁴⁸ The Malaysian Penal Code (Act 574) has its origin from the Indian Penal Code of 1860. Therefore many of the Indian authority is bound to be persuasive and should be treated with respect. Please refer to the local case of *of Ling Kai Huat v PP* [1966] 1 MLJ 123.

wide range of criminal offences that are punishable in the court of law in Malaysia.⁴⁹ The Code which is based on the Indian Penal Code of 1860⁵⁰ was first adopted wholesale in the Straits Settlements in 1871 by the British colonial authorities. The Code has been revised in 1997 as Act 574 and applies throughout Malaysia. In the Penal Code, the main section that can be focus on with regard to the issue of child marriage is section 375 of the Penal Code which provide for the offence of rape. The offence of

⁴⁹ The Malaysia Criminal Procedure Code (CPC) (Act 593) was promulgated to regulate the administration of the criminal justice or procedure in Malaysia. The CPC *inter alia* provides the ways in which an arrest, search, police investigations and trials are to be conducted throughout Malaysia. It has to be noted that the basic rights of an individual are enumerated in the Federal Constitution of Malaysia. As such there are essential procedures in law that strikes the balance between protection of society against criminals as well as to uphold the maxim “that one is innocent until proven guilty”. Accordingly, there are basic fundamental rules and procedures that are to be adhered to in restraining a potential offender and amongst other things the following are the primary constitutional and or international rights of an individual: A right to be informed of the ground of his arrest and the right to representation upon arrest (Article 5 clause (3) of the Federal Constitution); A right to be produced before court within 24 hours of arrest (Section 117 of CPC); The right to be informed whether the offence is bailable or non-bailable; Search is to be carried out on the offender and premises within the purview of the criminal rules and regulations; and Any restraint of the arrested individual should be carried out within the purview of the Police Act 1967 and general restraint procedure of the CPC and the Lock up Rules. Following from the above it is evident that an arrested person must be given opportunity to defend himself following the maxim *nemo iudex in causa sua potest* and *audi altrem partem*. Further, at all times a person who is charged is also entitled to the defence of *autrefois acquit* and *autrefois convict* at all times i.e. an individual can be charged and convicted only once for a crime.

⁵⁰ The Indian Penal Code was drafted by First Law Commission with Lord Macaulay as the chairman. The draft of the Code was then reviewed by Sir Barnes Peacock, Chief Justice and the puisne Judges of the Calcutta Supreme Court, who were members of the Legislative Council, and was passed into law in 1860: see http://wopedia.mobi/en/Indian_Penal_Code.

rape, which is rampant in this country is a serious and heinous crime, a violation of human rights, human decency and human dignity and thus, justifies a deterrent sentence.⁵¹

Rape is said to be committed by a man when he has sexual intercourse with a woman under circumstances falling under any of the following descriptions: (a) against her will; (b) without her consent; (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception; (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent; (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent; (f) with her consent, when the consent is obtained by using his position of authority over her or because of professional relationship or other relationship of trust in relation to her; and (g) with or without her consent, when she is under sixteen years of age. As from the above, to absolve a person from criminal liability, consent must be given freely without any fear of injury or under misconception of fact. However, sexual intercourse with a girl under the age of sixteen shall be construed as rape, irrespective of whether she consented to the act or not.⁵² The punishment for rape is governed by section 376 (1) of the Penal Code namely, imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

In some common law jurisdictions, statutory rape is regarded as sexual activity in which one person is below the age required to legally consent to the behavior.⁵³ Although it usually

⁵¹ See *Ong Lai Kim v Public Prosecutor* [1991] 3 MLJ 111 at 115.

⁵² See *Nelson Gnanaregasam v PP* [2010] 3 CLJ 561.

⁵³ Statutory Rape Known to Law Enforcement. (PDF). U.S. Department of Justice - Office of Juvenile

refers to adults engaging in sex with minors under the age of consent it is a generic term, and very few jurisdictions use the actual term statutory rape in the language of statutes.⁵⁴ Different countries use many different statutory terms for the crime, such as sexual assault (SA), rape of a child (ROAC), corruption of a minor (COAM), unlawful sex with a minor (USWAM), carnal knowledge of a minor (CKOAM), unlawful carnal knowledge (UCK), sexual battery or simply carnal knowledge. In statutory rape, overt force or threat need not be present. Statutory rape laws presume coercion, because a minor or mentally challenged adult is legally incapable of giving consent to the act. The term statutory rape generally refers to sex between an adult and a sexually mature minor past the age of puberty. Sexual relations with a prepubescent child, generically called child sexual abuse or molestation are typically treated as a more serious crime. Statutory rape laws are based on the premise that until a person reaches a certain age, that individual is legally incapable of consenting to sexual intercourse. Thus, the law assumes, even if he or she willingly engages in sexual intercourse, the sex is not consensual.⁵⁵ Critics argue that an age limit cannot be used to determine the ability to consent to sex, since a young teenager might possess enough social sense to make informed and mature decisions about sex, while some adults might never develop the ability to make mature choices about sex, as even many mentally healthy individuals remain naive and easily manipulated throughout their lives.⁵⁶

Another rationale comes from the fact that minors are generally economically, socially, and legally unequal to adults. By making it illegal for an adult to have sex with a minor, statutory rape

Justice and Delinquency Prevention. Retrieved 2008-03-24.

⁵⁴ State Legislators' Handbook for Statutory Rape Issues. (PDF). U.S Department of Justice - Office for Victims of Crime. Retrieved 2008-03-24.

⁵⁵ Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy? Guttmacher Institute. Retrieved 2008-03-24.

⁵⁶ Please refer to the pros and cons of statutory rape laws Cable News Network. 2004-02-13. Retrieved 2008-03-24.

laws aim to give the minor some protection against adults in a position of power over the youth.⁵⁷ Another argument presented in defense of statutory rape laws relates to the difficulty in prosecuting rape (against a victim of any age) in the courtroom. Because forced sexual intercourse with a minor is considered to be a particularly heinous form of rape, these laws relieve the prosecution of the burden to prove lack of consent. This makes conviction more frequent in cases involving minors. The original purpose of statutory rape laws was to protect young, unwed females from males who might impregnate them and not take responsibility by providing support for the child. In the past, the solution to such problems was often a "shotgun wedding", a forced marriage called for by the parents of the girl in question. This rationale aims to preserve the marriage ability of the girl and to prevent unwanted teenage pregnancy. Historically a man could defend himself against statutory rape charges by proving that his victim was already sexually experienced prior to their encounter (and thus not subject to being corrupted by the defendant). A requirement that the victim be "of previously chaste character" remained in effect in some United States of America states until as late as the 1990s.⁵⁸

In early January, 2014 the parliament of Morocco has unanimously amended an article of their Penal Code that allowed rapists of underage girls to avoid prosecution under statutory rape by marrying their victims. The move follows intensive lobbying by activists for better protection of young rape victims. The amendment has been welcomed by many human rights groups. Article 475 of the Moroccan Penal Code generated unprecedented public criticism. It was first proposed by Morocco's Islamist-led government a year ago. But the issue came to public prominence in 2012 when 16-year-old Amina Filali killed herself after being forced to marry her rapist. She accused Moustapha Fellak,

⁵⁷ State Legislators' Handbook for Statutory Rape Issues (PDF). U.S Department of Justice - Office for Victims of Crime. Retrieved 2008-03-24.

⁵⁸ Please refer to C. Cocca, Jailbait: The politics of statutory rape laws in the United States. SUNY Press (2004)

who at the time was about 25, of physical abuse after they married, which he denies. After seven months of marriage, Ms Filali swallowed rat poison. The case shocked many people in Morocco, received extensive media coverage and sparked protests in the capital Rabat and other cities. Article 475 of the Code provides for a prison term of one to five years for anyone who “abducts or deceives” a minor “without violence, threat or fraud, or attempts to do so”. But the second clause of the article specifies that when the victim marries the perpetrator, “he can no longer be prosecuted except by persons empowered to demand the annulment of the marriage and then only after the annulment has been proclaimed”. This effectively prevents prosecutors from independently pursuing rape charges. In conservative rural parts of Morocco, an unmarried girl or woman who has lost her virginity - even through rape - is considered to have dishonoured her family and no longer suitable for marriage. Some families believe that marrying the rapist addresses these problems. While welcoming the move, many human rights groups in the country say that much still needs to be done to promote gender equality, protect women and outlaw child marriage in the North African country.⁵⁹

4.3 The implementation of Islamic family and criminal law over the issue of child marriage in Malaysia

As mentioned earlier, the administration of Islamic law in Malaysia including criminal aspect of it is through Syariah Court. (Wan Arfah Hamzah and Ramy Bulan, , 2003, [19]). The Syariah courts are an integral part of the court system in Malaysia and are distinct from the civil courts as to their function and jurisdiction.⁶⁰

⁵⁹ Please refer to the link on Morocco’s child rape victims and the law, 28TH January 2014 at <http://www.aljazeera.com/indepth/features/2014/01/morocco-child-rape-victims-law>

⁶⁰ Shariah courts in every state in this country dispense justice independently of the civil courts. In *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 (FC), Mohd Eusoff CJ stated that: ‘[T]oday, the Syariah courts in each State and in the Federal Territories have their own officers to investigate and prosecute

The constitution, organisation and procedure of the Syariah courts are state matters over which the state has the exclusive legislative and executive authority.⁶¹ The Syariah courts were established under the State enactments⁶² and the court derives its jurisdiction under State law enacted pursuant to article 74(2) of the Malaysian Federal Constitution following paragraph 1, State List of the Ninth Schedule of the Federal Constitution and in the case of the Federal Territories (2A), by virtue of item 6(e) of the Federal List. The jurisdiction of this court is only on matters which the various state Legislatures have enacted as conferring jurisdiction on them.⁶³ The approach to be taken in determining its jurisdiction is the subject matter approach and not the remedy prayed approach, that is, to look into the State enactments to see whether or not the Syariah courts have been expressly conferred jurisdiction

cases in their own courts. Their court system is similar to and running parallel with the civil court system. It has its own Syariah subordinate court, the Syariah High Court and Syariah Appeal Court. The decisions of the Syariah subordinate court are appealable to the Syariah High Court, and the Syariah Court of Appeal hears appeals from their High Courts. The Chief Syariah Judge is the head of the Syariah courts and the Chief Syariah Prosecutor has the power to institute, conduct or discontinue any proceeding for an offence before a Syariah court’. Article 121A of the Federal Constitution draws a clear dichotomy between the respective jurisdictions of the civil courts and the Shariah courts. As observed by the late Marhum Harun Hashim SCJ in *Mohamed Habibullah Bin Mahmood v Faridah Bte Dato Talib* [1992] 2 MLJ 793, “the Civil Courts should have no jurisdiction in respect of any matter within the jurisdiction of the Shariah Courts”.

⁶¹ See *Majlis Ugama Islam Pulau Pinang & Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Anor* [2003] 3 MLJ 705 (FC).

⁶² Or known as ‘ordinance’ in Sarawak.

⁶³ See *Majlis Ugama Islam Pulau Pinang & Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Anor* [2003] 3 MLJ 705 (FC). The exception however, is conversion out of Islam. Although it is not regulated by all the state enactments, it still falls clearly within the exclusive jurisdiction of the Syariah court. See *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (FC).

on a given matter.⁶⁴ The exception however is conversion out of Islam (*Murtad*), although may not have been regulated by the various state enactments, falls under the exclusive jurisdiction of the Syariah court.⁶⁵ Furthermore, the jurisdiction of Syariah courts is limited only to persons professing the religion of Islam⁶⁶ and, being a State court, its jurisdiction and power lies

⁶⁴ See *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor* [1991] 3 MLJ 487; *Mohamed Habibullah bin*

Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (SC); *Majlis Agama Islam Pulau Pinang v Isa Abdul Rahman & Anor* [1992] 2 MLJ 244; *G Rethinasamy v Majlis Ugama Islam Pulau Pinang & Anor* [1993] 2 MLJ 166; *Lim Chan Seng v Pengarah Jabatan Ugama Islam Pulau Pinang* [1996] 3 CLJ 231; *Barkath Ali bin Abu Backer v Anwar Kabir bin Abu Backer & Ors* [1997] 4 MLJ 389; *Shaik Zolkaffily bin Shaik Natar & Ors* (sued as trustees of the estate of *Sheik Eusoff bin Sheik Latiff*, deceased) v *Majlis Agama Islam Pulau Pinang & Seberang Perai* [1997] 3 MLJ 281; *Nor Kursiah bte Baharuddin v Shahril bin Lamin & Anor* [1997] 1 MLJ 537; *Sukma Darmawan Sasmitaa Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241 (FC); *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618; *Mohd Hanif bin Farikullah v Bushra Chaudri* [2001] 5 MLJ 533; *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Anor* [2004] 2 MLJ 119; *Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505; *Kamariah bte Ali & Anor v Government of the State of Kelantan* [2005] 2 ShLR 93 (FC).

⁶⁵ See *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 (FC); *Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors* [2003] 2 MLJ 302; *Zubeydah bte Shaik Mohd v Kalaichelvan a/l Alagapah & Ors* [2003] 2 MLJ 471; *Tongiah Jumali & Anor v Kerajaan Negeri Johor & Ors* [2004] 1 MLJ 40; *Nedunchelian V Uthiradam v Nurshafiqah Mah Singai Annal & Ors* [2005] 2 CLJ 306; *Kamariah bte Ali & Anor. v Government of the State of Kelantan & Anor.* [2005] 2 Sh.LR.

⁶⁶ Federal Constitution Sch 9, List II, item 1. For persons professing religion of Islam or Muslim, see the Administration of Islamic Law (Federal Territories) Act 1993 (Act 505) s 2. See also Federal Constitution, Art 160 for the word 'Malay'. Also see *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119 (HC).

within the boundaries of the respective State.⁶⁷ The jurisdiction and powers of these courts are found in the state enactments.⁶⁸ The state enactments provide for both the civil and criminal jurisdiction of the Syariah courts. A number of criminal offences which may be tried in the Syariah courts are listed in the state enactments. In criminal matters, the jurisdiction of Syariah courts is limited to that conferred by the Malaysian Federal Constitution. The Malaysian Parliament has furthermore enacted the Syariah Courts (Criminal Jurisdiction) Act 1965 limiting the jurisdiction of Syariah courts.⁶⁹

⁶⁷ See the 9th Schedule of the Malaysian Federal Constitution, Item 1 of the State List and item 6(e) of the Federal List.

⁶⁸ See Administration of the Syariah Court Enactment 1991 (Perlis) (Enactment No 5 of 1991); Syariah Court Enactment 1993 (Kedah) (Enact No 4 of 1993); Administration of Islamic Religious Affairs Enactment 1993 (Penang) (Enactment No 7 of 1993); Administration of the Syariah Court Enactment 1982 (Kelantan) (Enactment No 3 of 1982); Administration of the Syariah Court (Amend) Enactment 1998 (Kelantan) (Enact No 2 of 1998); Syariah Court Enactment 2001 (Terengganu) (Enactment No 3 of 2001); Administration of Islamic Law Enactment 1992 (Perak) (Enactment No 2 of 1992); Administration of Islamic Law Enactment 1989 (Selangor) (Enactment No 2 of 1989); Administration of Islamic Law Enactment 1991 (Negeri Sembilan) (Enactment No 1 of 1991); Administration of Syariah Court Enactment 1985 (Malacca) (Enactment No 6 of 1985); Syariah Court Enactment 1993 (Johor) (Enact No 12 of 1993); Administration of Islamic Law Enactment 1991 (Pahang) (Enactment No 3 of 1991); Syariah Court Ordinance 1991 (Sarawak) (No 4 of 1991); Syariah Court Enactment 1992 (Sabah) (No 4 of 1992); and Administration of Islamic Law (Federal Territories) Act 1993 (Act 505).

⁶⁹ It was in 1965 when the Parliament enacted the Muslim Courts (Criminal Jurisdiction) Act 1965 (No 23 of 1965). The Act provided that the jurisdiction of the Muslim courts shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding six months or with any fine exceeding one thousand dollars or with both. It applied only to the States of Malaya. In 1984, the Muslim Courts (Criminal Jurisdiction) Act 1965 was amended by the Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984 (Act A612) which enhanced the Muslim courts criminal jurisdiction. It provided that the jurisdiction of the Muslim courts shall not be

With regard to the issue of child marriage, as mentioned earlier the Malaysian Islamic Family Law (Federal Territories) Act of 1984 (Act 303) established a set of laws concerning Muslim marriage and family rights within the country. The Act outlines rules for Muslim marriage including prohibition of mixed religious marriages and necessary paperwork to be completed before and after marriage. It establishes property ownership within the marriage and guardianship rights to any offspring produced within the marriage. Additionally, it outlines under what circumstances a man may divorce a woman or vice versa. While considered a law of equality between the sexes in 1984, subsequent amendments to the Act limit a Muslim woman's rights. The marriageable age for women is lower than for men. Regardless of age, a woman may not marry without consent of a guardian and the Syariah Court. Section 8 of the Act clearly stated that the minimum legal age for Muslim boys to get into marriage is 18, and for a Muslim girl is 16. Those younger couples are allowed to marry with the written permission

exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof. The 1984 Act was revised in 1988 and renamed the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). This was made applicable to the 'States of West Malaysia'. It substituted the words 'the States of Malaya' by virtue of the Revision of Laws Act 1968 (Act 1) s 6 (1)(iii). Furthermore, the word 'Syariah Courts' were substituted for the words 'Muslim Courts' by the Commissioner of Law Revision pursuant to the powers under the Revision of Laws Act 1968 (Act 1) s 6 (1)(iii) in line with the change of expression from 'Muslim Court' to 'Syariah Court' in the Federal Constitution by the Constitution (Amendment) Act 1976 (Act A354) s 45. Similarly, the words 'Islamic Law' were substituted for the words 'Muslim Law' and the words 'religion of Islam' for 'Muslim religion'. The Syariah Courts (Criminal Jurisdiction) (Amendment and Extension) Act 1989 (Act A730) which came in force effective from 5th May 1989 extended the applicable of the Act to 'all the States of Malaysia'. The Syariah Court (Criminal Jurisdiction) Act 1965 (Revised 1988) come into force in West Malaysia, on the 1st April 1965, and in the states of Sabah and Sarawak, 5th May 1989.

from the Syariah Court after both sets of parents put in an application to formalise their nuptials. Without having such permission from the court, the couple commits an offence and shall be punished with a fine not exceeding one thousand Malaysian Ringgit (More than USD300) or with imprisonment not exceeding six months or both.⁷⁰

Without having a proper solemnization of marriage, the couple can also be facing the charge for having "unlawful sexual intercourse".⁷¹ Islam regulates the marriage institution, disciplined sex behaviour, condemned adultery and prescribed severe punishment for the offence of 'zina'.⁷² Zina or illicit sexual intercourse means sexual intercourse between a man and a woman out of wedlock.⁷³ The involvement of unmarried male

⁷⁰ Section 40 (2) of the Islamic Family Law (Federal Territories) Act of 1984 (Act 303) states "Any person who marries, or purports to marry, or goes through a form of marriage with, any person contrary to any of the provisions of Part II commits an offence and shall be punished with a fine not exceeding one thousand ringgit or with imprisonment not exceeding six months or both".

⁷¹ P. Aruna and Qishin Tariq, Ministry: Marriage should not be way out for suspected rapists, 25TH May 2013 at <http://news.asiaone.com/News/AsiaOne+News/Crime/Story/A1Story>

⁷² See the Quran 17: 32; 25: 68; 60: 12.

⁷³ Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) s 2; Syariah Criminal Code Enactment 1985 (Kelantan) (Enactment No 2 of 1985, s 2; Syariah Criminal Code Enactment 1988 (Kedah) (Enactment No 9 of 1988), s 2; Syariah Criminal Enactment 1991 (Malacca) (Enactment No 6 of 1991) , s 2; Syariah Criminal Offences Enactment 1992 (Negeri Sembilan) (Enactment No 4 of 1992) , s 2; Crimes (Syariah) Enactment 1992 (Perak) (Enactment No 3 of 1992) , s 2; Syariah Criminal Offences Enactment 1993 (Perlis) (Enactment No 4 of 1993, s 2; Syariah Criminal Offences Enactment 1995 (Sabah) (Enactment No 3 of 1995) , s 2; Syariah Criminal Offences Enactment 1995 (Selangor) (Enactment No 9 of 1995) , s 2; Criminal Offences in the Syarak Enactment 1996 (Penang) (Enactment No 3 of 1996) , s 2; Syariah Criminal Offences Enactment 1997 (Johor) (Enactment No 4 of 1997) , s 2; Syariah Criminal Offences Ordinance 2001 (Sarawak) (Chapter 46) , s 2; Syariah Criminal

or female (*ghayr muhsan*) in sexual relationship is called fornication. Those who indulge in sexual act being not married to each other, but both or either of them is married to some other male or female (*muhsan*), the sexual relationship is called adultery. Penetration is necessary to constitute sexual intercourse. *Zina* is a wrongdoing which is exceedingly despicable and also against the manners and honour of mankind. *Zina* also harms the security of the family and household and gives rise to various wrongdoings and harms the life of the individual and the society. *Zina* also harms and causes the loss of the good name and existence of an *ummat*". The crime of *zina* in Islamic law is liable to the *hadd* punishment. *Zina* in many states within Malaysia is punishable with the maximum punishment provided for by the Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised 1988).⁷⁴ However, in the States of Kedah and Negeri Sembilan, the punishment of whipping is not provided in their respective enactments.⁷⁵

4.4 Selected cases on child marriage in Malaysia

Offences (Takzir) Enactment 2001 (Terengganu) (Enactment No 7 of 2001, s 2.

⁷⁴ Ie to a fine not exceeding RM 5,000, or imprisonment for a term not exceeding three years, or whipping not exceeding six strokes, or any combination thereof: Syariah Criminal Offences (Federal Territories) Act 1997 (Act 559) s 23(1),(2); Syariah Criminal Offences Enactment 1997 (Johore) (Enactment No 4 of 1997) s 23(1),(2); Syariah Criminal Code Enactment 1985 (Kelantan) (Enactment No 2 of 1985) s 11; Administration of the Religion of Islam and the Malay Custom Enactment 1982 (Pahang) (Enactment No 8 of 1982) s 146; Criminal Offences in the Syarak Enactment 1996 (Penang) (Enactment No 3 of 1996) s 23(1),(2); Crimes (Syariah) Enactment 1992 (Perak) (Enactment No 3 of 1992) s 48; Syariah Criminal Offences Enactment 1995 (Sabah) (Enactment No 3 of 1995) s 80(1), (2); Syariah Criminal Offences Ordinance 2001 (Sarawak) (Cap 46) s 20; Syariah Criminal Offences Enactment 1995 (Selangor) (Enactment No 9 of 1995) s 25(1), (2).

⁷⁵ Ie the Syariah Criminal Code Enactment 1988 (Kedah) (Enactment No 9 of 1988) s 11; Syariah Criminal Enactment 1992 (Negeri Sembilan) (Enactment No 4 of 1992) s 60.

It is difficult to know exactly how many children are affected by child marriage in Malaysia. The numbers suggest that it is a common practice among Muslims as well as indigenous communities; however it is also prevalent amongst the Indian and Chinese communities. Below are few selected cases which had received huge attention from the local over the years and had highlighted the loopholes within the legal system in the country. Siti Nur Zubaidah Hussin just turned 11 years old when her own father forced her to marry a 41 year old man from the state of Kelantan on February 2010. Her father Hussin Mat Salleh was a follower of a religious sect who was convinced by the leader Shamsuddin Che Derahman, a.k.a "Sudin Ajaib" that there is nothing wrong in such union. As the girl was clueless and too young to take the role of a wife physically and mentally, she went into a state of depression. Siti was found hundreds of kilometres in a delirious state in Masjid Al-Ikhwan, in Batu Caves, state of Selangor days after the husband disappeared with her. The suspect was later arrested and is being investigated under Section 31 (1)(b) of the Malaysia Child Act 2001 (Act 611) which carries imprisonment up to 10 years or a fine up to RM20,000 or both, if convicted. Siti Nur Zubaidah's sad fate is certainly neither the first nor going to be the last in the country. There are also many underage girls in the country who marry on their own will while some have no choice but to get married as they are pregnant out of wedlock.

In November 2012 after getting a court order according to section 18 (1) (a) of the Kedah State Islamic Family Law Enactment 2008, Nor Fazira Saad who was then only 12 years old get married with Mohd Fahmi, who was then 20 years old. However in late 2013, Nor Fazira Saad, 13, and Mohd Fahmi Alias, 21 were later. It was alleged that Nor Fazira Saad and her then husband Mohd Fahmi Mohamed Alias were married as she was allegedly raped by Mohd Fahmi. The case has led women's rights groups in Malaysia to criticise the Syariah Court in the country for allowing child marriages. The Syariah Court has come under fire from women's rights groups for allowing an alleged rapist to marry his victim who was only 12 years old when she tied the

knot last year. Women's Aid Organisation ⁷⁶ (WAO) Executive Director Ivy Josiah said the court should not have consented to the marriage, explaining that it was not a "young marriage" but a "child marriage". Since the girl was only 12 years old, the court must have given them permission to marry. This decision is unacceptable and wrong. Under Syariah law in Malaysia, girls below the age of 16 and boys below 18 must get the consent of the Syariah Court before they can marry.

Their marriage made the news in late 2012, where Nor Fazira's father Saad Mustafa had insisted that "it was better for them to get married than to do something that is not good". The couples, who have since divorced, have been thrust into the spotlight again when allegations of rape resurfaced. Sisters in Islam (SIS), which has been a long-time advocate against child marriages, noted that the law had in the country failed to protect the interest of the child. Similar to what has happen in Morocco recently, the case highlights a legal loophole in Malaysian Islamic family law that allows an alleged perpetrator to escape further investigation through marriage by becoming a husband. It is deplorable that marriage is being used by alleged rapists as a way to escape prosecution. The government had a responsibility to "act upon its pronouncements" and stop rapists from "manipulating religion and culture". The law should reflect the weight Islam puts on protecting children and simultaneously recognise a child's right to life, health and education as a basic human right. It also been argued that the best interest of the child was clearly not a consideration when the Syariah Court approved this marriage application.⁷⁷

⁷⁶ Women's Aid Organisation or WAO is a Malaysian Non-Governmental Organization (NGO) that fights for women's rights and specifically against violence against women. It was founded in 1982 and continues to play a leading role in the Malaysian women's rights movement working within the fields of advocacy, public education as well as law and policy reforms.

⁷⁷ Munirah A. Sami, Married off because she was raped, 29TH November 2013 at <http://english.astroawani.com/news/show/married-off-because-she-was-raped>

In early 2014, a Restaurant Manager Riduan Masmud from the state of Sabah was found guilty of raping a 13-year-old schoolgirl who he then married after bribing her dad, much to the relief of the girl's aunt who had initially brought her to the police. But her satisfaction was not shared by the girl's father, who before the verdict was handed down appeared concerned, saying he does not know what would become of his daughter should Riduan, for whom he had appeared as a defence witness during trial, be found guilty. "Apa boleh buat lah, saya tidak tahu apa mahu buat lagi (I don't know what else to do)", he told the local media. He further added "I had allowed them to marry as according to my daughter, she and Riduan suka sama suka (fond of each other). If I had not agreed then in the future there would be problems again". Riduan, age 41, was found guilty by a Sabah Sessions Court Judge Ummu Khalid Abd Samad after a protracted 26-day trial which saw 19 witnesses and three defence witnesses testifying before the court. Riduan, who has four children from his first wife, can be jailed up to 20 years and whipped for his statutory rape crime under section 376(1) of the Malaysian Penal Code. He was however being sentenced to 12 years in jail for raping. Riduan also faces another three counts of bribing the girl's father with RM5,000 to withdraw the police report lodged against him.⁷⁸ The public outcry against the recent case in Kota Kinabalu, Sabah involving the 40-year old alleged rapist marrying his 13-year old rape victim highlights again the prevalence of child marriage in Malaysia.

4.5 Possible legal reforms over the issue of child marriage

It's easy to cry foul at the recent statutory rape case in the state of Sabah, where the 40-year old rapist married the 13-year old victim in an attempt to escape the rape charge. That the prosecution didn't object to the rapist's withdrawal application based on the "I'm-marrying-the-girl" excuse was revolting enough,

⁷⁸ Riduan Masmud who raped, then married minor jailed in Malaysia, 3RD February 2014 at <http://www.news.com.au/world/riduan-masmud-who-raped-then-married-minor-jailed-in-malaysia/story>

that the Syariah court proceeded to approve the marriage application was on another level of horror altogether. Already, some are proposing for the rapist to be prosecuted under the Syariah for *zina*. Statutory rape is a despicable crime. Proposing to your victim after raping her is goddamn awful. Combine them together, and what we have is a recipe for disaster. It's high time that we recognize that sexual assault is assault regardless of our personal beliefs, relationship status and age. The issue of child marriage does not exist in isolation of other harmful traditions that devalue women. Child marriage must be clearly defined in the law as a form of discrimination and violence against women and children. It must be recognized that child marriage affects the public at large and is not a private arrangement between two families. The false dichotomy of the private/ public cannot obscure the way in which marriage can affect a child's civil, political, economic, social and cultural rights. The State will be accountable for customs that violate the right to life of children and women. Even when the State is not directly a party to such violence, lack of due diligence on the part of the State can hold the State liable for inaction. Child marriage must be viewed in the context of gender inequality in the public and private sphere. Child marriage does not exist in isolation but coexists with gender in equitable provisions in others areas of public and personal laws. Law reform must therefore be seen as a holistic process, and all areas of gender inequity must be outlawed in order to combat child marriage. Below are some of the possible suggestions

4.5.1 Clarify minimum statutory age of marriage

Fix or rise the minimum statutory age of marriage for both men and women to 18 and bring all other laws in line with that. In compliance with the 1989 Convention on the Rights of the Child (CRC), countries must establish the minimum age of marriage at 18 years of age. This has also been recommended both by the 1979 Convention on the Elimination of Discrimination against Women (CEDAW) Committee in its General Recommendation 21 and the UN Special Rapporteur on Violence

against Women. The CEDAW Committee's recommends that the minimum age for marriage for both men and women should be 18. The minimum age of marriage provision under the Shariah should be amended so that judge's discretion to approve underage marriage is abolished altogether. As long as that discretion is retained, it's as good as Muslims having no minimum age of marriage. The rape provision under the Malaysian Penal Code should also be reviewed and possibly amended so as to prevent rapists from marrying their victims as a way of escaping punishment.

4.5.2 Rendering the child marriage null and void

Sale of children for the purpose of marriage should be made null and void. Child marriages should be made voidable by either party and the application to void a marriage can be made within 2 years from the date of majority. At annulment, the law should allow for maintenance until remarriage. The law should also allow for a residence for the girl child in the event of the nullification of the marriage as well as provide for the maintenance and custody of children. The authorities should check the validity of any marriage celebrated abroad. All marriages that are treated as null and void should allow the girl to retain all property as if the marriage was valid.

4.5.3 Penalties and remedies must be clearly and strongly established

Punishments should focus on those responsible for the marriage and those who registered the child marriage. Strict criminal and civil penalties should be made applicable to anyone who officiates, facilitates, or participates in such a marriage, including the girl's or the groom's parents. The Non-Governmental Organizations (NGO's) should be recognized parties to the complaint. Punish those who are responsible for perpetrating child marriage. The punitive elements must include fines and imprisonment. Make it misconduct for public servants to participate in child marriages. Provide alternative for communities that traditionally opt for child marriage. Make reporting of child marriage compulsory. Provide incentives for reporting of

child marriage. Marital rape needs to be recognized as a penal offence, both under the specific statute dealing with child marriage, as well as under general criminal law of State parties. From criminal procedure perspective, in late 2012, a Bill was tabled to disallow judges from handing down lenient sentences to statutory rapists even if they are first offenders. The proposed Bill adds a provision to section 376 of the Malaysian Penal Code, which carries a jail sentence of up to 20 years and whipping for statutory rape. The then Minister in the Prime Minister's Department Datuk Seri Nazri Aziz said the provision would state that Section 294(1) of the Malaysian Criminal Procedure Code which gives judges discretionary powers to give a lighter sentence to first-time offenders would not apply to statutory rape cases. This initiative was taken due to the very lenient sentences passed on former Malaysian national youth squad bowler Noor Afizal Azizan and electrician Chuah Guan Jiu for statutory rape in that year. The culprits were 19 and 21 years old respectively when they committed the offences while their victims were 13 and 12 years old.

5.0 Conclusion

Sadly child marriage is rarely been seen as a human rights violation in Malaysia. The little recognition that it gets as a problem means that we are unable to reach out to victims. Once girls are married, they're rarely able to pursue with their education. The best course of action is through prevention. If we can act before abuse occurs, then maybe we stand a chance at preventing abuse and helping a girl stay out of child marriage. It is important to educate people of all ages about children's rights and the lasting impact of violence and exploitation, including child marriage, on a child's development. Many Non-Governmental Organizations (NGOs) in the country have played a very active role in developing an interactive manual for young children, which gives them tools to identify and report abuse. Comprised of creative activities and exercises, the manual helps them understand what sexual abuse is and explains what to do if they need help. Learning about their private body parts is key to that process. They conduct lessons for girls and boys separately where they use

visual and audio material to show them what safe or unsafe touch is. Adolescents explore those issues further in reproductive health workshops. In the sessions with teenagers, they discuss healthy relationships. Teenage pregnancies and their impact on girls' physical and mental wellbeing are highlighted and they inform teens about the legal minimum age of marriage as well as the lasting consequences of early marriage. Knowing what a healthy relationship looks like can protect them too. They teach adolescents how to assert their rights and wishes in a relationship and they emphasize that it is okay to say "no" to things they are uncomfortable with. The child protection system in the country needs to be improved as well. From government officials, to schoolteachers or counselors', and including parents, training is needed for variety of people in specially conducted adult workshops.

Laws have been traditionally created in the male image. In re-envisioning law and legal strategies it is important to capture the lived experiences of women that are so often excluded in the law. The human rights discourse provides the language and the framework to conceive new laws and revise old laws. Child marriage violates a panoply of interconnected rights, including, the right to equality on grounds of sex and age, the right to marry and found a family, the right to life, the right to the highest attainable standard of health, the right to education and development and the right to be free from slavery that are guaranteed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Currently, the minimum age of marriage in Malaysia is 16 for females and 18 for males. However, upon discretion, the Syariah courts can use discretion to give written permission for the marriage of minors. This raises serious questions about Malaysia's commitment to upholding the rights

of children especially girls, since we have ratified the 1989 Convention on the Rights of the Child (CRC) and the 1979 Convention for the Elimination of All Forms of Discrimination against Women (CEDAW). The human rights guarantees legitimize strong penalties for violations of laws and policies preventing child marriage. Locating child marriage as a human rights violation also helps to raise it as a grave public concern rather than a private matter between families. The human rights agenda helps to view child marriage through the lenses of both civil and political rights and economic, social and cultural rights covenants. Most of all, the human rights perspective helps to frame child marriage as a crime against women and the girl child. Child marriage disproportionately affects girls because of their sex and despite facially neutral laws, women and girls are often *de facto* unequal before the law. That is why apart from specific child marriage laws, laws relating to prohibitions against discrimination on the ground of sex and age must be strengthened in an effort to strike out the root causes of child marriage.

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**The Lebanese Judicial System:
An Overview of the Judiciary's Role to Safeguard National Security***

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Abstract

Justice keeps order, influence conduct, and insure honoring expectations. Justice, according to the Black's Law dictionary, is "the proper administration of laws." Hence, the appropriateness application of the notion of justice motivates citizens to implement social responsibilities and become better citizen. If any nation is to sustain, its citizens must believe that justice must always prevail and courts are the instrument that insures justice by protecting human's rights, preserving freedom, and providing social/economic sustainability. This paper will discuss, describe and elucidate all types of the Lebanese judicial system and their role in protecting the sustainability and the stability of the Lebanese national security.

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Mediation in the Native Courts of Sabah and Sarawak

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Abstract

Mediation is an alternative dispute resolution mechanism process which is principally aimed at exploring options for amicable settlement of a dispute and to facilitate negotiations between the parties. Mediation is conducted in private settings by a neutral third party who is usually skilled, trained or experienced to mediate. Through this process, the disputing parties are able to speak among themselves, and work together to find a lasting common solution to their conflict under the guidance of the mediator. Undoubtedly, litigation in courts is costly, time-consuming with unpredictable outcomes and above all, it has the potential to damage irreparably the relationships between the parties. It must be noted that there are many disputes that need resolution outside the framework of conventional litigation. Having said the above, this article discusses the application of mediation in resolving customary disputes among the native of Sabah and Sarawak with particular reference to its practice in the native courts of the abovementioned states.

Introduction

Disputes or conflicts are common in different places and circumstances. It can arise among workers, customers and suppliers, between and across organisational units, departments and even across international borders. Unresolved disputes or conflicts may have a significant negative impact; for example it may affect the relationship between the disputants, their commitment to the organisation and productivity, among others. Community disputes among the natives of Sabah and Sarawak are usually resolved at thlowest

organizational level with the earliest time possible. Further, it strongly encourages the use of alternative methods of dispute resolution. Through this process, the administrator of native laws and customs, usually the village headman (*Ketua Kampung*s), native chiefs, district chiefs and district officers, will be entrusted with the responsibility of solving any problems in their village and under their care. One of the primary roles of the district chiefs, native chiefs and headmen is to act as a mediator between the feuding parties so that disputes could be settled amicably. However, the resolutions are based on the voluntary choice of the parties where the decision to settle the dispute solely lies on the choice of the parties. Having said the above, this paper discusses the application of mediation in resolving the customary disputes and wit reference to its practice in the native courts of the states of Sabah and Sarawak.

A brief history of Sabah and Sarawak

Sabah (formally known as North Borneo) and Sarawak (also known as Land of the Hornbills (*Bumi Kenyalang*)) are two Malaysian states on the island of Borneo. There are more than 40 sub-ethnic groups in Sarawak and Sabah each with its own distinct language, culture and lifestyle. Sabah is the second largest state in Malaysia after Sarawak. The above two states shares a border with the province of East Kalimantan of Indonesia in the south. The state of Sarawak was ruled by Brooke dynasty for one century namely, from 1841 to 1941. Meanwhile, the British occupation of Sabah generally began in 1881 when it came under the administration of the British North Borneo Provisional Association Ltd. On the 1 November 1881, the British Crown officially

granted a Royal Charter to the Association. In 1888, North Borneo together with Sarawak became a British protectorate states, that is, British would defend these states if it were attacked, making North Borneo and Sarawak a British sphere of influence.

During the Second World War, the Japanese forces occupied Sarawak and Sabah. In July 1946, after the end of the War, Sarawak and Sabah became a British Crown Colony and was administered by the British Military Administration. The tide of independence experienced by other countries was also felt in the 50's in both the above states. In 1961, the winds of change arrived in the above two states when the then Prime Minister of Malaya, the late Tunku Abdul Rahman, announced the formation of the Federation of Malaysia along with Brunei and Singapore. Subsequent, on the recommendation of the Cobbold Commission⁷⁹ vide its report dated 1 August 1962, the states of Sarawak and Sabah joined Malaya and Singapore, in the federation of Malaysia which was formed on 16 September 1963. However by 1965, Singapore left the Federation.

Natives of Sabah and Sarawak

The definition of 'native' is important because native personal law is only applicable to a person declared as native besides the jurisdiction and powers of the native court restricted to a person declared native. The word 'native' is defined in the Federal Constitution, Article 161A. In relation to Sarawak, it means a person who is a citizen and either belongs to one of the races specified in Article 161A (7) as indigenous to the State or is of mixed blood deriving exclusively from those races. In relation to Sabah, it means a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah, and was born (whether on or after Malaysia Day or not) either in

⁷⁹ The Commission, which was set up to determine whether the people of North Borneo (now Sabah) and Sarawak supported the proposal to create the Malaysia, was chaired by Lord Cobbold, the former governor of Bank of England. The other members of the Commission were as follows: (i) [Wong Pow Nee](#), Chief Minister of Penang; (ii) [Mohammed Ghazali Shafie](#), Permanent Secretary to the Ministry of Foreign Affairs; (iii) [Anthony Abell](#), former Governor of Sarawak; and (iv) [David Watherston](#), former Chief Secretary of Malaya. See *Datuk Hj Mohammad Tufail Mahmud & Ors v. Dato' Ting Check Sii* [2009] 4 CLJ 449, FC.

Sabah or to a father domiciled in Sabah at the time of the birth.⁸⁰ The races to be treated as indigenous to Sarawak as provided in Article 161A(7) are the Bukitans, Bisayahs, Dusuns, Sea Dayaks, Land Dayaks, Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits.

Unlike Sarawak, the term the indigenous of Sabah is not specified in the Federal Constitution. Sabah has approximately 3.1316 million population which including the Malays (and their sub-ethnic groups), Chinese, Indians, Natives (most widely-known, the *kadazandusuns*) and others. From the above figure, the number of natives stood at 1.4858 million.⁸¹ The natives of Sabah are called *Bumiputeras* (people of the land). For purposes of interpretation of native of Sabah, reference is made to the Interpretation (Definition of Native) Ordinance 1952 (Cap 64). In the above Ordinance, 'native' is defined as whose parents are Sabah *Orang Asli* (Sabah Origin or natives), anyone living as a member of native community where one of his parents or ancestors are natives. Native is a person who is a citizen, is the child or grandchild of a person of a race indigenous to Sabah and was born in Sabah, or to a father living in Sabah at the time of the birth.⁸²

⁸⁰ Federal Constitution Article 161A(6).

⁸¹ The Kadazandusuns account for 551,300, Bajaus 423,100, Murut 104,300 and other natives 407,100 of the population: see <http://aboutsabah.com/sabah-news/natives-of-sabah/>

⁸² In particular, section 3(1) of the Ordinance defines a 'native' as either:-

- (a) any person both of whose parents are or were members of a people indigenous to the Colony; or
- (b) any person ordinarily resident in the Colony and being and living as a member of a native community, one at least of whose parents or ancestors is or was a native within the meaning of paragraph (a) hereof;
- (c) any person who is ordinarily resident in the Colony, is a member of the Suluk, Kagayan, Simonol, Sibutu or Ubian people or of a people indigenous to the Colony of Sarawak or the State of Brunei, has lived as and been a member of the native community for a continuous period of three years preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance:-

Provided that if one of such person's parents is or was a member of any such people and either lives or if

Section 3(1) of the Ordinance provides a mechanism to people who are qualified under the Interpretation Ordinance to apply to the Native Court to have his status declared as a native of Sabah as defined in the same Ordinance.⁸³ In *Hon Chung Lip v Kwan Ngen Wah & 6 others*,⁸⁴ the Court of Appeal held *inter alia*, that the jurisdiction in so far as native certificates are concerned belongs exclusively to the native court and not this court. As from the above, a person may apply to the native court and be qualified as the native of the state of Sabah if he/she fulfilled the requirements set in section 3(1) above.⁸⁵ For example, in *Ong Seng Kee v District Officer, Inanam*, the applicant, a Sino-Kadazan, applied for native certificate. His application was successful as he predominately lived in native area, and had assimilated into the native community by participating in the native festivities and ceremonies.⁸⁶ Again, in *Liew Siew Yin v District Officer Jesselton*, the Native Court of Appeal rejected the appellant's application, a Sino-Dusun, for a certificate to rank him as a native as he failed to fulfil the requirements of section 3 of the

deceased is buried or reputed to be buried in the Colony, then the qualifying period shall be reduced to two years.

(d) any person who is ordinarily resident in the Colony, is a member of a people indigenuous to Indonesia or the Sulu group of islands in the Phillipine Archipelago or the Federation of Malaya or the Colony of Singapore, has lived as and been a member of a native community for a continuous period of five years immediately preceding the date of his claim to be a native, has borne a good character throughout that period and whose stay in the Colony is not limited under any of the provisions of the Immigration Ordinance."

⁸³ See *Madlis Bin Azid @ Aziz v Board Of Officers (Pursuant to Section 3 (3) Interpretation Definition of Native) Ordinance (Sabah Cap.64) & Anor* [2012] MLJU 666.

⁸⁴ [2012] MLJU 81. See also *Datuk Syed Kechik Bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; *Joseph Paulus Lantip v Lion Kee Chu & Ors* [2011] 6 CLJ 399.

⁸⁵ Section 3(2) of the Interpretation (Definition of Native) Ordinance (Cap 64) provides that the Native Court shall have exclusive jurisdiction to entertain and determine any application made to it by a person for a declaration that such a person falls within one of the paragraphs (a) to (d) of the said provision.

⁸⁶ See Wan Arfah Hamzah and Ramy Bulan, *The Malaysian Legal System*, Shah Alam, Oxford Fajar Sdn Bhd 2003, 170.

Interpretation (Definition of Native) Ordinance 1952 namely, 'being and living' as a member of a native community.

Besides the above, it may be noted that the Federal Constitution, Article 153(1) vested *inter alia*, the responsibility on Yang di-Pertuan Agong to safeguard the special position of the natives of any of the States of Sabah and Sarawak. Further, a separate system and hierarchy of Native courts has been established both in Sabah and Sarawak under the Native Courts Enactment 1992 and Native Courts Ordinance 1992, respectively, to hear and determine disputes among natives in relation to native customary laws. The above instruments provides for a system of Native courts in Sabah and Sarawak with both original and appellate jurisdictions. It would also be worthwhile to note that Article 145(3) of the Federal Constitution provides that the Attorney General's power to institute, conduct or discontinue any proceedings for an offence does not extend to a native court.

Native Court in Sabah

In colonial times between 1881 and 1962, prior to Sabah gaining its independence, the administration was based on the Native Court presided by native chiefs, elders and the village headmen. After independence, the period after 1963, the Sabah *Bumiputera* Affairs Unit was entrusted to oversee the customs, disputes and administration run by the native courts. From 1999 onwards, native affairs come under the jurisdiction of Sabah Native Affairs Council. Native Courts have been vested with the authority to settle disputes and compensations in cases involving native matters. The hierarchy of Native Courts in Sabah as provided in Part II of the Native Courts Enactment 1992 and its constituted members are illustrated in the table below.

Hierarchy of Native Courts	Constitution of Native Courts
Native Court of Appeal	A judge of the High Court
District Native Court	Relevant District Officer
Native Court	Native Chiefs or Headmen

(i) Native Court of Appeal

The constitution of the Native Court of Appeal is contained in section 5(2) of the Native Courts Enactment 1992. The above section provides *inter*

alia, that the Native Court of Appeal shall consist of a Judge as President, and two other members who shall be District Chiefs or Native Chiefs to be appointed by the Minister to be members of such court. An appeal shall lie from any order of the District Native Court to the Native Court of Appeal. The appeal to the Native Court of Appeal shall lie - (a) as of right, on any ground of appeal which involves a question of native law or custom alone; (b) with leave of the Native Court of Appeal, on any ground of appeal which involves a question of fact or question of mixed law and fact or sentence of imprisonment.⁸⁷

The appellate power of the Native Court of Appeal is contained in section 23. This section provides that the Court may after hearing the appeal, (a) dismiss an appeal; (b) set aside or vary an order; (c) reduce or increase any sentence of punishment or fine or order for compensation; or (d) order a rehearing by the same or a differently constituted Native Court. Section 23(2) further provides that no order shall be varied or declared void solely by reason of any defect in procedure or want of form. The judgement of an appellate Court shall be unanimous or that of the majority of its members.⁸⁸ The decision of this court is generally binding the District Native Court and the Native Court.⁸⁹

(ii) District Native Court

Meanwhile, the constitution of District Native Court is governed by section 4 of the Native Courts Enactment 1992. Section 4(2) provides: 'A District Native Court shall consist of the District Officer of the district as the presiding member and two other members who shall be District Chiefs or Native Chiefs resident within the district duly empowered by the State Secretary to adjudicate in such court'. An appeal shall lie from any order of Native Court to the District Native Court in the district in which such Native Court is established.⁹⁰ An appeal to the District Native Court shall lie - (a) as of right, on any ground of appeal which involves a question of native law or custom alone; (b) with the leave of the District

Native Court to which the appeal lies, on any ground of appeal which involves a question of fact alone or mixed law and fact or against a sentence of imprisonment.⁹¹ Further, all proceedings of every Native Court shall be subject to revision by the District Native Court which, if it considers that such proceedings are irregular, improper or unconscionable, may quash or vary the same or direct a rehearing.⁹²

(iii) Native Court

Section 3(2) provides that a Native Court shall consist of the District Chiefs as the presiding member and two other members who shall be Native Chiefs or Headmen resident within the territorial jurisdiction of such Native Court duly empowered by the State Secretary to adjudicate in such court. The jurisdiction of the Native Courts however, does not extend to any cause or matter within the jurisdiction of the Syariah courts or of the civil courts.⁹³ Unless otherwise directed by the Native Court, all proceedings in the Native Court shall be heard in open court to which the public may have access.⁹⁴ The judgement of every Native Court shall be unanimous or that of the majority of its members.⁹⁵

The original jurisdiction of the Native Court is provided in section 6(1). The above section provides that a Native Court shall hear, try, determine and dispose of the following cases:

- (a) cases arising from breach of native law or custom in which all the parties are natives;
- (b) cases arising from breach of native law or custom, religious, matrimonial or sexual, if the written sanction of the District Officer acting on the advice of two Native Chiefs has been obtained to the institution of the proceedings, where one party is a non-native;
- (c) cases involving native law or custom relating to-
 - (i) betrothal, marriage, divorce, nullity of marriage and judicial separation;
 - (ii) adoption, guardianship or custody of infants, maintenance of dependants and legitimacy;
 - (iii) gifts or succession testate or intestate; and
 - (d) other cases if jurisdiction is conferred upon it by this Enactment or any other written law.

⁸⁷ Section 18(1).

⁸⁸ See Native Courts Enactment 1992, section 24.

⁸⁹ See *Flora Evaristus & Ors v Amanah Raya Bhd & Anor* [2012] MLJU 1288 *Donatus Justin v Bernadette Anita Bte Majanil & 3 others* (Unreported Civil Suit No. K21-06-2002)

⁹⁰ See section 17(1).

⁹¹ Section 17(2).

⁹² See section 16(1).

⁹³ Section 9 of the Enactment.

⁹⁴ Section 8 of the Enactment.

⁹⁵ Section 7 of the Enactment.

Section 6(3) provides that in any matrimonial or sexual case where the parties are not of the same race, the Native Court shall be guided by the native law or custom of the woman's race. Again, in any case relating to gifts or succession testate or intestate, section 6(4) provides that the Native Court shall be guided by the native law or custom of the race of the grantor, the testate or intestate, as the case may be. Likewise, in any case relating to adoption, guardianship or custody of infants, maintenance of dependants and legitimacy, section 6(5) provides that the Native Court shall be guided by the native law or custom of the race of the person in respect of whom the proceedings are instituted.

Where an offence has been committed against native law or custom, section 10(1) provides that a Native Court may- (a) impose a fine; or (b) order imprisonment; or (c) award both fine and imprisonment; or (d) inflict any punishment authorised by native law or custom not being repugnant to natural justice and humanity: Provided that such fine or imprisonment shall not exceed the amount or the term, as the case may be, or a combination thereof, as may be conferred by federal law.

The Native Courts (Criminal Jurisdiction) Act 1991, a federal statute, however limited the criminal jurisdiction of the Native Courts. It provides inter alia, that the Native Court may try offences where the punishment does not exceed a fine of more than RM5000, or imprisonment of two years, or both. No sentence of imprisonment by any Native Court shall have effect unless such sentence is endorsed by a Magistrate.⁹⁶ Section 12 provides that 'in addition to any penalty imposed for an offence against native law or custom, a Native Court may order the guilty party to pay to the person injured or aggrieved by the act or omission, in respect of which such penalty has been imposed, compensation in cash or in kind authorised by native law or custom'.

Further, section 13 further provides that 'a Native Court may order that any penalty or compensation payable in cash or kind which it shall impose shall be paid at such time and by such instalments in kind or otherwise as it shall think just, and in default of the payment of any such penalty or

compensation or of any instalment of the same when due, the court shall order that the amount of such penalty or compensation or the instalment thereof, as the case may be, shall be levied by sale of any property belonging to the offender and situate within the territorial jurisdiction of the court'. When a Native Court imposes a penalty in kind or in cash or orders the payment of compensation under the provisions of this Enactment, section 14 provides that this Court shall have power to direct by its sentence that in default of payment of the penalty or compensation, the offender shall suffer such period of imprisonment as will justify the justice of the case.

Representation in Native Courts of Sabah

Section 27(1) provides that no advocate shall appear for any party in any proceedings before a Native Court or before the District Native Court, but an advocate may appear for any party in any proceedings before the Native Court of Appeal. However, for an advocate to appear for any party in any proceedings before the Native Court of Appeal, he/she must have been duly registered as an advocate of the Native Court of Appeal in accordance with the prescribed procedure. A person who is not an advocate may appear as a representative for any party in any proceedings before any Court if the permission of such Court is first obtained by such person who shall give sufficient and satisfactory proof that his or her presence in such proceedings is necessary.⁹⁷

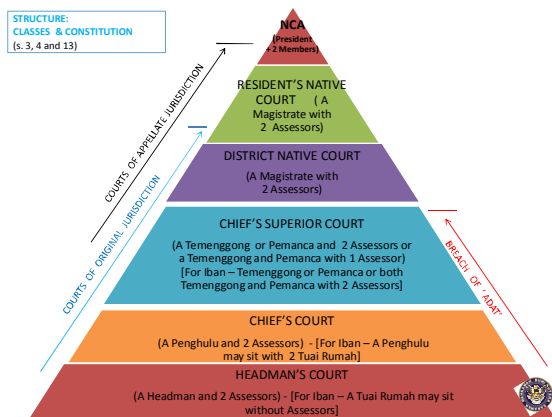
Native Courts in Sarawak

In the pre-Brooke era, disputes or offences were settled according to the manner practised in Brunei at that time but mostly at the discretion of individual *Pengiran* who was put in charge at the locality. Natives in the villages and longhouses settled their disputes according to unwritten traditions. There were no police or prison system and as such cases were settled either amicably before the elders or by ordeal such as a diving contest, swearing by the cutting of a dog, dipping the hand in boiling oil or water or by violent means like clubbing.

⁹⁶ Section 11 of the Enactment.

⁹⁷ Section 27(2).

However, during the Brooke and colonial era, Rajah Charles Brooke formally established Native Courts during the meeting of *General Council* on 11 October 1870. The Courts were presided by the *Datuks* and other Malay chiefs, mainly hearing cases involving matters of the Islamic faith. This became the fore bearer of *Majlis Islam* and the *Syariah Courts*. When Sarawak was ceded to the British Crown, the colonial government introduced the British Common Law system. This common law together with statutes formed the basis of present day legal system in Sarawak. The passing of *Majlis Adat Istiadat Ordinance* in 1977 consolidated and further enhanced the role and importance of native law and custom in the maintenance of law and order and harmony in the ethnically and geopolitically diversified Sarawak. The structure and composition of the Native Courts in Sarawak consists of the Headman's Court, Chief's Court, Chief's Superior Court, District Native Court, Resident's Native Court and the Native Court of Appeal. The composition of the above mentioned courts and their constituted members is illustrated with reference to the following diagram.



Source : Slides presentation by Chief Registrar of Native Courts, Tuan Hang Tuah Merawin
The table below further illustrates the hierarchical structure of native courts in Sarawak.

Hierarchy of Native Courts	Constitution of Native Courts
Native Court of Appeal	Judge with one or more assessors
Resident's Native Court	Resident with 2 or 4 assessors
District's Native Court	Magistrate and 2 assessors
Chief's	<i>Temenggong</i> or <i>Pemanca</i>

Superior Court	with 2 assessors or both <i>Temenggong</i> and <i>Pemanca</i> with one assessor
Chief's Court	<i>Penghulu</i> and 2 assessors
Headman's Court	Headman and 2 assessors

(i) Native Court of Appeal

The composition of members of this Court includes a president who is either a High Court judge or a retired judge or a person qualified to be appointed as a judge under the Federal Constitution. Other members are the president of the *Majlis Islam Sarawak* or president of *Majlis Adat Istiadat* and any person who is or who has been appointed a *temenggong* (government-appointed community chief) on the recommendations of the appropriate authorities. Jurisdictions of the Native Court of Appeal are as follows: (i) appellate; and (ii) revisionary and supervisory jurisdiction. An appeal shall lie to the Native Court of Appeal against the decision of the Resident's Native Court. However, only cases involving land disputes and native status are brought to the Native Court of Appeal. In a review, the Native Court of Appeal is merely to enquire into the decision-making process, to be satisfied as to the correctness, legality or propriety of any decision recorded or passed, and as to the regularity of any proceedings of the Resident's Native Court, and may give such direction on the future conduct of the same, as justice may require. When there is an appeal to the Native Court of Appeal, the appellant can be represented by a lawyer.

(ii) Resident's Native Court

The Resident's Native Court has the following jurisdictions: (a) original; (b) appellate; and (c) revisionary and supervisory. Section 20 of the Ordinance provides that the original jurisdiction of the Resident's Native Court will be to hear and determine the following matters:

- (a) for the purpose of section 9 of the Land Code, the question whether a non-native has become identified with a particular community;
- (b) whether a non-native who is subject to a particular system of personal law has become subject to a different personal law; and

(c) whether a person subject to a personal law of a particular native community has ceased to be so subject.

The decision of the Resident's Native Court on any of the above matter is subject to appeal to the Native Court of Appeal.⁹⁸ In relation to appellate jurisdiction, the Resident's Native Court shall hear an appeal against the decision of the District Native Court in matters concerning land disputes or native status. Meanwhile, the revisionary and supervisory jurisdiction of the Resident's Native Court is to supervise and review cases heard and determine by the courts below for the purpose of satisfying itself as to the correctness, legality, or propriety of any judgment.

(iii) District Native Court

The jurisdictions of the District Native Court are as follows: (a) original; (b) appellate; and (c) supervisory. In its original jurisdiction, the District Native Court shall hear matters under the codified statutes, for example under the *Adat Iban* Order 1993. While in its appellate jurisdiction, the

⁹⁸ In *Manggai v Government Of Sarawak & Anor* [1970] 1 LNS 80 the former Federal Court dismissed the plaintiff's action for a declaration that the Resident's Native Court was *functus officio* and had no jurisdiction to determine an appeal from the Native District Court in respect of a decision relating to a dispute over land which the plaintiff had with one *Tawi ak Selaku*. It held that where there was an alternative remedy available to the plaintiff, he must pursue that remedy first (i.e., an appeal to the Native Court of Appeal). In particular the Court observed: "An appeal lay from the Resident's native Court to the Native Court of Appeal. That Native Court of Appeal is presided over by a Judge of the High Court and must therefore be considered a Court which is competent to decide any question of law. The fact that the decision of the presiding Judge on a question of law could be overridden by other members of the Court is beside the point. The question of crossing that bridge would arise only when the bridge is reached. In so far as his complaint against the quashing by the Resident's native Court of the order made in his favour by the district Court was concerned, the plaintiff should have appealed to the Native Court of Appeal instead of going to the High Court. As regards his right to prosecute such appeal, the plaintiff, ironically, will now find himself in the same position as the first defendant when he failed to appeal to the Resident's native Court within the prescribed time. The High Court in striking out the portions in his writ of summons and the statement of claim in relation to the declarations sought expressly left it open to the plaintiff to pursue his claim for damages on grounds of conspiracy".

District Native Court shall hear appeal from the lower courts concerning disputes involving land where no title is issued by the Land Office. No appeal shall lie to this court on the following matters: (a) breaches of native customs and matrimonial or sexual matters; and (b) where the judgment of the Chief's Superior Court is expressly declared to be final and conclusive. Meanwhile, in its supervisory jurisdiction, the District Native Court supervises the exercise of powers by the courts below. It may, either on application of interested parties or of its own motion, investigate any case heard by the courts below, and exercise such powers which might have been exercised had there been an appeal.⁹⁹

(iv) Chief's Superior Court

The jurisdictions of the Chief's Superior Court are as follows: (a) original; (b) appellate; and (c) supervisory. Section 5 of the Native Court Ordinance 1992 provides that the Chief's Superior Court shall have original jurisdiction in the following matters;

- (a) breach of native law or custom where all the parties are subject to the same native system of personal law;
- (b) cases arising from breach of native law or custom relating to religious, matrimonial or sexual matter where one party is a native;
- (c) civil matters (excluding cases under the jurisdiction of the Syariah Court) in which the value of the subject matter does not exceed RM2,000 and where all the parties are subject to the same native system of personal law;
- (d) any criminal case of a minor nature which are specifically enumerated in the *Adat Iban* or any other customary law whose custom the court is bound and which can be adequately punished by a fine not exceeding that which the Native Court can award;
- (e) any matter in respect of which it may be empowered by any other written law to exercise jurisdiction.

The Chief's Superior Court however, does not have jurisdiction over the following matters;

- (a) any proceedings in which a person is charged with an offence in consequence of which is alleged to have occurred;

⁹⁹ Wan Arfah Hamzah and Ramy Bulan, *The Malaysian Legal System* (2003, Oxford Fajar Sdn Bhd, Shah Alam) 219

- (b) an offence under the Penal Code;
- (c) any proceedings concerning marriage or divorce regulated by the Law Reform (Marriage and Divorce) Act 1976 and the Registration of Marriages Ordinance 1952, unless it is a claim arising only in regard to bride-price or adultery and founded only on native law;
- (d) any proceedings affecting the title to or any interest in land which is registered under the Land Code;
- (e) any case involving a breach of native law or custom if the maximum penalty which is authorized to pass is less severe than the minimum penalty prescribed for such offence;
- (f) cases arising from the breach of Ordinan Undang-Undang Keluarga Islam 1991 and rules or regulations made thereunder, or the Malay custom of Sarawak;
- (g) any criminal or civil matter within the jurisdiction of any of the Syariah Courts constituted under the Ordinan Mahkamah Syariah 1991; and
- (h) any proceedings taken under any written law in force in the State.

The Chief's Superior Court is the highest appellate court for the following: (i) breach of *adat* and offences relation to matrimonial, religious, and sexual offences; (ii) all civil matters where the value does not exceed RM2000; and (iii) minor criminal offences. Meanwhile, the Chief Superior Court's supervisory jurisdiction is that it exercises supervision over the Chief's Court and Headman's Court.

(v) Chief's Court

The Chief's Court has original and appellate jurisdiction. In relation to the former, this Court hears cases involving land with no title issued by the Land Office and where all parties are subject to the same native system of personal law. In relation to the latter, this Court hears appeals against the decision of the Headman's Court.

(vi) Headman's Court

The Headman's Court may hear all matters stipulated under section 5 above except for land dispute where there is no title to the land.

As noted from the foregoing, in Sarawak, the dispute resolution structure at lower courts, are handled by the headman, the *Penghulu*, *Pemancha*

and *Temenggong*. While in Sabah they are handled by the headman and *Orang Kaya-Kaya*. Meanwhile, at the higher (appellate) courts level, disputes are resolved by the District Officer, the Resident (Sarawak) and a High Court judge who sits in the Native Court of Appeal. The appointment is based on their knowledge of the local customs and traditions.

Powers to Sarawak Native Courts to impose penalties

Section 11 of the Ordinance conferred on the Native Courts in Sarawak the power to impose the following penalties.

District Native Court	Imprisonment not exceeding two years and a fine not exceeding five thousand ringgit.
Chief's Superior Court	Imprisonment not exceeding one year and a fine not exceeding three thousand ringgit.
Chief's Court	Imprisonment not exceeding six months and a fine not exceeding two thousand ringgit.
Headman's Court	Fine not exceeding three thousand ringgit.

Imprisonment in default of penalty S.18

In default of the payment of penalty, section 18 empowered the Native Courts in Sarawak to direct an offender to suffer a period of imprisonment in the following manner:

Amount defaulted	Period of imprisonment
Does not exceed fifty ringgit	One month
Exceeds fifty ringgit but does not exceed one hundred ringgit	Two months
Exceeds one hundred ringgit but does not exceed two hundred ringgit	Four months

Exceeds two hundred ringgit but does not exceed five hundred ringgit	Six months
Exceeds five hundred ringgit	Twelve months

Apart from the above, section 19 empowers a Native Court to award compensation which may include costs and expenses incurred by a successful party or his witness. The Court may also direct any penalty to be paid to the person injured or order the restitution of any property.

Mediation: Its Merits

Before venturing into the application of mediation in the native courts in Sabah and Sarawak, it would be worthwhile to briefly describe the benefits of mediation. Mediation promotes compromise or collaboration. The disputes between the aggrieved parties would be resolved amicable, expeditiously and with the least expenses and delay. It is conducted in private settings by a neutral third party who is a skilled or trained mediator. The mediator would assist the parties in reaching a settlement. The disputing parties are able to speak for themselves, and work together to find a lasting solution to their conflict under the guidance of the mediator. The mediator would listen to the arguments forwarded by the parties. He may ask questions to help the disputants understand the issues. Further, he would guide the parties through the process to develop a mutually acceptable solution. He would also maintain a safe and respectful atmosphere.

The mediator explores the strength of the parties' case with a view of reconciling the parties' positions, to the extent possible, and assisting them in reaching a consensus on the resolution of the dispute. The mediator may offer suggestions, recommendations and alternatives for consideration by the parties as a means of resolving the dispute. The process works because the parties are given the power and obligation to seek solutions that meet their own needs and interests. Mediation can assist the disputing parties to re-establish trust and respect, and help to prevent damage to an ongoing relationship.

Further, it takes a fraction of the time of a trial or hearing, and is a cost effective means of dispute

resolution, that is, it is not an expensive affair. An average mediation will cost the parties a small fraction as compared to what they would have to incur if the case was brought to court. Mediation is held in a private setting or 'behind closed doors'. Members of the public and journalists would not be allowed to attend the mediation process except with the consent of the disputing parties. It would thus preserve secrecy and confidentiality of information that had transpired at the mediation.

Mediation in the Native Courts

As stated above, the native courts in Sarawak and Sabah primarily deal with breaches of native law and customs where all the parties are subject to the same native system of personal law. The native courts functions are to look into the breach of native law or custom where the cases range from family disagreements to proceedings affecting the title to or any interest in land which is registered under the Land Code.

In so far as the proceedings in the native courts are concerned, the Native Courts Rules 1993 of Sarawak and the Native Courts (Practice and Procedure) Rules 1995 of Sabah provides valuable standard guidelines as to the mode of instituting proceedings and the manner in which cases should be dealt with. Although the abovementioned Rules contains procedures on trial in the native courts which are identical with the civil trial system, it nevertheless, promotes speedy dispute resolution. Further, rule 6(1) of the Native Courts (Practice and Procedure) Rules 1995 provides that where there has been a failure to comply with the requirements of the Rules, such failure shall be treated as an irregularity and shall not nullify the proceedings or any step taken in the proceedings. Generally, the natives would settle their disputes through a participatory process of consultation, negotiation and mediation. This traditional process has been integrated with the formal system of courts as a supporting and complementary process. In relation to amicable resolution of disputes, rule 13 of the Native Courts (Practice and Procedure) Rules 1995 provides that the Court may advise and assist the parties to settle their disputes amicably. As from the above, the Court may encourage the parties to settle their disputes amicably whether prior to, or even after a trial has commenced. The parties may with their mutual consent agree for the appointment of one or more mediator of their preference to mediate their

dispute. If the amicable settlement *vide* mediation is successful, the court shall record a consent order on the terms as agreed to by the parties.¹⁰⁰

However, if the amicable settlement fails or if the parties do not agree to an amicable settlement, the matter will then be referred to the court to hear and complete the case. The Court shall proceed to hear the action and enter judgment thereon or may adjourn the hearing of the action to another date for final hearing. Where the matter goes for hearing, rule 14 provides that the Court may give such directions as to the mode of hearing and the presentation of evidence. The procedure rules and evidence commonly adopted in the civil courts is also followed in the native courts. In relation to the application of the procedure and hearing of cases in the native courts, it would suffice at this juncture to cite two cases of the Sabah Native Court of Appeal.

In *Bagang bin Ani v Pakang bin Risin*,¹⁰¹ the respondent alleged that the appellant had sold the land in dispute to him *vide* a sale and purchase agreement in 1974. The appellant on the other hand disputed the thumbprint on the sale and purchase agreement as being his. Both the Native Court and the District Native Court held that the said land was to be equally divided between the appellant and the respondent. On appeal, the Native Court of Appeal, in allowing the said appeal and setting aside the decision of the lower courts, held that there was insufficient evidence to say that the thumbprint on the document upon which the respondent relied on was that of the appellant. The Court further noted that in the face of the denial by the appellant, evidence of expert or evidence of witnesses who saw the appellant putting his thumbprint was required.

Again, in *Kassim Bumburing v Sammudin bin Sarun*,¹⁰² the respondent alleged that the appellant had trespassed upon his land and felled trees belonging to him. The respondent claimed that the

land belonged to him albeit no title deed had been issued. The respondent claimed customary right over the said land by virtue of occupation. He claimed to have planted rubber trees and paddy. The respondent subsequently applied for that land. It was held by the Native Court of Appeal that the evidence of ownership of the subject land was required before trespassing could be established. In the absence of title deed on the land, evidence from a qualified surveyor ought to have been adduced to prove the subject land. Hence, the Court concluded that the Native Court ought to refer the matter to the Lands and Surveys Department to assist in the matter by conducting survey and giving a report of the result of the survey.

Respondents Interview

In order to get first-hand information on the application of mediation in the native courts, the authors had the opportunity to interview the officers of the native courts as well as other persons directly involved with the native matters. Based on the interview sessions held with the abovementioned persons, their views and opinion are summarised as follows.

Sabah

In Sabah, mediation of native disputes is used at different levels. Disputes within families, young persons, neighbourhood and tribal problems are normally resolved peacefully with the assistance of respected elderly person(s) in the community who will try to assist parties with dispute resolution namely, pacify the aggrieved parties by getting them to rationalize, understand, cooperate and compromise the problem thereby leading to a mutual agreement by all parties i.e., promoting a win-win situation. The ego and competition between the aggrieved parties would be minimized. However, if the parties could not agree to a peaceful resolution of the problem as per the suggestion by the elder in the community, the matter would then be referred to the court for a decision.

As stated earlier, in Sabah the hierarchy of native courts encompasses the Native Court of Appeal, District Native Court and Native court. In the Native Court of Appeal, the court will be presided over by a judge of the High Court who will be assisted by two assessors. The trial judge will attempt to resolve the dispute amicably *vide*

¹⁰⁰ See for example, *Carol Chong; Chong Thien Yong @Andrew v Michael Chin* in Sabah Native Court of Appeal Law Report 1989 -2009, Cetakrapi Sdn Bhd, Kepong 2010, p. 258 where the appeal to the Native Court of Appeal was withdrawn when the parties amicably settled their grievance.

¹⁰¹ See Sabah Native Court of Appeal Law Report 1989 -2009, Cetakrapi Sdn Bhd, Kepong 2010, p. 237.

¹⁰² *Ibid.*, at p. 251.

mediation – the High Court judge presides as the Wise King Solomon.¹⁰³ Likewise, the District Native Court and the Native court will be presided over by relevant district officers and the native chiefs. They will be assisted by assessors. It must be noted that lawyers are only allowed to represent their clients at the Native Court of Appeal.

According to the respondent, a practicing lawyer, mediation is cultural in approach. It makes the parties feel at ease and the outcome would actually depend on the mediator namely, that if the mediator is a respected, known and trustworthy then the outcome would be good. However, if the mediator is known to be bias, then the outcome will not work. He stated that before the mediation session officially begins the parties would normally be served with light refreshment. The mediator, upon calming the disputant down and making them comfortable, will began gathering information and understanding each party's point of view with a view of helping the parties to clarify issues. He will listen attentively to each side both before, and during, the mediation session. In an attempt to reach a mutually acceptable agreement, the mediator will be involved in negotiating on behalf of both sides without compromising his or her position of neutrality.

According to District Chief of Kota Kinabalu, Mr. Eric Majimbun, when parties have filed the dispute in the Native Court, the parties would be encouraged to mediate over the dispute. Asked about the success rate of settlement of cases, he was of the opinion that its only when the parties could not resolve the matter would it be heard by the Native Court. The statistics of cases settled were however not available, as they had yet to established a proper system of filing cases.

¹⁰³ “Cut the baby in two and give half to each woman!” Do you remember the story? Two prostitutes presented their cases to King Solomon. They lived together and both had babies. But a baby died in the night. One woman claimed she awoke to find the dead baby next to her but it wasn't hers. She said the other woman had taken her baby and replaced it with the dead one. But the other woman said this was a lie, that the living baby was hers. After listening to both King Solomon asked for a sword. He told his men to cut the living baby in two and to give half to each woman. The false mother was comfortable, but the real mother said, “Please my lord, give her the living baby! Don't kill him!” So, the real mother was revealed and King Solomon gave her the child (1 Kings 3: 16-28).

Sarawak

To avoid conflict or to expiate a personal animosity, thereby appeasing the spirits and maintaining a harmonious balance in society, there is an ancient *Iban* wisdom which goes: “*Utai besai gaga mit; Utai mit gaga nadai*” which means “make big things small; and let small things become a nonentity”. Conflict avoidance and conflict resolution are among the highest principles in *Iban* culture. Early socialization experiences impresses upon youth the serious consequences of conflict, and that is to be avoided wherever possible. When conflict is unavoidable, it must be resolved as promptly as possible, and to the mutual benefit of the parties concerned.

In the migration and evolution of *Iban* society, as described by Mr. Benedict Sandin, settlers established claims upon and rights to land. ‘As longhouse domain became increasingly bounded, the *tuai menua* (regional leaders) were expected to act as arbiter and go-betweens within this evolving setting, dealing with inter-longhouse conflicts and resolving disputes over farmland and community boundaries. As an aspect of his peace-keeping role, the *tuai menua* diving ordeals and other forms of juridical contests, many of them having to do with land claims or boundary disputes.¹⁰⁴ According to Tuan Hang Tuah Merawin, momentous events in Sarawak's history were settled by negotiations and goodwill. Earliest stage of mediation was referred to as ‘*ancau tikai*’ which means spreading out of the mat, in which the success rate was overwhelming.

According to Mr Henry Ginjom Lazim, the District Native Court Magistrate, to the natives of Sarawak, a mediator must be a person of unquestionable reputation / integrity. They must have a good knowledge about the subject matter of the dispute between the parties and on the personal values of the parties namely, the traditions, customs, and religion of the disputant's tribes. The mediators must also take into consideration the factor of relationship between parties, their respective ages and level of literacy, among others. Mediators should have the ability to analyse the issues effectively before reaching a decision. They must have patience and tact in creating and maintaining rapport between himself

¹⁰⁴ Sather 1980 axxiii [Sather 1994a 11-12], adapted from presentation slides of Tuan Hang Tuah Merawin.

and the disputants, thereby enhancing the success of the process. By displaying impatience the mediator may encourage the disputant to think that if he remains unresponsive for a little longer, the process will end. This could also cause the disputant to lose respect for the mediator, thereby reducing the mediator's effectiveness.

To convince the parties that mediation would be a better mode of settlement, the parties are made aware of the tedious process of the court. They are asked to appeal to their sense of fairness, generosity and good neighbourliness. They are also made aware that even though their cases are filed in court, it may be settled through mediation. Thus, the parties are strongly urged to settle their differences through mediation where the out-of-court settlement would arrive at a win-win situation and their harmonious relationship would continue as opposed to judgment of the court where the 'winner takes all' and the relationship between the parties will undoubtedly become bitter and in most circumstances, it would lead to the deterioration of the relationship – there will be feelings of betrayal, hatred and hurt, among others. A failed mediation is not to be taken as a failed one. It will only mean that the parties' next option would be to resolve their disputes in court.

Be that as it may, mediation is preferred and the success rate is encouraging. Not many of the natives know that the disputes could be mediated. After a visit to the land office, the disputants would be under the impression that they must file the suit in court as this is what the land office advises them. If the parties are aware that the case can be settled *vide* mediation, they would rather go for that. This is due to the fact that they are members in the long houses of Sarawak and it would be very difficult to live as enemies. They would rather mediate for a favourable decision for both sides rather than to go to court. In this way, harmony and tolerance can be achieved.

The success rate of mediation depends on a few factors. Firstly, the age of the parties. The mediator will try to convenience elderly parties that litigation would take years to complete. They are confronted with the reality. By then the parties would be too old to enjoy the judgment of the court and that only their grandchildren might live to enjoy it. Sometimes it is difficult to locate the land. The trees would have been felled and owning the land is by way of working the land. Even if the parties were to work it out with the court years

later, the judgment would probably be to divide the land equally. Sometimes the parties might not even be alive to benefit from the judgment. In this aspect, parties would prefer to go for an amicable settlement, thus, making mediation the preferred mode of dispute resolution. However, mediation might not be successful if one side has a good chance to succeed, and as such they will not desire negotiate. Another reason is based on the ego of the parties. Loosing the negotiation would cost them their pride.

The Native Court magistrates prefer the parties to mediate rather than to go on a full trial of the matter. As far as possible, neither lawyers nor relatives would be encouraged to be involved in the settlement. It will be pertinent to say that most disputes are between relatives and the disputants are hardly ever total strangers. It must be further noted that the magistrates of the native courts in Sarawak are a rare breed. There are only 3 magistrates, who handle 58 districts. Their job is a tedious one. The District Native Court for example deals with land matters. To facilitate settlement, they first need a day to hear the problem. They then make arrangements to go to the site to assess the matter, either by boat or by land cruiser. The other day they need is to deliver judgment, for which an appeal is allowed. They have to undertake this tedious journey as most of the land in Sarawak has no title. Out of the many cases handled, priority is given to Government compensation cases with the view of settling the cases early so that proposed projects could proceed timely and expeditiously.

Conclusion

Expeditious settlement of human conflict is important to ensure a steady relationship between parties. Mediation promotes *inter alia*, compromise or collaboration as people learn how to work harmoniously, develop creative solutions to problems and reach outcomes that mutually benefit those involved. Through this process, resolutions are based on the voluntary choice of the parties where the decision to settle the dispute is solely up to the choice of the parties. This informal process allows parties to be relaxed and open with each other. As there is much respect for the wise individual listening to their disputes, they often came to a truce or agreement. The outcome is a win-a-win situation where, in most case, both the parties would be satisfied with the outcome. Mediation is only an alternative mode of dispute

resolution and, where mediation fails to bring about an amicable resolution, the dispute will be referred to and adjudicated in court.

Although mediation, in the past few decades is being looked at as something new, it must be known that mediation is widely used mode for dispute resolution involving the native law and custom. Mediation had been in use and has been around for generations. In fact, a strong bond or cordial relations among different tribes and neighbours is important. The village headman or elders in the community were entrusted with the responsibility of solving problems in their village and to those under their care. Efforts are being taken to promote mediation by taking advantage of its immense benefits to the society and cutting down stress of the courts. Officers are being trained on how to mediate, records are being maintained and the whole process is now monitored to ensure that justice is done for parties who seek it. In fact, based on the feedback from the respondents it is obvious that mediation is the preferred mode for dispute settlement involving the natives.

II PLENARY SESSION

Session Chair: Christoforos Ioannidis, King's College London, UK

Are the Conditions of Statehood Sufficient? An Argument in Favor of Popular Sovereignty as an Additional Requirement for Statehood, on the Grounds of Justice as a Moral Foundation of International Law*

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Abstract

The aim of this article is to propose an idea of popular sovereignty as a necessary condition for statehood. I will first evaluate the two main theories of statehood in international law, mainly the constitutive and declarative theory and explain their deficiencies. I will explain the two interrelated reasons why the fourth requirement of the declarative theory is problematic. I will suggest that the fourth condition ought to be popular sovereignty. I am suggesting a thin notion of popular sovereignty: the historical fact that at some point in time, a permanent population living in an identifiable territory under a government voted for a constitution freely, i.e. while the four standard requirements for freedom and individual autonomy were being satisfied. I try to ground this notion on Buchanan's deontological argument regarding the goal of international law: justice, in the sense of realization of basic human rights.

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Protection of privacy in the case-law of the European Court of Human Rights

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Abstract

Privacy is a concept, whose domain is different in each society according to the cultures and beliefs. As a result there is not any obvious and absolute definition of this concept in the encyclopedias.

Cases of the violation of privacy have been increased by development of technology. New mass media, printed media with high circulation and internet, increase the possibility of sharing the information vastly; so, new ways of breaking the privacy have been existed.

The European Convention for the protection of Human Rights and Fundamental Freedoms in the 8th article has paid attention to this right. On the contrary, the 10th article of law has spoken about the freedom of expression which places freedom of information and "right of society to know", in the opposite of regard to privacy.

In this research, we are going to survey different case-law in the European Court of Human Rights, and the junction of privacy and freedom of information is mentioned and as a result the actual meaning of protection of privacy will be denoted.

1. Introduction

Right of privacy, is one of citizenship rights issues that its base is in the person's identity. This right is a concept that its domain is different in any society, due to different cultures and beliefs. Because of this, there hasn't been any complete and clear definition in any encyclopedia so far.

Attention of Privacy, as one of most fundamental Human Rights issues is derived from attention to human dignity and values

based on freedom kinds. Nowadays, it has been on of focal topics in information society and one of

most important issues of Human Rights in new age. By technology development, cases of privacy violations have also been increased. New media, newspapers in high circulation and internet, have increased the ability to share information widely and consequently there have been new ways to enhance privacy violations.

Media are frequently reporting some news about dissemination of films, pictures and writings from private lives of people. This kind of dissemination from private aspects of people lives will be result in desecration of people whether it is accurate or indisposition, intentional or unintentional and montage or original cases. Whereas, protection of people's honor is basically accepted by world public opinion, International organizations and documents and also constitution of many countries.

In this research, we want to state the rate of conflicts between concepts of privacy and freedom of information by surveying different records and case-law in European Court of Human Rights. Hereby, the actual concept "privacy protection" will be clarified and this question can be replied: "where is the position of privacy protection in case-law of European Court of Human Rights?"

2. Overview

Privacy of people and its protection is an important and discussable issue in different countries especially in developed countries. Although, the vast and invisible domain of privacy concept results in problems about discussion of one unit concept in all of countries, but for the main discussion, concept identifying and accepted definition of it will be necessary.

2.1. History of Privacy

Privacy as the protection of personal integrity is a fundamental civil right in modern democracies, and a tradition with a long history. Some writers

and scholars of law, state that privacy history is attributed to the ancient Greek and Roman times, and its origin is related to the need of respecting the right of ownership over the material. Some people state that it has not a long history dating back to the other categories of human rights, such as the right of life. They claim that in the past, there was no much difference between private life and public life. They believe that this right has been established in the late twentieth century.

In 1765 AD, English "Lord Kamdan", legislated a law upon which a license was required to enter people's houses and confiscate their written notes,. One of the UK Parliament named "William Pitt" wrote in this regard: "Even the poorest people, in their humble cottage could disobey the orders of the king. The cottage of this poor man could be very humble, and the roof could be leaking, the storm may enter, but the King of England cannot enter it, and no one has dared the king's forces near the ruins of the house and step into." [1]

Over the centuries, different countries by legislating different laws have protected privacy. In 1858, a law has been legislated in France that foreboded the dissemination of private matters of people and considered penalties for privacy breakers.

Also, in 1889, the Norwegian legislation banned the dissemination of information about individuals and their private affairs. Of course, talking about the modern concept of privacy, dates back to legal debates about influence of journalists into private lives of famous people in the United States of America. [2] In other words, privacy in the modern sense is one of new concepts of the rights that is still developing and completing in concept. This concept and protection of that was introduced in a joint article by "Samuel Warren" and "Louis Brandeis" for the first time in 1890.

Primary forms of privacy violating , had been done more as physical form, like assault, rape or eavesdropping, and perhaps one of the reasons for the delay in recognition of privacy as a fundamental right, is the emergence of new technologies in modern era and violation of privacy by the innovative tools that faced legal challenges. [3]

In other words, with the advancement of technology, privacy violations has been also

increased and expanded. Technologies like the printing press and the Internet have increased the ability to share information on a wide range and resulted in existing new ways to increase privacy violence. [4] Article was written by Samuel Warren and Louis Brandeis, is greatly in response to increase newspapers and emitted photos by the new technology of printing.

2.2. Concept of Privacy

Defining the concept of privacy in any part of the world, requires studies of sociology, anthropology, philosophy and many other sciences. Without such studies we may not achieve an appropriate definition of privacy.

Privacy and private individuals are non-offensive area of human life that have always been considered by scholars. From the beginning of human life, they have tended to define their own territorial out of reaching the other people. The following, the concept of privacy in international documents and doctrine are discussed.

2.2.1. Concept of Privacy in International Documents

The right of privacy has been considered in different regional and international documents that any of these documents and conventions have considered this right from a particular aspect. Some of conventions, documents and declarations that have pointed to privacy, are as follows in order of years:

1) Declaration of Human Rights and Citizenship of France (1789): This declaration includes 17 articles and combination of individual and nation considerations. In Article 12 of the Declaration states: "The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be entrusted." [5]

Article 12 of Declaration of the Rights of Man focuses on the protection of citizens of France from abusive police. Police misconduct refers to inappropriate actions taken by police officers in connection with their official duties. It focuses on the idea that the police are representatives of the citizenry and should not act arbitrarily or at the will of the government.

2) The Universal Declaration of Human Rights (1948). Article 12 of the Universal Declaration of Human Rights states that: "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" [6]

According to the Article 12 of the Universal Declaration of Human Rights, right to privacy means that anyone should be free in terms of their private life, home, place of residence and communications. Anyone should not be interfered in their private life, home, place of residence and communications. Their reputation and credit should be protected in terms of those matters. Everyone should be duly protected by the laws.

3) The European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms)(1950): Article 8 of the Convention provides: "1- Everyone has the right to respect for his private and family life, his home and his correspondence. 2- There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." [7]

Article 8 of the European Convention on Human Rights protects the private life of individuals against arbitrary interference by public authorities and private organizations such as the media. It covers four distinct areas: private life, family life, home and correspondence.

In other words, article 8 guarantees the individual's right to respect for his private and family life. The Article specifies that public authorities may only interfere with this right in narrowly defined circumstances. In particular, any interference must be in accordance with law and necessary in a democratic society, in view of such public interests as national security and the prevention of crime.

The convention entered into force on 3 September 1953. It is completely discussed about this issue in chapter 3.

4) International Covenant on Civil and Political Rights (1966): Article 17 of mentioned Convention provides: "1- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2- Everyone has the right to the protection of the law against such interference or attacks." [8]

Article 17 (1) of the International Covenant on Civil and Political Rights, has not directly opposed to the definition of privacy, but there is inference from the opposite concept that it is necessary to specify certain and defined rules for entering privacy.

5) Resolution 428 (1970) adopted by the Parliamentary Assembly of the Council of Europe. In this Resolution it is stated that: "in its essential limits the right to privacy of the persons is the possibility of being able to lead lives as they wish, with minimal interference. This right relates to privacy, family life and to that of the home, to the physical and moral integrity, to the honour and reputation, to the fact of not being presented in a false light, to the non- disclosure of unnecessary and embarrassing facts, to the publication of private photographs without authorization, to the protection against espionage and unreasonable or unacceptable intrusion, to the protection against misuse of private communications, to the protection against disclosure of confidential information communicated or received by an individual" [9]

6) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (known as "Convention No. 108"). [10] Parties to this Convention, which include all EU member states, are required to implement it into their national laws. Convention No. 108 is open to any countries that have enacted legislation "in accordance with" the standards it establishes; and it was amended in 1999 making it possible for the EU to accede to it. [11] In 2001 was adopted an additional Protocol regarding supervisory authorities and transborder data flows, that entered into force in 2004. [12] Furthermore, Convention No. 108 is complemented by a series of Recommendations, [13] such as the Recommendation Regulating the use of Personal Data in the Police Sector. [14]

The object of this convention is to strengthen data protection, i.e. the legal protection of individuals with regard to automatic processing of personal

information relating to them. Recently, the Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data has been actively working on the issue of profiling. It adopted in June 2010 a Draft Recommendation on the subject. [15] Additionally, it has launched a process of analysis of Convention No. 108 and is expected to start discussing its possible revision in the near future.

7) Cairo Declaration on Human Rights in Islam, (1990). Article 18 of the Islamic Declaration of Human Rights provides: “(a) Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property. (b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or to besmirch his good name. The State shall protect him from arbitrary interference. (c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.” [16]

8) Charter of Fundamental Rights of the European Union (2000). This Charter brings together in a single document the fundamental rights protected in the EU. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. Proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009.

In article 7 of the Charter of Fundamental Rights of the European Union, has been emphasized on respecting to private and family life, home and communications of people. Also, Data protection means the right of a person to know which data is gathered in regards to her person, how the data is used, aggregated, protected, and where the data is transmitted. Anyone has the right to have access to that data and to modify it. In all cases, the person has to give his/her consent for that data to be used by another person, government, or entity. Data protection values are not essentially privacy related ones. These values cannot be dealt with just through the privacy perspective. They are autonomous values, which grant fundamental rights. The right to data protection as recognized by Article 8 in the Charter of Fundamental Rights

of the European Union: “1- Everyone has the right to the protection of personal data concerning him or her. 2- Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3- Compliance with these rules shall be subject to control by an independent authority.” [17]

9) Resolution 1843 (2011) adopted by the Parliamentary Assembly of the Council of Europe. The Parliamentary Assembly of the Council of Europe has adopted the Resolution 1843 (2011) on the protection of privacy and personal data on the Internet and online media. [18]

Users of online services have been alarmed by numerous intrusions into their personal data and correspondence by public authorities, commercial companies as well as private individuals. Widely publicized examples have been the interception of communication and the screening of user data through national security services in Europe and the USA, the professional data-mining of social online networks, the commercial profiling of users by online service providers through Internet access data and geo-localization data, as well as the large-scale hacking into user accounts and passwords for fraudulent purposes. The Assembly therefore welcomes the Resolution on the right to privacy in the digital age, which was adopted by the United Nations General Assembly on 18 December 2013. The Assembly concurs that the same rights which people have offline must also be protected online, in particular the right to privacy as expressed in its Resolution 1843 (2011) on the protection of privacy and personal data on the Internet and online media. [19]

2.2.2. The concept of privacy in doctrine

Privacy is one of concepts that seem there is no Encyclopedia definition of it. Although, many lawyers and experts have provided several definitions, but providing a clear and complete definition of it seems to be difficult because of ambiguous domain and challenged its concept. Furthermore, the growth of information and communication technologies that are related to privacy resulted in more difficulty in providing a clear concept of it.

Difficulty of providing a clear definition of the concept of privacy has been discussed by many scholars in this field.

"Arthur Miller's" state that it is hard to define privacy because it is very vague and fragile. Also, "William Beaney" believes that even the most earnest advocates of the right of privacy must admit that there are serious problems in defining the nature and scope of this right. [20]

As defining privacy is difficult, it has led some theorists do not believe an independent identity for privacy and the protection of privacy is what they are called, and is referred to other established rights. Therefore, there are 2 approaches. The first is dedicated to countries like France, Germany and some countries that follow "Romano-Germanic" system that studies privacy right with a critical opinion. The second approach is conceptually independent of other individual rights. This approach is devoted to the Anglo-Saxon countries that follow the system of "common law".

Samuel Warren and Louis Brandeis, the first spokesmen of privacy, defined this right to a "right of privacy or Let to be alone" based on the principle of honorable character. A principle that is a part of a more general right as named security right or "right of a person on his own personality." [21] "Colin Bennett" a political scientist believes that the above definition of privacy, deals with the human dimension of this concept based on dignity, individuality, integrity and personal of people. [22]

However, there are drawbacks for above definition:First, this definition is not comprehensive because it doesn't include some cases like the gathering of family or personal relationship. In those cases "loneliness" is not considered but it is privacy of people.Secondly, all items of privacy, is not applied. Because if one person observes the other without disruption lonely, that person will not have the right to protest.

"Ellis Smith" has defined privacy as: "our desire to a physical space where we can be free from harassment and assault, and may not be subjected to shame and responding and the control of timing, the way of disclosing personal information about ourselves will be in our hands."

In this definition the word "desire" is used while:First, the desire is not the legal sense. Secondly, desire, depends on people. If there is violation of privacy of a person, there will be a desire by others. Thirdly, if we consider "desire" as a measure of privacy, generally human desires to be free from harassment and assault of others in public domain.

"Edward Blostin states that privacy is a criterion to distinguish people from each other and believes if human is forced to share every minute of his life with others, will be deprived of human dignity and individuality. Thus, his feelings are not genuine because is raised apparently and his value will be like material objects. [23]

"O - L – Godkin" believes that privacy is the right to decide on how much access is permissible to information, feelings, thoughts, actions and personal dignity of an individual for others. (Limited access to other's itself).

Also, "Charles Fried" former prosecutor of United States of America believes that privacy is not merely this issue that there is not information about us in the minds of others. But rather that we have control over information about ourselves.

According to what has been mentioned, it appears that difficulty of providing a comprehensive definition of privacy, has led scholars in this field to the citing specific examples and providing a clear definition has remained silent. Despite the difficulties and the problems, we need to provide the appropriate definition for this field.

To provide a comprehensive definition for privacy , it could be mentioned: "privacy is a part of life that person is free from interpellation and legal penalty and any decision about it, informing and observing is only by himself and involving the others or access it without his permission is not permitted."

3. Privacy and Case-law of European Court of Human Rights

The European Court of Human Rights (ECtHR) is a supra-national or international court established by the European Convention on Human Rights. It hears applications alleging that a contracting state has breached one or more of the human rights provisions concerning civil and political rights set

out in the Convention and its protocols. An application can be lodged by an individual, a group of individuals or one or more of the other contracting states, and, besides judgments, the Court can also issue advisory opinions. The Convention was adopted within the context of the Council of Europe, and all of its 47 member states are contracting parties to the Convention. The Court is based in Strasbourg, France.

Article 8 of the European Convention on Human Rights states that privacy of people should be protected from the invasion of others and governments should respect this right. European Court of Human Rights as one of the mechanisms by which European Union legislation must be implemented, states that Privacy is a broad concept in several votes which includes physical and psychological integrity of a person.

Article 8 has been legislated in order to respect for private and family life and correspondences of a person. Most of case-law in connection with the definition of the concepts "private life", "domestic life", "Home" and "correspondence". According to what was mentioned, we survey concept, scope, and records related to any section of this article separately.

3.1. Article 8 Paragraph 1 ECHR

Article 8 of the European Convention on Human Rights, states that the privacy of people should be protected from any invasion and knows it a right that must be supported and protected. In the paragraph 1 of this article states: "Everyone has the right to respect for his private and family life, his home and his correspondence."

Most actions have been decided under the right to respect for private life, although they may involve incidental claims to respect for home, family or correspondence. The following are the resolution of the case referred to in this paragraph, separately and survey the case-law of the European Court of Human Rights.

3.1.1. Private life

Private life includes an individual's physical and psychological integrity, personal or private space, the collection and publication of personal information, personal identity, personal autonomy

and sexuality, self-development, relation with others and reputation. [24]

The European Court of Human Rights ruled in *Niemietz v. Germany* decision of December 16, 1992, [25] that it is neither possible nor necessary to find an exhaustive definition of the term "privacy". However, it would be too restrictive to limit the scope of its impact on the inner circle in which anyone can perform life as he wishes entirely excluding the outside world of this circle. Privacy may encompass, to some extent, the right of an individual to establish and develop relationships with other people. [26]

The existing policy is only related to his professional activities in mentioned case. In the other words, only professional activities are considered as an exception for protections available in article 8 because generalization of that to the other cases will lead to injustice and inequality as distinction between professional and nonprofessional activities of a person is difficult for these kinds of interferences. In fact, the court has failed to specify the border of private life and professional activities about telephone line that is used both business activities and private calls.

The concept of private life has been also mentioned in several cases. Including, in *Van Kuck v. Germany* decision on June 12, 2003, [27] the European Court of Human Rights ruled that sexual identity is one of the most intimate aspects of private life.

Private life, in one of the cases was stated against the UK, included sexual activity as well. In this case, sex was considered as an element of privacy. In case of *Dudgeon v. UK* in 1981, [28] the court recognized sexuality as the most personal aspects of a person's private life and ruled that the law in Northern Ireland that penalized sex between men in private was incompatible with the European Convention on Human Rights. The court believed that a law that would allow penalized homosexuals is violation of the Article 8(1)(Right to respect for private life). By the same token, the Court found in *Norris v. Ireland* (1988), that the mere existence of criminal laws impugning homosexual acts amounted to an interference with the right to private life. The Court held that the fact that the applicant had, unlike the applicant in *Dudgeon v UK*, had not been questioned by police of subjected to an investigation, did not render the

case distinguishable. It reiterated that the possibility of a criminal prosecution, which held the applicant in constant fear, amounted to an interference with his right to private life. Since the Court was unable to see any reasonable justification for this legislation, it found a violation of article 8 ECHR. [29]

It seems that article 8 of the European Convention on Human Rights is also including to protect the rights of transgender people that is an aspect of private life. This issue is in order to recognize the new gender after a sex change. In case of *B v. France* in 1992, [30] the court ruled that the French government, has violated the paragraph 1 of Article 8 of the European Convention when refused to provide allow evidence of change to plaintiff person. In fact, in the case of *B. v. France*, the Court concluded for the first time that there had been a violation of Article 8 in a case concerning the recognition of transsexual people. *Ms. B*, a male-to-female transsexual person, complained of the refusal of the French authorities to amend the civil status register in accordance with her wishes.

Moreover, private life encompasses the network of relations that a person has established such as work, education, friendships, reliance on medical or therapeutic services. For example, The European Court of Human Rights stated in *Khan v. UK* decision of December 20, 2011, [31] that: “The Court recalls that, as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual’s social identity, it must be accepted that the totality of social ties between settled migrants such as the applicant and the community in which they are living constitutes part of the concept of “private life” within the meaning of Article 8. Indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8.”

3.1.2. Family Life

Family life is one of the aspects of privacy that is firstly protected by the Universal Declaration of Human Rights. Territory and sphere of family life, including issues related to respect the privacy of the family, the rights of parents in relation to children, marriage and its issues, adoption and

more. In the other words, the concept of family life goes beyond formal or traditional relationships. It covers engaged couples, cohabiting couples and same-sex couples. It also covers relationships with siblings, foster parents and foster children and grandparents and grandchildren.

Article 8 of the European Convention on Human Rights, has recognized the right to respect family life of people. European Court of Human Rights concerning the violation of the right to respect private life, with issues such as changing the name of the person for religious purposes, forbidding homosexuality as considered one of the most severe form of privacy, the expulsion of land which led to separate one from the other family members and similar issues.

Nowadays, family relationships are considered beyond formal relationships and legitimate arrangements. For example, *Schalk and Kopf v. Austria* is a case decided in 2010 by the European Court of Human Rights in which it was clarified that the European Convention on Human Rights does not oblige member states to legislate for or legally recognize same-sex marriages. The Court, for the first time, has accepted homosexual relationships as a form of "family life". [32]

The case concerned the complaint by a same-sex couple that they were not allowed to contract marriage and did not have any other possibility to have their relationship recognized by law before the entry into force of the Registered Partnership Act in Austria in January 2010. In its Chamber judgment of 24 June 2010, the Court found that Article 12 of the Convention (right to marry) did not impose an obligation on the Austrian Government to grant a same-sex couple access to marriage. It therefore held that there had been no violation of that Article. The Court also found that there had been no violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life).

Homosexual relationships with each other is not recognized as family life, in accordance with principles of family support based on paragraph 1 of Article 8, although it can be protected according to the principles of private life. In the case of *X v. British* in 1997, the court ruled that the right to protect of family life highlighted in the paragraph 1 of Article 8, does not include a gay couple life. [33]

3.1.3. Home

Home is a place which a person selects it for living. There is no difference if he lives there completely or lives there temporarily and returns home again. It also does not matter who is the owner is not the owner. In other words, a home is not just one's current residence, but can also include a holiday home, business premises, caravans and homes built in contravention of applicable town planning regulations. More recently, "home" has been described as 'the place, the physically defined area, where private and family life develops. This concept of right to respect for home, was considered in the case of *Moreno Gomez v Spain* in 2004. [34] According to the ECtHR in *Moreno Gomez* this shows that the right to respect of the home is not confined to concrete or physical interferences, such as unauthorized entry into a person's home, but also includes those matters that are not concrete or physical, such as noise, emissions, smells or other forms of interference. The Court in *Moreno Gómez* after mentioning the above cases, also referred to what was held in the *Hatton* case, that a serious interference may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home. [35]

The concept of life in home and private life may be overlapping and sometimes it is difficult to distinguish between these two concepts. In the case of *Niemietz v. Federal Republic of Germany* that was earlier mentioned in part of "private life", the court has also extended the concept of privacy to some workplaces. The court protected a case which office of a lawyer had been inspected by Police because it was included by privacy. Lawyer's office was protected because the court accepted private life is not one dimension but it consists of home and also office of lawyer in other place and time and any undue inspection and assault will be as violation of privacy.

3.1.4. Correspondences

The right of respecting correspondences and communications of people means that people can relate each other without interfering by public authority and others. The concept of correspondence covers communication by letter, telephone, fax or email. In other words, correspondence includes postal correspondence,

telephone calls, emails and text messages. Examples of interference with correspondence include opening, reading, censoring or deleting correspondence.

The European Court of Human Rights has made several pronouncements on the collection and use of data and surveillance information and their impact on the right to privacy. Prisoners have brought the majority of cases alleging interference with correspondence before the European Court. In the case of *Campbell and Fell v. UK*, [36] the applicant complained that correspondence with his lawyer was opened and read by prison authorities.

The Court concluded that there was no pressing social need that warranted the interference and established that the right to uncensored correspondence with one's lawyer is in principle privileged under Article 8.

Only in exceptional circumstances may correspondence between prisoner and lawyer be read, when there is reasonable cause to believe that the content may threaten the safety of others or prison security or is of criminal nature. Correspondence of a non-legal nature may in some instances be censored, e.g. when it refers to other prisoners or illegal activities taking place in the prison. In case of *Schonenberger and Durmaz v. Switzerland*, [37] the Court established that preventing a prisoner from receiving a letter may constitute an interference with his right to correspondence.

The European Court of Human Rights considers telephone conversations to fall under the concept of correspondence protected under Article 8. Telephone tapping constitutes a serious interference with the right to privacy and must be subject to precise laws. In the case of *Kopp v. Switzerland*, [38] the applicant's phone was tapped in relation to a criminal investigation against him. The Court found a violation of the right to privacy, as there were no clear laws on the procedure for distinguishing between privileged (lawyer/client) information and other matters. Similarly, both France and the United Kingdom have been found to have violated the right to privacy in relation to telephone tapping as the rules governing the discretion conferred on public authorities to carry out telephone surveillance were considered unclear. [39]

3.2. Article 8 Paragraph 2 ECHR

Article 8 is a qualified right, so in certain circumstances public authorities can interfere with the private and family life of an individual. These circumstances are set out in Article 8(2). Such interference must be proportionate, in accordance with law and necessary to protect national security, public safety or the economic wellbeing of the country; to prevent disorder or crime, protect health or morals, or to protect the rights and freedoms of others. In other words, paragraph 2 of Article 8 of the European Convention on Human Rights sought to express exceptions to the principle of privacy protection that is listed in the paragraph 1 of this article. In the paragraph 2 of this article has been stated: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The burden is on the state to justify an interference with an Article 8(1) right. This means that the state must show that the interference falls within one of the exceptions in Article 8(2), and that it is in accordance with the law and necessary in a democratic society. This requires the state to demonstrate that the interference corresponds to a ‘pressing social need’ and that it is ‘proportionate to the legitimate aim being pursued’. A state will find it harder to justify an interference which concerns a more intimate aspect of a person’s private life.

Once the European Court is satisfied with the legality of the interference, it will examine the legitimacy of the aim pursued. The aims listed in paragraph 2 form part of a closed list. It has happened, however, that the Court has taken into consideration objectives different from those explicitly elicited. In case of *Nyanzi v. the UK* in 2008 [40] the Court was satisfied that the maintenance and enforcement of immigration controls were a legitimate justification for the removal of the claimant from the United Kingdom to Uganda. Despite exceptions, however, the wording of the Convention appears to be comprehensive of the main interests potentially at stake, each of which is couched in broad terms.

They are encompassed by all qualified rights, with the sole exceptions of the economic well-being of the country. In procedural terms, it is for the respondent state to spell out the objective pursued with the interference: generally, the Court will be satisfied with it. This means, however, that the true battle is fought over the necessity and proportionality of the measures adopted to pursue such aims.

The legitimate aims, as listed in Article 8 and as interpreted by the Court, are:

3.2.1 National security

This concerns protecting the state from the risk of harm resulting from internal or external enemies’ conduct, such as subversion of the national government or violent attacks to the democratic system. This provision has been evoked in a handful of cases concerning secret collection of information about an individual or covert surveillance measures, allegedly necessary to counter threats stemming from alarming terrorist activities or sophisticated forms of espionage. The justification was not upheld in case of *Smith and Grady v. UK* in 2009 concerning the less favorable treatment of homosexual personnel of British armed forces. [41]

3.2.2 Public safety

This aim has rarely been invoked alone. Even when it is, the Court tends to rely at the same time on other coexistent grounds, such as national security or prevention of crime and disorder. Public safety was at the core of the Commission’s judgment in the case of *X and Y v. Switzerland*, [42] on the limitations to family life in prison. Likewise, in *Buckley* the Court accepted public safety as one of the justifications for the British authorities’ refusal to allow the claimant to live in her caravans on her land. Had the applicant been authorized to do so, there would have been a danger to road traffic, since access to her property was from a public highway.

3.2.3 Economic well-being of the country

The careful management of public finances has been a major concern in some cases involving local policies on housing and demography. For instance, this legitimate aim was raised by the respondent state in *Gillow v. the UK*: housing

limitations in Guernsey were justified by the urgent need to maintain the population within limits that could permit the balanced economic development of the area. [43]

In any case, the distinction between private and public economic interests is not always easy to draw. For instance, in *Hatton and others v. the UK* in 2003, the increased number of night flights was justified by the favorable general economic consequences deriving from a better transport system, but the collective interests were necessarily and deeply intertwined with those of the airlines. [44]

3.2.4 Prevention of disorder or crime

This aim is twofold as it encompasses two different concepts. That of disorder, one of the most invoked legitimate aims, seems to embrace alarming situations derived from individual or collective conducts threatening peaceful social life. In relation to the “crime” component of the aim, an important distinction has to be drawn between prevention and detection of crime. The measures taken by the state can be justified only in so far as they tend to avoid the commission of a crime. After the offence has been committed, the state has to rely on different justifications. However, the distinction may be a fine one in practice. For instance, in *S and Marper v. UK* in 2008, [45] the Court considered that a system of collection of DNA samples and fingerprints served the aim of preventing crime, albeit disproportionate in comparison to the aim it pursued.

In the case of criminal investigations the Court generally refuses to accept the legitimacy of police officers’ conduct when based on erroneous beliefs or evidently wrong premises, which could and should have been reasonably avoided with proper precautions. [46]

3.2.5 Protection of health or morals

As with the previous item, this aim too combines two autonomous interests. Health refers to the individual sphere, while the protection of morals has been usually interpreted as a synonym of sexual morality. It is clear from the case-law that morality can imply either ethical standards of a society as a whole or the sensitivity of specific social categories, such as schoolchildren. In *Dudgeon v. UK*, the Court addressed the criminalization of sexual activities between

consenting male adults in private, denying that the choice to criminalize such behavior could meet the need to preserve moral standards. It reached a different conclusion in *Laskey, Jaggard and Brown v. UK*: there the Court gave precedence to the protection of the health of those concerned, having regard to the possible bodily consequences of sadomasochistic activities. [47]

3.2.6 Protection of the rights or freedoms of others

This aim is couched in extremely broad terms and covers a wide range of situations. On many occasions it has resulted in an open clause thanks to which various – potentially not yet clearly defined – kinds of limitations have been justified. The *Chappell* case is illustrative, as the Court extended the derogations embodied in paragraph 2 to the protection of intellectual property rights. Protection of third parties’ rights and freedoms has also been successfully invoked to justify the decision to separate children from their parents. [48] In particular, the Court has adopted the “best interest of the child” formula as a key element for its judgments, even if the expression does not appear in Article 8.

3.2.7 The necessity requirement

The legality and legitimacy of the interference do not guarantee its compliance with Article’s 8 conditions of derogation. The measure will also have to pass the necessity test, which entails a multi-faceted analysis. The term “necessity” used in the Convention epitomizes the tension created by the collision between the individual and society. In assessing the necessity requirement, which inevitably implies a proportionality test, the Court might also extend its scrutiny beyond the boundaries of the right in question, extending its assessment to the democratic essence of the respondent state against a number of indicators such as pluralism, tolerance, broadmindedness, equality, liberty, right to fair trial, freedom of expression, assembly and religion. [49] As for what is meant by necessity, as usual the Court has not come out with a clear-cut definition: instead, it uses a composite and balanced notion, whereby necessity is not synonymous with indispensable, nor has it has the same flexible meaning of expressions such as reasonable, useful or desirable. [50]

A glance at the case-law of the Court shows that the more important the rights in the scheme of the Convention are, the more convincing the reasons required to justify a restriction in them will be. The passage of time is also a variable that has been considered in order to conclude for the continuity of the necessity. In case of the *Luordo v. Italy* in 2003, [51] the Court considered that after fourteen years, the balance between the general interest in payment of a bankrupt's creditor and the applicant's right to correspondence was upset and therefore there was no longer need to subject the correspondence sent to him to the review of the trustee in bankruptcy. Although in the subsidiary system established by the Convention Contracting States enjoy a variable margin of appreciation on the means to reach their objectives, ultimately it is for the Court to assess that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued and to the social need addressed.

3.2.8 Proportionality

The doctrine of proportionality is at the heart of the Court's investigation into the reasonableness of the restriction. Although the Court offers a margin of appreciation to the Member State and its institutions, the Court's main role is to ensure that the rights laid down in the Convention are not interfered with unnecessarily.

The principle of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective. [52] The different versions of the proportionality test appear to reflect various standards of review in different contexts.

As proportionality is an ingredient of the necessity requirement and of the margin of appreciation, any interference with Article 8 rights will have to be weighed on this ground: in principle it will not be considered disproportionate if it is restricted in its application and effect, and is duly attended by safeguards in national law so that the individual is not subject to arbitrary treatment. The case of *Ernst and others v. Belgium* in 2003, [53] an interesting example of a judgment based on the proportionality principle. The case concerned four journalists whose offices and homes had been searched in connection with the suspicion of disclosure to the press of confidential information by members of the judiciary. In relation to the

search warrants, the Court noted that they were drafted in wide terms ("search and seize any document or object that might assist the investigation") and gave no information about the investigation concerned, the premises to be searched or the objects to be seized. Furthermore, the applicants, who had not been accused of any offence, were not informed of the reasons for the searches, thus giving rise to searches which could not be considered proportionate to the legitimate aims.

In *Elli PoluhasDodsbo v. Sweden* in 2006, [54] the Court considered that, by refusing to allow the applicant's husband's ashes to be moved to her family's burial plot on the basis of the notion of "a peaceful rest" enshrined in the law, the national authorities had acted within the wide margin of appreciation afforded to them in balancing the interest of the individual against society's role in ensuring the sanctity of graves. The boundaries of the margin of appreciation depend very much on the interests at stake: the more they involve fundamental values and essential aspects of private life, the less the Court is likely to recognize wide discretion.

3.3. Freedom of expression and privacy

The right of "freedom of expression" and "freedom of information" or "The right to know" is one of the principles of human rights that is recognized and has been stressed in Article 10 of European Convention on Human Rights. Article 10 of the European Convention on Human Rights provides: "1- Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2- The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The right to freedom of expression is crucial in a democracy. Information and ideas help to inform political debate and are essential to public accountability and transparency in government. In case of the *Handyside v. UK*, [55] the European Court of Human Rights stated that freedom of expression constituted one of the essential foundations of a democratic society and one of the basic conditions for its progress and development of every person. It also made clear that Article 10 applied not only to information or ideas that are favorable and inoffensive but also to those that offend, shock or disturb the State or a sector of the population. However, where an interference with expression has concerned anti-democratic ideas and extreme right wing views contrary to the text and spirit of the Convention, the ECHR has varied between excluding the expression from the scope of Article 10 altogether or concluding that the interference is justified by Article 10(2).

The right to freedom of expression in Article 10 is not an absolute right. It is a qualified right which means that formalities, conditions, restrictions or penalties may be imposed on the exercise of this right if they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society. This latter condition requires the means employed to be necessary and proportionate to the aim pursued. The legitimate purposes for which freedom of expression can be limited are set out in Article 10(2) set out above.

Article 10 provides that the exercise of this freedom “since it carries with it duties and responsibilities” may be limited as long as the limitation: 1- is prescribed by law; 2- is necessary and proportionate; and 3- pursues a legitimate aim, namely: the interests of national security, territorial integrity or public safety; the prevention of disorder or crime; the protection of health or morals;

- the protection of the reputation or rights of others;
- preventing the disclosure of information received in confidence; or
- maintaining the authority and impartiality of the judiciary.

In considering questions of proportionality the potential for a ‘chilling effect’ on expression, the value of the particular form of expression, the

medium used for the expression (i.e. newspaper or television) will all be taken into account, along with other considerations. Article 10 also provides that it does not prevent the Government from requiring the licensing of broadcasting, television or cinema enterprises, although such restrictions must still be in accordance with law and be necessary and proportionate.

Freedom of expression and privacy are two sides of the same coin. Therefore, the European Court of Human Rights has found in several cases that privacy is an essential part of freedom of expression.

In case of the *Petrina v. Romania* in 2008, [56] the Court was asked to adjudicate a case where the domestic jurisdictions had given precedence to the freedom of expression over the applicant’s reputation. The complaint was brought by a politician whom a satirical journalist indicated as a collaborator of the former state security services, the Securitate. The allegations were taken further in articles that were published in one satirical newspaper. The domestic courts acquitted the journalists responsible for the publications on the grounds that their remarks had been “general and indeterminate”. The applicant’s civil claims were also dismissed. The Court considered that the subject of the debate in issue, that is the enactment of legislation making it possible to divulge the names of former Securitate collaborators, a subject which received considerable media coverage and was closely followed by the general public, was highly important for Romanian society. Collaboration by politicians with the Securitate was a highly sensitive social and moral issue in the Romanian historical context. Despite the satirical nature of the newspaper in which were published, however, the articles in question had been bound to offend the applicant, as there was no evidence that he had ever belonged to that organization (and in fact at a later stage evidence showed that he never collaborated with the Securitate). As the message contained in the articles was clear and direct, with no ironic or humorous note whatsoever, thus not mirroring the “measure of exaggeration” or “provocation” journalists are normally allowed in the context of press freedom, the Court considered that the article misrepresented reality without a factual basis. By accusing the applicant of having belonged to a group that used repression and terror to serve the old regime as a political police instrument, and in a

situation in which no legislative framework was in place to allow the public access to Securitate files, the Court considered that domestic jurisdictions had allowed the journalists to overstep the bounds of the acceptable.

Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly. [57]

In case of the *Axel Springer AG v. Germany* in 2012, [58] the European Court held that a ban imposed by a domestic court on the owner of a newspaper who wanted to publish an article on the arrest and conviction of a well-known actor violated Article 10 of the ECHR. The Court reiterated criteria that it had established in its case law when balancing the right to freedom of expression against the right to respect for private life: first, whether the event that the published article concerned was of general interest: the arrest and conviction of a person was a public judicial fact and therefore of public interest; second, whether the person concerned was a public figure: the person concerned was an actor sufficiently well known to qualify as a public figure; and third, how the information was obtained and whether it was reliable: the information had been provided by the public prosecutor's office and the accuracy of the information contained in both publications was not in dispute between the parties.

Therefore, the Court ruled that the publication restrictions imposed on the company had not been reasonably proportionate to the legitimate aim of protecting the applicant's private life. The Court concluded that there had been a violation of Article 10 of the ECHR.

Also, in case of the *Von Hannover v. Germany* in 2012, [59] the European Court found no violation of the right to respect for private life under Article

8 of the ECHR, when Princess Caroline of Monaco was refused an injunction against the publication of a photograph of her and her husband taken during a skiing holiday. The photograph was accompanied by an article reporting on, among other issues, Prince Rainier's poor health. The Court concluded that the domestic courts had carefully balanced the publishing companies' right to freedom of expression against the applicants' right to respect for their private life. The domestic courts' characterization of Prince Rainier's illness as an event of contemporary society could not be considered unreasonable and the Court was able to accept that the photograph, considered in light of the article, did at least to some degree contribute to a debate of general interest. The Court concluded that there had not been a violation of Article 8 of the ECHR.

4. Conclusions

Privacy as a concept in which a personality, dignity and physical integrity of the person, and the type a person uses to "be himself" and amplifying his senses under national law is considered in democratic societies. While the laws of countries try providing public safety and welfare of the community, decide to equalize violating factors of the privacy of individuals and restrict them.

Decision of the European Court of Human Rights in the field of privacy shows that the court protects privacy and dignity of human beings is going to create case-law and rules that obligates countries to execution of human rights.

Also, freedom of expression is a principle contained in various human rights documents. Its objective is to ensure that people are able to communicate and express opinions, in public, private, either written or spoken, without the interference of the state or others.

Both freedom of speech and privacy are fundamental rights, which are equally recognized in the Universal Declaration of Human Rights, by international conventions such as the European Convention on Human Rights, and in many national constitutions.

In the case-law of European Court of Human Rights, protecting privacy as a principle is accepted and the court tries to narrow

interpretation of exceptions of the right so that completely supports privacy right of people. The principle of freedom of expression and the right to know the court where the original conflict with the right to privacy regarding to principle of expression freedom and the right of society to know, the court has supported this right if is not against the privacy right of normal people. The majority of their decisions are in favor of the right to freedom of information and freedom newspapers. In other words, the Court has distinguished between the privacy of politicians and usual people regarding to conflict of Article 8 (right to privacy) and article 10 (freedom of expression and freedom of information) of the European Convention on Human Rights, thereby it has balanced between those mentioned rights that seems to have conflict with each other.

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Islamic Law and Privacy Protection

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Abstract

Sharia law recognizes human rights that are essential for all individuals. Basic human rights which are adopted by constitutions and universal conventions are implemented by Sharia law. The value of existence, privacy, and liberty is an essential part of Sharia law. Islamic law totally accepts the protection of the privacy of someone's house and personal life; and hence, respecting the individual's right to privacy is one of the fundamentals of Islamic Sharia law. This paper shows some examples which indicate how the protection of personal information is guaranteed in Islamic society and how the principles of protecting privacy in Sharia law can contribute to modern legal framework. In addition, this paper presents the direction of the EU with regard to privacy protection. The paper concludes that the EU legal framework with regard to protect personal information can be the foundation that might be adopted by many countries which specify Sharia law principles as a main source to their legislation.

1. Introduction

New technology makes the collection of personal data easier and sometimes, this occurs without the knowledge of data subject (an individual to whom personal data relates). This highlights the need to establish a privacy system which assures that the right of individuals to have their information adequately protected.

It is vital to examine the concept of privacy according to the principles of Sharia jurisprudence that is derived from the Quranic and the Sunnah (the teachings and practices of Prophet Muhammad) texts which are considered to be the main sources of law in Islam. This paper will explain some examples which show how Islam respects individual's right to privacy.

Then the paper will show how these principles can contribute to the development of the issue of privacy protection.

In addition, the concept of privacy in the EU with regard to protect personal data will be presented. Furthermore, some cases of the European courts that dealt with the issue of privacy protection will be presented.

2. The protection of privacy in Islamic Sharia Law

Sharia principles provide many examples that indicate the right to privacy according to Sharia law. For example, people should be protected from spying by others and that prohibition of snooping is linked to individuals as well as Islamic governments because Islamic administrations are prohibited from looking at individuals' secrets. [1] The Prophet Muhammad (PBUH) states that 'if you start prying into the secret affairs of the people, you will corrupt them, or at least drive them very near corruption'. [2] This is clearly respectful of an individuals' private life because it requires that others do not interfere into any person's private life as the prophet said that that will negatively affect those persons.

Ida Madiha Azmi describes the theory of privacy rights according to Sharia law as divided into two 'normative frameworks': the first one is a ban on the interference in someone's private life and the other is the orders and rules for maintaining secrets. [3] 'Included in the first category is the prohibition against espionage, trespass and eavesdropping. The second category includes keeping secrets of others in the context of a marital relationship, personal sins and information imparted to others in confidence'. [4] According to this notion, a great number of Muslim scholars view personal privacy as a basic individual rights. [5]

Sharia law texts ensure the protection for individuals' privacy as a valued human right, and also many scholars indicate that the sanctity of individuals' privacy is guaranteed in Islamic society. In the following discussion, some examples that explain the protection of privacy according to Sharia law will be provided. These examples are provided to show the importance of individuals' privacy in Islamic society, from protecting privacy at home to defending privacy according to the Islamic law of evidence.

2.1 Privacy of homes and correspondences

Sharia law in both the Quran and Sunnah texts respects all individuals' right to keep their own privacy under strong protection from interference from others, regarding the place where they live or the way they communicate. It is vital to this study to provide some evidence from the Quran and Sunnah texts to support such protection for persons in those specific circumstances. The prophet Muhammad said, regarding the protection of property, that 'verily your blood, your property are as sacred and inviolable as the sacredness of this day of yours, in this month of yours, in this town of yours'. [6] Allah says in the Quran:

O you who have believed, do not enter houses other than your own houses until you ascertain welcome and greet their inhabitants. That is best for you; perhaps you will be reminded. And if you do not find anyone therein, do not enter them until permission has been given you. And if it is said to you, "Go back," then go back; it is purer for you. And Allah is Knowing of what you do. [7]

Also, with regard to get permission before accessing private life, the Hadith (the term 'Hadith' refers to reports of statements or actions of the prophet Muhammad - PBUH- or of his tacit approval or criticism of something said or done in his presence) says that 'Asking for permission is allowed up to three times. If it is not granted, you must return'. [8]

The Quran evidently prohibits spying and negative assumption as such activities cause offense to the individual's right to privacy:

O you who have believed, avoid much [negative] assumption. Indeed, some assumption is sin. And do not spy or backbite each other. Would one of you like to eat the flesh of his brother when dead?

You would detest it. And fear Allah; indeed, Allah is Accepting of repentance and Merciful. [9]

It is apparent from the above text that the Quran recognizes the value of everyone's right to privacy by suppressing spying on each other. The Quran describes someone who spies on others as liking to eat the flesh of his dead brother. This description provides evidence of how strongly Sharia law considers the significance of privacy. 'The prohibition of spying also includes opening of personal letters and confidential correspondence'. [10] This principle is stipulated by the Hadith 'one who looks into the letter of his brother without his permission is like looking into the fire of Hell'. [11]

The Prophet (PBUH) said, 'if one's eye has entered a private place, the person her/himself has entered'. [12] According to the abovementioned sources from the noble Quran and the narration of Prophet Muhammad (PBUH), it is obvious that the sanctity of private life has been an important aspect of Islamic society and thus the protection of privacy is seen as a human right for every individual in the community. From the Quranic and prophetic principles about the conditions for entering houses, the principles of prior consent can be derived from the condition of asking permission to entering homes. It is obvious that Sharia law, in order to protect the sanctity of private life of individuals, requires individuals to get clear permission from the resident of a house before the potential visitors can enter that house.

2.2. Privacy and Islamic law of evidence

Another indication that privacy is deeply protected in Sharia is the principles of law of evidence. In order to protect privacy, the Sharia principles of evidence guarantee to every person the protection of his or her privacy in a variety of ways as can be seen in several texts and juristic analysis. [13]

The Prophet Mohammed turned his face away (two times) from a man who sought to admit that he committed adultery. Only subsequent to the man's insistence on making his admissions for the fourth time, did the Prophet examine the proposition that the person's psychological condition may have induced him to make his confession. Basically, after the exclusion of these factors, the penalty was applied. [14]

This is clear evidence that Sharia law respects the sanctity of the private life of individuals. People are not forced to give any information about themselves when they breach the obligations of Sharia law in their private place and indeed, they are encouraged not to do so. People in their private place are independent and the single condition that is applied to this personal independence is that the individual behaviour must not damage anyone else. [15]

Another example of the protection of privacy offered in the Islamic law of evidence is that Muslim scholars affirm whose unwillingness to permit the evidence of individuals when it is made for or against relatives.[16] The reason for that is because family members are those mainly familiar with the details of every other's private affairs. The suggestion is that even though scholars have not applied the term of 'privacy' to avoid such evidence, their approach has indeed been directed to the protection of an individual's privacy. [17]

It is evident from the abovementioned circumstances that the law of evidence according to Sharia law provided restrictive rules about accepting witness statements when there is a special relationship between individuals. Such a condition shows a good example of the protection of privacy in the Islamic community.

2.3 Restriction on government

During Islamic history, many indications from the practice of Islamic authorities provide evidence regarding the protection of individuals' privacy in an Islamic state. These indications suggest that even the head of the Islamic state should not be allowed to get access to private life of persons. The following story illustrates such restriction.

Omar Bin Khattab, the second caliph, while he was travelling at night in a city, heard a noise and cursing which was coming from a residential area. He then tried to discover the reason for these loud voices that were coming through houses, so Bin Khattab tried to peek into the house and said to a man who was in that residence: [18] you, the sinner, do you think that Allah will ignore your sins, as you're sinning against him?' The man replied, if I sinned once, you sinned three times. Allah has forbidden you to look into someone's fault, and you have done otherwise. Allah has commanded you to enter peoples' homes through

the front door, and you have intruded over the fence. And you have approached me without salutation, and Allah has commanded you not to enter into other peoples' homes without their permission, and without saying 'greetings' (Salam) when you enter their premises. [19] The Caliph left the man's house and asked him to repent of his sin. [20]

Maududi, an Islamic scholar, states that the Islamic principle of *Amr-bil-Marooif-wa-Nahi-anil Munkar*, to enjoin the good and to forbid the evil, does not permit the government to attack individual's private life.[21] Another clear example of restriction is the role of a Muhtasib. 'The Muhtasib was certainly in charge of weights and measures, but he was also in charge of standards generally - even standards of public behaviour. He was, moreover, backed by a body of inspectors who were empowered to make regular checks on all the shops in the city, and to arrest offenders'.[22] The *Muhtasib* 'is not allowed to investigate or invade people's privacy, even if they are committing sin in their privacy'.[23]

Ghazali, an Islamic jurist, said that the *Muhtasib* is not allowed to try to get information about a sin that is committed by an individual in his home behind closed doors. He also declares that 'a person carries his privacy with him, and the *Muhtasib* can judge only on prima facie appearance'. [24] These restrictions on government collection of personal information imply that Sharia takes the issue of privacy seriously.

2.4 Privacy and the Islamic Declaration of Human Rights

The strong protection of privacy in Sharia can be seen clearly in the *Islamic Declaration of Human Rights*. The Nineteenth Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development), held in Cairo, Arab Republic of Egypt 1990, introduced the *Cairo Declaration on Human Rights in Islam*. Article 18 of this Declaration stipulates that: a. Everyone shall have the right to live in security for himself, his religion, his dependents, his honour and his property. b. Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to his property and his relationships. It is not permitted to spy on him, to place him under surveillance or

to besmirch his good name. The State shall protect him from arbitrary interference. c. A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted. [25]

Prior to the *Cairo Declaration*, the *Universal Islamic Declaration of Human Rights* stipulates that every person is entitled to the protection of his privacy. [26]

It is evident that Islamic jurisprudence provides a real protection for the privacy of individuals in their homes, work places and communication. Thus, the general rule is that the protection of an individual's privacy is guaranteed under the Sharia law unless there is inconsistency between the right of privacy and the scope of Sharia law. [27]

To sum up, Maududi argues that no one has the right to spy on others, it is illegal according to by the Sharia law, 'whether spying is done because of suspicion; for causing harm, or for satisfying one's own curiosity'. [28]

2.5 Islamic principles and the Contribution to modern framework

Sharia law principles regarding the protection of personal data can contribute to the current debate about the level of protection that can be adopted. The next example can give clear indication about the contribution to modern legal system.

There are two approaches to gaining permission from a data subject (consumer or stakeholders) in order to process his or her information. Some may accept the opt-in choice which provides more power to individuals or others might prefer the opt-out choice.

Steven Salbu provides comprehensible clarification regarding opt-in and opt-out options: Specifically, both opt-in and opt-out policies provide a measure of consumer privacy protection, although the former are stronger than the latter. Opt-in policies prohibit businesses from collecting, using, or sharing personal information unless the subject of that information has expressly agreed to these activities. Under an opt-in policy, the default assumption is that every consumer expects privacy. The assumption can be rebutted only through voluntary and affirmative

consumer consent. Opt-out policies prohibit businesses from collecting, using, or sharing personal information only after a consumer has taken the initiative to inform the appropriate person or entity of objections to the relevant activities. In contrast to opt-in policies, the default assumption in opt-out policies is that a given consumer does not have privacy expectations regarding relevant activities, such as collecting, using, or sharing the data. To trigger the privacy protections that are automatic under an opt-in policy, a consumer must take the initiative and follow the prescribed steps. [29]

The principle that would be derived from the Quranic and prophetic texts is that prior consent is required before getting access to someone's private life as the way to protect the sanctity of personal life. Thus, opt-in formats might comply with Sharia law because opt-in options require the permission of individuals to process their personal information before using and collecting personal data.

It appears that the opt-in format complies with the principle of Sharia law as the latter asks permission before getting access to someone's property. Because the opt-out format would permit businesses to use and collect data and then each individual has the right to prevent further processing, this format may be considered as not complying with Sharia law as there is no prior permission given to access someone's private life.

Thus, the opt-in option might be preferred over the opt-out format as it would provide more protection for data subjects and encourage business to improve and provide clear procedures of opting-in.

3. Privacy protection in Europe

In 1981, the Council of Europe opened for signature and ratification a *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* which states that its objective and purpose is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him.[30]

The European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 8 stipulates that: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. [31]

Thus, the European attitude requires government to introduce rigorous rules to organize data transfers. [32] As a result of increasing concern with regard to data protection, the EU has adopted 'rights-based', privacy information statutes as models to protect an individual's data. [33] In 1998, the EU *Directive 95/46* came into force, which introduced the EU principle of the basic right of data privacy. [34] This *Directive* created a wide and comprehensive set of rules which provide strong protection for persons regarding the use of their private data. [35]

The practice in Europe demonstrates the value of establishing privacy law because in the EU, privacy is considered a basic 'democratic value', for which adequate protection should be offered by a legal framework. [36] Data protection in Europe is a significant area of established protection. The EU *Directive*, as a result, attempted to lay down high, comprehensive principles with regard to securing personal information. The EU *Directive* introduces an international form of an accurate law-making model for data protection law.[37] The data protection law should be precise, deliberate, and harmonious to achieve its aim, which is protecting personal data.[38]

According to the European model for privacy protection, the EU *Directive* ensures that a great number of rights are guaranteed such as the protection of civilians and the sensible treatment of personal information. Commonly, the EU data protection approach recognizes all individuals with their fundamental right to their data. [39] Thus, European citizens have the power to

organize the gathering and utilizing of their data. Firms or industry not only have to follow the process of the EU *Directive* which organizes the gaining, storing, using, and disclosing of individuals' data, but also they should ensure that individuals have the authority to access stored data and to correct errors.[40]

Some commentators state that the EU *Directive* identifies privacy as 'a fundamental human right and freedom that overrides commercial concerns over regulatory costs'. [41] European countries established complete data protection laws to enshrine a consumer rights-based, rather than market-based, approach to privacy. [42] Spiros Simitis said that when we speak of data protection within the European Union, we speak of the necessity to respect the fundamental rights of the citizens. Therefore, data protection may be a subject on which you can have different answers to the various problems, but it is not a subject you can bargain about. [43]

3.1 The European Court of Human Right

It is important to investigate how the court of human right deals with the issue of privacy protection of the individuals in Europe. The following cases will show how the protection of personal information is strong.

The European Court of Human Rights delivered judgment in *Copland v. United Kingdom* [2007] ECHR 253 found that the UK had infringed the Copland's right to respect for her personal life and correspondence under Article 8 of the European Convention on Human Rights. The fact in this case as follows:

'In 1991 the applicant was employed by Carmarthenshire College ("the College"). In 1995 the applicant became the personal assistant to the College Principal ("CP") and from the end of 1995 she was required to work closely with the newly appointed Deputy Principal ("DP").' At 7-8.

During her employment, the applicant's telephone, e-mail and internet usage were subjected to monitoring at the DP's instigation. According to the Government, this monitoring took place in order to ascertain whether the applicant was making excessive use of College facilities for personal purposes. The Government stated that the monitoring of telephone usage consisted of

analysis of the college telephone bills showing telephone numbers called, the dates and times of the calls and their length and cost. The applicant also believed that there had been detailed and comprehensive logging of the length of calls, the number of calls received and made and the telephone numbers of individuals calling her. She stated that on at least one occasion the DP became aware of the name of an individual with whom she had exchanged incoming and outgoing telephone calls. The Government submitted that the monitoring of telephone usage took place for a few months up to about 22 November 1999. The applicant contended that her telephone usage was monitored over a period of about 18 months until November 1999. The applicant's internet usage was also monitored by the DP. The Government accepted that this monitoring took the form of analysing the web sites visited, the times and dates of the visits to the web sites and their duration and that this monitoring took place from October to November 1999. The applicant did not comment on the manner in which her internet usage was monitored but submitted that it took place over a much longer period of time than the Government admit. At 10-11.

In another case, the case between *HALFORD v. THE UNITED KINGDOM* [1997] ECHR 32 Halford alleges that calls made from her home and her office telephones were intercepted by the Merseyside police for the purposes of obtaining information to use against her in the discrimination proceedings. Halford alleged that the interception of her telephone calls amounted to violations of Article 8 of the Convention (art. 8). The court holds that there has been a violation of Article 8 (art. 8) in relation to calls made on the applicant's office telephones.

It is clear from these cases that the protection of privacy in Europe is considered as a fundamental human right and the right to private life and secure communication is guaranteed by the European legal framework.

4. Conclusion

Sharia law requires respect for an individual's private life and this paper provides examples of many circumstances where Sharia law indicates the significance of individuals' privacy, whether in their homes or their correspondence. Sharia law recognizes the right to privacy and provides strong

protection for a person's private life which means that policy-makers in countries that their legal system is based on Islamic Sharia law can consider the right to privacy according to the international directions as long as those directions provide a strong protection to individuals' privacy and there are no contradictions of Sharia principles.

It seems that both Islamic principles and the European privacy framework consider the right to privacy as a fundamental human right. This foundation is encouraging any country that takes Sharia law as a main source to its legislation to adopt the approach of EU with regard to protect personal information as in general such approach will be compatible with Islamic Sharia law. Therefore, the principles of EU directive can be a starting point for enacting personal data protection law.

The EU directive stipulate particular principles that should be followed in order to deal with personal information, these principles include data quality principles; the rights of access, rectification and opposition; the purpose specification principle; the security principle; Enforcement Mechanisms and the Accountability Principle and Restrictions on onward transfers. Such these principles aim to provide a strong protection to individuals when their personal information is processed by big firms or governments. As these principles maintain personal information in secure places and any transfer of personal data will be done under the knowledge of data subject, therefore, these principles will be compatible with Sharia Principles of dealing with personal data. The principles of EU directive provide a practical method to secure and protect individuals' data and could be adopted by legal systems which based on Islamic Sharia law.

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Libya, Responsibility to Protect and UN Security Council Resolution 1973

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Abstract

On March 17th 2011, the United Nations Security Council passed resolution 1973 that paved the way for the NATO-led military operation in Libya. It was the first time a resolution authorized the use of force against a functioning government in order to protect civilians. It was also arguably the first time the concept of "responsibility to protect" (RtoP) was alluded to in the text of a resolution. This paper analyzes the provisions of the resolution as well as the declarations made by the representatives of the Security Council member states, and highlights the particular dynamics between member states that mostly supported the resolution and those who were opposed to it but did not vote against it. Through that analysis, it seeks to shed light on the factors that allowed such a resolution to be passed, with a special emphasis on the role, if any, RtoP played in it.

1. Introduction

United Nations Security Council Resolution 1973, passed on March 17th 2011, was the first resolution in which the Security Council authorized the use of military force for human protection purposes against a functioning government. As such, it represents an important development in international politics and the use of military force. In addition, it is the first time in an UNSC resolution that the concept of "Responsibility to Protect", or RTOP, was alluded to and may have been used to justify such a use of military action. Gareth Evans, one of the fathers of the concept of RTOP, stated that "Libya was a textbook case for the application of the "responsibility to protect" (RTOP) principle, and the U.N. Security Council resolutions in February and March, which paved the way for the military campaign, were textbook responses"[1]. However, given the controversy of the subject, it seems unlikely that RTOP was the driving force behind passing the resolution and other factors may have been more decisive.

In this essay, we will analyze the passing of this resolution and understand what factors made it possible, as well as the possible implications for future crises. First, we will briefly present the concept of RTOP, from its inception to its current form in the United Nations. We will then make a brief account of the events in Libya leading up to the passing of the resolution. Next, we will analyze how this resolution was passed and the various factors that made such a resolution possible and whether that means that the Security Council is finally ready to accept its responsibility in RTOP and to apply it consistently in the future.

2. The Responsibility to Protect concept

During the 90's, the main doctrine for responding to grave humanitarian crises or mass violations of human rights was the so-called 'humanitarian intervention', defined as "coercive action against a state to protect people within its borders from suffering grave harm" by Gareth Evans and Mohamed Sahnoun[2]. While this doctrine was applied most notably in Somalia by the United States in 1993 and in Kosovo in the late 90's, such interventions provoked wide outrage from the parties not involved. The first blame was that such interventions were not decided by the United Nations Security Council and were thus illegal from an international law perspective. The second criticism made to humanitarian intervention was that it violated the sacrosanct principle of non-intervention inherited from the peace of Westphalia. The United Nations Secretary General of the time, Kofi Annan, challenged political leaders and asked the question: "How should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity"[3].

The answer came from the International Commission of Intervention and State Sovereignty, or ICISS, in the report "The Responsibility to Protect" released in the end of 2001 with the

concept of 'Responsibility to Protect'. Basically, it puts forward 2 levels of responsibility. The first level of responsibility is "the primary responsibility for the protection of [a state's] people [which] lies with the state itself." [4] The second one addresses the case when the first level is failing or has failed: "where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect." [5] It also outlined 3 duties that should be accomplished. The first is the responsibility to prevent "both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk." [6] The next is a responsibility to react, requiring the state in trouble and the international community to respond to the situation when the first responsibility has failed. The last duty, after intervention, is a responsibility to rebuild, which requires "full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert." [7] To address the critics made to humanitarian intervention, RTOP, in principle, insists that prevention is the single most important component and military operation is the last ultimate resort and such operations should try to have the approval of the UN Security Council or other international or regional organizations [8].

The concept immediately received great attention and support and was formally adopted in the UN World Summit of 2005, although a bit modified and restricted to only 4 crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. The United Nations General Assembly has since then engaged in two debates to further refine the norm and 'decides to continue its consideration of the responsibility to protect' [9]. This has led to further clarification of the concept and a new 'three pillars approach' [10]. The first pillar deals with the protection responsibilities of the state: state should inculcate appropriate values and build institutions for protection of their own citizens. The second one is about international assistance and capacity-building: the international community must persuade states to apply pillar 1 and to build capacity by development assistance or providing UN or regional presence. The final and most controversial one has to do with timely and decisive response: pacific measures and coercive

use of force for cases where state does not uphold pillar 1.

3. UN Security Council Resolution 1973

3.1. Background and events in Libya

The Libyan crisis started in the wake of the revolutions in neighboring Tunisia and Egypt, in February 2011, when people started demonstrating in various cities across Libya and got reprimanded heavily. The first demonstrations happened in the eastern city of Benghazi, and were met by security forces using excessive and lethal force, causing numerous civilians to die.

The Organization of Islamic Cooperation [11] and the Peace and Security Council of the African Union [12] initially responded by both condemning the use of excessive force against civilians. On 22 February 2011 the UN High Commissioner for Human Rights, Navi Pillay, called for an immediate cessation of the human rights violations committed by Libyan authorities [13]. On the same day the Arab League decided to suspend Libya from the organization [14]. The League of Arab States later called on the Security Council to impose a no-fly zone over Libya [15] to prevent further loss of civilian lives. These responses came from states and organizations tied closest to Libya both territorially and politically, and gave the international community grounds for concern.

With the situation deteriorating so quickly, and following the Arab League's recommendation, the United Nations Security Council convened and passed resolution 1970 [16] on 26 February 2011. In it, the Council expressed "grave concern" at the situation in Libya and condemned the use of force against civilians. It also condemned the repression and violations of human rights, and attempts by the Libyan government to incite violence. It demanded an immediate end to the violence in Libya and for the government to address the "legitimate demands of the population". It urged the authorities to respect international humanitarian and human rights law, act with restraint, ensure the safety of foreign nationals and humanitarian supplies and lift restrictions placed on the media. The resolution also referred the situation to the Prosecutor of the International Criminal Court, who was to address the Council within two months following the adoption of Resolution 1970 and every six months thereafter on action taken, further deciding that

Libyan officials should fully co-operate with the Court. An arms embargo was also imposed, preventing weapons from being exported to or out of Libya as well as a travel ban and asset freeze on key individuals of Libyan regime.

3.2. Contents of the resolution

However, the government was still amassing the army close to the city of Benghazi and was preparing to assault it, with Gadhafi making inflammatory statements on national television. The League of Arab States called on the UN Security Council “to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States,” and to “cooperate and communicate with the Transitional National Council of Libya and to provide the Libyan people with urgent and continuing support as well as the necessary protection from the serious violations and grave crimes committed by the Libyan authorities, which have consequently lost their legitimacy.”[17] Subsequently, the Security Council then passed Resolution 1973 on 17 March 2011, submitted by France, Lebanon, the United Kingdom of Great Britain and Northern Ireland and the United States of America, based on the resolution of the League of Arab States. The resolution:

- demanded the immediate establishment of a ceasefire and a complete end to violence and all attacks against, and abuses of, civilians;
- imposed a no-fly zone over Libya;
- authorized all necessary means to protect civilians and civilian-populated areas, except for a "foreign occupation force";
- strengthened the arms embargo;
- imposed a ban on all Libyan-designated flights;
- imposed an asset freeze on assets owned by the Libyan authorities, and reaffirmed that such assets should be used for the benefit of the Libyan people;
- extended the travel ban and assets freeze of Resolution 1970 to additional individuals and Libyan entities;
- established a panel of experts to monitor and promote sanctions implementation.

3.3. Passing of resolution 1973

The resolution was passed with ten votes in favor (Bosnia and Herzegovina, Colombia, France, Gabon, Lebanon, Nigeria, Portugal, South Africa, the United Kingdom, and the United States), zero votes against and five abstentions (Brazil, China, Germany, India, and Russia). What might be surprising is how this resolution came to pass in the first place with the well-known frugidity of the Security Council in authorizing such actions. In order to understand that, we look at the statements issued by the representatives of each country in the Security Council on the day of the vote. The arguments used for justifying voting for the resolution or abstaining differ for each country but can be categorized in five broad categories: matters of principles, matters of practicality, matters of regional implications, matters of assessment and matters of procedure.

3.3.1. Matters of principle.

In terms of matters of principle, we can see two main arguments for supporting or abstaining on the resolution. First is the opposition to the use of force. Indeed, several members of the Security Council made it clear that they were against resorting to the use of force in this situation but the degree differs. Most notably, China and India were strongly opposed to any form of use of force. The representative from China said that his country was “always against the use of force in international relations”[18], while the Indian representative said that it is “totally unacceptable and must not be resorted to”[19]. On the other hand, the representative of Russia was more wary of the possibility of excessive use of force and the consequences it might have on the conflict and the region. The position of Lebanon on this argument is perhaps the most intriguing in that its representative stated that it “would never advocate the use of force or support war in any part of the world”[20], but that it supported the resolution with the hope that it might serve as a deterrent to the Libyan authorities to force them to stop their operations. This position is possibly due to the fact that Lebanon was not only representing itself but also the position of the League of Arab States that supported the establishment of a no-fly zone and of which Lebanon is a member. On the other side of the fence, the positions of Nigeria and South Africa are much softer on this issue. Indeed, they are not against the use of force *per se* but against any

unilateral use of force or occupation force. In supporting the resolution, they emphasized the provisions of the resolution requiring a multilateral and joined effort and explicitly excluding any foreign occupation force. This position clearly reflects the position of many African countries that are suspicious of military operations reminiscent of the humanitarian intervention doctrine. By supporting the resolution, they guarantee that any military operation would have to be multilateral with the Security Council still informed.

The second argument has to do with the legitimacy, or lack thereof, of the Gadhafi regime. Indeed, some states affirmed that the Libyan authorities had lost all legitimacy and were no longer representative of the Libyan people. This was notably the position of the representative of the United Kingdom, Lebanon, Germany and Portugal. While all member states condemned the repression and aggressions against civilians, these four states made it clear that the Libyan regime of the time could no longer be seen as the representative of the Libyan people and thus there would have to be a political transition to a new regime. It is interesting to note that though Germany also adhered to this argument, it still abstained in the vote, showing that this issue was of less importance in its view.

3.3.2. Matters of practicality.

There were two main arguments dealing with issues of practicality. The first dealt with the fact that the previous resolution 1970 was not sufficient to stop the conflict. Member states deplored the fact that the Libyan authorities did not comply with its provisions and that the fighting was still ongoing. However, there were two opposing views in this matter. On the one hand, there were those who argued that since the previous resolution was not followed by the Gadhafi regime, the new resolution would have to be stricter with means to enforce its provisions. As explained by the representative of Colombia, “even more important than the establishment of a no-fly zone is its enforcement... [and] without this authorization, the no-fly zone would be illusory”, estimating that “the Libyan authorities had sufficient time to comply with resolution 1970”[21]. This view was shared mostly by France, the United Kingdom, the United States, Portugal and Lebanon. On the other hand, countries like Russia, India and Germany, though recognizing that the Libyan regime did not comply with the previous resolution, were just in favor of

another resolution without the resort to the use of force. However, they gave no clue to how such measures could be enforced without the possibility of use of force. Their position seems to do more with matters of principle or politics rather than with the practicality of a new resolution.

The second argument about practicality has to do with how the military operation would go. In this issue, the roles are reversed and we see Russia, India and Germany questioning the practicality of such a military operation and the risks associated with it while the opposing member states avoid any detail about it. India questioned the implementation of the resolution, pointing that they “do not have clarity about details of enforcement measures, including who will participate and with what assets, and how these measures will exactly be carried out”[22] while Russia received no answer regarding “how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be”[23]. On the other side, France and the United Kingdom simply reaffirmed their readiness to act to enforce the provisions of the resolution, with the United Kingdom clearly citing NATO as a participant in the military operation.

3.3.3. Matters of regional implications

The Security Council also discussed the regional implications of an involvement and military participation in Libya in the context of what came to be known as the Arab Spring. Indeed, many countries recognized that important changes were rocking the Arab world and that it could have a big impact on the region in the future. For France, it was “one of the great revolutions that change the course of history”[24] and Germany recognized that “North Africa is undergoing major political changes”[25]. However, there was division in how to deal with the particular situation in Libya in that regional context. For France, the United Kingdom and the United States, that meant supporting the opponents of the Gadhafi regime in what they saw as their legitimate demands. France was particularly vehement in its statement, saying that “we must not give free rein to warmongers; we must not abandon civilian populations, the victims of brutal repression, to their fate; we must not allow the rule of law and international morality to be trampled underfoot”[26] and the United States insisted that it “stands with the Libyan people in support of their universal rights”[27]. South Africa

echoed this sentiment, but to a lesser degree, stressing the necessity for any solution to the conflict to “also preserve the unity, sovereignty and territorial integrity of Libya”[28] and Germany stressed “the opportunities for political, social and economic transformation”[29] of such a movement. But for Brazil, it was the “spontaneous, home-grown nature” of the movement that was the most important and it feared that using force “could change that narrative in ways that may have serious repercussions for the situation in Libya and beyond”[30]. Russia was also wary of the possible implications any military operation would have on the whole region.

3.3.4. Matters of assessment.

Another point of discussion between the representatives had to do with how to assess the need for a military operation. There was still an ongoing mission of the Special Envoy of the Secretary General to Libya taking place at the time[31] and some member states such as Russia and India were awaiting his report of the situation and his progress. At the same time, the African Union was also planning another round of discussion scheduled to start on 19 March 2011 with the Gaddafi regime and the rebels [32]. Russia and China were particularly opposed to the possibility of the use of force and pushed strongly for a political and peaceful settlement of the conflict. Russia recalled that it had presented an earlier draft of the resolution backing the efforts of the Special Envoy and the need for a peaceful settlement, but was rejected because “the passion of some Council members for methods involving force prevailed”[33]. Both India and Russia also stressed the importance of the involvement of regional organizations in trying to find a peaceful solution, commending the efforts of the African Union in particular and giving their support to their initiative. Russia also feared the possibility of states using force to further their own agenda rather than just for protecting the civilians while a peaceful and negotiated solution was being researched but said that “during negotiations on the draft, statements were heard claiming an absence of any such intentions” and that it “take[s] note of these”[34]. Even some member states who voted for the resolution were hopeful for a peaceful solution to the conflict. As mentioned earlier, Lebanon hoped the threat of the use of force would deter the Libyan regime from attacking the civilians anymore. As members of the African Union, Nigeria and South

Africa also expressed strong hope in political and peaceful resolution of the conflict, with Nigeria reminding that “the crisis is one of regional import”[35] and South Africa “the decision of the African Union Peace and Security Council to dispatch an ad hoc high-level committee to Libya to intensify efforts towards finding a lasting political solution to the crisis in that country”[36]. It is interesting to note that France, the United Kingdom, the United States, Columbia and Bosnia and Herzegovina did not cite any foreseeable political process in their statements, hinting that they were not expecting any possible political or potentially peaceful outcome of the situation.

3.3.5. Matters of procedure

Matters of procedure were also addressed. Indeed, some countries expressed regret over the way the resolution was passed. China’s representative raised procedural issues by noting that many of China’s questions during the “consultation on resolution 1973 . . . failed to be clarified or answered.” Consequently, China had “serious difficulty with parts of the resolution”[37] but due to the special circumstances of the situation on the ground, and the position of the Arab League on the establishment of a non-fly zone, it chose to abstain rather than to vote against. Brazil was also surprised and deplored the fact that the provisions of the resolution went beyond what the League of Arab States had initially asked for. Similarly, Russia said “the draft was morphing before our very eyes, transcending the initial concept as stated by the League of Arab States”[38]. India strongly criticized the lack of a report from the Secretary General Special Envoy to Libya and the fact of having to vote on a resolution without “an objective analysis of the situation on the ground”[39].

Despite all these issues, the resolution was still passed. On the outside, there seems to be no issues on the lawfulness of the resolution itself, but its contents touches upon important legal issues.

4. Legal issues of the measures taken

Because UNSC Resolution 1973 was passed by the Security Council under Chapter VII of the Charter, the resolution is arguably lawful. However, we need to check if the Council overstepped its prerogatives by asking: was the “threat to international peace and security” established, and was the non-compliance by the government of

Libya to UNSC Resolution 1970 ground enough to justify the use of force?

4.1. Threat to international peace and security?

By the time resolution 1973 was passed, a number of civilians were already dead, and by all accounts the situation was deteriorating. There are no definitive estimates of the number of civilian casualties at the time. According to Luis Moreno-Ocampo, the prosecutor of the ICC, 500 to 700 died from shootings in February, before full-fledged fighting broke out between the government and hastily assembled rebel forces[40]. Italian Minister of Foreign Affairs Franco Frattini stated that according to his information 1,000 people had died by 23 February 2011[41]. Article 39 of the Charter of the United Nations explains when non-military measures and use of force can be applied by the Security Council on states:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." [42]

Both resolutions 1970 and 1973 were adopted under Chapter VII of the Charter as a response to a "threat to the peace." No explicit reason is cited for the application of Art.39, however such reasons can be inferred from the wording of the resolutions:

- "plight of refugees and foreign workers forced to flee the violence in the Libyan Arab Jamahiriya"
- "condemning the violence and use of force against civilians"
- "considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity"
- "gross and systematic violation of human rights"
- "rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government"
- "the Libyan authorities responsibility to protect its population"

It is possible to argue that refugees could threaten the peace in neighboring states if large numbers

were to follow. However, the resolution does not give any clear indication to the fact that they are dealing with any significant number of refugees. Most other possible reasons are drawn from grave breaches of human rights in Libya along with a possibility of such actions constituting crimes against humanity as defined through the Rome Statute of the International Criminal Court. The last potential reason is a possible direct reference to the RTOP doctrine and the "Libyan authorities responsibility to protect its population". The Libyan authorities having failed their duty, the RTOP doctrine says that this duty therefore falls upon the international community.

Though no clear and direct explanation is given for determining that the situation in Libya constitutes a "threat to peace" as was stated in resolution 1973, we can assume that the Security Council reached this conclusion by the non-compliance of Libya with its previous resolution 1970 and the deterioration of the situation. Each reason viewed separately does not seem to constitute a "threat to peace", however, when taken all together, they can be considered to constitute a "threat to peace" and this seems to be the way the Security Council determined it.

4.2. Non-compliance to resolution and use of force

However, is the non-compliance with previous UNSC Resolution 1970 ground enough to authorize use of force? There is a precedent to this situation: UNSC Resolution 678 (1990) about Iraq in the context of the first Gulf War. The resolution "demands that Iraq comply fully with resolution 660 (1990) and all subsequent relevant resolutions, and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of goodwill, to do so". It also "authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area".

We can draw a parallel between the situation of Iraq and that of Libya. In both cases, a state did not comply with the provisions of a Security Council resolution, and another resolution was passed with

the possibility of use of force in order to enforce the provisions of the first one and the new provisions. The context of the two situations is nonetheless different: in Iraq, it was about a clear military aggression of Iraq against another sovereign state while in Libya, it was in the context of civil insurgency. However, one of the goals of UNSC Resolution 678 was to “uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”[43]. In this case, the threat to international peace and security was deemed important enough because a previous resolution was not implemented, and thus the use of force could be authorized and used to bring about the restoration of international peace and security. In the case of Libya, it was also found that the situation constituted a threat to international peace and security, and as in the case of Iraq, a resolution was passed and was not followed by the state in question.

It could be argued that there needs to be a stronger requirement than simply not observing a UNSC resolution in order to authorize use of force and that it was authorized in Iraq because it was a clear act of aggression. But in the case of Libya, not only did the government not implement the provisions set forth by resolution 1970 but also made numerous breaches to humanitarian law, such as the deliberate targeting of civilians and the refusal to provide humanitarian access. Given the severity of these breaches, and the fact that they could amount to crimes against humanity, in addition to the non-compliance with resolution 1970, the Security Council estimated the threat to peace strong enough to justify the possibility of using force to implement the previous resolution and restore the peace. Considering the previous points, it doesn't seem that the UNSC overstepped its prerogatives in passing resolution 1973.

5. Legitimacy of the measures take

5.1. Necessity of assessing legitimacy

As can be seen from the previous sections, while the resolution was passed with no votes against, the authorization of the use of force was still controversial. Keeping in mind the example of Kosovo, the intervening states sought to defend their action by focusing on the fact that though the military action was not sanctioned by a Security Council resolution, they still went on ahead because they deemed it legitimate and not unlawful.

This view was later challenged in the Kosovo Report[44] which agreed on the legitimacy of the actions but not on their lawfulness. Since RTOP was conceived as solution to crises such as Kosovo, we might be tempted to assess both the lawfulness and the legitimacy of actions done in similar situations. However, we need to consider whether we actually need to do that in this particular case. Indeed, we here have a United Nations Security Council resolution that was passed under Chapter VII of the Charter. It can easily be argued that since the resolution was passed and is legally binding, it is deemed legitimate, and there is a tradition in legal studies of conceiving legitimacy as being equivalent to legality[45]. However, this is a reductionist view of the concept of legitimacy that ignores other aspects pointed by other scholars. According to Hurrell, “legitimacy is about providing persuasive reasons as to why a course of action, a rule, or a political order is right and appropriate”[46]. Thus, the process of debating, justifying and giving reasons is an integral part of legitimacy. Thomas Franck also points out that since there is no recognizable sovereign in the realm of international relations, adherence to the rules comes from voluntary compliance by the members of the community of states. He defines legitimacy as “a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process”[47]. Basically, legitimacy is the force that exerts a pull toward voluntary compliance to a particular rule. As discussed previously, the military operation in Libya is lawful. But the fact that the resolution was lawful and legally binding should not excuse us from questioning the legitimacy of the actions decided precisely because it is the degree of legitimacy of these actions that favors or hinders compliance. Furthermore, because RTOP as a concept and norm is still changing and has yet to be fully accepted or implemented, it is thus even more necessary to discuss whether a military operation justified by the language of RTOP is both legitimate and lawful. As is with almost all cases of use of force, any such actions are highly controversial, and even more when they are perceived as illegitimate. It is thus important to check if such actions are considered legitimate or not.

5.2. Legitimacy criteria

The original ICISS report listed a number of criteria to legitimize reaction against a government who was not upholding its responsibility to protect its citizens: just cause, right authority, right intention, last resort, proportional means and reasonable prospects. Although these criteria were not adopted in the Outcome Document, they still give a good basis to assess if the actions taken could be considered as legitimate and we use them here in the context of the Libyan case.

5.2.1. Just cause criterion

The first is the just cause criterion. The commission stated this criteria is met when actions to be taken are done to stop or avert “large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape”[48]. We also have further description of the responsibility of countries in the UN 2005 World Summit Outcome Document. Paragraph 138 of the 2005 Outcome Document states that:

“each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement.”[49]

In the case of the Libyan government, there have been reports of repression of demonstrations and killings and even use of helicopters and military aeroplanes against civilians[50] as well as public threats on national television by Gadhafi urging his supporters to go attack the “cockroaches” against him[51]. These actions could amount to crimes against humanity due to their wide spread. Thus, it seems the Libyan government did not uphold its responsibility to protect its citizens.

Paragraph 139 of the World Summit 2005 Outcome Document states that:

“the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and

crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”[52]

Following this paragraph, there needs to be a failure in peaceful means to settle the situation in order to be able to military action. In the case of Libya, the UNSC, through its resolution 1970, tried to stop the fighting and demanded an immediate end of violence while the African Union offered to mediate between Gadhafi and the rebels. However, the Libyan authorities refused the mediation offer and did not comply with the provisions of resolution 1970, with repression continuing and government troops advancing on rebel-held towns and cities.

In the case of Resolution 1973, while “expressing grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties” and “[c]onsidering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity”, it “[d]emands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians”. Libya had manifestly failed to uphold its responsibility to protect its citizens. The resolution passes the just cause criteria.

5.2.2. Right authority criterion

The second criterion is the right authority criteria. The ICISS report states “there is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes”[53]. As resolution 1973 was passed in the United Nations Security Council, it thus passes the right authority criteria. Because of the current status of RTOP as a norm adopted by the UN system where it is explicitly required to have an authorization from the Security Council in order to authorize military action, it seems that this criterion is no longer relevant to the issue.

5.2.3. Right intention criterion

The third is the right intention criterion. The report states “the primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned”[54]. This point was clearly challenged in the remarks of the representative of Russia[55]. Indeed, the Russian delegate expressed strong concerns over the fact that some countries insisted on having the possibility of using force. Most notably, France and the United Kingdom were the front leaders in arguing for a military operation, and it has since emerged that France’s ex-president Nicolas Sarkozy might have had motives for favoring a military solution against Gaddhafi[56]. However, all member states condemned the use of force of the Gaddhafi regime against its population and acknowledged the fact that Libya did not comply with the previous resolution. Even Germany, who abstained in the vote, clearly stated it did not see the Gaddhafi regime as legitimate anymore. In the case of France, the United Kingdom and the United States, it seems it was regime change they were pushing towards: as seen in the statements of their representatives, they did not mention any potential political solution to the conflict. This is in opposition with the position of African countries and Lebanon who condemned the violence but emphasized the need for such a political settlement. But there is a difference between saying a regime is no longer legitimate and actively pushing for a regime change. Could regime change be considered a right intention? On its own, it clearly isn’t. However, when coupled with a regime that is actively attacking its own citizens and possibly committing war crimes, such a change, along with some safeguards, may be considered to be done with a right intention. In this case, although some supporters of the resolution were hoping for regime change, other supporters trying to achieve a political settlement and explicitly forbade in the resolution “a foreign occupation force of any form on any part of Libyan territory”[57], imposing limits on what could be done by a military force even in the case of a regime change. We consider the criterion passed.

5.2.4. Last resort criterion

The fourth one is the last resort criterion. As written in the ICISS report, “military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded”[58]. From a strictly theoretical point of view, one could question the need for this particular criterion, especially when dealing with the Security Council. Indeed, the Security Council has full discretionary powers to decide how to respond to a threat to international peace and security: it could decide to authorize a military action without having to try to have a peaceful resolution of the crisis. However, doing so would leave room for suspicions of abuse of power and would undermine the standing of that organ. As such, the last resort criterion is necessary as a shield against potential abuses and needs to be taken into account when assessing the legitimacy of a course of action.

As mentioned before, the Libyan government didn’t comply with the previous resolution calling for immediate ceasefire, refused mediation plans by AU as well as prepared an imminent attack on the city of Benghazi. However, there was still an ongoing mission of the Special Envoy of the Secretary General to Libya taking place at the time[59] and some member states such as Russia and India were awaiting his report of the situation and his progress. At the same time, the African Union was also planning another round of discussion scheduled to start on 19 March 2011 with the Gaddhafi regime and the rebels[60]. The fact that these initiatives were still ongoing and that some member states emphasized their support and expectations to them could be seen as the proof that not all peaceful means were exhausted. It could be argued that the Security Council should have waited for the report of the Special envoy and the outcome of the efforts of the African Union before passing a resolution authorizing the use of force because the last resort criterion was not met at the time.

However, as the ICISS mentions, non-military option should be explored insofar as there is reasonable grounds for believing the options would succeed. It is even made clearer in the wording of the Outcome Document where the international community would respond more forcefully “should

peaceful means be inadequate”. Given the failure of previous attempts to bring Gadhafi and his opponents to the negotiation table and the deterioration of the situation on the ground, it seems that previous attempts proved inadequate to resolve the situation and it is likely a lot more blood would have been shed while waiting for such efforts to produce a solution. While doing so would ensure the last resort criteria, such a solution would not be an effective solution in that instead of stopping the violence, it would have allowed it to continue under the justification of favoring a hypothetical peaceful settlement. Because of that, it would be better to assess the last resort criteria by looking at every effective measure that can stop the violence immediately, after non-military option proved inadequate, rather than every potential measures taken to resolve the crisis peacefully while allowing violence to continue on the ground.

Effective peaceful measures were taken in UNSC Resolution 1970 to stop the violence but the government of Libya did not comply with it. Furthermore, the fact that there was the threat of an imminent attack by regime forces on the rebel stronghold of Benghazi and the public threats of Gadhafi showed the necessity for a quick and strong response if the international community wanted to avoid a potential bloodbath. Because of the fact that effective peaceful measures were taken before and not respected and the lack of further effective options to bring about a peaceful resolution of the crisis, we can say that the resolution was passed as a last resort, in order to protect population in imminent danger.

5.2.5. Proportional means criterion

The next criterion is the proportional means criterion. Basically, “the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective”[61]. In this case, the resolution explicitly excluded “a foreign occupation force of any form on any part of Libyan territory” but allowed member states “to take all necessary measures, ... to protect civilians and civilian populated areas under threat of attack”. The use of the expression “all necessary measures” implies that proportionality was not considered for the military operation and non-proportional means could be used to achieve the goals of the resolution. However, the term necessity is often used in conjunction with proportionality in just war theory.

Because of that, another reading of the resolution could focus on the term “necessary”, in that necessity cannot be taken without proportionality. Such an interpretation would pass the proportional means criteria, in that though there is no allusion to proportionality, the use of necessity goes hand in hand with proportionality and thus there is no need to mention it. However, given the controversial nature of military operations, a stricter assessment and interpretation of the terms of the resolution would be better to assess its legitimacy. Thus, because of the use of the term “all” and the lack of explicit reference to any notion of proportionality, we consider the proportional means criterion not met.

5.2.6. Reasonable prospects criterion

The last criterion is the reasonable prospects criterion. It means that “there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction”. The abstention of Germany was justified by its view that this criterion would not be met. Indeed, it feared large-scale loss of life and making the situation a protracted conflict and announced it would not contribute its forces for the military operations. Other states such as Russia and India also questioned this criterion but on more technical and practical terms: how would the no-fly zone be enforced, what assets would be used, what rules of engagement would a coalition adopt. The fact that these great nations emit doubt as to the feasibility and chance of success of the military operation casts doubts on the existence of reasonable prospects. But as resolution 1973 “authorizes Member States ... acting nationally or through regional organizations or arrangements” and “requests the Member States of the League of Arab States to cooperate with other Member States in the implementation of paragraph 4” (protection of civilians)” and Libya not being any major military power, the chances of success of the military operation seemed high enough to pass this criterion.

5.3. Legitimacy of the resolution

In the ICISS report, the commission’s position was that all criteria should be met if a military operation was to be considered legitimate. However, it is the author’s view that there is no need for all the

criteria to be met in order to consider this authorization of use of force legitimate. Indeed, the fact that the resolution was passed by the Security Council in and of itself is a strong indicator of the legitimacy of its provisions. If there was a strongly contentious point, it seems very unlikely the resolution could have been passed at all. By having only abstentions and no votes against the resolution, the member states and the international community give credence to the legitimacy of the actions decided. While it can be argued that some of the criteria were not met, and this was clearly hinted at in the declarations of some member states, they eventually abstained rather than voting against because of the special circumstances on the terrain, upholding their commitment to respond in a “timely and decisive manner”. As noted by Franck, “a rule’s degree of beingness is infinitely variable, depending on the degree to which those to whom it is addressed believe themselves obligated by it.”[62] Thus, there is no such thing as absolute legitimacy: it is always a matter of degree. The fact that the resolution passed a number of criteria serves only to support the view that it has a high degree of legitimacy. Although the proportional means criterion could not be satisfied, the fact that all other criteria were respected gives us reasonable grounds to view the actions authorized by resolution 1973 as legitimate indeed.

6. Factors supporting the resolution

As we can see from the analysis of the statements of members of the Security Council, of the lawfulness and the legitimacy of the resolution, there were different reasons for supporting the resolution. A first set of reasons has to do with deterioration of the situation in Libya and the non-compliance of the Libyan authorities with the provisions of resolution 1970, most notably the establishment of a cease-fire and the immediate cessation of violence. All countries in favor of the resolution referred to this issue as one of the reasons for their support.

A second set of reasons advanced to justify the vote in favor is the strong involvement of relevant regional organizations, notably statements by the African Union condemning the situation in Libya and the League of Arab States which was the first to call for a no-fly zone and whose resolution serving as the basis for resolution 1973. Again, all member countries voting in favor of the resolution used this argument.

The last set of reasons has to do with the potential resolution of the conflict and potential political process sought for by the African Union and the mission set up by the resolution. Although the situation was deteriorating, there was still hope among some states that after the establishment of a no-fly zone, the situation would grind to a halt allowing the political process to take place. It is important to see that at the time there were two conflicts taking place: the root conflict having to do with the grievances of the Libyan people that led to demonstrations and repressions in the first place, and the second conflict nested in the first that was about the military offensive of the Libyan army against the city of Benghazi, the heart of the contestation. In saying that they supported a political settlement of the conflict, Lebanon, Nigeria and South Africa were referring to the root conflict. Indeed, the involvement of the African Union in setting up a high-level committee to Libya shows that they were not only concerned with the cessation of violence but also with addressing the demands of the opponents of the Gadhafi regime. Thus, there is no contradiction in allowing the use of force because in this case, that force was to stop the localized conflict around the city of Benghazi, showing the Libyan authorities that it would not be allowed to violently repress opponents of the regime and hopefully force it to negotiate.

African countries and the African Union also managed to secure provisions against any unilateral military operation or foreign occupation in the text of the resolution, which might have also helped them support it. Furthermore, France, the United Kingdom and the United States made clear in their statements that they were responding to the pleas and aspirations of the Libyan people and thus no longer recognizing the Libyan government as the legitimate authority, and insisted that any future action to be done was only called for and in the name of the Libyan population. Even among supporters of resolution 1973, we can see a clear divide between countries expecting and hoping for a political settlement of the situation and those thinking that a political resolution was no longer possible. It is therefore no coincidence that countries who took part in the later military actions were from the latter camp.

In light of these statements, we can also see a number of factors that made states decide to abstain rather than to vote against (which in the case of Russia or China would have meant that the

resolution would have never passed). First and foremost was the crucial involvement of two of the most relevant regional organizations, the League of Arab States and the Organization of the Islamic Cooperation, which explicitly called for such a resolution, as well as the African Union and its threemembers in the Security Council which voted in support: a vote against Resolution 1973 could have been seen as ignoring key regional voices while the trend was to depend more on them. A second factor was the isolation of the Gaddhafi regime. All the countries in the Security Council denounced the repression of civilians by the regime and many of them deemed the regime as having lost its legitimacy. Also, during his reign, Gaddhafi alienated most of his neighbors in the Middle East and in Africa[63]while his support of international terrorist groups made him an enemy of the West. Another factor was the lack of other credible and practical alternative policies. The very public threats on national television of Gaddhafi left no doubt at would happen to the citizens of Benghazi if nothing was done for them and made it difficult to argue that the situation could still stabilize and cool down, especially after recognizing that the previous resolution 1970 was just ignored by the Libyan regime before.

A last factor both in favor of supporting and against opposing the resolution can also be seen in the inclusion in the resolution of reference to the RTOP principle. Indeed, Williams & Bellamy claim that “advocacy for RTOP helped to establish the principle that foreign governments have a responsibility to stop mass atrocities, helped to clarify how military means might support humanitarian outcomes and supported the development of epistemic communities that are slowly warming domestic politics to the idea of saving strangers”[64]. The fact that the resolution clearly reiterated the “the responsibility of the Libyan authorities to protect the Libyan population” seems a clear acknowledgment that RTOP has become an integral part of the discussion in international affairs, even if it avoided mentioning the responsibility of the international community. As a consequence of these factors, Security Council members could not justify voting against the resolution which purpose was to put a stop to mass atrocities.

7. Conclusion

In conclusion, UNSC Resolution 1973 was passed thanks to a combination of four factors: the strong involvement of relevant regional organizations, the isolation of the Gaddhafi regime, the lack of other effective measures and the spread of RTOP as a norm relevant in international affairs. Furthermore, it was passed following the ideal of RTOP in that it was both lawful and legitimate, and its passing seems to indicate a higher degree of legitimacy of the norm. However, because of those unique circumstances, along with the way the military operation took place and how many countries accused NATO of going over what the UN mandate specified, it makes it relatively unlikely for another resolution such as UNSC Resolution 1973 to be passed in the near future. Though this was a textbook case and response of RTOP, it still seems that, as it is now, it is not by itself enough to make the Security Council take action as could be seen from the statements of the Security Council members and the situation in Syria at the moment. But the fact that the resolution was passed seems to be a clear indicator that massive violations of human rights are less and less accepted. RTOP, being a potential solution to these kind issues, is also here to stay and the recent proposal of Brazil for a “responsibility while protecting” indicates that the concept is relevant and still evolving.

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Terms Implied by Courts: A Comparative Appraisal of the Law in Malaysia, the United Kingdom and Australia

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Abstract

The normal contract is not an isolated act, but an incident in the conduct of business or in the context of some more general relation such that of landlord and tenant or employer-employee. It will be usually set against a background of usage. In addition, therefore to the terms which the parties have expressly adopted there may be other imported into the contract from its contexts. The implications may be derived from custom or rest upon statute, or may be inferred by the judges to reinforce the language of the parties and realise their manifest intention. Thus addition to terms imported into particular type of contract, the court may in any class of contract, imply a term in order to repair an intrinsic failure of expression. The document which the parties have prepared may leave no doubt as to the general ambit of their obligations; but they may have omitted, through inadvertence or clumsy draftsmanship, to cover an incidental contingency, unless remedied, may negative their design. In such a case the judge may himself supply a further term, which will implement their presumed intention, and give 'business efficacy' to their contract. In doing so he purports at least to do merely. What the parties would have done themselves, had they thought of the matter. The assertion of this judicial power to imply terms has been asserted by the courts first utilising the business efficacy test, the officious bystander test, both the combined tests, and latterly through the Privy Council's judicial eyes, reasonableness and equitable tests. This paper briefly conducts a critical appraisal of the tests in England, Malaysia and Australia.

Keywords: *Implied Terms, Implied Terms By court, Business Efficacy Test, Officious bystander Test, Reasonableness and Equitableness Test*

1. Introduction

An implied term is a phrase that is not expressed by the parties either in writing or in words, but the

court "reads it into" the contract. Considering that courts are not included to create a contract for the parties, what is the rationale for implying terms? The reason depends on the type of term implied. In some cases, the court implies a term on the ground that the parties most likely had the term in mind but just neglected to express it; here the court is giving effect to the actual intentions of the parties. Sometimes the court implies a term which the parties possibly did not have in mind but would have wanted if they had thought of it at the time. Yet again, the justification for implying the term is that the court is simply giving effect to what the parties would have wanted if they had bothered to attend to the subject matter in their negotiations.

Nevertheless, there are other kinds of implied terms which have nothing to do with the parties' intentions. A statute such as the Sale of Goods Act and Hire-Purchase Act allow certain terms to be implied into all their respects agreements. Implied terms are those which are acknowledged to be a part of the contract even though the parties have not knowingly included them; in such cases the courts will imply a term. How terms may be implied into contracts can cast into three groups: terms implied by usage or custom, terms implied by the courts and terms implied by statute. If there is an implied term which is inconsistency with an express term, the express term will generally override the implied term. Nonetheless, if the term is implied by statute, the implied term will overrule the express term agreed upon by the parties. Having said the above, this paper focuses merely on terms implied by the court. The aim of this paper is to review relevant cases with the purpose of answering the question of "in what circumstances are the courts entitled to imply a term in a manner which will not contradict with the freedom of contract doctrine". The paper seeks to evaluate the approach taken in the UK, Malaysia and Australia.

2. Terms Implied by Courts

Terms will not be implied just because they might eliminate an uncertainty or make the bargain more effective in the opinion of one of the parties (see also *Scanlan's New Neon Ltd v Tooheys Ltd; Caldwell v Neon Electric Signs Ltd* [1943] 67 CLR 169); nor will they be implied if one of the parties has not agreed to them when contract was being prepared. The court might imply terms in order to give expression to the unexpressed issues but with the presumption that the intention of the parties is to give business effectiveness to the contract, therefore no term will be implied if the contract is effective without it. This may be needed as parties might have neglected to include a term for some reason, which they would have done so if they had thought about it. To do so, the court will look at the terms of the contract and its surrounding circumstances. Three tests have been considered to imply terms in a contract: The Business Efficacy Test, The Officious Bystander Test and a combination of the two tests. The paper discusses the approach taken by some leading cases in the UK, Malaysia and Australia as to how courts imply terms.

3. The Business Efficacy Test

The business efficacy test is used when the court is looking at terms implied as facts and will ask if the allegation of the statement as a term is necessary to give the contract the effect it originally intended. The term must be necessary to make the contract work. The business efficacy test has been applied in Malaysia in *Datin Peggy Taylor v Udachin Development Sdn Bhd* [1984], CLJ 36, affirmed [1984] 2 CLJ 17; *Kong Wah Housing Development Sdn Bhd v Desplan Construction, Trading Sdn Bhd* [1991] 3 MLJ 269. There are certain facts that may make it a much easier process to discover a person's intention, including having knowledge of the parties and knowing that if both parties agree to the terms of the contract. The classic authority for this business efficacy test is *The Moorcock* [1889] 14 PD 64 (see also *Liverpool City Council v Irwin* [1977] AC 239 and *Shell UK Ltd v Lostock Garage* [1977] 1 All ER 481 and *Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51). In the leading case of *The Moorcock*, the defendant agreed to allow the plaintiff's ship to unload a cargo at defendant's Thames docks; it was a well known fact that ships usually ran grounded at

low tide on the river Thames. Alas the plaintiff's ship was damaged because of the roughness of the river bed at the defendant's dock. The contract between the parties did not contain any express terms as to the fittingness of the river bed for mooring a ship. The plaintiff brought an action for damages against the defendants. The court implied a term into the contract providing that the defendant would take "reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used" (A more modern example of the role of business efficacy; *Re Ronim Pty Ltd* [1989] 2 QdR 172). However, the court stated that a term should only be implied where it is necessary to "give such *business efficacy* to the transaction as much have been intended at all events by both parties who are business men". The test being applied here is strict; it is not based on the logical expectation of the owner of the ship, but instead on what is necessary in order to make the contract work. The mere fact that a contract might work better if a particular term is implied would not be enough. The *Moorcock* case can thus be distinguished as having established a test of "necessity" in relation to the implication of terms.

4. The Hallowed Officious Bystander Test

The officious bystander is a symbolic figure in English law (for example *Yong Ung Kai v Enting* [1965] 2 MLJ 98. In this case, the High Court using the test, held that there was an implied term that the agreement for the sale of timber was to be subject to the obtaining of the necessity license), created by MacKinnon LJ in *Southern Foundries (1926) Ltd v Shirlaw* to help to determine whether a term should be implied in an agreement. Although the officious bystander test is not the overriding formulation in English law today, it provides a helpful guide. The suggested approach is to visualize a curious, intrusive bystander walking past two contracting parties and asking them, whether they would want to put some express term into the agreement. If the parties would instantly reply "of course" the term is appropriate for implication. If an officious bystander had been nearby at the time the contract was made and had suggested that such a term should be included, it must be clear that both parties would have agreed to it.

Shirlaw v Southern Foundries [1939] 2 KB 206, provides a classic example of the officious

bystander test. The plaintiff had been employed as a managing director of Southern Foundries and the office of employment was to last for 10 years; Federated Foundries then purchased a controlling share in the company. They distorted the company's Articles of Association giving them the power to remove directors; they then dismissed the plaintiff as a director who brought an action for wrongful dismissal. There was no breach of contract for his removal from office based on the employment contract since they had not dismissed him from being a managing director but only as a director. However, if he was not a director he was not able to be a managing director. The plaintiff asked the court to imply a term that the defendant would not act in a way making it impossible for him to perform his contract.

Both the Court of Appeal and the House of Lord held that there was an implied term that the defendant would not remove the plaintiff from his directorship during that period since any such removal would automatically terminate his appointment as a managing director. In the Court of Appeal, MacKinnon LJ said that for a term to be implied in a contract it should be such that if an officious bystander had asked while the contract was being made but what about so-and-so, the parties would testify suppress him with the words "Oh, of course". In other words, the courts would not imply a term into a business contract, unless they are sure that it is necessary for business efficiency and the parties would have included such a term since it is obvious that such a term is regarded as part of the contract without the need to actually put it in the contract. In this way, the courts are only giving effect to the presumed but unexpressed intentions of the parties and so are not excessively interfering with the conception of freedom of contract.

5. The Combined Business Efficacy /Officious Bystander Test

As the law on implied terms developed, courts have combined and used both of these previously mentioned tests. Historically, the two major tests for implication of terms by the courts have been described as the officious bystander test and the business efficacy test. Both have contributed to the composite test now applied by courts. In *Reigate v. Union Manufacturing Co (Ramsbottom)* [1918], Albert Reigate had been dealing in fabric products from Germany until the occurrence of war in 1914.

He approached a company in Manchester and suggested to make a range of products for which he would be the exclusive agent in Britain, India and the colonies, except for Manchester. He invested 1000 pounds in the company through purchasing shares. The agency was to last for seven years should he live so long, and after that continue until determined by either party with a six months notice. The agreement provided that he was not to accept orders decisively, but only subject to affirmation by the company. In 1915 the company was experiencing financial difficulties and therefore asked Mr. Reigate to invest some more money to keep them buoyant; he tried but was unable to raise the necessary money. The company then told him that the only way forward was for him to give up his agency and in return get the agency valuable Manchester district. He declined the offer. The company entered into voluntary liquidation and the business was subsequently sold. Mr. Reigate sued on the basis that the company had breached the contract by demanding that he step down and then entering into liquidation.

The Court said that the first thing is to see what the parties had expressed in the contract. An implied term was not to be added because the court thought it would have been reasonable to have inserted it in the contract. A term could only be implied if it was necessary in the business sense to give *efficacy to the contract*, that is, if it was such a term that it could confidently be said that if at the time the contract was being negotiated someone had said to the parties 'what will happen in such a case' the answer would be of course, it is understood.

In *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* it was held that both the "business efficacy test" and the "officious bystander test" must be satisfied before court can imply a term. The facts in the above case were: the Sandakan Turf Club ('the Club') was registered under the Societies Act 1966 for the purpose of conducting gaming activities. Following its purpose, the Club was granted an exclusion from the relevant authorities under the Sabah Gaming Ordinance 1930 ('the Ordinance'), and was allowed to conduct gaming activities in Sabah. Beside the exclusion, a license was also granted to the Club to carry on public lotteries in the State ('original license'). On 26 November 1987 the Club entered into an agreement with the appellant ('Sababumi') whereby it granted Sababumi exclusive rights to carry out off-course and on-course betting and gaming for twenty years,

in consideration of payment to it of 2% of the gross takings, and in further consideration of the promise by Sababumi to build at its cost a race course and to manage and operate such gaming activities.

The 1987 agreement also included a few terms, one of which was c111 which dealt with consequences that would happen to the parties in the event that either of the above-mentioned exemption or license is cancelled. Sababumi afterwards expended large sums of money in keeping with their part of the bargain. On 14 April 1992, the Sabah authorities cancelled the original license, and in its place issued an amended license to the Club. However, unlike the original license, this amended license had a new condition: “that this license shall be personal to the licensee and shall not be transferable in any manner whatsoever”.

Shortly after that, the Pool Betting Act 1967 (‘the Act’) was enforced in Sabah, and following that the Finance Ministry informed the Club of their decision to cancel the amended license. The Club was additionally informed that from thereon a license under the Act was necessary for gaming activities. Subsequently, the Club applied for and in 1995 was granted a license under s. 5 of the Act (‘the Federal license’). Some new conditions were attached to the Federal license, one of which was condition 23 which prohibited any transfer or assignment of the rights, duties and obligations appearing in the license.

Misunderstandings consequently arose between Sababumi and the Club mostly regarding the validity of the 1987 agreement. In the situation, claiming that the Federal license was within the scope of the 1987 agreement, Sababumi took out an originating summons and applied to the High Court for declaratory and other reliefs. The High Court after hearing the issues and using “the officious bystander” test, found that there ought to be implied into the 1987 agreement a term to the effect that the Federal license fell within the scope of the agreement. It was thus the High Court’s view that the 1987 agreement remained valid and enforceable even in the face of the terms of the Federal license, on the ground that the terms of the license could be implied into the agreement. In the state of affairs, declarations were granted that the Federal license and any renewals were within the scope of the agreement, and that the Club was in breach of the agreement.

The Court of Appeal however disagreed with the High Court and held instead that the 1987 agreement could not further exist or be enforceable. The Court of Appeal also held that the Club, had breached s. 21(1) of the Act, by assigning the rights and benefits conferred by the original or Federal license to Sababumi and therefore the agreement was prohibited by s. 24(b) of the Contracts Act 1950 and was illegal and void. Sababumi appealed, and before the judges of the Federal Court issues inter alia arose as to: (a) whether the Court of Appeal was correct in law and on the evidence in holding that the High Court was wrong in implying a term in the 1987 agreement in the manner it did. Peh Swee Chin FCJ, delivering the judgment of the Federal Court, stated inter alia:

(1) Implied terms are of three types: The first are those which the court assumes from proof that the parties to a contract must have had the intention to contain in the contract even if not expressly set out within. The second are those that come about by function of law, whilst the third are ones that are implied by rational convention and practice of any market or trade. The implied term asserted for in this appeal belongs to the first type.

(1a) As for the first type of implied term aforementioned, two tests must be fulfilled before a court could deduce them. The first is subjective in nature, and it is that such a term to be implied must be “something so clear that it goes without saying, so that, if, while the parties were making their negotiations, an *officious bystander* were to suggest some express terms for it in the agreement, they would reply him with a common ‘Oh, of course’.” The second test is that the implied term should be of a kind that *will give business effectiveness to the deal* of the contract of both parties. Business efficiency means the desired result of the business in question.

(2) There is no doubt that by the 1987 agreement, both parties had decided to commit to each other in regard to such business on a long-term basis for 20 years. Thus at the time of discussing or signing the said agreement, if an *officious bystander* had asked the question whether such exclusive right to operate off-course and on-course betting for 20 years would continue if the licenses and the exemption were issued or granted by any other laws, i.e. by law other than the said Gaming Ordinance of Sabah, both parties would have answered “Oh, of course”. Additionally, the answer to the officious bystander

would give business efficacy to the said business between the parties.

(3) It was wrong of the Court of Appeal to have taken the view that, since the parties had mentioned their rights and obligations very clearly and had made express terms for unforeseen events that covered the current situation in this appeal, it would therefore militate against the insertion of such implied term contended for.

Peh Swee chin FCJ applied the *officious bystander* and the *business efficacy* tests to the facts of this case and held that the 1995 license could be implied into the agreement, as the fundamental nature of the intention of both parties was for the club to grant an exclusive right to the appellant to conduct betting or gaming activities on a long-term basis. Zakaria Yatim FCJ also agreed that both tests were necessary.

6. Moving Towards A More Liberal Approach

In Australia, in determining the parties' assumed intentions and identifying proper term to be implied in fact in a formal contract, dependence is usually placed on the following Privy Council judgment in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*. In this Australian case, the Privy Council applied both tests and combined them with other indicators. The court added two other tests of Reasonableness and Equitableness and used this combination to make the final decision more accurate. The facts of the case were: BP entered into an agreement with the State government to establish an oil facility. A clause stated that BP could assign rights in the facility to an external company to the amount of a maximum %30 stake. The Shire of Hosting also assessed BP at a lower rate of taxation according to a preferential agreement. Six year later, BP was taken over by BP Australia. The Shire now sought to tax BP at the normal rate. The issues raised were: (i) could the Shire imply a term that the preferential agreement would end if BP did not have the ownership of the refinery any longer?; and could BP imply a term that the preferential agreement would continue if BP assigned ownership to a company in which it had a 30% share? The Shire's alleged term could not be implied because it (a) would be unfair, (b) was not necessary for the contract to execute the business efficacy requirements, and (c) was not obvious. BP alleged that term could be implied because (a) it was capable of clear expression, (b) it

was essential, clear and rational and (c) it did not disagree with express terms of the contract.

The Privy Council listed the five requirements necessary to be satisfied for a term to be implied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying;'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract (this statement has been approved by the High Court many times: *Secured Income Real Estate v St Martin's Investments Pty Ltd* (1979) 144 CLR 596, at 605-606; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, at 347; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, at 66, 117-118). In relation to the first requirements, reasonableness and equitableness, it is possible to mention two points. First, it is clear that such requirement indicates fairness between the parties. Therefore, in *Byrne v Australian Airlines Ltd*, McHugh and Gummow JJ rejected the recommended implication because 'The contractual term propounded by the appellants would operate in a partisan fashion'. Second, it is obvious that reasonableness and equity should be judged by indication to the benefits and troubles each party can anticipate benefiting from, or undertaking under the contract. Hence, in *BP Refinery v Shire of Hastings*, the majority of the Privy Council rejected the suggested implication into a rating agreement requiring a permanence of corporate identity on the ground that such an implication would divest the plaintiff of an advantage which induced it to make a main capital investment in the defendant's Shire. Nevertheless, reasonableness alone is not sufficient to imply a term: *Codelfa*, per Mason J.

Based on this test, the majority reject the implied term proposed by Shire on the basis that it is not reasonable and equitable (*Byrne v Australian Airlines Ltd*) and it does not 'go without saying' (this element overlaps considerably with that of business efficacy and in that sense addresses itself not to the *actual* intentions of the parties but to their *presumed* intention as reasonable persons as disclosed by the contract and surrounding circumstances: *Heimann v Commonwealth* (1938) 38 SR (NSW) 691 at 695 per Jordan CJ). Considering the matrix of facts in which was used to set the agreement, to imply such a term would be

completely unreasonable and equitable. Their Lordships held that a group of companies, such as BP, may want to change its corporate structure, mainly when a period of 40 years was predicted. “This possibility was recognized in the refinery agreement and the identity of the member of the BP group occupying the refinery cannot have been of the least importance to the respondent”. Their lordships held that it would be wholly unreasonable to imply a term which meant that the benefits of rating agreement could only be enjoyed for 5 years. Whether or not an implied term is “fair”/reasonable and equitable is very fact specific. Examples of what is NOT fair: Where implied term cannot be carried out without the assistance of a third party (see *Penrith District Rugby League Football Club v Fittler*); Where it would inhibit legitimate commercial decisions (see *Saad v TWT LTD*); and Where it would impose a financial risk on the other party (see *State Bank of NSW v Currabubula Holdings Pty Ltd.*).

7. Conclusion

The courts must be cautious not to take a view which is too wide. The ad hoc insinuation of rights and responsibilities has the propensity to seriously weaken commercial reassurance and freedom of contract, mostly in the case of meticulous agreements drafted by professional legal advisers. The fact that an unexpressed term is necessary as a matter of meaning should not be an sufficient requirement for reading it into a contract. Additionally, the term should be essential as a matter of business efficacy, whether in the performance or the formation of the contract, with the necessary level of stipulation depending upon the circumstances of each individual case. In the absence of that necessity, the parties should bear the consequences of their own failure to express terms clearly as seen in Malaysia and England. They usually use the officious bystander test and sometimes a combination of officious bystander and business efficacy test. However the Australian courts through the Privy Council has further liberalised the implied term doctrine.

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III PLENARY SESSION

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European Certificate of Succession

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Abstract

This study is reviewing the european certificate of succession from the perspective of law theory and practice.

At the beginning the seat of matter is established, which are Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4th July 2012.

European certificate of succession's definition is formulated. There are also reviewed the features and purpose of european certificate of succession. A part of the study is dedicated to proceedings concerning the certificate, which is including competence to issue the certificate, examination of application, issue of the certificate and its contents. The effects of european certificate of succession in Member States of European Union are also studied. At the end the importance of certificate is reviewed.

1. Introduction

The European Certificate of Succession must be reviewed considering its future apparition in law space of European Union, for a proper and correct interpretation and application of provisions laid down by Regulation concerning the certificate.

2. Seat of matter

European Certificate of Succession seat of matter is Chapter VI named "European Certificate of Succession" from Regulation (EU) of the European Parliament and of the

Council No.650 of 4th July 2012 on jurisdiction, applicable law, recognition and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession adopted in Strasbourg, on 4 July 2012, on a proposal from European Commission and with the opinion of the Economic and Social European Committee.

Regulation is an European legislative act which is part of derived law of European Union, with incidence in inheritance matter.

Regulation was published in Official Journal of the European Union on 27th July 2012.

It will enter into force on 17th August 2015, except Articles 77 and 78 which are applied since 16th January 2014 and Articles 79, 80 and 81, which are applied since 5th July 2012.

3. Definition of European Certificate of Succession

Regulation does not define the European Certificate of Succession. In the absence of a legislative definition, we are formulating its following definition, which is an opinionated definition and starts from provisions of Regulation.

We are defining the European Certificate of Succession as the act which certifies the title of successors or legatee of the entitled ones, rights of each one, extension of these rights concerning successional patrimony, a part of successional patrimony or some goods or one good of it too, their obligations too, the title of testamentary executor or administrator of successional patrimony and also their rights and obligations, having the quality of European act issued in a Member State, which produce effects in each Member State.

4. Features, meaning and purpose of European Certificate of Succession

Based on provisions of Regulation, we are establishing the following features of certificate:

This is an European act, which is released by issuing authority from Member State of European Union and produce effects in every Member State. The creation of European Certificate of Succession takes place in Member States of European Union. Its using and production of effects are general in European Union space, because of taking place in Member States, according to Treaties and Regulation.

Certificate has an optional character. It may be used both in absence of other similar internal acts—that means Internal Certificate of Succession or court order in successional matter and in parallel with these documents. We consider we may also name the Internal Certificate of Succession, National Certificate of Succession, because of its producing of legal effects on the territory of state whom authority had delivered it. Thus the European Certificate of Succession is alternative or supplementary towards internal documents done and delivered in state of issuing authorities.

It is delivered according to Regulation proceedings by competent authorities: court of justice or other competent authority in inheritance matter, according to internal legislation, under the request of successors, legatees, testamentary executors or administrators of successional patrimony.

Certificate is not a property title. It is not proving the property, being an act which is proving status of successors, legatees, or testamentary executors, or administrators of successional patrimony, of quotas from successional patrimony, of rights of legatees, attribution of some goods or one good from successional patrimony to successors or legatees.

Certificate is an inheritance title, but without final character in successional proceedings. Certificate may be amended or withdrawaled by issuing authority and certificate's effects may be suspended by issuing authority or legal authority, in conditions regulated by Regulation. In order to have a final character in successional proceedings, it would have had been the act of completion of successional proceedings and had been submitted to

remedies to legal authority or suspension of certificate's effects only by legal authority, in conditions of Regulation, but not to amendment or withdrawal by issuing authority, or suspension of certificate's effects by issuing authority.

The purpose of certificate is stipulated by Article 63 named "Purpose of the Certificate" from Regulation. This is its using the entitled ones—successors, legatees, or testamentary executors, or administrators of successional patrimony, in order to prove their status or to exercise their rights or if the case, their attributions, derived from certificate. Certificate is proving the status of successors and legatees, of their rights and quotas from successional patrimony they own, or goods or good from successional patrimony they own and also their obligations, but also the rights and obligations of testamentary executors and administrators of successional patrimony.

We consider the purpose of certificate is fitting to European Union's objectives in inheritance matter whom Regulation is based on, regulated by Preamble of Regulation, between them being adoption of an instrument in matter of wills and successions, instrument in inheritance matter concerning especially conflict of laws, competence, mutual recognition and enforcement of decisions, by competent authorities in inheritance matter, according to national legislation, organisation from time of successions by European citizens and effective guarantee of rights of successors, legatees and other persons closed to deceased and also of succession's creditors.

5. Proceedings concerning European Certificate of Succession

Proceedings concerning European Certificate of Succession are stipulated by Articles 64-68 and 70-73 from Regulation.

Competent authorities to deliver certificate are court of justice or other authority who, according to national legislation, has the competence in successional matter.

Paragraph (2) of Article 3 named "Definitions" from Regulation defines term of "court of justice" as "every legal authority and all the others authorities and practitioners from legal domain who are competent in successional matter and exercise legal attributions or act on base on

delegation of power by a legal authority or act under control of a legal authority, provided that these authorities and practitioners from legal domain offer guarantees in terms of objectivity and right of all parties to be heard and in terms of pronounced decisions by these authorities and practitioners on the basis of Member State law where they are exercising their activities: (a) may be subject of remedies or control by a legal authority ; and (b) have a similar force and effect to a decision of a legal authority relative to the same aspects. Term of "court of justice" is *latu sensu*. The definition is exhaustive. According to Romanian law, only courts of justice and public notaries have competence in successional matter. Courts of justice enter into legal authorities category. Public notaries are the practitioners in legal domain who are competent in inheritance matter, have no legal attributions, but act on basis of their invest to exercise a service of public interest by appointment in his office by justice minister, having the status of an autonomous function, notarial activity being subject of legal control, according to the law.

Certificate is issued in Member State whom courts of justice have competence according to Articles 4,7,10 or 11.

General jurisdiction belongs to courts of justice from Member State where the deceased had habitual residence on date of his death. Regulation does not define habitual residence, that is creating some difficulties , because of existence in Romanian law of domicile, which is principal and permanent inhabitation of persons and also residence, which is secondary and temporary inhabitation of persons.

If *de cuius* have chosen as applicable law to govern his succession, the law of a Member State, then parties who are interested to obtain a European Certificate of Succession may agree that courts of justice from respective Member State have jurisdiction.

In European Certificate of Succession matter Article 5 relative to choice-of-court agreement has no incidence.

Court of justice's jurisdiction on basis of *de cuius* choice of law of other Member State as applicable law to govern his succession and parties choice-of-court agreement relative to other State courts of

justice's jurisdiction, is applied if three conditions are accomplished: previous declining of jurisdiction by a another court who parties previously applied to relative to same cause, parties agreement to confer jurisdiction to courts from respective Member State and express recognition of parties of court's jurisdiction. These conditions are alternative.

Subsidiary jurisdiction is applied in case of *de cuius* did not have habitual residence on date of his death in a Member State, but there are successional goods on a Member State territory. It belongs to courts of the Member State where successional goods are. Subsidiary jurisdiction is applied if two conditions are accomplished: the deceased has the respective Member State nationality at the time of death, or the deceased previously had had habitual residence in that Member State , but provided that a period of no more than five years from the time of changing of residence until the time the court have been seised had had passed.

Competent authorities are court of justice or another authority, who, according to national law, has jurisdiction in inheritance matter. Competence to do and issue the European Certificate of Succession is alternative: courts of justice have jurisdiction or other competent authorities have competence in inheritance matter, according to national law.

Certificate is issued under the request. The following persons have the quality to request the certificate: successors, that means *ab intestat* successors , legatees , that means testamentary successors, testamentary executors or administrators of successional patrimony.

The contents of application is the following: information that the application must contain are requested provided that : if applicant have such information and its are necessary to issuing authority in order to certify elements requested by applicant. The application must be accompanied by all relevant documents either in original or copies that accomplish conditions to be establish their authenticity. The scope of this provision is the guarantee of civil circuit security.

Application's contents include several categories of information:

Information relative to deceased include: surname (surname at birth, if applicable), given name, sex, date and place of birth, civil status, nationality, identification number (if applicable), address at time of death, date and place of death. These are personal data of de cuius.

Information relative to applicant include: surname (surname at birth, if applicable), given name, sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relation with de cuius (if applicable). These are personal data of applicant.

Information relative to representative of the applicant include, if applicable: surname (surname at birth, if applicable), given name, address and ability of representation. These are personal data and information relative to legal ability of representative to represent the applicant.

Information concerning the husband or the wife or the partner of the deceased and if applicable, ex-husband, or ex-husbands or ex-wife or ex-wives, or ex-partner or ex-partners include: surname (surname at birth, if applicable), given name, sex, date and place of birth, civil status, nationality, identification number (if applicable), address. These are personal data of the husband or the wife or the partner of the deceased and if applicable, ex-husband, or ex-husbands or ex-wife or ex-wives, or ex-partner or ex-partners.

Information concerning other possible beneficiaries under a disposition of property upon death and /or by operation of law include: surname, given name or organisation name, identification number (if applicable), address. These are identification data of the possible beneficiaries.

The scope of certificate must be in accordance to Article 63.

The contact data of the court or another competent authority who are seised with the succession are mentioned too.

The elements applicant request is based on are, if applicable, his survivance in his quality of beneficiary and/ or right to execute the deceased's will and /or right to administrate the successional patrimony and they are mentioned too.

Indications if de cuius has or has not made a disposition of property upon death and, if applicable, the place where it is, if they do not accompany the application neither the original nor copies concerning dispositions of property upon death made by the deceased, if applicable are also specified. These are important for the deceased's will and legatees rights respect.

Indications which specify whether de cuius had or had not made marriage contracts or contracts regarding a relationship which may have comparable effects to marriage, if applicable, the place where they are, if they do not accompany the application neither the original nor copies of its are concerning marriage contracts or contracts regarding a relationship which may have comparable effects to marriage. These are important in successional matter relative to matrimonial regime and survivance of survivor spouse and an equivalent patrimonial regime and survivance of person who has a relationship with the deceased.

Indications regarding the existence of a declaration concerning acceptance or waiver of the succession are mentioned too. These are important in exercise of successional option right matter.

Declaration regarding absence of pending causes about elements that have to be certified, under the acceptant's knowledge, is necessary to avoid issuing of other documents with the same object by another authorities, except possibility of issuing of a European Certificate of Succession by competent authorities and national documents by internal competent authorities. European Certificate of Succession does not replace internal documents.

Every other information considered useful by applicant for issue of certificate are specified. Application's content is complex, almost exhaustive.

The enumeration is sample, not limiting. Of course these elements of enumeration are essential to make and issue the certificate. They have the role of guarantee the complete and just character of mentions of European Certificate of Succession.

The application is registered in issuing authority's registers and in European Register of successional causes.

Proceedings rules regarding succesional debate are stipulated closed to examination of the application. We consider Article 66 named "Examination of the application" from Regulation must be properly renamed as "Succesional debate", because it also includes provisions of Regulation regarding inquests for verifications, administration of other supplementary proofs, informs of beneficiaries and other persons having an interest, eventual declarations made on oath or statutory declarations in lieu of an oath, requests of data and information from competent authorities.

Authority shall verify, upon the application receiving, information and declarations from the application and documents and other proof means attached to it, shall make inquests regarding verification, shall be able to invite the applicant in order to present every other evidences considered necessary by authority.

If national law stipulate, they shall also ask for declarations made on oath or statutory declarations in lieu of an oath wording. Romanian law regulate deposition of witness in the succesional notarial proceedings.

Authority shall take action to warn the beneficiaries of existence of an application of certificate issue.

It shall hear if necessary, every involved person, testamentary executors, or administrators of succesional patrimony and shall make public announcements to offer the possibility to beneficiaries to invoke their rights.

We consider regarding beneficiaries it is not only necessary their inform, but is necessary their citation and release of their rights, their obligations, terms of exercise of rights and sanctions in case of absence of exercise of these rights, or the consequences of these situations. This permit to avoid proceeding vices and further litigations, where beneficiaries shall be involved.

According to Romanian law there will be the the research of succesional file pieces, in order to settle the cause. According to Romanian law, the public notary shall make a final conclusion at the end of succesional debate, before issue of certificate of succession.

Issue of the certificate is made without delay by the authority, when the elements which must be certified according to applicable law which govern the succession or other applicable law to specific elements were established.

The authority shall not deliver the certificate in particular if: elements which must be certified are the object of a litigation, or certificate is not according to a decision regarding the same elements. These are only ones of the situations the certificate shall not be delivered, which are sample enumerated. Authority shall take action to inform beneficiaries regarding certificate issue. We consider it is important to communicate the certificate to the beneficiaries, not only to inform them about act issue.

Certificate contents consist of data, information, elements și indications which are included only if necessary for the certificate scope. These must be useful from the point of view of persons status who are entitled to use the certificate or exercise their rights and/ or their attributions in these qualities.

These are: name and address of issuing authority, necessary for identification of this one; the reference number of the file, which is assigned according to internal record of authority's activity; elements the issuing authority is considered herself competent to deliver the certificate based on, these consisting of legal grounds of succesional proceeding and competence; date of issuing, that is important for establishing the moment when it was delivered; information about applicant: surname (surname at birth, if applicable), given name, sex, date and place of birth, civil status, nationality, identification number (if applicable), address and relation with de cujus (if applicable), necessary for identifying the applicant; information about the deceased: surname (surname at birth, if applicable), given name, sex, date and place of birth, civil status, nationality, identification number (if applicable), address at time of death, date and place of death, to identify de cujus; information about beneficiaries: surname (surname at birth, if applicable), given name, identification number (if applicable), to identify beneficiaries; information which precise whether the deceased had or not had made marriage contracts or contracts regarding a relationship which may have comparable effects to marriage, if applicable and regarding patrimonial aspects of matrimonial regime or an equivalent regime, to

establish the inheritance and the survivance of survivor spouse and an equivalent patrimonial regime and survivance of person who has had a relationship with the deceased , if applicable ; the applicable law which govern the succession and elements it was established based on , to indicate legal grounds and basis on whom it was established , de jure and de facto; information which certify whether succession is ab intestat or based on a disposition of property upon death, including information about elements from whom are derived rights and /or attributions of sucesors, legatees , testamentary executors or other administrators of sucesional patrimony, to indicate nature of succession-ab in testat or testamentary, to establish rights and attributions of sucesors, legatees , testamentary executors or other administrators of sucesional patrimony, if applicable; information about nature of acceptance or waiver of the succession, by every beneficiary, indicating in this way the variants of sucesional option chose by entitled to succeed; quota which ought to every successor and, if applicable, list of rights or goods which ought to certain sucesor, indicating in this way quotas of all the sucesors and also the survivance which ought only to one of the sucesors, according to the law or the deceased 's will; restrictions applied to survivance of sucesors and , if applicable, of legatees, according to applicable law which govern the succession or disposition of property upon death, that means reduction of excessive liberalities and / or gifts and legacies return, if applicable, indicating portion of inheritance that must devolve upon the heirs, if applicable; attributions of testamentary executor and/ or administrator of sucesional patrimony and their limits according to applicable law which govern the succession and /or disposition of property upon death , that means extensions and restrictions regarding testamentary executors and/ or administrators of sucesional patrimony .

Contents of European Certificate of Succession is ample.It is similar to the contents of national certificate of succession from Romania.There is in the contents of the European Certificate such information and data which are supplementary towards the Romanian certificate, such as: date and place of birth, surname at birth , if applicable, sex, place of death of the deceased , information and data about applicant and surname at birth of beneficiaries, if applicable.We consider it would be useful that data and information about date and

place of birth, surname at birth , if applicable, sex, place of death of the deceased and surname at birth of beneficiaries , if applicable, to be included in the Romanian certificate of succession , in order to have a more ample identification of these persons, by supplementary personal data .

Certificate shall be drafted as a form type, which shall be the same in all Member States. Certificate shall be registered in European Certificates of Succession Register.

Certified copies of the certificate may be delivered by issuing authority of certificate which is keeping the original, according to the Regulation.

Rectification , modification or withdrawal of certificate may be done as it follows: The issuing authority may rectify errors of draft from the certificate, upon application.

There is also the possibility for the issuing authority to modify or withdrawal the certificate in the situations they have established that such elements from it do not correspond to reality.These are made upon application or authority's own.

In all situations of rectification, modification or withdrawal of certificate the competent authority shall inform persons whom they have delivered certified copies of certificate.

Redress procedures may be act in order to contest to decisions stipulated by Article 67 about certificate's deliver, Article 71 about rectification , modification or withdrawal of certificate and Article Paragraph (1) letter (a) about suspension of the effects of the certificate, by the issuing authority.

The perons entitled to ask for the certificate have the quality to attack the decisions stipulated by Article 67 .

The persons who prove they have a legitimate interest have the quality to attack the decisions stipulated by Article 71 and Article 73 Paragraph (1).

The jurisdiction belongs to legal authority from the Member State of issuing authority.

Suspension of the effects of the certificate is made by issuing or legal authority. The competence is alternative.

On the period of suspension they shall not be able to deliver other copies of the certificate. It is a consequence of suspension of the effects of the certificate.

6. Effects of the certificate

Article 69 named "Effects of the certificate" regulate effects of European Certificate of Succession.

Paragraph (1) stipulate that certificate produce effects in every Member State without any special proceedings being required. It produce effects in any Member State, without any other from. Its applicability is general. Production of effects of the certificate take place directly, being stipulated by Regulation which produce direct effects in Member States.

Paragraph (2) stipulate that certificate is presumed to prove exactly elements established in base of the law applicable to succession or another law applicable to specific elements and it is presumed that person certified in certificate as successor, legatee, testamentary executor or administrator of successional patrimony having the status mentioned in certificate and quality of titular of rights and powers certified in it, without other conditions or restrictions of these rights and powers, except those stipulated in the certificate. This is the presumption of European Certificate of Succession's validity.

There are two consequences of this presumption: The first one consist of they consider every person who, acting in base on information certified by certificate make payments or attorn goods to a person mentioned in the certificate being authorized to accept payments or goods, have done contract with a person authorized to do it. This is the rule. But there is an exception too: the rule is not applied in case of this person knows the information contained by certificate do not correspond to reality or does not know because of a grave negligence.

The second one consist of when a person mentioned in the certificate being authorized to dispose of successional goods, is disposing of its in favour of a third person, provided to act in base on

information certified by certificate, they consider that person becoming part of a contract with a person authorized to do it. This is the rule. But there is also an exception: this rule is not applied to case that person knows the information contained by certificate do not correspond to reality or does not know because of a grave negligence.

Certificate is a valid title to register successional goods in register of a Member State. It is about real and mobile publicity regarding successional goods.

7. Importance of certificate

We are assisting to an encreasing of international successions number, that involve and justify the creation of European Certificate of Succession.

European Certificate of Succession consist of a progress to legislation unification on level of the European Union, in inheritance matter.

It shall create conditions to successional practice unification in European space.

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Prohibition of nuclear weapons production according to Shiite religion

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Abstract

Production, accumulation also the use of genocide weapons and nuclear weapons are controversial discussion in international relation field. World communities have tried to create an international regime of control and publication prohibition of genocide weapons for 80 years. The effort shows that this issue stands on important place. Most significant parts of the regime state in NPT, BWC, CWC and several execution arrangement. Some of the countries which members of NPT like Iran on the way of access to nuclear peaceful energy face up several challenges. Iran face to more acute situation than another. In this article we want answer to follow question:

Is making nuclear bomb prohibited in Shiite Religion or Not?

Claim of present article is verification of Sanction Doctrine, so we can say: Iran bind itself to follow above treaties according to religious viewpoint and there is no reason to produce nuclear weapons according to religious Resources and Religious believes.

1. Introduction

Effort to preserve the human generation and the natural continuation of their life in a safe environment, free from any intolerable threat and risk and far from the war and existence of destructive and dangerous weapons are the necessities of human life. International organizations, especially the UN, have taken into consideration the fulfilling of this desired issue as one of their goals. The realization of

control them. The existence of very dangerous weapons in the framework of biological and nuclear weapons is serious threat for global security and human environment. Yet, it is also true that the right to development cannot be ignored. In order to the Countries to achieve their own goals,

human dignity, human growth and development from all aspects needs a safe and healthy environment.

To reach this goal by accepting the third generation of human rights, a new horizon has been opened in international relations, among the issues and discussions relevant to third generation rights, there is a closer relationship between the right to life and environment and it is probably because of such a great importance that today, 300 multilateral international treaties and approximately one thousand bilateral international treaties of protection of environment play a major role in world relations. These rights implies the right to life, the right to live with minimum international standards, as well as the right to health. international instruments relevant to the right of a healthy environment, obviously have considered this. For example, the Stockholm Declaration, the first international instrument in the form of a declaration on the right of environment, in the first principle creates a relationship between freedom and equality to the right of environment.

Sustainable development is subject to have a safe environment and away from violence and war. The importance of this issue has made countries effort at both regional and international levels. Europe, America, Asia and Africa - All are main axes in the regional efforts. The capacity of the third generation rights paves the way for exercising the second and first generations rights. Along with extensive countries' movement, it is necessary to eliminate threatening factors or to

which are in fact the same ones that stipulated in UN Charter, growth and development from all aspects are needed. how the both rights of the third generation group can be realized, so the countries not only experience the general development, but enjoy safe environment free of

war and conflict. Specifically, in both the military and peaceful aspects nuclear development is subject matter of dispute in the world. This study is an attempt to smooth the way to religiously integrate both rights by juratory theory plan, (the respect for atomic bomb). Some international efforts within humanitarian law discussions and four Geneva conventions (1949) and the two annexed Protocols (1977) are in response to such discussions. Relying and insisting on humanizing war and paying special attention to the civilian rights, as well as protection of victims of international and non-international armed conflict is in respond to above claim.

Article 3 common in the four Geneva Conventions, which should be exercised in all non-international armed conflicts and is as a small treaty within a big convention, and even is applicable when sever conflict taken place as well, clearly accepts the prohibition of loss to life and physical integrity including massacre of civilians in all its forms. Obviously there are some war weapons that can seriously endanger such people life¹⁰⁵. It worth noting that the focus on the issue of atomic bomb is because it includes the claim of a kind of conflict between two rights, i.e. the right to development and the right to live in peace and it can be said that the right of peace is the prerequisite for the vindication of the right to development and, moreover, the right to development guarantees the stability and lasting of real peace. On the other hand the role of development of international order should not be bypassed, as judge Bjavvy believes that the exercise of political sovereignty entails economic sovereignty .considering what happened, a brief overview of the issue in terms of international regulations is necessary and, then juratory approach is to be explained.¹⁰⁶

2. International law and humanitarian principles

Humanitarian law regardless of the prohibition or not prohibition of war seeks to humanize war and reduce individuals suffering. In order to achieve this goal it is necessary to consider several issues. First, the basic principles such as the principle of necessity, the limitation principle, separation principle and the principle of proportionality must

¹⁰⁵ Annexed Protocol of Convention of Humanitarian, Geneva, 1977

¹⁰⁶ Convention of Humanitarian, Geneva, 1949.

be respected. Second, military restrictions also must be strictly observed. Some of these limitations, such as prohibition of use of weapons and materials that cause unnecessary and vain suffering are related to military issues. As use of weapons that is aimed at inflicting long term or severe damage to the natural environment or is expected to leave such effects is also prohibited. And some other restrictions such as the prohibition of genocide or separation of combatants from non-combatants related to human and civilian. Third there are limitations relate to the weapons and war equipment's. Use of weapons of mass destruction is the kind of such restrictions. The standard of this type of weapons on the one hand is destructive power and their purposes on the other hand. Basically, these types of weapons cannot be limited to specific purposes.

Weapons of mass destruction include nuclear, bacteriological and chemical weapons which are used as A.B.C or N.B.C or R.B.C. Chemical weapons were defined in the commission of classic weapons in 1948, but the other two types have not been defined. The other limitations relate to the war methods. Accordingly, denying safe haven, causing famine, retaliatory acts, unfair operations, looting and using brutal and cruel means is prohibited and eventually attack civilian targets, from personal to public facilities is also prohibited. Accordingly, to attack the defenseless cities, to attack fortified and hazardous areas to attack the dams, seals, power stations and nuclear generators, non-nuclear areas, historical, cultural and religious monuments, as well as scientific, artistic institutions and cultural heritage, to attack the safe areas of war prisoners camps, and the camps of detainees is prohibited as well.

3. Feghh (religious jurisprudence) and atomic bomb

As an introduction, first, it is necessary to define the atomic bomb in order to the topic of discussion to be clearer. Although it was expected that the definition of an atomic bomb would be provided in important international instruments, including the Non-Proliferation Treaty 1968, which is known as the NPT, but it did not happen.

Therefore, for its definition we can invoke to the protocol annexed to Paris agreements. Accordingly, atomic weapon is an armament that in its manufacture nuclear explosives or

radioactive isotopes used and because of explosion or any other nuclear changes it can widely cause destruction or poison.

Based on the definition, what separate nuclear weapons from other weapons, and should be also considered as a legal technique, is its large scale destruction or poisoning power. In order to confirm this, we can consider the definition of biological weapons which are stipulated in 1972 convention on non-proliferation, production and storage of biological weapons. Chemical and biological weapons have a common feature and it is the unpredictability of their effects so that even civilians could be vulnerable (perhaps more vulnerable) to them. And although using all these weapons is prohibited, as provided in article 17 of the 1919 treaty that using suffocating and poisoning gases, and similar to it and liquids, and similar substance are also prohibited, but the nuclear destruction power is completely different. The importance of this issue and special status of nuclear weapons resulted in a question by the World Health Organization to request advisory opinions from the International Court of Justice.¹⁰⁷ Although the court denied the request but was followed by the General Assembly of the United Nations. In the final provision of resolution 75/49 the General Assembly decided to bring up the question before the court.

Although the General Assembly question and the reply of the court is completely considerable and has been repeatedly criticized and analyzed, but what is more significant in this debate, is the mentioned question which only was about nuclear weapons. The General Assembly brought up its question that whether providing (producing) and using nuclear weapons in any circumstances permitted under international law or not.

The International Court of Justice considered the question to be addressed on the basis of Paragraph 1 of Article 65 of the Statute and paragraph 1 of Article 96 of the Charter, and in the end by decisive judgment, which is considerable issue, announced that the threat or the use of nuclear weapons is generally contrary to the international law which is applicable in armed conflicts. However, the court cannot claim that in light of the current status of international law, the objective elements of the threat or the use of nuclear

weapons in extreme circumstances of self-defense in which sovereignty of a country is endangered, is legal or illegal. However, the court held that there is no absolute prohibition in customary international law on nuclear weapons. Many jurists believed that the court judgment led the countries up the garden path. The mentioned conditions are experienced by international law. For better juratory explanation of the issue, it is necessary to reconsider the above question and answer. There are several points which have been taken into consideration in this question.

Threat, production or the use of nuclear weapon and finally defensive critical conditions of the country are various dimensions in this issue. So the issue includes production, storage and use, although the question focuses on the latter. In Shiite jurisprudence although there is not such a title, but there are relatively many similar subjects in both religious and traditions books. At the beginning, it seems useful to pay attention to some of important words of Shiite books and Juratory Great Encyclopedia, i.e. Javaheralklam. The author in Al Jihad Zeel Rokn Sani mentioned to important points. His statement about use of poison is:¹⁰⁸

As has been mentioned in the books of Nahayeh, Ghaneyh, Srayr, Nafe, Tabsareh, Ershad, and Dorous and Jameolmaghsed, infusion of poison in enemy territory is unlawful. In the many words, of course, the respect is bound to the case which is not urgent to do, or on which conquest and victory does not depend. The jurist reason for this issue is a tradition which narrated by Imam Baqir (AS), he stated on behalf of Hazrat Ali (AS) that the Holy Prophet (PBUH) had prohibited the use of poison in dualists territory, but this issue has been attributed to other news in Srayr book, although I could not find a case but the mentioned news. As it has been indicated in the Ghavaed, Tahrir, Tazkareh, Loma and Loma explanation (Arrozah) books, some jurists believe that using poison is abominable and this issue not only has been narrated by late Eskafi and Mabsoot book, but also was attributed to the companions in different books on the basis that the existing prohibition in this tradition has justified the abomination because the tradition document cannot convey the respect. As it is inferred from the above expression, the Shiite jurists are not unanimous on the issue that is related to the use of poison in enemy territory,

¹⁰⁷ U. Molaie, Tehran Winter of 2007 .

¹⁰⁸Nader Saed, Tehran, 2004.

some believe in respect and some abomination. The use of poison in the enemy territory has general meaning including drinks, food and air pollution. The tradition and the words of the late Najafi is the closest statement to this paper.

4. Respect Juratory Proofs (Evidence)

As was mentioned earlier in the paper, the discussion of atomic bomb is about three subjects including, production, storage and use. This paper focuses on the production because storage and use is another subject. What is inferred from the expression of the author of Javaher relates to using. So the evidence of using is not necessarily brought up in the production. It worth mentioning that in the question which was raised before the international court of justice there was no difference between production and use and as if the production is an accepted issue that only can be prohibited in a treaty, that is, if a state is committed to production, there is no reason for non-production.

4.1. Lossless Lazarar (Lazarar) tradition

The term of loss (Zarar) in persian and has been included in dictionaries, including *Alsahah* Volume 2, Page 720, *Mu'jam Maqayys Allagheh*, Volume 3, Page 36, *Mofradat Alragheb Alesfahany* page 293 and *Alqamus Almohyt* Volume 2 Page 75. *Ibn Asyr* Volume III, page 81, has defined loss as anti-benefit. Therefore lossless (Lazarar) means that an individual should not loss the other so that would impair his right and loss (Zarar) is reaction against incurred losses. In some verses of Holy Quran loss is VS the growth (Maedeh / 76). This tradition with particular combination has been used in Shiie and Sunni traditions, "Samreh Ben Jondab" case, "Shofe" tradition and "Mane fazl Ma" tradition naratted by Prophet (PBUH). or the meaning of this rule, well-known jurists including Sheikh Ansari, in *Fraedalvosol* book , late Nraghi in *Avaedolayam* book, fourth Aedeh and *Manyeh Altalb* book and second volume of Sheikh Musa Khonsari, believe that in divine law, there is no loss order and the mentioned rule as generalities prevails on claims and all other proofs . Although in the statement of the lossless (Lazarar) tradition meaning and consequentially in lossless (Lazarar) rule meaning, there are several possibilities which can carry seven theories, but well-known jurists have defined this tradition so that could observe religious

commandments. Accordingly, if religious decree loss to the license or practical necessity, lossless (Lazarar) rule because of dominating over the other proofs and can also limits or develop them, can prevent license or necessity decree. Consequently, if the license of atomic bomb production leads to losses, according to the mentioned rule, production respect should be taken into account. Any deficiency and reduction is called loss.¹⁰⁹

But the point is that what loss mean in lexical meaning and juratory terms which is close to lexical meaning. Any deficiency and reduction is called loss, in fact, as it is inferred from above resources loss is anti-benefit. This means that if the religious decree has no interest and expediency, both material and intellectual, or individual and collective, its issuance and divine law cannot be justified. Loss associated with common understanding and its recognition depends on general or particular custom, especially if we believe that the loss standard in non-worship is typical but not personal. In this regard, the question may be that whether the lossless (Lazarar) tradition dose not includes Discharge injunctions and the legislator decree about production of atomic bomb is a type of discharge injunctions not task one. This problem has also appeared with similar literature in other remark of religious leaderships. For instance, in reply to this question whether lossless (Lazarar) rule includes only divine decrees or necessity ones, it can be said that according to Sheikh Ansari and late Khoei remarks, the obligatory decrees are negated, however, both also have a slight difference.

Based on Sheikh Ansari remarks, lossless (Lazarar) does not include the non-obligatory decrees which relate to an individual himself /herself, but if the loss is relevant to third person and that result from a legislator permissibility decree, lossless (Lazarar) includes it .But late Khoei clearly stated that there is no difference between haming oneself and the other. The answer is that if the meaning of lossless (Lazarar) is the same as the remarks of the well-known jurists so there is no choice but respect its general provisions because in conformity with popular meaning, this tradition eliminate the loss from divine law and, on the other hand, some questionable points are seen

¹⁰⁹ G. Abysab, Tehran, 1994.

in late Khoe's that the most important is cause dominates the agent but this not the fact.

However, since there are too many discussions about this tradition and related rule, so there is no choice except to consider some of them in order to prove the popular view of jurists. Consequently according to

This tradition there is no license to produce atomic bomb in Holy law. And those who have difficulties in this case either relate to the lossless (Lazarar) meaning which have been contrary to popular opinion, or have doubt as to realization of the losses results from production. For the former it must be said that although other theories is considerable, but each have their own special questionable points that for removing them we can refer to detailed books on this subject. For the latter, regarding typical loss which has been accepted in transactions by all jurists, where there is beyond the question. Finally, that lossless (Lazarar) rule proves primary religious decree other than removes loss decree and this is explicit and precise remark that contains important results.

4.2. The rule of Denying Osr and Haraj

The term Haraj means sin and distress and hardship. However, there is a kind of distress and hardship within any sin. The term Osr also refers to the distress and hardship according to jurists remarks about this rule, there are four modes in terms of fulfilling of duty: no (without) hardship, hardship without distress and hardship with distress, and finally impossibility and incapability of denying of Osr and Haraj rule relates to second and third modes. Forth mode is subject to task Taklif mala Yatugh (task beyond one's capacity). Although some jurists believe that Haraj is stronger than Osr and any Haraj is Osr and contrary to its reverse.¹¹⁰(ibid), however, it can be said that there is a equal relationship between Osr and Haraj equivalently. There are several verses in the Quran imply the rule including Hajj / 78, Maedeh / 6, Cow / 185, 286. Different traditions, including Kafi Volume III, P. 4, 2th tradition and also P.14 of 7th tradition and Volume III, P. 33 of 4th tradition have taken into account the rule. Regarding verses and traditions, Allah in Islam has not imposed a sentence that causes sin and suffering, especially if Osr and Haraj have typical

¹¹⁰ S. Malekzadeh, Tehran, 2002.

aspect (have some kind of hardship) and put to trouble a community and a nation. Nevertheless, in this regard, there is a minor difference between the Shiie jurists: whether non counterfeit and removing the obligation from obligators means non necessity of the decree before legislator or non-counterfeit is the same non counterfeit decree that its effect can be inferred from dominance of the rule over the primary orders in accordance with the first view and its conflict with proofs and referring to documentary resources and reasons according to second one. (Regarding mandatory rule, its content will deny Hraji decree whether it is obligatory or non-obligatory, therefore it can be said that the rule dominates over primary proofs, so the rule paves the way for prior decree. In the case of conflict between Lazarar (lossess) and Laharaj (free from hardship), Sheikh Ansari prefers Laharaj, though the others believe that both of them should be rejected and consequently referring to primary proofs (ibid) leads to many discussions about this rule which are useful for current discussion as well, but involving in them gives rise to independent one. It is inferred from the above that regarding the divine law, legislator must not counterfeit decree which requiers Osr and Haraj

However, if license of atomic bomb requires typical Osr and Haraj and creates hardship and distress for the Islamic nation and Muslims, no justification is accepted. Production and storage of atomic bomb are among the examples of such a decree which requiers typical Osr and Haraj, although jurists believe that existence of personal Osr and Haraj is adequate for rejecting or counterfeiting. The predominance of this rule over other proofs demands, even if the production was permitted in accordance with the prior decree,

The divine law prohibits the production of nuclear weapons because it requires hardship.¹¹¹

4.3. Necessity of fulfillment of an obligation

Fulfillment of an obligation is among the serious discussions in Shiite jurisprudence .In this regard Allama Tabatabai the great interpreter of the Quran, following the first verse of Maedeh Sura(h) indicated to important points. He believes that contracts in this verse is plural and have Alef and Lam (A and L). (in principles terms, local sum-wing) is useful for all and therefore involves all

¹¹¹ J. Sobhani, Qom, 2000.

contracts including transaction. Consequently what called contract customarily like other contracts is entitled to commitment because human needs to fulfillment of an obligation which is infrastructure of a society and paves the way for realization of individual and collective rights?

So in Asra Sura, verse 34, Allah has confirmed the meaning of the word obligation and points out that it will be called into question. In summary, Islam considers that the fulfillment of obligation is absolutely necessary. Necessity of fulfillment of an obligation is necessary whether it is beneficial or not, even if fulfillment of an obligation causes a loss. Realization of social justice is more necessary than any cases and breach of an obligation opposes justice. At the end of this discussion he states, "and I swear by my life, necessity of fulfillment of an obligation is one of supreme teachings and Islam considered it necessary for the realization of social justice and social basis will never be formed without In 1968, the treaty on the nonproliferation of nuclear weapons, also known as the NPT was codified and entered into force in 1970. The treaty member states, including Iran, took into consideration the agency as guarantor of enforcing the articles of treaty. The main objective of NPT is to prevent the proliferation of nuclear weapons under Articles 2 and 3 of this treaty, Iran has denied having nuclear weapons of its own and has accepted agency's monitoring at all stages of its nuclear agency as well.

Based on article 3, member states which do not have nuclear weapons are committed to accept the provided decisions that stipulated in the agreement which concluded in accordance with the international atomic energy agency statute and the agency security measures system. This agreement is a typical agreement that has been regulated by the agency and called as a typical agreement, INFCIRC (214) and (153) and (66). As has been indicated in the discussion of political regimes succession, succession does not affect these obligations and continuity of them is important. Yet the NPT obligations provisions are general that also include the production.

4.4. Impossibility of respect of humanitarian principles in war

According to the section IV of the first annexed protocol (1977) and also the fourth Geneva Convention about the protection of civilians during

the war (1949), involved parties right of choosing war methods or means is limited in any armed conflict. The two basic rules which result from this principle are prohibition of use of weapons, launchings, materials and war methods that in nature cause unnecessary suffering and ensure segregation of the civilian population and combatants and as well as military and civilians targets and property. Prohibition of attacks on individuals and civilian properties embrace all violent acts, including acts of aggressive or defensive (P.1.49.51.52). Attack or threat to violence aimed at terrorizing the civilian population, which is entirely opposes human rights is prohibited. This prohibition includes blindly attack too. These attacks especially are ones that prevent war means or methods from directing. Examples of attacks are the attacks which consider a number of specific and distinct military objectives within a city, village or other area in where similar gathering of individuals and civilian properties is placed, as a single aim of military. The protocol prohibits attack on necessary objects for the survival of the civilian population, such as foodstuffs, agricultural areas and crops and livestock, facilities and drinking water supplies and workshops of water supply, (P.I.54), as it announces that the environment must be protected against widespread and strong damage (P.I.55) consequently the methods or war means which are likely to cause such damages and thus threatening the health or survival of the population is prohibited. There is a similar question in the jurist's words, including Saheb Javaher. After quoting of the jurists about infusion of poison, he states that infusing poison in water and territory of enemy is unlawful because doing so often lead to kill children, women, elders and Muslim group as well as other people whose killing is unlawful. In the territory:¹¹² If it is assumed that this method only leads to the killing of people who are lawful to be killed with different kinds of weapons, yes, they are allowed to be killed, but it is possible that in the first part non license is considered though a victory results from infusion of poison, because it refer to sokoni tradition about prohibition.

First annexed protocol of the special protection of certain property announces that if there is a threat of release of dangerous forces that can cause severe damage to the civilian population and the dams..., attack should not occur. Authoer of Shiie Vasael book, Vol 11, and entitled Aljihad quotes

¹¹²Mus ibn mohammad Khansary Najafi, , Tehran, 1994

five traditions in chapter 15 that all have the same meaning as in international instrument. The second tradition of Imam Sadiq (AS) narrated that whenever the Messenger of Allah, Muhammad (PBUH) will to war called his army before himself and said, "in the name of Allah, start off, in this war do not betray the booty, do not torture, do not kill elder, children and women and do not cut the trees unless you have to do and if the youngest of you, gives a dualist safe it is worth hearing Allah's speaking, so if he is your follower, he will be your brother, otherwise get him to a safe place and in this way, seek help from Allah". The same as this theme is in the third tradition, although there are more details such as the burning of the palm or closing water in the enemy territory and the burning of crops or following cattle has been also added.

Naturally, as defined about the nuclear weapons, these weapons are not separable and cannot respect the principle of proportionality and prohibit unnecessary loss. Advisory opinion (1996) of the Court, in paragraph 90 of Nir indicated that these rules are the basic rules that in any case should be respected (Cardinal Rules).

4.5. Islamic general policies

Glancing at juratory discussions, there are three important features of martial issues which are almost limited to Islam. Furthermore, Islam pays special attention to the training of combatant. Quran in Surah Tobeh (Repentance), verses 111-112, describes the combatant as follows:

Allah has purchased the believers' lives and property in order to make their way to heaven, which is, they fight, kill and killed in Allah's way. This promise is on his right which is pointed out in the Bible and the Quran .who is more loyal than Allah? Now we give you glad tidings for dealing with Allah and this is a great victory. Repentant, worshipers, thanks givers, tourists, prostrators, who bid what is reasonable, and forbid what is wrong and the keepers of divine boundaries and giver of good news to believers. Despite these features and characteristics we must believe that the primary focus of Islam is on training combatant. On the other hand, it remembers the principle of direct ability of the enemy and the prophecy of guiding him.¹¹³

¹¹³Abu Ja'far Muhammad ibn Ya'qub Koleini, Tehran, 1986.

Surah Nahl, task of calling to Allah with wisdom and good preaching, and finally with better controversy has been determined (Nahl / 125). As the first step in calling to the right is use of the correct logic and giving a reason. First the Quran refers to wisdom, in the second step refers to the use of human emotions and preach and advice. This means should avoid any kind of violence, superiorism, stimulation of others sense of obstinacy, etc. The third step is a debate with appropriate method. This step is for those who have wrong information that must be discharged. Evidently a well debate is formed when the right, justice, honesty. Integrity prevails on it and is free from any kind of insult and humiliation.). There are three specific recommendations devoted to the military, for example, in this regard the Prophet says: during the war don't destroy a building and don't kill women, children and aged persons, too. Allameh Tabatabai in the following verse 195 of Surah Baqara believes that to do a favour for an enemy is confront with him / her in the best manner, as it is stated in Fossilat Sura, verse 34. This benevolence includes respecting prisoners of war, the protection of injured, prohibition of killing time, children and the aged person. Prophet (PBUH) said, Allah considered charity in everything. Whenever you kill an enemy, keep a good attitude with killed persons

The triple policies, on one hand, prevent Muslim fighter from committing war crimes and reduce the cost of enemy resistance on the other hand, and call him to accept Islam religion and then he/ she will be treated well.

If the war is to be occurred in such circumstances, what will be the justification for the production, storage or the use of weapons which challenge all of the above policies? The problem may arise here that the Quran in Surah Tobeh (Repentance) below 73, states in another way. In this verse, we read: in the following verse, O prophet fight against the disbelievers and the hypocrites and be serious with them, they are placed into hell and what a bad place there is! Great Allameh Tabatabai believes that jihad has not used as a term, but it implies giving generously and effort against these people. in the following verse he says: O prophet, be serious with this people and deal with them sharply. What comes from the Quran literature indicates that jihad against the disbelievers and

dualists cannot be contrary to the mentioned principles.

We cannot act in a way that paving the way for any of guidance and doing a favour for an enemy is impassible and producing and using destructive weapons on religious logic cannot be justified.

4.6. Prohibition of war crimes

By referring to Islamic doctrines it can be found that some of the behaviors in the face of the enemy. Especially while fighting is forbidden and those who get such behaviors will commit crimes.

Since such behaviors and actions are prohibited its committing also seeks penalties. The late Jewel Saheb in the 21 volume of his book on Shrif Fegghi (Juratory Noble) and similarly, the late Sarakhsi in Volume 10 of the Mabsout book have considered the issue from jurist's perspective. What can be deduce from religious books, about twenty behaviors have been prohibited. Among above cases some are very similar to the atomic bomb. This similarity is because of the effects which result from an action and the use of special weapons. Burning in the juratory literature which is interpreted as "Rami Alnar" is among these cases. Igniting either in the form of traditional methods or using new means such as laser or nuclear weapons is forbidden and there is no difference in this respect. In general, this procedure is not justified. Allameh Helli added other cases such as Hadamal dor, Gharagh Alnahr and Otragh Alzarea in the Tazkaratol Alfoqaha book which in the literature has been extended to the cities war. Fighting with manslaughter weapons which, in fact, is a blind war and leads to mass destruction and the destruction of generation are among cases. The other cases has been also stated in juratory and traditional books, including Jame Alahadys Volume III, and Ershad (Guidance) Sheikh Mofid as well as the historical books, Tarikh Tabari, Volume VI, Sharhe Ibn Abi al-Hadid, Volume XIII, Mahasen Bayhaqi, Volume I and Sunan Bayhaqi, Volume VIII. Burning the people that has been defined as "Rmyhm Balnyran" in traditional books is the most important of these cases. Similarly, the prohibition of the use of inappropriate procedures that are contrary to

human dignity has also been mentioned. Destroying buildings and ruinous is another prohibition. The use of nuclear weapons includes all the foregoing, so there is no justification for its using in the divine law. Rationally, if the use of nuclear weapons is not justified, regarding high costs and risks and relevant intensive care, productions will not be justified as well, unless the existence of an absolute reason of mere production is justifiable for world wise men. Despite foregoing cases, a question may be raised in this regard. The question comes from an existence tradition in chapter 18 of chapters of Jhadaladv in the Aljihad book, Vasaal Alshie. This chapter only has three traditions. In first tradition Mohammad Yaqub Koleini is quoted: Imam Sadeq (4) quoted the Prophet (PBUH) stated that His Holiness has prohibited the killing of women and children. This prohibition relates to women and children who settled in the enemy war zone (Daralhrb), unless a self-defense claim is raised, when these individuals who enjoy the security fight with the Muslims. Following this tradition, the late Sheikh Hurr Ameli has said that if the killing of women and children is forbidden in Daralhrb, then killing them in Darolsalam is prohibited all the more. This tradition quoted by three learned men, that is, Sheikh Tusi, Sheikh Koleini and Sheikh Saduq. But in Chapter 16 of this vol, the author of Vasaal Alshie book quotes Mohammad IbnYaqub Koleini an opposite tradition. The theme of the tradition is that Hefs Ibn Ghiyas as a narrator quotes that Imam Sadiq (AS) was asked a question about a city of Daralhrb cities. The question is related to cut off water to the city or to fire or to throw fire by catapult toward the city. Whether such an action is permissible. Obviously if the action leads to the killing of women, children and the aged person, and also gives rise to annihilate the Muslim prisoners and traders, is it possible to behave like before?

His Holiness stated that such an action is not prohibited and it is not necessary that Islam soldiers deny acting so, and if they take an action, blood money will not belong to them apparently, these two traditions are in conflict with each other. It can be said that tradition relates to self-defense, otherwise, there is no justification for killing Muslim prisoners by the Muslims themselves and license only used for fear. On the other hand, this action should be a last defensive solution because in accordance with other traditions there is no justification for killing women and children and

¹¹⁴Ahmad ibn Mohammad Mahdi Naraghi, , Qom Iran , 1994.

finally the tradition relates to self-defense and does not refer to the production license.

4.7. Directing one to do what is lawful and enjoying not to commit what is unlawful

Directing one to do what is lawful and enjoying not to commit what is unlawful is one of the principles which accepted in Shiite jurisprudence. Based on this general and fundamental principle, any action which is considered as an important interest for an individual and society needs to be realized. If an action leads to loss of an important interest should be prevented. There are various stages of religious duty that expressed in religious books in detail. There can be found several examples in the international relations area for directing one to do what is lawful and enjoying not committing what is unlawful. It is worth noting that the lawful act is not equal to religious law. If the unlawful act is not equal to religious law too, the legislator is satisfied with lawful acts, hence they can be advised. In contrast to what is denied shall be prohibited from. That is a question, whether producing atomic bomb is equivalent to lawful actions or not. Basically it can be said that the good action is one which is friendly- wisdom and is accepted by universe wise men and legislators. The legislator and the wisdom both in order to define a good action, they compare its benefits and disadvantages and then conclude.¹¹⁵ For example, in the Quran holy legislator after considering the benefit of wine, in a comparison, he taken into consideration its disadvantages as well. As a result, he evaluated it as an evil action and, in the end, ordered that it must be avoided (Surah Baghareh / 219). This story also was raised about gambling. Such rational methods about atomic bomb should be addressed. For example, it is worth noting that one of nuclear scientists Walter in his article titled Peace - Stability and Nuclear Weapons that was published in 1995 by the Institute for conflict and Global Cooperation (IGCC) of University of California, has considered both production and proliferation of nuclear weapons. On the one hand, destructiveness and proliferation of conventional weapons is more and nuclear weapons are relatively inexpensive. On the other hand, they are not used at the most of wars. For some countries having nuclear weapon is the worst choice and for some is the best one. However, these weapons will be with us for a long

¹¹⁵ Mohammad Hasan Najafi, Tehran, 1994

time and we must take into consideration their benefits and disadvantages.¹¹⁶ Finally the author concludes that always the biggest risks in international politics are from big powers and the smallest ones are from small powers. So the new nuclear countries are not as threatening as old ones and the efforts should focus on immunization of large arsenal and not prevent the poor countries from access to a few warheads because they may need security, so they seek to acquire these weapons (ibid 176). He concluded that regarding political - economic, social, military and human dimensions can come to the conclusion that the risks of these types of weapons are much more of its benefits. When such an equation occurs in the Quran approach, it is refer to as an example of unlawful act and must be prohibited.

Obviously, the above arguments are not based on secondary orders and government provisions but are formed on directing one to do what is lawful and enjoying not committing what is unlawful. It is worth paying attention to paragraph 6 of the NPT treaty. This paragraph is equivalent to lawful act which should be rationally advised, regarding reasonable independents, religious law also confirms it because nuclear disarmament and efforts to eliminate such weapons in the world is a rational favourable fact. And world peace without nuclear weapons is far better than world peace with ones because there is no guarantee of non-use for a more complete discussion, it is important to remember a few things:

In the Holy Quran, the Muslims have been asked to enjoy forces both military and civilian (Anfal / 60). The verse theme is that Muslims should be equipped with whatever called force and power. And, of course, enjoying nuclear weapons is considered to be one of these capabilities. However, there are some points about this verse, it is worth paying attention to it. On the other hand, the verse has used the power which has general meaning and it cannot be only devoted to weapon. On the other hand, the verse refer to have the power, but not necessarily to produce it., the verse implies philosophy of such action, that is, to frighten the enemies of God. And it is clear that in any time and era the means of frightening the enemy is different. Deterrence can vary on the circumstances. Today, accepting that the atomic

¹¹⁶ Naser Makarem Shirazi , qom, 1990

¹¹⁷ Hasan Bohnordi, Qom, 1998.

bomb is a deterrent deserves reflection. However, realization of this philosophy is not associated with the production, because the purpose of having atomic bomb is both production and purchase. The forth, traditions about this verse are very different which represent instances, that is, these traditions have sought to express the cases that could cause terror and fear in the heart of enemies. Another point is that, although some jurists believe that a transaction is based on the basic principle and -the validity of any transaction is (in general sense) the principle-, as a result, production license is accordance with it and its prohibition needs evidence. But it is clear that, if in doubt, referring to this principle is possible and if there is a opposed reason about a case, it (the reason) will be addressed, but not the principle.

5. Conclusions

Production, storage and use of nuclear weapons - has always been a serious discussion on international relations. Islamic Republic of Iran due to the different issues has participated in the discussion and has always been in question by the different countries. Naturally peaceful nuclear efforts could be a good excuse to plan challenging topics which happened to Islamic Republic of Iran. Thus it was necessity that Iran's production doctrine of the atomic bomb was codified. Since the legal issues in the legal system are rooted in the legal sources, referring to the juratory interests within the primary orders is the best response. Although in this regard the secondary orders and government provisions is also considered, but in the discussion, juratory primary orders in determination of doctrine is preferred. In this article has been attempted to take into account several reasons that comes from juratory primary orders. By referring to the juratory interests there are a variety of reasons indicating the respect of atomic bomb? Some of these reasons show in the light of fulfilling of an obligation that the violation of an obligation is unlawful. Some other evidence was followed as titled Lazarar (lossless) and Laharaj. What is worth noting is that, although invoking to the Lazarar (lossless) as a predominant rule indicates the lack of production license, but such an order cannot be necessarily considered as a secondary order because in some cases Lazarar prevent order from counterfeiting and in some cases Lazarar ignores the existence order due to losses and in some cases it counterfeit the order itself.

Therefore, it cannot be argued that essentially production of atomic bomb needs a license on the basis of general rules of such transactions, in general sense, and on the basis whatever is lawful so that its respect could be recognized, so if loss caused by this license, it can be prevented according to Lazarar rule. But the story tells otherwise. it seems that, basically, production license is not necessary because the general rules are lawful and the license observes rational cases the cases which are not rejected by common sense ,otherwise, it should be noted that there will be no unlawful unless there is a loss. This means that the privy actions essentially need license, but because of existence of the loss the issue of license is impossible. In summary, first, the prohibition of atomic bomb production cannot be determined in a secondary or

Government titles and thus, without an important policy which must not ignored, one cannot speak of a production license. Of course, use is itself another issue. The distinction between Islamic religious approach to producing an atomic bomb and international instruments must be defined in the production license. Because according to the NPT, production, at least, for reach countries is an established fact, and if there is prohibition of production, it is because of an agreement and a treaty law, otherwise, there cannot be found another reason for prohibiting of production While the general regulations of Islam do not include production, although there is no also an agreement in this regard.

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The Effectiveness of the European Union Measures for Reconciliation of Work and Family Life

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Abstract

The principles listed in The Charter of Fundamental Rights of the European Union which was proclaimed in the city of Nice (France) in December 2000 with an emphasis on Chapter 4- Solidarity i.e. Article 33 - family and professional life will be the starting point of the paper. The paper analyses the effectiveness of the European Union measures aiming towards realization of the rights resulting from this Article. Comparing the state of families and family life in the European Union before and after the proclamation of the Charter of Fundamental Rights of the European Union in the year 2000 leads to conclusions regarding the challenges of the balanced family and professional life in the growing European family.

1. Introduction

Ever since the establishment of the European Union, the economic development was the most emphasized component in terms of economic integration between the member states aiming to form a single Internal Market. This can be noted in the Founding Treaties from the 1950's (the Treaty establishing the European Coal and Steel Community from 1951, the Treaties of Rome establishing the European Economic Community and the European Atomic Energy Community from 1957). The concepts of the European Union and its Treaties did not cover the area of politics, figuring that the human rights are part of the responsibilities of the Council of Europe and the European Convention on Human Rights whereas the social policies are member states' obligations. The European Union continued developing in the spirit of economic development. During its existence of almost 6 decades, it constantly expanded its authorities reducing the member states' authorities primarily in the area of economics whereas the same was done to a lower extent and with a slower pace in the sphere of politics [1]. The lack of common family policies on the one hand and the incompleteness of definition

of social rights on the other hand strengthened the absolute member states' autonomy in control of the field of social politics.

Efforts to harmonize the national legislations in the field of social politics have been made since the Treaties of Rome but they are not even close to reconciling family policies and social rights of the European Union citizens. The years to come bring structural changes in the European family, new family forms, changes in birth rate, life span and other indicators that influenced the increasing heterogeneity of family characteristics in the member states. All this influenced the European Union to start considering the family as a key tool for the social and economic prosperity to a greater extent. In 198, the European Parliament formulated a Resolution on family policies in the European Community so that they can be integrated in the other community policies. This Resolution expresses concern in regards to the implications of the changes in structure in the European family and the role of the woman in the family and in the society and simultaneously, it has been suggested that an action program aiming to harmonize the national policies is established in the frames of the EEC. During 1989, a communiqué on family policies has been published. The Communiqué establishes the areas of mutual European interest, such as reconciliation of family and professional obligations, helping certain categories of families as well the effect that the EEC policies have on families, especially on children during the school period. It is underlined that an action which must be pragmatic in order to respect the separate characteristics of the different national policies that have already been created and the socio-economic context in which these policies exist must be taken. In 1994, with the Resolution on Protection of the family, a more inclusive approach in regards to protection of children and the family on the European Union level has been initiated through securing an equal treatment of all families no matter their structure or type. Since the year 2000

onwards, the interest in the area of family policies in the European Union increases. If the problem of the European policies on family being underdeveloped resulted from the lack of binding united level.

2. The Charter of Fundamental Rights of the European Union

The peak of expressing democracy and respect of human rights and liberties in the European Union is the Charter of Fundamental Rights of the European Union, proclaimed by the European Council on the Summit in Nice in the year 2000. The Charter is the formal statement on human rights of the EU and beside the civil and political freedoms and rights includes a wide area of economic and social rights. In addition to emphasizing the universal values that are the foundation of the Union, for all member states, it supports the social policies that will enable a uniformed, legitimate respect and practice of economic and social rights in the Union. The Charter consists of 6 chapters (Dignity, Freedoms, Equality, Solidarity, Citizen's rights and Justice) and its 54 articles elaborate on the values of the European Union and the civil, political, economic and social rights of the citizens of the European Union.

The Chapter Solidarity is the one most directly related to the topic of this paper. This chapter reflects some of the stipulations of European Social Charter. It lists the social and worker rights such as the right to fair working conditions , right to protection from unfounded dismissal from work , the right to protest, employees right to information and consultation, right to reconcile family and work life, right to healthcare protection, social security and social welfare throughout the entire territory of the European Union. It can be noted that the forth chapter mainly consists of labor rights (abolition of child labor, right to fair and just work conditions etc.), the right to free professional orientation, environmental and consumer protection. This chapter has been subject to a great extent of criticism due to the weak formulation of many rights contained in it , some of which were not formulated as rights and freedoms at all (environmental and consumer protection). It is still worth noting that the Charter promotes the equality between men and women and introduces rights such as data protection, right to environmental protection, rights of children and the elderly and the right to a good administration .

acts of this area, the EU Charter of Fundamental Rights brought the social rights connected to family life to a whole new and

The Chapter Solidarity is specifically significant for the social politics of the EU because with the right to reconciliation of family and work life the European Union actually strengthens the position of the family, that is the parents on the Workforce market. Article 33 - family and work life, lists:

The family has the right to legal, economic and social protection; In order to reconcile family and work life, everybody has the right to protection of dismissal from work due to reasons connected to maternity and a right to paid maternity leave after giving birth to or adopting a child (from Charter on Fundamental rights of the European Union).

Even though the Charter did not have a full legal effect, it has been practiced as legitimate by the EU institutions since it was adopted. The European Commission has conducted a revision in regards to the concordance of the Charter and all legislative proposals. It has also quoted and practiced the stipulations in practice. The European Ombudsman has also continued to direct towards the stipulations of the Charter in his speeches and annual reports , i.e. the basic standard for evaluating the concordance with the human rights , according to the European Ombudsman , is the Charter on Fundamental Rights.

The Charter on Fundamental Rights of the European Union became legally binding for the institutions and member states of the European Union while practicing the Law of the EU when the Treaty Of Lisbon (1 December 2009) came into force. The Charter listed in the Treaty is a renewed version of the Document of the year 2000.

3. Current situations in the European Union

Since the year 2000, the interest of the European Union for family and family life has been increasing. Family policies are gradually becoming a priority topic in the political and economic activities. This point of view probably results from the current demographic changes in the industrialized world as well as from the structural changes in family and social life. Great changes have been noted in the family models. Beside the dominant model of households consisted of parents with one or more children, new forms of reconstructed families (families consisted of

partners and children from previous marriages), as well as single parent families, same sex marriages etc occur. The average size of the family has also diminished as a consequence of the decreased birth rate. In 2011, 5.2 million children were born in the EU. This number is identified as a cruel birth rate (the number of live births per 1000 population) of 10,4. Since 1960 to the beginnings of the 21 century, the number of live births in EU-27 has rapidly decreased from 7,5 million to a low level of 5,0 million in 2002. The number of divorces also increases and the number of marriages decreases. According to Eurostat (Statistical office of the European Union) the number of marriages concluded in EU-27 in 2010 was 2.2 million whereas about 1,0 divorces have been registered in 2009. The rate of concluded marriages, that is the number of marriages per 1000 inhabitants was 4,4 in 2010 whereas the divorce rate was 1,9 in 2009. Actually, the marriage rate in the EU-27 decreased from 7,9 marriages per 1000 population in 1970 to 4,4 marriages per 1000 population in 2010.

It has been established that the EU population is constantly decreasing and aging. The extension of the life expectancy, the decrease of the fertility rate and the waves of immigrants have notable repercussion of the age structure of the population in Europe (in the last 50 years, the life expectancy of the EU citizens has been increased for 10 years). A big difference between the ideal and real size of the families is noted in regards to the decrease of the European fertility rate. This attitude has been confirmed by the recently published report by Maria Rita Testa titled "Family sizes in Europe: Evidence from Evrobarometer Survey" according to which about 30 % men and women at the age of 40 or more, concluded their reproductive roles before reaching the desired size of family. It has been established that although the preference of families with 2 children is popular again, it is still far from the time when Europeans wanted a 3 and 4 child family whereas the reality mirrors European single child families [2].

Great changes have also been occurring in the structure of the active working population, in economic terms, and at the same time, the general concern for fiscal and financial sustainability of the social security system has been increasing. The parents' employment, of course, is the basic dimension in the family policies and through it, the rights to gender equality, extinction of poverty and social exclusion are practiced. According to the

European surveys on the workforce, the average employment rate in the EU -27 is 65,4% in 2007, which is 0,9% more compared to 2006 and 4,6 percent points more compared to 2000. In other words, out of 100 citizens of the European Union between the ages 15 and 64 are in some sort of working relationship, regardless of the type: a full time employment, part time employment or an employment agreement on a fixed period. The other 35 % are either unemployed or inactive. Also, the need for providing public transportation and services for the children and the elderly has been increasing, which pressures the public consumption. Although progress has been made in the overall employment rate, the European Union believes that additional efforts for increasing the employment rate in order to provide a sustainable economic growth and social cohesion are needed [3].

The time people spend at the workplace is another hurdle on the road towards a balanced family and professional life. The number of working hours is one of the most important factors in establishing whether someone's work is compatible with their family responsibilities and the life outside the home overall. In general, Europeans are less satisfied by the amount of time spent with their families than by the amount of time they spend at work. As a matter of fact, the family life adapts to the profession. There are significant differences in the reasons for dissatisfaction from the balance between family and work in the European Union countries. As the survey "Second European Quality of life Survey - Family life and work" points out, the reason for this in the Nordic countries and Benelux countries is the lack of time, whereas the reason in the Central-European countries and country candidates of EU is the tiredness resulting from bad working conditions that come from long working hours. In accordance, it seems that reconciling work and family life is easier in the German speaking areas and the Anglo-Saxon countries [4]. Also, the key working conditions that decrease the compatibility of the workplace in terms of the relation work-family are the long weekly working hours and "unsocial" working time during the evening, night and weekends. The inflexible working hours and the limited childcare lead in favor of strengthening the traditional division of labor in the family - "the man makes the living and the woman takes care of the household" and in this way, the create difficulties in combining the paid work with the family duties. Besides, the "unsocial" working

hours during the night , as well as the unpredictable changes in the working schedule increase the possibility of a conflict between work and family for men and women [5].

As a result, the European Union faces challenges in the field of family issues that have never emerged before. Family structures change, parents have difficulties reconciling work obligations and private life, gender equalities not always a reality, child poverty increases and on the other hand, the Union must provide reconciliation of family and work life for its citizens as this is a right guaranteed by the European Charter , as part of their human rights and freedoms.

4. How EU provides reconciliation between work and family life

Considering the fact that the European Union sees family as a source of economic prosperity, it stimulates the member states to incorporate family policies into their economic and social politics. It insists that the families are treated equally, no matter their structure or type. Special attention is dedicated on the needs and protection of children , with a special focus on the children in single parent families and poor households as well as on promoting equal opportunities for men and women , preventing family violence and child abuse. In the last few years, the European Alliance for Families that has been established in 2007 aiming to contribute towards the creation of appropriate family policies through exchange of ideas and experiences between the member-states and inducing cooperation between the Union's members has had a great influence in the field of development of a common approach in the area of family policies on European Union level. Its members advocate for a greater support and better quality in the care for the children and the elderly, more flexible work engagements that go in favor of family needs as well as for greater gender equality and greater inclusion of fathers in process of raising children (European Alliance for Families, 2007).

The measures the EU anticipates for a greater reconciliation between family and work life can be noticed in the degree, nature and frequency of the aid and support to parents, such as financial means , flexible working hours, flexible work engagements, various measures provided by employers that enable balancing work and family duties. The guarantees or at least opportunities to keep the

work post after returning from some of the leaves connected to family obligations, providing opportunities to advance in the workplace and the career in general as some of the goals. In the current economic crisis, it is crucially important that the policies providing the women's interests are not set aside [6].

Families are provided with different benefits: Child needs and protection come first and this is why the financial aid is necessary, in the form of social aid and /or tax reliefs that present a compensation of the expenses related with raising of children; Additionally, the reconciliation of family and work life means advancement of education and welfare of all the family members. Assistance in-kind or assistance in the form of services from the area of education , young children care (these measures can be in the form of direct providing of services and / or providing grants for various services that can be in the form of tax relief or monetary aid that would help families pay for certain services) is anticipated.;

Family leaves and other compensations meant for parents that provide care for their children (maternity leave, paternity leave, special care for sick or handicapped child leave etc.) The assistance in the form of compensation for leaves, above all, has the purpose to protect the mother before the birth of the child as well as to assist her to strengthen physically and mentally after the childbirth, at the same time not neglecting the needs of the child for care and establishing a close contact with both the parents. A financial compensation for paternity leave is also anticipated as the father as well has the need to establish close contact with the newborn child. This measure favors the support of equal distribution of parental obligations and the roles of the genders. The scheme of leaves, i.e. the maternity leave, the paternity leave , parental leave and special childcare leave covers a time period in which parents are absent from work due to childcare and most countries provide parents with monetary compensation to the lack of revenue in the leave period. The Nordic countries along with Estonia, the Czech Republic, Latvia, Hungary and Romania allocate the biggest amount of funds for this measure of the family politics [7]. The occurrence of different forms of family leaves is one of the central issues of the European Union. These leaves are a part of the measures for balancing and reconciliation of family and work life. They are

also one of the ways in which parents, especially mothers try to cope with the indirect expenses for raising children and childcare, insisting the time spent in raising their children does not interfere with the progress in their careers. Although at first it was established and developed as a measure to support parents and relief their return to work or labor force process, the parental leave is a measure to induce equality between genders. However, the leave can enhance the difficulties for some parents, especially mothers that most often face the difficulties of keeping their jobs or reentering the workplace process. The leave policy aims to protect the mother before the childbirth as well as to help her physically and mentally strengthen after the delivery, at the same time not neglecting the needs of the child to establish close relations with both parents. This measure respects the need of the father to establish a close relationship with the newborn as well and thus supports the equal distribution of parental obligations and the roles of the genders. The scheme of leaves, i.e. the maternity leave, the paternity leave, parental leave and special childcare leave covers a time period in which parents are absent from work due to childcare and most countries provide parents with monetary compensation to the lack of revenue in the leave period. The Nordic countries along with Estonia, the Czech Republic, Latvia, Hungary and Romania allocate the biggest amount of funds for this measure of the family politics [8].

The measures that the Union introduces to adjust work time to family needs of employees are presented in a form of managing the work hours that include different possibilities such as : collective reduction of working hours, individual right to reduction or adjusting of the working hours for family reasons. In addition, there are the programs for flexible working time and the schemes for " adding hours" (so called working time accounts) that allow employees to have different working hours based on the individual family situation. In order to provide the employees with the needed time and flexibility to cope with their family responsibilities, EU policies include the possibility that connects workers with the workplace from home via telecommunication and thus combine family and work obligations on a daily basis more easily [9].

The following paragraphs point out some good examples of the productiveness of the European

Union's assistance for reconciliation of family and work life.

In 2007, Slovenia introduced a Family - Friendly Company Certificate to encourage employers to implement principles favorable for the family obligations on the workplace. The Certificate is granted to companies that adopts at minimum of 3 measures of the catalogue for reconciliation of work and family life, such as flexible working times, company childcare services, job sharing, adoption leave or part-time work [10].

Germany implements the program Family: Success factor to make the friendliness towards family a characteristic of German economy. The program offers employers advice on how to organize their activities in a way that will enable employees to sustain a family-work balance.

In Torino, Italy, in 2007 the centre Everyday Life House - a multipurpose social and cultural centre for families, children and elderly was built, with a financial support by the European ,urban II fund (7,3 million euro).

Portugal and Romania have implemented an exchange program : The voice of European seniors (2009-2011) financed by Grundtvig that offers 3-week or longer stay in social care institutions to voters over the age of 50 [11].

Beside this, the support for family businesses and requests by the Union that the member states adopt measures for creating a more favorable environment for family businesses through laws on taxation and trade companies, were productive. Family businesses make 60% of European small and medium enterprises. The European Union offers multiple opportunities for agriculturists that wish to modernize or expand their activities. (European Agricultural Guarantee Fund) (EAGF); European Agricultural Fund for Rural Development (EAFRD).

5. Conclusion understandings

It is a fact that the demographic changes and the labor force market shape the family and work life with long-term consequences. The demographic changes are caused by the changes in the models of forming a family and the changes in the roles of men and women in the home along with the decrease of the birth rate, lifespan extension and

free movement in the EU that result in a lot of trouble in the field of distribution of time and obligations between work and family. On the other hand, transformations on the Labor market caused by the increase of economic instability, insecurity at the workplace and the growth of work productiveness and flexibility do not diminish the tendency to achieve balance. Although the differences between the ideal and real size of the family in the European Union point out that the Europeans still "dream" about bigger families, it is a fact that this dream does not become a reality.

In the past family policies were placed under the jurisdiction of the national politics of the member states and a unique family policy was not possible. One of the reasons for lacking a unique family policies in the field of family is the accent of the worker's freedom, not the citizen's freedom, which is the case with some other rights that have not been developed enough. At the same time, there are great differences between the states and within them, in regards to the values founding the family policies of different countries as well as assistance measures for families and children in the member states which obstruct their coordination. In the last decade, however, it can be noted that the policies introduced by the EU aim to shift the context of work and family life to EU's sphere of action and to a wider social frame.

As we could notice, EU policies underline the balance between work and life, gender equal distribution of tasks, increase of the birth rate as well as many important items for the social politics of the Union. Mainly, the measures focus on three dimensions i.e. goals: first, the welfare of the child, second, gender equality and third, balancing family and work life. It is obvious that these goals are interconnected and that the development in one area is dependent on the development in the other area and as such, they form a union. The research data clearly shows that the reconciliation between family and work life contributes towards the child's welfare and that the parents' satisfaction is increased if they can balance these two fields of life accordingly. An important goal of the European Union is the reduction of child poverty because even though there is an overall labor market development, children are in an increasing degree of danger from poverty compared to the general population in the European Union. The European Union considers that solving the problems in all areas and establishing an adequate balance between

the family and the child is the best way to overcome child poverty. It implies combining of the strategy for increased employment of the parents by providing services and financial assistance to avoid spinning in a circle and coming to the same point again. The European Union should insist on its members implementing a balance diverse policies in the process of overcoming these challenges.

Although the gender equality has a top priority status in the European Union, women are still in a bad situation when it comes to balancing family and work life. Several initiatives of the European Union promoting consistent gender equality have been raised and this would solve the problem of differences in earning between genders aiming to encourage member states to implement the legal provisions in the area of gender equality. The Union is taking actions and steps in the area of gender equality by promoting equal participation of women and men in the decision making process , for example, participation of women in political or economic decision making through transparency in promoting, flexibility of work time and access to childcare facilities. Beside all the efforts for reaching gender equality, the women's efforts to reconcile obligations and demands of the workplace with the home, children and other family members put them in a subordinate role on the workforce market. As a matter of fact, only 67 % of women with young children go to work in the European Union, compared to 92 % of men (according to the data of The European Commission , European Union 2011) .Also, almost one third of women in the EU , which is 31/4 % , work part -time compared to only 7 % of men (according to The European Foundation for the Improvement of living and working conditions, 2007) .

In conclusion, an action that must be pragmatic in order to respect the separate characteristics of the different national policies that have already been created and the socio-economic context in which these policies exist , must be taken . Policies aiming to create appropriate conditions for balancing family and work life should not result only with a better adaptation of the family's requests but should have a useful effect on people's satisfaction by the reconciliation between work and family in the modern societies. In the future, EU policies should place a greater focus on the measures for active participation of women on the workforce market, equal distribution of obligations in the framework

of the family between paid work and unpaid care and finally, equal distribution of responsibilities between partners in the home. These measures, along with the equal treatment of men and women at the workplace, employment incentives, birth rate increase measures shall contribute towards a constant social and economic growth on national level and on European Union level.

6. Recommendations

Challenging the title of this essay, I'm asking myself if the EU found a solution to the problem. Most probably, it didn't. It could be worse if nothing was done, but it is a fact that the figures showing the aging population in the EU, the increasing number of divorces and the decreasing number of births opens one of the most serious topics for the EU.

This will have, and already has impacts on the European economy, on the social benefits for the elder, on the rate of taxes paid by the working class. Is it making the EU a larger or a smaller market in the long run with more or less competitive advantage Vs. the US and the growing economies like China, India, Brazil, Russia and others?

We need to check on the demographics and get more details about the problem. Where is the answer? Can government measure make highly educated women with a strong career to give up their carrier development for four years in order to be able to raise two kids in a period of four years? I don't think so. Can the EU search for the statistical improvement of marriage/birth rate in the working class? Knowing the working class is the largest group, the answer might be YES.

What kind of measure should be taken? More aggressive measures, which will produce hard discussions in the Union and make some conflicts between the political axes; or measures below the line, which might give results on the long run.

No quick results could be achieved without some blood, sweat and tears. I believe that the most can be done by focusing on the medium income working class with government incentives. This should be checked through large qualitative and quantitative studies in order to predict the outcome.

Some measures could include:

- Education reimbursement for third child Lower interest (reimbursed) rate for families with a third child purchasing real estate Singles luxury tax (very tricky one) Educating so called "family specialists" or "family consultants" to help young married couples stay together during difficult periods (divorce prevention)
- Informal education through NGOs about the importance of work-family balance

I would conclude with the fact that the trend is negative and something should be done. Even if wrong measures are taken, new measures will be invented and taken. The worse case is doing nothing and simply observing.

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IV PLENARY SESSION

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Towards a more neutral income tax system

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Abstract

Belgium is one of the many countries struggling to reform its income tax system. In the open and global economy of the 21st century, a more transparent and neutral tax system with fewer loopholes should be pursued.

The main aim of this paper is to analyze two important tax-induced distortions. First of all, the current income tax system is not neutral regarding the choice of the legal form of a business. Secondly, it is not neutral regarding the financing choice of a company between debt or equity. In order to improve economic efficiency, tax policy should be as neutral as possible by minimizing these distortions. Therefore, tax measures should not have a first-order effect on business decisions. However, multinational enterprises benefit from loopholes in the tax legislation of countries to evade and avoid taxes.

This contribution provides an overview of the historical evolution of business income taxation in Belgium and reveals new insights. Additionally, this paper focuses on some important research studies conducted by international organizations and by other countries which emphasize the need for more neutrality in tax reform.

1. Introduction

1.1. The need for more neutrality in tax policy

The basic concept of tax neutrality is simple: generally spoken, a tax system should strive to be neutral so that decisions are made on their economic merits and not for tax reasons [1]. The main purpose of tax systems is to raise the revenue that is required to pay for government spending. The goal is to raise this revenue without

distorting the decisions that individuals and enterprises would otherwise make for purely economic reasons [2].

When policymakers impose higher taxes on sole proprietors than on incorporated enterprises, people would factor taxes into their choice of legal form and would not choose the economically most efficient form for their kind of business activities. In addition to distorting choices, non-neutralities in the tax system will also lead people and enterprises to devote a substantial part of their efforts to transforming the form or substance of their activities in order to reduce their tax payments [3].

The lack of neutrality towards the legal form of a business can also mean an infringement of the principle of equality, which is constitutionally guaranteed in many countries, including Belgium [4].

The European Commission has also made a recommendation concerning a more neutral taxation of small and medium-sized enterprises [5]. It gives a detailed examination of how enterprises are taxed and reveals a disparity in tax treatment depending on the legal form under which they operate. The recommendation indicates that because of their legal form, sole proprietorships and partnerships very often have to pay income tax on the whole of their income. The progressiveness of the personal income tax scale means that the marginal rates of this tax, while sometimes lower, are generally higher than the rates of corporation tax. The European Commission emphasizes that this creates distortions of competition between enterprises on the basis of their legal form, particularly since the self-financing capacity of sole proprietorships and partnerships is likely to be squeezed compared

with that of incorporated enterprises of the same size or even larger, owing to their heavier tax burden. In some cases this may affect the very development of the enterprise. Because on average, in the EU one out of two firms is a not incorporated enterprise, this tax feature has a quite significant impact. Therefore, some Member States of the EU have themselves introduced tax arrangements based on the concept of tax neutrality between incorporated and unincorporated enterprises [6].

With regard to the non-neutrality towards financing choice of a company between debt or equity, we must emphasize that most corporate tax systems contain a debt-equity tax bias, because at arm's length interest payments are in principle tax deductible, while dividend payments are part of the corporate tax base. Debt-financing is thus favored over equity-financing via the tax deductibility of interest payments, which causes economic distortions and outward tax planning opportunities [7].

Firstly, the tax bias has an impact on the economic choices of companies: the choice to finance new investments with debt or equity. In this respect, it should be noted that highly leveraged companies experience an increased risk of bankruptcy.

Secondly, in an international context it may encourage outward tax planning opportunities. Some companies will shift reported profit via debt-shifting or the use of hybrid instruments [8].

In respect of the above reasons, it is clear that legislators should aim for minimalizing tax-induced distortions, such as the debt-equity bias and the lack of neutrality towards the legal form of a business.

Of course we acknowledge the fact that deviations from a neutral tax system can reflect certain goals of policymakers. A tax system can for example encourage home ownership. But it is highly debatable if a tax system is the best way to achieve these goals, especially considering the economic implications [9].

1.2. The unequal tax treatment of business income between sole proprietors and corporations

The current Belgian tax system is characterized by a lack of neutrality regarding the choice of the legal form of a company. This forms a tax-induced economic distortion [10]. A different set

of tax rules apply to sole proprietorships (with no separate legal entities from the individual owner of the business) and incorporated enterprises (with separate legal entities from the owners). On one hand, the business income of sole proprietorships is directly taxed as a business income of the owner in the personal income tax and on the other hand, the business income of incorporated enterprises is directly taxed in the corporate tax. The main differences between personal income tax and corporate income tax concerning the income derived from the business activity are :

- There is an important distinction in terms of tax rates. In the personal income tax there is a progressive rate ranging from 25% to 50%, while a proportional rate of 33.99% applies to the corporate tax [11]. Although one can argue that on the distributed profits, a certain rate balance exists between personal income tax and corporate tax, there is more to it than this. The problem is that the majority of taxpayers will be taxed at an average tax rate of personal income that is higher than the tax rate for the corresponding amount of income in the corporate income tax. When a sole proprietor receives a total income of more than €37.330, he will be taxed in the personal income tax at the rate of 50%. Meanwhile, when an entrepreneur chooses to embed his business in a separate legal entity, such as a corporation, the lower rate of corporate tax will be applied and the owner can defer tax in time by booking long-term earnings as reserves in his corporation.
- The rules that apply to profits earned in the personal income tax form the basis for calculating the taxable profit relating to incorporated enterprises, but it is important to take into account that there is a set of exemption rules that apply to incorporated enterprises [12];
- Profits of a sole proprietorship are subjected to substantial additional social contributions, while this is not the case for profits of an incorporated enterprise [13].

1.3. The unequal tax treatment between debt and equity in corporate income tax

In the current Belgian tax system there are also severe consequences attached to the debt-equity choice. The main tax consequences relating to external financing for taxpayers subject to the Belgian corporate tax, can be summarized as follows [14]:

- Dividends are part of the tax base, while at arm's length, interest payments form a deductible business expense for taxpayers [15].
- In principle, on dividends and interest payments, a 25% withholding tax should be withheld. However, there is no withholding tax levied on dividends and interest payments if all exemption conditions of the Parent-Subsidiary directive and of the Interest-Royalty directive are met [16].
- The withholding tax can be offset against a company's corporate tax liability and can possibly be refunded to the extent that the withholding tax exceeds the corporate income tax due [17].
- Ninety-five percent of dividends received could be tax exempt if all the quantitative and qualitative requirements are fulfilled for the system of dividend received deduction, while received interests are subject to corporate income tax [18].
- Incorporated enterprises subjected to corporate income tax can benefit from deduction from their taxable base in the form of fictitious interest deduction calculated on the basis of the risk-bearing adjusted net-equity of the company or Belgian permanent establishment. This deduction is called the notional interest deduction. For small companies, this deduction is increased with 0.5% as a favourable measure [19].
- Thin capitalization rules can be applied if a company is being excessively funded by debt [20].

2. Legal historical evolution in Belgium

2.1. The Belgian tax system in the past : more neutrality?

The authors have researched and analyzed the four main legislative reforms in the history of the Belgian tax system. These reforms are relevant to show the evolution of the taxation of business income. These four reforms include the Act of May 21st, 1819 that introduced the patent tax on corporate profits, the Act of September 1st, 1913 that changed the patent tax for incorporated enterprises thoroughly; the Act of October 29th, 1919 that introduced the schedular income tax system and, finally, the Act of November 20th, 1962 that introduced the Belgian current global income tax system with on the one hand the personal income taxation and on the other hand the corporate income taxation [21].

The Belgian legal history shows that the legislator initially wanted to obtain neutrality of legal form, meaning that the tax is levied regardless of the legal form in which an entrepreneur wished to exert his activity. An example of this is the business tax in the schedular tax system that applied to business profits derived from all sorts of enterprises regardless of their legal forms. Only later the legislator became aware of the consequences of the unequal tax treatment between debt and equity. We believe that striving for a system in which taxation is neutral towards the chosen legal form may be a justification for the unequal treatment between equity and debt. In the past, the shareholder was considered as an extension of the company. Moreover, shareholders were considered both as the controllers and the owners of the company [22]. The legislator wanted to affect the shareholder by taxing corporate earnings. At the same time, the legislator assumed that the payment of interests impoverished the incorporated enterprise, and thus also indirectly the shareholder. Nowadays, there is a separation of ownership and control in large companies: the management instead of the shareholders really control the company [23].

In 1962, the corporate income tax in Belgium was designed as a withholding device for the personal income tax [24]. When a dividend was paid by the incorporated enterprise, the underlying corporate taxes were credited against the personal taxes of the shareholder. In addition to this first measure, the (imputation) tax credit, there was also a second measure, namely an optional system for small companies [25]. This optional system implied that certain smaller companies could choose that their profits were either taxed in the personal income tax with the shareholders of the company or separately taxed in the corporate income tax. A third measure that enhanced neutrality of legal form was a higher rate of corporate income tax that was also implemented in 1962 for reserved earnings [26]. Therefore, it was made less attractive for companies to book long-term profits as reserves and defer tax in time. However, the above-mentioned tax credit, optional system and higher rate for long-term reserved earnings were rather short-lived measures that emphasized neutrality of legal form in the tax system.

Although there was an initial implementation of neutrality towards the legal form of a company,

the measures that really emphasized the neutrality were not applied for a long time. Neutrality or lack thereof, towards debt and equity in tax treatment were not a priority or a conscious choice of the Belgian legislator in the past.

2.2. The current and future Belgian tax system : need for reform?

Since the abolition in the eighties of the above-mentioned measures that entailed more neutrality towards the legal form of a company, there has been a growing lack of neutrality of legal form in the Belgian tax system. For many sole proprietors it is much more interesting to conduct their business in the form of a separate legal entity, such as a corporation, only for tax purposes. Therefore, future tax reforms should not only depend on budgetary needs of the government in the short term, but should also be based on a reinstatement of previously existing principles that underpinned the tax regulations, such as the pursuit of more neutrality of legal form. One can consider to reinstall the above-mentioned measures, for example the optional system. However, one must take into account that the benefit of a different rate will remain if such a system for taxable persons is optional. Hence, such a system can probably only be effective in our current tax system if it is made mandatory. This in turn entails a new problem, namely which companies will be obliged to be taxed in the personal income tax. The reverse solution forms also a possibility, namely that all types of enterprises, including sole proprietors, are taxed in the corporate income tax on their business profits. This would also entail a rapprochement to the old business tax of 1919 which made entirely no difference towards the legal form of the enterprise.

A more pragmatic reform of the Belgian tax system could entail a return to the diversified corporate tax rate of 1962, in which reserved earnings were taxed more heavily than distributed profits.

Another approach could be to focus more on the specific differences that exists between large (multinational) enterprises and small enterprises and provide in more customized measures for each category. In this case it would still be possible to categorize the sole proprietorships under the small enterprises. The current tax

system only exceptionally provides in some measures in favour of certain small companies (i.e. with separate legal entities), for example a higher rate of notional interest deduction.

All companies that are subjected to corporate income tax can normally benefit from the notional interest deduction. However, this system is based on a weaker existing relationship between shareholders and corporations than the one that was presumed in the former measure of an imputation tax credit. From this perspective, it is rather maladaptive that the small companies which usually have a stronger relationship with their shareholders than large companies, receive a higher deduction of risk capital.

It is self-evident that policymakers should not only pursue more neutrality of legal form in future reforms, but should also pursue a more neutral and equal tax treatment of equity financing relative to debt financing. The tax legislation should not lead to a situation in which an entrepreneur's financing choice is being primarily influenced by fiscal considerations. Therefore it is essential that these tax-induced economic distortions are minimized as much as possible in future tax reforms.

The legislator can achieve this by granting an imputation tax credit to shareholders. In that case shareholders receive a tax credit which corresponds to at least some part of the corporate income tax which has been paid on the profits that are distributed as dividends. However, reintroducing an imputation tax credit for shareholders could be difficult in respect of the freedoms of the European Union, namely the free movement of capital and the freedom of establishment. A discrimination of those principles arises if dividends that are paid to residents by resident companies are treated differently than those paid to residents by non-resident companies[27].

Another possibility is to maintain the current system of notional interest deduction. In the present economic climate, however, this deduction is put into question, since it is assumed that companies overcapitalize to reduce their taxable base by this deduction. Such abuse could possibly be restricted by introducing different tax rates for distributed profits and reserved earnings. Once the total amount of retained earnings

exceeds a certain limit, the retained earnings could be taxed more heavily than the distributed profits.

An alternative to the above-mentioned measures may consist of making the interest partially non-deductible under certain conditions, as specified in the current undercapitalisation rules for companies. Finally, there is also the option of introducing a system of defiscalization of interest. This means that interest is non-deductible (for the debtor) and non-taxable (for the creditor) for corporate income tax. Although the Act of September 1st, 1913 considered the interest payments as a profit component, defiscalization of interest for companies was never mentioned. Merely the interest payments and fees were included under the Act of 1913. Furthermore, this system led to a further erosion of the tax base in cross-border situations, since the interest is mostly deductible by the debtor.

Consequently, we can only agree with the Finance Minister of Belgium when he recently mentioned that the basic principles of the tax reform of 1962 are lost in the current system of income taxes and that this is deplorable. He also stated that there is need for future reforms, but that there is still a lack of broad political support to succeed in a thorough tax reform [28].

3. The points of view of international and country reports regarding more neutral tax systems

3.1. The OECD

The OECD (Organization for Economic Co-operation and Development) stipulates in its paper 'Tax and Economic Growth' that there is a wide consensus that taxation should avoid discouraging efficiency improvements and aim at ensuring neutrality and consistency, for instance, by not favoring some kind of investments or firms at the expense of other investments or firms [29]. Therefore the OECD agrees that neutrality towards the business legal form and towards the financing choice of an enterprise is a right approach.

According to the OECD the approach of a low corporate tax rate with few exemptions and thus base broadening, would minimize tax-induced

distortions and increase the efficiency of tax systems.

Concerning special tax reliefs based on firm size, the OECD concludes that such reliefs could result in economic inefficiencies as resources may be wasted. Moreover, cuts in the overall statutory corporate tax rate were found to be more beneficial for enhancing economic growth.

The choice of treatment by a country of corporate equity income can definitively have implications for economic growth according to the OECD. The problem of double taxation of corporate equity creates disincentives to invest and discriminates against equity finance in favor of debt and therefore tilts the playing field in the direction of companies that easily obtain debt finance. This also implicates negative effects for small firms in particular due to greater costs. The OECD states that generally the double taxation of dividends may inhibit firm growth and has negative consequences on economic performance. According to the OECD the allowance for corporate equity, such as the Belgian system of notional interest deduction, provides a valuable solution to overcome the distortion of the choice between debt and equity as sources of finance at the corporate level.

There is also a warning from the OECD that the possibility of tax minimization by shifting income between corporate and personal income taxation needs to be taken into account when designing a corporate tax system. If personal income is taxed at a significantly higher rate than corporate income this may encourage an entrepreneur to classify his income as corporate instead of personal. Consequently, this would reduce tax liabilities, erode the tax base and lower overall tax revenues collected by a country.

3.2. The 'Mirrlees Review'

The 'Mirrlees Review' is the result of a thorough research conducted by an independent organization in the UK in 2011 [30]. The goal of the 'Mirrlees Review' was to determine the characteristics of a good tax system for an open economy in the 21st century and to give recommendations on how the system in the UK could be reformed.

According to the authors of the ‘Mirrlees Review’ small companies should be treated as little as possible in a ‘special’ way. The report pleads on the one hand for an income tax that is as neutral as possible towards the legal form of business entities. On the other hand it pleads for effective tax rates that are as similar as possible for all groups of entities, from the employees to the companies.

An adjustment to the current tax system in the UK may consist of the equalizations of social contributions for employees and sole proprietors, along with an increase in the rate of corporate income tax for small companies to the standard higher standard rate of corporate income tax.

A more fundamental change proposed in the ‘Mirrlees Review’ is to exempt, both in personal income tax and in corporate income tax, the normal profitability in the form of a rate or return deduction. The ‘Mirrlees Review’ states that the return to capital should be more lightly taxed than the return to labor. It prefers a solution with a combination of a shareholder income tax with a rate of return allowance and a corporate income tax with an allowance for corporate equity. This system would exempt the normal rate of return to capital from taxation at both the corporate and the personal level, but at the same time provide a mechanism for taxing above normal returns to capital and labor income at the same progressive rates. By doing so, it remains the case that equalization of the effective tax rates applied to the different legal forms is necessary to tax owner-managed enterprises in a sensible and neutral way, but this can be achieved without prejudicing the capacity of the tax system to effectively distinguish between normal returns to financial capital and labor income. Therewith, a more neutral way of taxing businesses and choice of financing can be obtained.

Aside from the allowance for corporate equity, which is a similar system to the Belgian system of notional interest deduction, the ‘Mirrlees Review’ also discusses the possibility of a system where interest expenses are no longer deductible for incorporated enterprises (defiscalization of interest).

A disadvantage of the first recommended system, the allowance for corporate equity, is that it results in

a lower tax base. Therefore, the statutory rate would have to increase in order to obtain a budget neutral reform, because this system forms an incentive for corporations to shift their profit. According to the ‘Mirrlees Review’ the system of defiscalization can only be implemented given a long transition period.

3.3. The report ‘Van Weeghel’

In 2010, the Dutch Tax System Committee, led by Van Weeghel, published a report on the improvement and simplification of the tax system in the Netherlands [31]. This committee also offered important recommendations concerning greater neutrality in a tax system.

According to this report, the only shareholder of a small company with a separate legal identity and a sole proprietor should be treated as similar as possible. This report agrees with the ‘Mirrlees review’ that capital income should be taxed at a lower rate than labor income.

The committee has also taken under consideration the possibility of a limited fiscal transparency for certain companies with only one business owner (shareholder). This implies a taxation directly at the level of the shareholder behind the company.

In regard to the possibility of an allowance for equity, the committee stipulates that more neutrality of business legal form can be obtained if this would also be implemented for sole proprietorships, and not only for companies subjected to corporate income tax.

Concerning the different treatment of equity and debt, the committee also suggests the allowance for corporate equity. Otherwise, it also suggests the possibility of defiscalization. In that case there is a neutral and equal treatment of debt and equity. Nevertheless, a great disadvantage is the effect this would have on investors in real activities who usually finance largely with debt.

All of the above-mentioned reports emphasize the importance of measures that effectuate a higher level of neutrality in the tax systems.

4. Conclusion

It is preferable that a tax system strives to be neutral so that decisions are made on their

economic merits and not for tax reasons. Various (international) reports concerning tax reform affirm that legislators should aim for minimalizing tax-induced distortions.

First of all, the current income tax systems should be more neutral regarding the choice of the legal form of a business. Secondly, it should be more neutral regarding the financing choice of a company between debt or equity.

The legal historical evolution of the tax system in Belgium proves that initially there was neutrality towards the business legal form in the system of the schedular taxes. When the corporate income tax was introduced in 1962, an integrated approach of the personal income tax and the corporate income tax was the design. This can be demonstrated by three measures that also enhanced neutrality in the tax system : firstly, the (imputation) tax credit, secondly the optional system for certain small companies and lastly, the higher rate in the corporate income tax for reserved earnings. Unfortunately, all these measures are abolished in the current Belgian tax system. For future reforms it could be useful to return to these 'neutrality enhancing' measures from the past.

Whereas the shareholders were initially presumed to be the extension of the company and presumed to be the controllers and the owners of the company, this is no longer the case for large corporations nowadays. Therefore it might also be useful to design specific rules for large corporations on the one hand and small companies and sole proprietorships on the other hand.

When we study the current Belgian tax system and international and country reports regarding tax reform, there is certainly a growing awareness concerning the need for a neutral tax treatment of debt and equity. An exquisite example that realizes a similar treatment of equity and debt is the current Belgian notional interest deduction or the allowance for corporate equity suggested in the paper of the OECD, the 'Mirrlees review' and the report 'Van Weeghel'. Another possibility consists of the defiscalization of interests.

The need for neutrality towards the legal form of a business is also emphasized in the reports, but the methods to achieve more neutrality at this point are not explained very clearly. Probably a more analog approach of corporate income taxation and

personal income taxation can be read between the lines.

Finally, it is important to stress the need for further development in measures that minimize tax-induced distortions. Because tax purposes should not outweigh in economic decision making such as the choice of a legal form of a business or the choice between equity and debt.

After all, there is a broad consensus that taxation should avoid discouraging efficiency improvements and aim at ensuring neutrality and consistency.

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The Foreign Investment Law of Mexico and its conflict with the North America Free Trade Agreement

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Abstract

Considering the commercial opening in the 80s Mexico has been signed twelve foreign trade agreements (“FTA’s”). However, the FTA that is to the World Trade Organization (“WTO”) databases, the commercial exchanges between NAFTA’s parties raise up to \$1103 billion dollars annually. Also, the exportations between members represented the 48.3% of the 100% of commercial exchanges in 2013. Each party of NAFTA had an important volume of commercial exchange with other countries. In 2011, the United States of America (“US”) report a total amount of \$1480 billion dollars in exportations, occupying the second place in worldwide exportations and a total amount of \$2266 billions of dollars in importations, taking with this numbers the first place around the world.

Introduction

The aforementioned statistics represent the relevance of NAFTA despite other foreign trades around the world. Specifically in the case of Mexico exportations, a total amount of \$350 billion dollars and \$361 billion dollars in importations from NAFTA were taking in 2013. Those numbers are sufficient evidence to represent the volume of foreign trade operations between NAFTA’s parties and their importance around the world. How this statistics may be affected? In most cases, exist a conflict between internal laws and international dispositions. In this regard, we will analyze the structure of NAFTA concerning foreign investment and the legal dispositions of the Mexican foreign investment law (“Mexico Investment Law”) in order to observe the possible conflicts between NAFTA and Mexico Investment Law.

Main Thesis

Inside NAFTA’s theoretical framework we find a great diversity of legal provisions that are related foreign investment between parties, as well, we

most relevant by the volume of his commercial exchanges is the North America Free Trade Agreement (“NAFTA”). According find a variety of fundamental ideas that regulate the commercial relations between parties. Those provisions are mandatory for the US, Canada and Mexico and its accomplishment are regulated by the Vienna Convention on the Law of Treaties. Specially, we will center our analysis in annex 602.3 of the Mexican exceptions of NAFTA. It is important to define the conception of national exception. Following the legal lore the “national exception”, has an exclusively power of the country inherent sovereignty, in other words, there are activities, goods or services that are in exclusive dominion of a State “reserved activities”. Commonly in a modern State it is noticed which activities, goods or services are considered as inalienable to the administration and control of the State, its enforcement declines in their national legislation. Ergo, each Country may decree by their national legislation and sovereignty their activities, goods and services as private, so they can be regulated and administrated by a public power. So in the legislative content of NAFTA, the annex 602.3 described the strategic activities as reserved for the Mexican State:

- a) Exploration and exploitation of crude oil and natural gas; refining or processing of crude oil and natural gas; and production of artificial gas, basic petrochemicals and their feed-stocks and pipelines;
- b) Foreign trade; transportation, storage and distribution, up to and including the first hand sales of the following goods:
 - i) Crude oil,
 - ii) Natural and artificial gas,
 - iii) Goods covered by this Chapter obtained from the refining or processing of crude oil and natural gas, and
 - iv) Basic petrochemicals;

c) The supply of electricity as a public service in Mexico, including, except as provided in paragraph 5, the generation, transmission, transformation, distribution and sale of electricity; and Exploration, exploitation and processing of radioactive minerals, the nuclear fuel cycle, the generation of nuclear energy, the transportation and storage of nuclear waste, the use of reprocessing of nuclear fuel and the regulation of their applications for other purposes and the production of heavy water. Moreover and pursuant to Article 1101(2), there are other activities and/or services reserved for the Mexican State “*Investment-Scope and Coverage*”, private investment is not permitted in the activities listed in paragraph i. Chapter Twelve “Cross-Border Trade in Services”, shall only apply to activities involving the provision of services covered in paragraph I when Mexico permits a contract to be granted in respect of such activities and only to the extent of that contract. At this point we can detect that the foreign investment its forbidden under reserved activities.

Also, concerning to the subsections a) and b), the Mexican State has excluded the commercial intervention or foreign investment in hydrocarbon or any activity related to exploration, exploitation, refining, processing, production, trade, transportation, storage, distribution and sale. Otherwise in the subsection c) the supply of electricity is reserved as a public service, including the generation, transmission, transformation and distribution and sale of electricity. As well in nuclear areas, there are exceptions related to the exploration, exploitation and processing of radioactive minerals, including the nuclear fuel cycle, generation, transportation and storage of nuclear waste, the use and reprocessing of nuclear fuel and the regulation of their applications for other purposes.

The aforementioned provisions represent the activities restricted under NAFTA for foreign investors. Therefore, if we interpret those provisions in “*contrary sense*”, the subsections a), b) and c), we can determine and conclude that the activities, goods and services not included in said articles are areas that can be used for investment between NAFTA parties.

Furthermore, article 1101(2), paragraph I from NAFTA, emphasizes that the parties will consider

as reserved activities, the “Cross-Border Trade Services” as follows:

- a) All the Transportation Service Agreements, including:
 - i) *Land transportation services.*
 - ii) *Nautical transportation services.*
 - iii) *Aerial transportation services.*
 - iv) *Support and auxiliary transportation services.*
 - v) *Telecommunication and postal services.*
 - vi) *Restore services related to transportation machinery related to a fee...*

However, if the Mexican State allows a contract between NAFTA’s parties and related to these activities, therefore it’s permitted the foreign investment in the Cross-Border Trade Services.

According to both analysis we can infer that NAFTA allows to invest in those activities that are not reserved in the trade according to annex 602.3. Also for the Cross-Border Trade Services if parties comply within the contract stated by Mexican State.

In addition, Annex I related to the foreign investment in Cross-Border Trade Services, Mexico’s list referred as follows:

- A) *Its required a permission from the Secretary of Communications and Transportation to establish and operate a truck station. Only the natural people with Mexican nationality as well Mexican industry with a termination clause will be able to obtain a permit.*
- B) *The investors from elsewhere or their investments will not be able to participate, directly or indirectly, in the industry founded or established in Mexican territory, dedicated or related to truck stations.*

Successively, it refers to a gradual outline of foreign investment participation in Cross-Border Services area, and applied to a “*Reduction Schedule*”, which points:

...associated to founded or established companies in Mexican territory, dedicated to the operation or activity of truck stations and bus terminals, the foreign investors would only be able to acquire, directly or indirectly:

- a) *Three years after the signing Treaty date, till a 49 percent in the participation of the companies.*

b) Seven years after the entry into force of the Treaty, till up to a 51 percent in the company participation: and

c) Ten years after the entry into force of the Treaty, till a 100 percent in the participation company.

Afterward, in urban trucking matter, touristic transportation and loading it decrees that Member Countries will be able to invest in the previously mentioned services, following the reduction schedule.

a) Three years after the signing Treaty date, till a 49 percent in the participation of the companies.

b) Seven years after the entry into force of the Treaty, till up to a 51 percent in the company participation: and

c) Ten years after the entry into force of the Treaty, till a 100 percent in the participation company.

Pursuant within both legal dispositions advertised in NAFTA at 2014 Foreign Investors will be able to invest in the auto-transportation till a 100 percent as a foreign entity.

Carrier in Mexico is a principal conveyance for transporting goods into national territory. The loading motor carrier moves around 83% that equals to 470 million tons that at the time is the 56% of national load. A featured question appears, if the carrier sector is the most important issue for goods trading, then why the companies do not invest in their transportation infrastructure? Based in databases of Secretary Telecommunication there are 114,541 companies dedicated to carrier in Mexico, which 82% have less than 5 units and only the 0.5% had the more than 100 truck fleet. It is important to point out the difference between the Mexican carrier companies that operate under a scheme of man-truck, and the North American and Canadian carrier companies that operate in a massive level under more than 1000 transportation units.

The lack of Mexican entrepreneurs investors in the carrier sector, it's on a critical point where the government must put his eye on. The creation of programs to develop this sector is a clue to become one of the most competitive carrier companies. Even so if the government does not create this programs to support carrier sector,

there are other alternatives such as the foreign investment.

Following the topic of reduction schedule in the previous analysis, related to foreign investment under NAFTA, it is illegally the legal provisions associated to the Foreign Investment Law stated in Article 6, fraction I:

“Mexican activities and societies that are mentioned are restricted in an exclusive way to Mexican people or Mexican societies with an exclusion clause of alien: National terrestrial passenger transportation, tourism and loading, not including courier and parcel service”.

As we can observed under Article 6 the conflict between laws appeared and is related to an exclusion to Mexican Societies with foreign participation in auto-transportation sectors and the analogous scheme which allows the foreign investment of companies in the auto-transportation sector.

In this context the Mexican Supreme Court on February 13th 2007, stated “THE INTERNATIONAL TREATIES CONSTITUTE PART OF THE SUPREME UNION LAW AND ARE POSITIONED OVER THE GENERAL FEDERAL AND LOCAL LAWS” (Interpretation of the Constitutional Article 133, 2007). It shall respect the schedule established to permit the participation of foreign investment in carrier regarding Mexican companies. To accomplish this purpose it has to be proposed a reform to article 6 of the Foreign Investment Law, so the conflict between NAFTA and the Foreign Investment Law may be disregarded.

Also, one of the main problems concerning the Mexican legal frames is the lack of capacity to accomplish with the main objectives of NAFTA. However, this issue seems to be a secondary priority for the legislators in all parties, as well, in this regard exist a un-accomplishment by the US. In recent days Mexican transporters are pressing the Government of Mexico in order to open the carrier investment, as an example of this matter we can observe the recent law suit presented by 4,500 enterprises affiliated to the Mexican National Chamber of Carriers considering the breach of NAFTA for impeding the transit of transporters and investment between NAFTA's parties. We consider necessary to create international panels in order to discuss different

alternatives and homologate criteria respecting security and services measures to be accomplished by the transporters before reforming of the Foreign Investment Law.

Conclusions

Finally, we conclude that there is a real issue between the legal dispositions established in NAFTA regarding foreign investment, specifically in carrier matters versus the Mexican regulations for the foreign investment related to carrier companies. In other words, there is a conflict between the application of NAFTA or the Mexican Foreign Investment Law. In this scenario the legal solution to this problem in a short term is to utilize the international legal proceedings created for these issues. Is the case of the international proceeding of arbitration established by the International Center for the Arraignment of Differences Related to Investments (“CIADI”). This international proceeding serves to establish through an international recommendation, NAFTA’s hierarchy before the Mexican Foreign Investment Law. This instrument will help the foreign investor to exploit the benefits of NAFTA regarding foreign investment in carrier matters. In other words the foreign investor could use the legal interpretations stated herein to demonstrate the permission stated by NAFTA to invest in Mexico’s auto-transportation sector. Notwithstanding, we have to consider that the legal sustention and the results of the arbitration by CIADI to solve the conflict between laws are topics to other analysis. Of course as we said the investor could consider the legal aspects detected and demonstrated in this research in order to invest in Mexico.

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Futures Contract From the Perspective of Islamic law and Establishment of Muslim Countries Stock Markets

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Nowadays, along with the progress of growing technology in global village, the need to upgrade Financial Derivatives is so clear more than ever.

In this keeping up to date, thinkers and scientists of economics and finance have initiated designing of Financial Derivatives to answer economy's need in different aspects including adequate liquidity to resolve the dynamics associated with.

In Muslim countries based on Islamic teachings, there are some restraints on transactions which Muslims and their states are required to follow in international arena. This is a place where experts in finance affairs and Muslim scholars should cooperate and collaborate with each other and review these designed Financial Derivatives in international financial markets and correspond them with Islamic law and clarify whether using these Financial Derivatives is ok from the viewpoint of Islam or even there is a need to design new Financial Derivatives based on Islamic teachings.

Introduction

This study examines Futures Contract from the perspective of Islamic law and provides the history of the use of Financial Derivatives in Muslim states and reviews different kind of transactions from the viewpoint of Islamic scholars about each of them. Moreover, comparative study between some kinds of transactions and Futures Contract has been done and also the way stock market works under Islamic teachings is reviewed.

To be exact, if we want to review the history of Islamic Financial Derivatives we should divide it into Money Market Instruments and Money Market Investment Instruments.

The idea of using Islamic Financial Derivatives goes back to 1980s. In that time, Islamic banks began using IFD to control liquidity. In Jul 1983,

Central Bank of Malaysia used Stripped Bonds which is called Certificate of State Investment instead of States Bonds. Profit rate did not follow fixed condition and depended on various criteria such as Macroeconomic Policies, Inflation Rate and interest rate of other Securities. Therefore, apparently Quasi-Ribawi (similar to usury) was dismissed so Muslims began purchasing these which were based on Islamic contracts such as Ijarah/ Lease Contract, Musyarakah (kind of shared ownership), Mudharabah (another kind of shared ownership) and etc. Alongside with expanding Islamic Money Market and issuing Securities related to this Market, Money Market Investment began to expand. In 1990s, along with expanding various formats of Muamalat (transactions) by Islamic Banks, the idea of using Islamic Money Market Investment Instruments got power. Although Arsalan Tarigh (2007) referred to Abbasi (1999) and Vaghaf (1997) to first idea of using Money Market Investment Instruments, Islamic Republic of Iran prepared regulations on issuing Musyavakah Bonds (kind of shared ownership) and Municipality of Tehran in the position of publisher published the first ones. Due to not informing scholars of Islamic Financial Institutes, the idea of using Money Market Investment Instruments goes back to early 1997 which are 3 years after rating of executing publishing Musyarakah Bonds.

Islamic Rules & Principles , Basic Criteria To Study Issues

Ratification and implementation of any rules and regulation (in parliament) , should be complied with Islam rules and principles , in Islamic countries , and regarding the contemporary matters, what Islamic scientists state , are based on

Islamic principles and instructions which play a critical role to verify new laws and regulations in such countries.

Futures Contract from perspective of Fiqh (jurisprudence).

Considering kind of deals and brokers in the stock exchange of Futures Contract, there are lots of religious requirements to be met. The most fundamental question to be answered is Bay kali Bi kali, stock exchange transaction and gambling which are studied under the Islamic Law whether they are allowed or not .

Jurisprudence view on Bay Kali Bi Kali (kind of Executor Sale)

Futures Contract in the market is done through Financial Derivatives and includes commitment of doing a deal of exact goods within due time. To guarantee performing contract, each party should leave amount of fund as deposit in stock Exchange, based on price of goods from the time of contract to due time and this price can be modified every day. This kind of contract of Metal Market is well-known to Bay Kali Bi Kali (kind of Executor sale) among Muslims and this contract is condemned by some jurists. For instance, Mofti Taghi Osmani says:” Futures Contract is not allowed because it is Bay Kali Bi Kali and exchanged of good is not met and there is only cash liquidation, based on price difference”.

Other jurists such as Ahmad Mohiedin Hassan & Fahim Khan raise the same issue on this kind of contract.

Bay/sale contracts

Since Bay Kali Bi Kali is one kind of Bay/sale Contracts, for the better understanding we review different kinds of Islamic Contracts .Based on due time of payment, we divide it into 4 kinds: Cash Sale, Salaf (kind of post-delivery sale), sale on Credit, and Bay Kali Bi Kali.

Cash sale

This contract needs to be made with immediate payment and item sold which is a valid possession even though the physical possession has not taken place.

Sale on Credit

In this contract, price is Universities Fact and limited to certain period of time to be paid. Item sold is exchanged immediately whereas price is delayed and seller can hold a deposit to guarantee to be paid.

Bay Salaf (kind of forward sale)

This is a contract which payment is paid immediately whereas the goods are delivered at an agreed later date. Also, the quantity exact date and place of delivery should be exactly specified. Islamic scholars are unanimous in that the buyer pays the price in full to the seller at the time of affecting the sale. Imam Khomeyni in Tahrirovasele in chapter of Bay Salam mentions two conditions to be met: to specify the quality and quantity of commodity, also to play the price in full to the seller before leaving the place of affecting the sale.

Bay Kali Bi Kali (kind of Executor sale) or Bay Dayn Bi Dayn

Trading with one liability against another, e.g. the price and the delivery is postponed like in a conventional forward agreement, which therefore is deemed impermissible. (Islamic Finance WIKI)

The Arabic term for debt is “Al-Dayn” which can be monetary, commodity or commitment to do or not to do something. In terms of legal point of view, it is obligation of payment which debtor has to pay to creditor. Bay Kali Bi Kali is kind of Bay which price and item sold are Universities Fact and there is a specified time during making contract. Shaykh Tusi said Bay Kali Bi Kali is valid but disliked (Bay Makrooh).

Mohaghegh Heli said that bringing debt to present whether it is responsibility of debtor or another does not have any problem even if it is going to be paid by another’s debt, but if is not made with immediate payment, it will not be valid from some scholars points of view.

Alame Heli said a Hadith from Imam Sadiq (A.S) narrated from prophet Muhammad Peace be upon him Bay Dayn Bi Dayn is not allowed but selling Dayn (debt) for anything but debt is allowed

especially in cash but on credit is Makrooh (valid but disliked)

Gharar

Gharar is defined in English as “Uncertainty” which is a risky or hazardous sale and details concerning the sale item are not clear. It can be related to risks arising from shortage of knowledge about the contract delivery of the object, and /or the outcome. Therefore, it is prohibited under Islam due to uncertainty.

Comparative study between Bay Kali Bi Kali and Futures Contract Prophet Muhammad peace be upon him condemned Bay Kali Bi Kali, because nothing is exchanged during making contract and there is a fixed time for price and commodity to be exchanged. Moreover, as there is no executive

guarantee, it does not include fulfilling a promise Shaykh Tusi narrated from Prophet Muhammad peace be upon him condemned any contract which there is no guarantee that the contract is fulfilled. On the one hand, in Bay Kali Bi Kali, there is no condition to be mentioned during forming a contract and also there is no need for quantity, quality, description and time of the possession of the commodity to be mentioned which makes this contract Gharar (uncertainty). On the other hand, Futures Contract includes obligation of discharging of contract of specific item sold and specific time which parties have to put deposit to guarantee discharging of contract in due time. Moreover, price fluctuation should be modified by amount of deposit every day. Considering specifications of Futures Contract and Bay Kali Bi Kali, there is a table below to compare them.

Table 1: comparative study between Bay Kali Bi Kali and Futures Contract

description	price	item sold	surety	Executive guarantor	Specification Of item sold	Time of Transferring Or delivery	Physical possession
Bay kail Bi kali	Muajjal	♠ Muajjal	no	no	approximately	approximately	maybe
Futures Contract	Muajjal And cash	Muajjal	Good performance deposit	Stock market of Metal	Completely Specified	Completely specified	little
comparison	average	Advanced	no	no	Average	Average	little

♠ muajjal: paying the price of the commodity at a future date in a lump sum or in installments.

Conclusion to be drawn from the table 1 shows that there is a fundamental difference between futures contract and Bay Kali Bi Kali which means specifications and mechanism of transactions are completely different. In other words, we cannot say Futures Contract is Bay Kali Bi Kali. Considering the criteria mentioned, Bay Kali Bi Kali does not match Futures Contract. As a result, Futures Contract is allowed in Islam.

Juala Contract (Kind of contract of reward)

There is another contract which is allowed in Islam called Juala that is one of the parties (the Jail) offers specified compensation (the Ju'l) to

any one (the Amil) who will get a aimed result in a known or unknown period.

Article 561 of Civil Law of Islamic Republic of Iran: “Juala contract includes obligation of a party specified price for the desired work whether it is specified or not.”

In Futures Contract, one party can be Stock which is the Jail and other party can be either person or company. There are two kinds of Juala: special contract of reward and general contract of reward that latter can be used to create liquidity and Second Market. Shia scholars believe that offer in financial contracts can be made to a specific individual, group or the world at large. In other

words, *Juala* can be concluded by the issuance of an offer directed at the general public.

The subject matter of the contract is the work that is agreed upon which may or may not be specified. In terms of legal viewpoint, parties can have the least general information about subject. Article 563 of Civil Law of Islamic Republic of Iran: "There is no need that compensation is described completely."

In Futures Contract, contracts are in the form of General Contract of Reward. The subject – matter of contract is specified and only compensation fluctuates based on changing of fundamental elements, but still parties have general understanding of price. In other words, action which is buying specified commodity is known but price fluctuates which is also known by parties. As a result, Futures Contract can be defined as kind of *Juala* as follows:

"A Futures Contract is a financial contract obligation the *Jail* to purchase a particular commodity or financial instruments at a predetermined future date and price if the asset is offered to the *Jail* in the prior agreed-upon price and the daily future price is settled daily also (variation margin). Therefore, the *Amil* is obligated to offer a stated amount of security, currency or commodity at a specific future date and at a pre-agreed price. The *Jul* is that specified compensation which the *Jail* offers to the *Amil* and makes him/her obligate to purchase it,"

Arbitrage from viewpoint of jurists

Arbitrage means "Giving Judgment" literally. In economics and finance, taking advantage of a price difference between two or more markets is called arbitrage.

It is clear that nothing is risk-free in making decisions in all aspects of life. In other words, there is a degree of risk-taking in our everyday life. As a result, there are always risks in either life or arbitrage which Islamic Shari'a does not have any issue with.

However, there is a chance of loss, generally arbitrage is the profit making market and it is not

categorized in pure *Gharar* which is condemned in Islam.

As it said, juristic issues of arbitrage are related to gambling and *Gharar*.

Arbitrage in Comparison with Gharar

Gharar means "Uncertainty", "being deceived" literally. It includes not knowing trade description of an asset in terms of quantity, quality and volume exactly. In terms of legal viewpoint, *Gharar* means one party does not know everything about that contract which makes him or her vulnerable to lose. As a result, this kind of contract is void.

Based on what said, *Gharar* is opposite certainty. In all clear and precise contracts, both parties have a good will to do their part. In other words, parties are obligated to inform each other about all details of contract, but *Gharar* is completely opposite.

Imam Ali ibn Abi Talib (A.S) said "Gharar is not safe of loss." Prophet Muhammad peace be upon him said: "This is the position we take. Sales with uncertainty in them are all invalid." In terms of carrying on business and transactions, Islamic scholars are unanimous in banning *Gharar* in all *Muamalat* (transactions).

If there is considerable lack of knowledge about the contract, it would be unreasonable to expect that the contract is done which no common sense accepts it. Furthermore, logic commands us to avoid contracts which do not have clear future and even sometimes causes trouble and conflicts among society members. Of course there is a possibility of loss in any deal and contract such a *Mudharabah* (profit-sharing) which one party gives the capital to another for investing in a business. Amount of profit or loss cannot be predicted which means there is always risk. This possible risk does not damage or restrict the credit of *Mudarabah* and does not make it *Gharar*.

Thus, we can conclude that loss in *Gharar* is because of lack of knowledge of parties.

In financial markets, which financial documents are exchanged, prices should reflect all information about that asset. Otherwise, based on

guess people do business to make more profit on unknown deal. Considering these explanations, information is a factor which separates arbitrage from Gharar. It seems that nonexistence or lack of information makes the border between arbitrage and Gharar so narrow. Of course, it does not mean all decisions made in market without proper information or knowledge is Gharar.

If in financial markets, arbitragers and stockbrokers put misleading advertisements and give a false pretence to push customers to buy Securities and Stocks, it will be prohibited in the Shariah of Islam because this kind of deal is done within false and misleading information. If misleading information. If misleading advertisements make one party lose asset, the party can claim compensation. In designing of Mechanism of Islamic Stock Market, there is no place for misleading advertisement. Monitoring bodies of Islamic financial market should reveal all information clearly. This market should be efficient to separate valid contracts from Gharar.

There is no place for conspiracy and collusion in Islamic financial market for example arbitragers and stockbrokers cannot collude if there are enough amount of floating shares and Securities which makes them unable to increase or decrease the price exclusively. As a result, another characteristic of Islamic Financial Market is free floating of shares and Securities. Considering concepts of arbitrage, below points can be concluded:

- There is no issue with the decision of making deal of high risk by arbitragers if there is no lack of information.
- Investing for a short period of time on Islamic contracts such as Bay is allowed and does not count as Gharar.
- Making decision based on rumor about item to be sold or purchased is condemned by Islamic Jurists.
- Doing business by arbitragers and stockbrokers to make profit on price difference of daily price and purchased price is allowed by Islamic jurists if they are not against points mentioned above.
- Falsifications of price and pushing them into false prices count as Gharar and is prohibited.
- Making decision where there are conditions of lack of information on selling and buying securities and shares is not legitimate.

Arbitrage in Futures Markets and Contracts includes all concepts of arbitrage in Cash Markets.

The philosophy of formation of Futures Markets is covering investors' risk against price fluctuations of financial documents or goods. Arbitrage in these markets is against operation of risk covering. Arbitragers in these markets who only intend to make profit out of price difference of price mentioned in contract and daily price count as "unlawful ownership" which is not legitimate because this kind of contract is not real or serious while forming of it is formal. Other discussions related to arbitrage is like Cash Market.

Comparing operation of Arbitrage and Gamble

Gamble means making money based on pure luck if gambling devices are on your side. Shaykh Ansari said: "Gamble and selling and buying gambling devices are forbidden under the Islamic Shari'a."

Characteristics of gambling are as follows:

1. The nature of gambling is based on pure luck.
2. Information and knowledge does not play a role to make money or lose.
3. As soon as gamble starts, gambler does not have any control on it, so he/she should wait until accidental outcome happens.
4. Main goals of gambling is making profit and passing time, so it does not bring any economical profit for society.

Considering concepts of gambling in comparison with arbitrage operation in financial market, following points can be mentioned:

1. Major nature of arbitrage transactions, statistics analysis, information analysis and decision making are based on information available in financial market which has the least efficiency.
2. Understanding present condition correctly and predicting future condition play an important role to make profit or to lose.
3. The aim of Futures Markets is controlling and managing risk and stabilizing production.

Arbitragers and stockbrokers increase liquidity and decrease risks or market fluctuations which help risk management of production. Considering comparison made above there is no common ground between gambling and arbitrage at all.

Limitations of study

The most important limitation is differences between Shia's school of jurisprudence and Suniil's school of jurisprudence which are not highlighted here. Common ground has been mostly emphasized based on common ideas of both scholars about Financial Derivatives.

Conclusion

Referring to the process of verification and implementation of laws and regulation in Islamic countries, especially in financial area, high sensitivity of sharia is tangible, and any kind of Bay(Trades) should be approved by Islam sharia.

Considering subjects have been discussed including Futures Contract and comparative comparison with Bay Kali Bi Kali which is not allowed in Islam, we come to this conclusion that Futures Contract is allowed and Futures Stock Market can be designed based on this.

Considering to the similar effective factors in financial derivatives , a uniform stock market could be established in a wide network, accessible to Islamic countries and investors.

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V PLENARY SESSION

Session Chair: M. Ehteshamul Bari, Macquarie University, Australia

The Unjust Exercise of Emergency Powers in Bangladesh and Their Consequent Impact on the Fundamental Rights: A Critical Appraisal*

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Abstract

The declaration of a state of emergency can be a legitimate constitutional method to take prompt measures in protecting the interests of the society in times of crises threatening the life of the nation. But as it entails restrictions on the fundamental rights of the citizens, it must be used with utmost care and as a means of last resort only. The objective of this paper is to examine whether it was justifiable to deprive the citizens of Bangladesh from the enjoyment of all or majority of the 18 fundamental rights guaranteed by the Constitution during the continuance of the five emergencies invoked for dealing with ‘internal disturbance’. This paper finds that in the absence of effective mechanisms in the Constitution of Bangladesh to obviate the possibility of abuse of the procedure for invoking and clinging on to emergency powers, emergencies have been conveniently resorted to and continued by succeeding generations of executive for purposes other than that of securing the life of the nation at the expense of the core fundamental rights of individuals. Therefore, this paper recommends for insertion of the following safeguards in the Constitution of Bangladesh for not only reducing the possibility of abuse of the emergency powers but also ensuring the maintenance of rule of law: b) a list of concrete circumstances which truly endanger the life of the nation and thereby merit the proclamation of a state of emergency, b) a list of non-derogable rights to prevent the abuse of human rights; and c) the mechanisms for ensuring the effective scrutiny of a state of emergency and its timely termination.

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Protection of Indigenous Peoples Rights Under REDD Mechanism: A Legal Analysis

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Abstract

Avoided deforestation' and thereby reducing forest loss in order to reduce emissions of global warming gases – has become a key issue in policy debates about climate change. The United Nations Framework Convention on Climate Change COP meeting has accepted the relevance of the concept in its fight against climate challenge. The concept of REDD allows and act as an incentive for the developing nations to preserve their carbon stocks and there by receive payments and a path to development. These payments could take the form of "carbon credits" sold in a post-Kyoto carbon market to developed countries struggling to meet their emissions reduction targets. It is seen as one of the fastest and most cost-effective ways of reducing carbon emissions while providing much needed financial assistance to developing countries. The very fact that 17% of Greenhouse gas emissions are contributed by tropical deforestation adds to the appeal of REDD. The basic premise is that if deforestation is a cause of the problem the solution can also be found in it. Various International players including World Bank, UNEP, Norway etc are entering the field and a huge market potential is developing. But there are issues to be sorted out in terms of its design and implementation. Further if REDD is to be effective it is imperative that Indigenous and forest dependent communities have their rights fully recognized with regards to the design, implementation and benefit sharing of REDD projects. The questions like determining who can claim rights over the forest and who will receive the REDD benefits will have many implications. While REDD has the potential to benefit indigenous peoples at the same time there are concern that REDD activities may fail to adequately respect their rights. Several international instruments recognize indigenous peoples' rights to land and their rights are also enforced by courts. However, there is often a gap between the protection granted by international

law and how it is implemented in practice. REDD may increase or decrease this difference. Protecting the indigenous rights presuppose modifications in land security tenure and forest reforms if Developing Nations. The paper will analyze the mechanisms of REDD and its potential impact on Indigenous communities. Paper will also analyze whether Cancun safeguards is enough to protect the rights of one of the worlds marginalized sections of the society –Indigenous community.

Introduction

Reducing Emissions from Deforestation and Degradation ('REDD) appears to be one of the controversial issues negotiated under the auspices of the United Nations Framework Convention on Climate Change ('UNFCCC') [32]. REDD mechanism will allow developing countries the opportunity to receive payments for conserving their carbon rich forests REDD involves payments to developing countries for reducing their deforestation rates below a historical or projected reference rate (the "baseline"). These payments could take the form of "carbon credits" sold in a post-Kyoto carbon market to developed countries struggling to meet their emissions reduction targets.

The payments are designed to be an incentive for developing countries to regulate and reduce deforestation and its associated emissions. It is seen as one of the fastest and most cost-effective ways of reducing carbon emissions while providing much needed financial assistance to developing countries. However, significant concerns remain like the issue of additionally, permanence and leakage etc. Further if REDD is to be effective it is imperative that indigenous and forest dependent communities have their rights fully recognized with regards to the design, implementation and benefit sharing of REDD projects. But since deforestation and forest degradation so often

accompany extreme poverty, particularly among the indigenous people and forest dependent communities, it has been argued that unless properly safeguarded REDD can further impoverish the lives of the poor besides impinging negatively on biodiversity, food security and on

Forests and Climate Cycle

Global forest covers around 30 per cent of the Earth's land surface (nearly 4 billion hectares) [9] provide valuable ecosystem services and goods, serve as a habitat for a wide range of flora and fauna and hold a significant standing stock of global carbon. The total carbon content of forests has been estimated at 638 Gt for 2005, which is more than the amount of carbon in the entire atmosphere. Forests play an integral role in mitigating climate change. Not only are forests one of the most important carbon sinks, storing more carbon than the world's play an integral role in mitigating climate change. Not only are forests one of the most important carbon sinks, storing more carbon than the world's oil reserves, they also assessment Report, reducing and/or preventing deforestation is the mitigation option with the largest and most immediate carbon stock impact in the short term. [26].

RED and REDD Plus beginning of negotiations

The 1997 global climate agreement, the Kyoto Protocol, policies related to deforestation and degradation were excluded due to the complexity of measurements and monitoring for the diverse ecosystems and land use changes. [17] But UNFCCC does include the role of forest in climate protection. Under UNFCCC, Article 4.1(d): All Parties shall ... promote sustainable management, promote and cooperate in conservation and enhancement ... of sinks and reservoirs of all GHGs... including biomass, forests.[33] But the exclusion to make it as part of formal strategy resulted in the formation of the Coalition for Rainforest Nations. Participant nations included Papua New Guinea, Costa Rica and other forest nations.[23] In 2005, at the 11th Conference of the Parties (COP-11), the Coalition for Rainforest Nations initiated a request to consider 'reducing emissions from deforestation in developing countries.' [24] The matter was referred to the Subsidiary Body for Scientific and Technical

national sovereignty. The Cancun Conference of Parties meeting to UNFCCC agreement has now addressed these concerns through well designed safeguards. The paper deals with the design and policy implementation issues of REDD.

constantly remove carbon from the atmosphere through photosynthesis, which converts atmospheric carbon to organic matter [8]. At the same time deforestation and degradation of forest is proving to be a big obstacle in our fight against climate change. Some of the estimates suggest that tropical deforestation activities account for over 17% of human-caused greenhouse gas emissions [13]. Deforestation, mainly conversion of forests for agriculture activities, has been estimated at an alarming rate of 13 million hectares per year (in the period 1990-2005) [14]. Deforestation results in immediate release of the carbon stored in trees as CO₂ emissions. It is estimated that deforestation contributed approximately 5.8 GtCO₂/yr to global greenhouse gas emissions in the 1990s [26]. According to the IPCC in its Fourth

Advice (SBSTA). [11] RED was thus considered as the grease that could lubricate the negotiations on a future climate agreement under the convention because the voluntary participation and the 'positive incentives' would provide options for developing countries to meaningfully participate in a future climate regime without impairing their ability to develop.[27]

A major decision to stimulate action on reducing emissions from deforestation and forest degradation in developing countries was adopted by the COP in Bali (2008).[1] The decision provides a mandate for several elements and actions by Parties: The COP, at its fifteenth session (Copenhagen, 2009)[2], adopted a decision on Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries. In December 2010, at COP-16, REDD formed part of the Cancun Agreements, REDD is described in paragraph 70 of the Ad Hoc Working Group on long-term Cooperative Action under the Convention AWG/LCA outcome [3]. The main purpose of the RED is to "Encourages developing country Parties to contribute to mitigation actions

in the forest sector by undertaking the following activities, as deemed appropriate by each Party and in accordance with their respective capabilities and national circumstances;

- (1) Reducing emissions from deforestation;
- (2) Reducing emissions from forest degradation;
- (3) Conservation of forest carbon stocks;
- (4) Sustainable management of forest
- (5) Enhancement of Forest carbon sinks.[3]

The first components of deforestation stand for RED. The first two components added form the core of REDD [3]. The components of Conservation, Sustainable management and enhancement of carbon stocks form the idea of REDD plus. Concept of REDD plus was include at the behest of India. This was opposed by Brazil as they perceived it to dilute the real issue of deforestation.

Considerable differences exist with regard to the mode of baseline to be adopted for the calculation of RED finance and Credits. The main point of contention is whether to follow an international, National or project level baseline. Additionally the issue of monitoring whether through an international institutional body on the lines of CDM or a national implementation though a bottom up approach is better is negotiated. To add to the complications several international players entered the RED arena. UN-REDD programme is a collaborative partnership programme between the three UN Agencies - UNDP, UNEP, and FAO.[31] UN-REDD is providing financial support for building and implementing REDD readiness phases, including capacity building, national REDD strategies and mechanisms.[31] Actions aim at building capacities and provide practical experiences and lessons learned that can inform the international dialogue on a post- 2012 REDD mechanism. At CoP13 in Bali in December 2007, the World Bank launched the Forest Carbon Partnership Facility (FCPC) in order to assist developing countries in their efforts to reduce emissions from deforestation and forest degradation, and to conserve, manage sustainably and enhance forest carbon stocks. [10](REDD+). The FCPF has the dual objectives of building capacity for REDD in developing countries in tropical and subtropical regions, and testing a two-tiered program of performance based incentive

payments in some pilot countries.[10] For India a watershed conservation project in the East Khasi Hills district of Meghalaya in northeast India became country's first REDD project. The project is a watershed conservation project that started in 2005. It is run by Community Forestry International (CFI) with a Mawphlang tribal community and covers an area of 8,379 hectares. The project aims to preserve sacred groves and other forest areas and to re-plant surrounding land. The community has established ownership rights over the forest. India already has a Compensatory Afforestation Fund Management and Planning Authority (CAMPA). "

Issues with REDD mechanism and Cancun Safeguards

As noted earlier the idea of making payments to discourage deforestation and forest degradation was discussed in the negotiations leading to the Kyoto Protocol, but it was ultimately rejected because of four fundamental problems: leakage, additionality, permanence and measurement.

Leakage refers to the fact that while deforestation might be avoided in one place, the forest destroyers might move to another area of forest or to a different country. [10]

Additionally refers to the practical and technical difficulty of predicting what might have happened in the absence of the REDD project.[7]

Permanence .This issue refers to a fundamental flaw with the REDD mechanism. Speaking of forests acting as a carbon sink and a solution for climate change cannot be a remedy due to the fact that carbon stored in trees is only temporarily stored.[7]

Measurement refers to the fact that accurately measuring the amount of carbon stored in forests and forest soils is extremely complex – and prone to large errors.

Although much has been written about addressing these problems, they remain serious problems in implementing REDD, both internationally nationally and at project level.[19] But perhaps the most controversial aspect of REDD is omitted from the REDD text agreed in Cancun. There is no

mention in the text about how REDD is to be funded.

There are two basic mechanisms for funding REDD: either from government funds (such as the Norwegian government's International Forests and Climate Initiative) or from private sources, which would involve treating REDD as a carbon mitigation 'offset', and getting polluters to pay have their continued emissions offset elsewhere through a REDD project. There are many variants and hybrids of these two basic mechanisms, such as generating government-government funds through a "tax" on the sale of carbon credits or other financial transactions. Yet many REDD proponents continue to argue that carbon markets are needed to make REDD work. While there has not yet been any agreement on how REDD is to be financed, a look at some of the main actors involved suggests that there is a serious danger that it will be financed through carbon trading. Trading the carbon stored in forests is particularly controversial for several reasons:

REDD and it's Impact on Indigenous people

The Traditional idea of an international legal system based entirely on states as stake holders in disregard of interests and influence of individuals and groups, does not hold much significance now. The Rights and position of Indigenous people has attracted international legal and policy attention and as a result a significant amount of literature and policy steps have been initiated at the International level. This was specially evident in the development of human rights law where explicitly the rights of Indigenous communities was recognised. In 1989, the International Labour Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries was adopted and is still recognized as the paramount international law guaranteeing the rights of indigenous peoples [15]. Indigenous peoples' rights were further recognized in 2007 by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Indigenous peoples are, by definition, organic groups, i.e., collectivities which are characterized by the desire and practice of sharing virtually all aspects of life together. (37). While the UN Declaration on the Rights of Indigenous Peoples basically encompass both individual and collective rights, one of the major

objections to the novel rights of indigenous peoples has been that they are largely rights of collectivises, not individuals. Thus, they appear to sit uneasily with the traditional human rights regime, which in the eyes of many is constructed around the interests and concerns of individual human beings. (6).

Convention emphasizes that parties are required to "grant legal title to indigenous peoples' customary lands and to ensure their free, prior, and informed consent for any activity on, or their resettlement from, their lands. [17], Both UNDRIP and ILO explicitly recognize that indigenous peoples have a right to "free, prior and informed consent" (FPIC) regarding activities that directly or indirectly affect them. FPIC is crucial to the protection of indigenous peoples' right to self-determination. "Free" implies that local communities should not be coerced, manipulated, or intimidated while making decisions. "Prior" means that local communities are contacted well before the authorization or implementation of any activities, and that there is sufficient time for consultation.[17]

The concept of FPIC becomes significant in the context of REDD and many argue that REDD processes should be carefully constructed so that FPIC is protected, otherwise REDD will violate international human rights obligations, potentially harm indigenous livelihood and self-determination, and create further environmental vulnerabilities. Despite the widespread recognition of property rights, indigenous peoples are frequently stripped of their ownership entitlements, due in large part to the complexities of land tenure systems in developing countries. [12] There is a high probability that vulnerable indigenous groups will be further marginalized by REDD. One primary concern is that indigenous peoples who have customary land rights on government land will be ordered to stop deforestation—thereby giving up their livelihood—and yet will not receive any financial benefits from the sale of sequestered carbon.[12] In addition to indigenous concerns, prominent environmental economic reports emphasize the importance of a clear property rights framework. For example, the *Stern Review* emphasizes the importance of property rights and argues that a clear rights structure is essential to

effective forest management for carbon sequestration. [38]

Existing REDD proposals do not contain “explicit recognition of the need to respect the rights of Indigenous peoples.” General language regarding indigenous rights was included in the preamble to the COP-13 REDD decision, which states: “[T]he needs of local and indigenous communities should be addressed when action is taken to reduce emissions from deforestation and forest degradation in developing countries.” Indigenous parties were not satisfied, protesting that vague language placed in the preamble of the COP-13 agreement was not strong enough to adequately safeguard their rights. The International Forum of Indigenous Peoples on Climate Change adamantly protested REDD, claiming that it would create more violations of indigenous rights, giving “States and Carbon Traders control . . . over the forests.” (*IFIPCC*) In 2008, eight Amazonian countries signed The Manaus Declaration and Areas of Consensus and Disagreement to “ensure the full exercise of the sovereign rights of the Amazon countries over the resources of the region’s biological diversity.” Signatories to the Manaus Declaration agreed that REDD projects must “recognise the capability of sustainable management of forests as exercised by indigenous peoples and traditional communities, as well as the historical role of these peoples and communities in the conservation and in the equilibrium of global climate to develop a compensation system.[19].

Indigenous people stand at the cross roads in RED negotiations. RED mechanism if implemented transparently and following rule of law can lead to the protection of indigenous communities and their development.[15] But lack of information and role of markets may actually result in violations of their rights. Under RED forest becomes a marketable commodity with millions of dollar flowing and this tendency may lead to land grabbing and displacement of IPs.[16] To date the protective mechanism for indigenous communities at the international level is minimal.[28] At the same time if protection of forests is encouraged while safeguarding the indigenous communities rights through prior informed consent and benefit sharing , it may result in Increased visibility of IPs in climate change negotiations and may improve livelihoods, generate additional resources,

potentially continuous benefits over long time – economic, social, and cultural development.[28]

Indigenous peoples all over the world have become increasingly concerned about REDD since their experiences in the past have shown that governments and the private companies often refuse to recognize their rights and interests in forest policies and programs.[30]The positions on of indigenous organizations on REDD differ. Many indigenous groups argue that many countries participating in REDD+ programs do not adhere to Free, Prior, and Informed Consent.[7] Some indigenous groups, such as the National Coordination of the Indigenous Peoples of Panama (COONAPIP), have withdrawn support for REDD+ entirely and urged other indigenous groups to “proceed with caution and take the necessary measures to avoid being tricked by United Nations bodies and officials.[7] Some groups vehemently oppose the idea of treating forests mainly as a carbon storage, and they reject any form of forest carbon trading.[30] Others accept that there could be benefits, and demand that indigenous peoples' positions are included in international and national processes. It is not just the expected increase of encroachment of outsiders on indigenous peoples' forests which may lead to more conflicts. The increased value of forests and the anticipated benefits from REDD schemes will undoubtedly generate more conflicts over boundaries between communities or among local landholders and forest owners. but that it may also mean the eviction of indigenous and other poor communities from such carbon protected areas. Experiences in the past have shown that such an approach has failed to prevent the destruction of forests or the loss of biodiversity [6]

Further it is also feared that indigenous communities may face Isolation of customary land rights Increased political marginalization Denial of the right to participate in financial benefits from the program[6] Inability to participate effectively due to lack of information Exploitative carbon contracts. Money directed to fraudulent participants Decreased local food production, loss of livelihood, and threats to food security Increased tension between indigenous groups and the government.[19] further at the national level, there is no legal framework for benefit sharing in REDD projects.

Carbon trading does not reduce emissions because for every carbon credit sold, there is a buyer. Trading the carbon stored in tropical forests would allow pollution in rich countries to continue, meaning that global warming would continue. Creating a market in REDD carbon credits opens the door to carbon cowboys, or would be carbon traders with little or no experience in forest conservation, who are exploiting indigenous peoples by persuading them to sign away the rights to the carbon stored in their forests. In 2012 an Australian businessman operating in Peru was revealed to have signed 200-year contracts with an Amazon tribe, the Yagua, many members of which are illiterate, giving him a 50 per cent share in their carbon resources. The contracts allow him to establish and control timber projects and palm oil plantations in Yagua rainforest.

Fair distribution of REDD benefits will not be achieved without a *prior* reform in forest governance and more secure tenure systems in many countries. An estimated 1.6 billion people mostly indigenous in nature worldwide depend on forests and many are among the poorest on earth. The pro-poor and Indigenous approach puts the focus of REDD on the interests of the most vulnerable groups. Key elements include the development of sustainable livelihoods for Indigenous communities, good governance and transparency.[4] There is a serious risk of REDD leading to increased corruption, if large sums of money start to flow – particularly for unregulated trade in REDD carbon credits in poorly governed countries. Forestry departments are among the most corrupt departments in some of the most corrupt countries in the world. The complexity of carbon markets combined with poor regulation leads to the increased risk of fraud and corruption in the rich countries. Billions of dollars have already been lost from carbon markets in Europe through fraud. [4]

Cancun safeguards for Indigenous Communities

The outcome document of Cancun made REDD and REDD plus officially part of climate change mitigation and adaptation strategy. In 2010, parties to the UN Framework Convention on Climate Change (UNFCCC) agreed in Cancun on seven broad safeguard principles for the implementation of REDD+ addressing transparency, participation

of stakeholders, protection of biodiversity and ecosystem services, and respect for rights of indigenous and local communities.[16] Appendix 1 of the outcome includes a variety of safeguards designed to ensure that Indigenous and forest-dependent communities are involved with, and benefit from, REDD Plus activities. Paragraph 2(c) and (d) of appendix 1 affirm that safeguards should be promoted and supported as they relate to Indigenous people and their participation in REDD Plus.[16] Paragraph 2(c) pledges respect for the rights of Indigenous people as recognized in local laws as well as international agreements such as the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').[32] More importantly, perhaps, para (d) calls for the 'full and effective participation of relevant stakeholders, in particular Indigenous peoples and local communities' in relation to REDD Plus.[8]

The Cancun Safeguards define broad criteria and guidance and, at present, leave it to the implementing country to develop methods for supporting them. Whether future decisions will add more guidance is an ongoing issue being negotiated within the UNFCCC.[20] The three most common safeguard design standards enable countries to convert the Cancun Safeguards into a national framework by means of guidelines and steps for operationalizing their safeguards. The REDD+ Social and Environmental Standards process seems to be the most clear, with ten implementation steps organized in three themes: Governance, Interpretation and Assessment.[21] A year later, in Durban, an agreement was reached that parties undertaking REDD+ activities "should provide a summary of information on how the Cancun] safeguards are being addressed and respected.[21]

Regarding the substantive elements, general consensus exists on overarching principles for safeguarding social welfare and the environment (e.g., protecting human rights, avoiding natural forest conversion), with variation found mostly in the rigor of application, definitions and co-benefit considerations of standards. Regarding procedural safeguard components, user-friendliness is a central issue for the efficiency of operations at the country and project levels.[5] Many of the safeguard standards' documents (including websites) and procedural requirements tend to be

unwieldy, requiring time, money and often international consultants, for countries to navigate, understand and adopt them[5]. The harmonization of REDD+ safeguards would facilitate this work, reduce cost and increase transparency. Agreed reporting formats would allow a verification of compliance based on provided evidence and spot checks.[5]

Conclusion

The idea of fighting climate change through protection of forests is a great idea. This if implemented in letter and spirit has the potential to promote sustainable development in the developing nations. While there has been lot of resistance and skepticism during the initial phase of climate negotiations regarding the role of forests situations and viewpoints have drastically changed. The initial fear and skepticism was majorly focused on the methodological and technological underpinnings. That concern seems to be manageable now. REDD should contribute to meeting UNFCCC ultimate objective, alleviation of poverty. Should not weaken efforts to reduce emissions from other sources/sectors. For this it is important to consider drivers of deforestation being most causes lay outside forest sector and lies in multitude of socio and economic characteristics.

To be able to participate in and/or implement any future activities aiming to reduce emissions from deforestation and forest degradation, most indigenous communities in many developing countries will require capacity building, technical assistance and financial support for a number of enabling activities.[28] These include, for example, putting in place the necessary institutions and national monitoring systems to improve the data collection systems, and their estimation and reporting of emissions. At international level, it will be important to follow and put to implement the CANCUN safeguards related to indigenous peoples and local community's rights and protective measures within the framework of REDD. Promotions of social and financial safeguards for the Indigenous communities are important to ensure efforts to reduce deforestation successful on the long term. Bottom--up, flexible, voluntary approach may lead to broad participation. Implementation of actions on the ground requires long-term, sustainable funding and

important that rewards/ compensation reach "actors" on the ground.

Furthermore, property rights and customary resource rights are often still insecure and not codified in laws. In many developing countries, there is an overlap of customary and state owned lands, with the majority of land and forest area being legally owned by the state. This limits the opportunities of indigenous and other forest dependent communities to participate in forest and revenue management decisions.[36] Any proper implementation of RED requires financial assistance, capacity building, and transparency, broad based participation of the community and early action and information sharing.

While it is appreciable that Cancun and Durban COP has developed environmental and social safeguards relating to REDD and its protection to Indigenous communities it lacks a strong statement of the rights of indigenous peoples. It is imperative for any strong REDD program to recognise and respect indigenous peoples' permanent sovereignty over natural resources.[36] This will require governments to respect the right of indigenous peoples to own, control and manage their lands, territories and natural resources. But the whole debate on safeguards and indigenous communities has moved from theoretical elaboration towards a translation of principles into operational tool the problems also has arisen. In February 2013, indigenous peoples' organisations completely withdrew from the UN-REDD Programme. As explained in article, protection of indigenous rights is crucial in REDD programs, not only because of international human rights obligations, but also because REDD will not be successful without the cooperation of the forest-dwelling peoples who choose whether or not to cut down trees on a day-to-day basis. National governments, on the other hand, are required to respect international treaty obligations. The right to property can be found in the Universal Declaration on Human Rights, which, although non-binding, is a cornerstone of rights protection and is respected across the globe. Currently, most voluntary REDD projects are contract based, causing indigenous peoples to be subject to terms and conditions of agreements that they may not understand.

Additionally, the United Nations Declaration on the Rights of Indigenous Peoples specifically mentions that indigenous groups have the rights to property and the right to “free, prior, and informed consent.” Further, indigenous groups’ opportunities for participation in REDD schemes is greater at the national level than it is at the international level. To ensure that the above safeguards are in place, there should be an independent monitor to assess the rights situation in each nation before it can receive REDD funding, similar to the system that currently exists under the voluntary CCB standards. Further REDD-plus safeguards aim to put the welfare of the indigenous people at the center of the debate on REDD-plus. They magnify the role of institutions and the importance of linkages between sectors of society to make sure the voices of the people are not omitted in the more scientific and political debate. REDD can be a win-win situation for both biodiversity and the indigenous peoples who inhabit the earth.

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The victims before the International Criminal Court

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Abstract

The goal of this paper is to examine the role of victims before the ICC criminal justice system by giving a general overview of their role and participation.

It also focuses on examining some specific rights of victims before international criminal court such as right to participation, the right to protection and the right to reparations which represent one of the greatest advances made by the international criminal justice system and a significant challenge that the Court has already faced in its early hearings.

The right of victims to participate in the proceedings of the Court, as being the primary right granted by the Statute, shall be a crucial topic in this paper. Explanation will be given during this study regarding the various elements that need to be considered to understand the scope of this right, as well as when this right will be exercised.

1. Introduction

One of the unique aspects of the International Criminal Court (ICC) compared to other international criminal tribunals is the element of victim participation.[1] The International Criminal Court (the "ICC") results from the adoption of the *Rome Statute* by the diplomatic conference organized by the United Nations on 17 July 1998m which entered into force the 1st July 2002 after the 60th ratification, triggering the establishment of a criminal justice system on a worldwide scale whose mission would be to punish the most heinous of all crimes: crime of genocide, crimes against humanity, war crimes and the crime of aggression. The ICC is the only existing international court today whose jurisdiction is targeted towards individuals who have committed the most serious crimes, affecting the whole international community. From now on, victims will play a key role in the international justice system. The legal

instruments of the Court, however, are not explicit in detailing the modalities of victims' participation in the said proceedings.

According to Article 68(3) of the *Rome Statute* specifies that "Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

The first proceedings before the Court have shown how complex this legal framework is and that effective participation of victims in proceedings depends mainly upon the interpretation of the provisions of the legal texts by the Chambers.

The question of what the purpose of the victims' participation in the context of the ICC proceedings scheme is and how it should be implemented to make effective such participation remains to same extent to be explored.

Victims value information and clarity concerning their role in the criminal proceedings, so to avoid creating erroneous hopes and expectations that cannot be fulfilled or that will leave victims frustrated. Another critical interest of victims in relation to their interaction with the criminal justice system is respect.

Finally, it is commonly understood that victims are more likely to feel satisfied with the criminal justice system if they feel as though their voice has been heard.

2. Reaching a definition of "victims" in the framework of the Rome Statute?

The ordinary usage of the term "*victim*" was revolutionized after the UN General Assembly first

adopted the Declaration on Basic Principles of Justice for Victims of Crimes and Abuse of Power (the "Victims Declaration") on 29 November 1985.

The adoption of the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, represented a major step forward in the recognition of victims' rights. The UN Declaration on Justice for Victims was the first international instrument to specifically focus on the rights and interests of victims in the administration of justice. The aim of the UN Declaration on Justice for Victims is to "ensure that all victims have access to the justice system as well as support throughout the justice process".

The definition adopted in the Victims Declaration, provided by articles 1 and 2 is significant since for the first time, not only direct victims, as well as their immediate family or dependants were included in the definition, but also persons who have suffered harm in intervening to assist victims.

Article 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

"Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States [...]"

Article 2 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power:

"A person may be considered a victim [...] regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who

have suffered harm in intervening to assist victims in distress or to prevent victimization"

During the Statute negotiations in Rome on the adoption of the said definition, objections were raised. On the one side, those who wanted to impose a restrictive concept - "to any natural person against whom an offence may have been committed that falls within the jurisdiction of the Tribunal". On the other side were those who advocated an expanded definition, which would conform to the precedent set by Security Council Resolution 687/91, which reaffirms that Iraq "[...] is liable under international law for any direct loss or damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".

Nevertheless, a definition was finally included in the Rule 85 of the Rules of Procedure and Evidence:

"(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes"

It was decided that it is essentially persons who may be victims - whether they are physically assaulted themselves, or are relatives of murdered individuals. As such, they may take part in court proceedings both before and during a trial and may be eligible for redress. Organizations involved in charitable, humanitarian, educational, or cultural work may also be considered as "victims" if they have suffered direct damage.

The UN High Commissioner for Human Rights estimates that 90% of the information on massive human rights violations emanates from NGOs, who are themselves in direct contact with the victims.

It was therefore essential that the victims be the central focus of the ICC's activities at all stages of the proceedings.[2]

3. Victims' rights

3.1 The right to an effective remedy

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.[3]

The right to an effective remedy is also recognized in human rights instruments dealing with specific rights [4]. It includes the right to investigations prosecutions and punishment of those responsible for human rights violations, as well as the right to reparations. [5]

3.2 The right to be treated with respect and dignity

The UN Declaration on Justice for Victims provides that *“victims should be treated with compassion and respect for their dignity”* [6]. Treating victims with respect includes keeping them informed at all stages of the proceedings of the developments in the case that concerns them.[7]

3.3 The right to protection and assistance.

The UN Declaration on Justice for Victims requires states to take measures to ensure the safety of victims, their families and witnesses on their behalf, from intimidation and retaliation [8]. The Declaration also contains detailed provisions on the assistance and support which should be provided to victims before, during and after legal proceedings. Measures of assistance include material, medical, psychological and social assistance.[9]

The Van Boven/ Bassiouni Principles state that *“appropriate measures should be taken to ensure victims' safety, physical and psychological well-being and privacy, as well as those of their families”* [10]. States should *“take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as of their families and witnesses, before, during and after proceedings”* [11]. States should also provide *“proper assistance to victims seeking access to justice”* [12]

3.4 The right to reparation

The UN Declaration on Justice for Victims introduced the notion into international law of an individual right to reparations. [13] *“The right to reparation of victims of gross violations of international human rights law and serious violations of international humanitarian law is the main focus of the Van Boven Bassiouni Principles, according to which victims have a right to “adequate, effective and prompt reparation” which should be “proportional to the gravity of the violations and the harm suffered”* [14]. The Joinet/Orentlicher Principles provide: *“Any human rights violation gives rise to a right to reparation on the part of the victims or his or her beneficiaries, implying a duty on the party of the state to make reparation and the possibility for the victim to seek redress from the perpetrator”* [15]

4. Participation

The participation of victims in proceedings represents a landmark development in international criminal justice. Pursuant to article 68(3) of the *Rome Statute*, for the first time before an international criminal tribunal, victims have been granted access to the proceedings and the possibility of presenting their views and concerns before the Court at any stage provided that their personal interests are affected..

Article 68 of the Rome Statute:

Protection of the victims and witnesses and their participation in the proceedings

“3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”.

Article 68(3) of the *Rome Statute* does not prescribe a specific time frame within which victims are able to be involved in the proceedings, but reserves this at the prerogative of the judges as they deem it

appropriate. In order to be allowed to participate in the proceedings, victims have to submit their request to the Registrar in writing, preferably before the beginning of the phase of the proceedings in which they wish to participate to.

In particular, in accordance with article 15(3) of the *Rome Statute*, victims may make representations to the Pre-Trial Chamber when the Prosecutor, acting *proprio motu*, submits a request for authorization of an investigation. The *Rome Statute* also provides that in case of a challenge to the jurisdiction of the Court or the admissibility of a case, victims may submit observations, pursuant to article 19(3) of the *Rome Statute*. Moreover, in accordance with rule 119 of the *Rules of Procedure and Evidence*,^[16] the Pre-Trial Chamber has to seek the views of victims before imposing or amending conditions restricting the liberty of the person in the custody of the Court.

Participation of victims to specific procedures may also be inferred from other provisions of the *Rome Statute* which do not explicitly confer a role to victims, but when read in conjunction with article 68(3) of the *Rome Statute*, may allow victims to present their views and concerns when their personal interests are affected. In particular, rule 92(2) of the *Rules of Procedure and Evidence* requests the Court to notify victims of the Prosecutor's decision not to initiate an investigation or not to prosecute pursuant to article 53 of the *Rome Statute*, in order for them to apply for participation. Accordingly, one might conclude that victims may play a role within the framework of the procedure governed by article 53 of the *Rome Statute*. This conclusion is in line with the concrete possibility that their personal interests would be affected by the decisions of the Prosecutor not to initiate an investigation or not to prosecute.

Victims could also play a role in proceedings initiated by a Pre-Trial Chamber pursuant to articles 56(3) and 57(3)(c) of the *Rome Statute*. Indeed, the personal interests of victims may also be affected by measures taken for the protection and privacy of victims and witnesses and the preservation of evidence. Article 57(3)(c) of the *Rome Statute* empowers the Pre-Trial Chamber to provide for such measures, where necessary. In respect of protective measures, the personal interest of victims

seems self evident when the Court decides to take or to deny such measures.

4.1 Meaning of “Personal Interest”

The Rome Statute and the Rules of Procedure and Evidence of the ICC grant victims an independent role in proceedings that victims can present their interests. In order to be granted leave to express their “views and concerns” at the trial, the Statute requires that victims be able to demonstrate that their personal interests are affected.

The requirement that “*personal interest*” of the victims have to be affected is generally met whenever a victim applies for participation in proceedings following the issuance of a warrant of arrest or of a summons to appear (*i.e.* in a case). In fact, that the personal interests of a victim are affected in respect of proceedings relating to the very crime this victim was allegedly involved seems entirely in line with the nature of the Court as judicial institution with a mission to end impunity for the most serious crimes.

The question of whether “personal interests” are affected is necessarily fact-dependent. The victims' central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue. The interests of victims go beyond the determination of what happened and the identification of those responsible, and extend to securing a certain degree of punishment for those who are responsible for perpetrating the crimes for which they suffered harm.

The analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted in relation to stages of the proceedings, and not in relation to each specific procedural activity or piece of evidence dealt with at a given stage of the proceedings.

The pre-trial stage of a case is a stage of the proceedings in relation to which the analysis of whether victims' personal interests are affected under article 68(3) of the Statute is to be conducted.^[17] The interests of victims are affected at this stage of the proceedings [pre-trial stage of a

case] since this is an essential stage of the proceedings which aims to determine whether there is sufficient evidence providing substantial grounds to believe that the suspects are responsible for the crimes included in the Prosecution Charging Document, and consequently: (1) this is an appropriate stage of the proceeding for victim participation in all cases before the Court; (2) there is no need to review this finding each time a new case is initiated before the Court; (3) a procedural status of victim exists at the pre-trial stage of any case before the Court.

4.2 The different roles of victims before the ICC

4.2.1 Victims as independent participants

Unlike the International Tribunal for the Former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR), where victims have to rely on the Prosecutor, judges, or third parties acting as *amici curiae* to represent their interests, the ICC allows victims to present their views and concerns to the Court, at all stages of proceedings, when their interests are affected.

The first historic decision of the ICC [18] to accept the first victims' applications to participate in proceedings was taken in the case of Prosecutor v. *Thomas Lubanga Dyilo (the Lubanga case)*

On 17 January 2006, the Pre-Trial Chamber (I) of the International Criminal Court (ICC) issued a decision recognising the right of six victims to participate in proceedings before the ICC, including at the stage of the investigation. The decision of the International Criminal Court is an international legal first. The six victims *referred to as VPRS 1 to 6*, have achieved a landmark victory. For the first time the violation of the fundamental rights of victims, the harm they have suffered and their rights to defend their interests have been recognised by a court, the ICC.

The Chamber further recognised that "the Statute [of the ICC] grants victims an independent voice and role in proceedings before the Court" (paragraph 51). The decision thus contributes to the developing recognition of the role of victims in international law. "The Chamber considers that article 68-3 of the Statute [which defines the right

of victims to participation] also gives victims the right to participate in the fight against impunity" (paragraph 53). Also, the Chamber considers that "the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered." (paragraph 63).

4.2.2 Submitting information to the Prosecutor

Victims have an important role in submitting information to the Prosecutor on the commission of crimes that they consider to fall within the ICC's jurisdiction. Such information can contribute to the opening of an investigation, as well as to ongoing investigations and prosecutions. NGOs and other members of civil society can also submit information. There is no particular requirement concerning the form of the document to be used to submit such information.

Information can be of a general nature: for example, the types of crimes committed, the human rights situation, suspected perpetrators, victims, the national justice system, including its ability and willingness to investigate and prosecute perpetrators etc. Information can also focus on specific crimes and include testimonies of witnesses and victims, photographs, images, recordings etc. These submissions are referred to as "communications" in the language of the Court. The legal basis for such communications is Article 15 (1). It is important to highlight that victims can request the Prosecutor to keep all or some of the information confidential. In order to do so, the communication should specify that such information is provided "on the condition of confidentiality and solely for the purpose of generating new evidence" as specified in Article 54 (3)(e).

4.2.3 Testifying as Witnesses

Victims can testify before the Court as witnesses, at the request of the prosecution or the defense, or of other victims participating in the proceedings. As witnesses, victims give evidence to the Court to serve the interests of the party calling them and respond to the questions put to them. As a result,

they do not necessarily have the opportunity to present their own views and concerns. Before the ICTY and ICTR victims of crimes can only participate as witnesses.

Main differences between being a participant and appearing as a witness[19]	
Victim as a participant	Victim as a witness
Participation is voluntary	Called by the defense, the prosecution or other victims participating in the proceedings or the Chamber
Communicating to the Court their own interests and concerns	Serve the interests of the Court and the party that calls them
It is up to the victims to decide what they want to say	Give evidence in testifying and answering related questions
Participation is possible at all stages of proceedings when considered appropriate by the Judges	Called to testify at a specific time
Always entitled to be represented before the ICC by a legal representative	Does not normally have a legal representative
Normally participates via a legal representative, and need not appear in person	Always testify in person

4.2.4 Submitting an amicus curiae

An amicus curiae, literally translated as “friend of the court” refers to someone, not a party to a case, who submits information on an aspect of the proceedings in order to assist the court in deciding an issue before it. Such submissions can be made by States, organizations, including NGOs, or individuals, including victims. Under Rule 103, a Chamber may “invite or grant leave to a State, organization or person to submit in writing or orally any observation on any issue that the Chamber deems appropriate”. The decision whether to admit

the information lies with the discretion of the Court. The ICC has already invited and received several amicus curiae submissions.

An Example of amici curiae before the ICC is the case of *The Prosecutor v. Thomas Lubanga Dyilo (DRC)*, Women’s Initiatives for Gender Justice, an international women’s rights NGO, requested leave to file an amicus curiae on the issue of the scope of the charges brought against the defendant, and in particular the absence of charges for gender crimes. The Pre-Trial Chamber refused to allow such a submission in the Lubanga case, but invited the organization to resubmit the request to file an amicus curiae in relation to the situation in the DRC as a whole

5. Modalities of participation of victims in the proceedings before the Court

The legal instruments of the Court are not explicit in detailing the modalities for victims’ participation in the proceedings. According to rule 89(1) of the *Rules of Procedure and Evidence*, “The Chamber shall [...] specify the proceedings and manner in which participation is considered appropriate”. Moreover, article 68(3) of the *Rome Statute* specifies that “Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

Some types of participation are common to all stages of proceedings. Examples of ways in which victims and/ or their legal representatives can participate include:

- Attending hearings;
- Making written observations;
- Making oral observations;
- Making statements at the beginning and end of a stage of proceedings;
- Consulting the record of proceedings;
- Asking questions to a witness, expert or the accused who is giving evidence before the Court;
- Receiving notification of the progress of proceedings.

5.1 Participation in the decision whether to investigate or prosecute

Article 15 of the ICC Statute explicitly stipulates that the Prosecutor may open an investigation on the basis of information provided by the victims or the NGOs. Victims may file complaints and relevant evidence with the Office of the Prosecutor. Such elements may convince the Prosecutor to initiate an investigation. The Prosecutor may also seek out and gather information from government or non-governmental organizations. When the Prosecutor receives information on crimes within the jurisdiction of the Court, he must analyze the seriousness of the information and decide whether there is “a reasonable basis to proceed with an investigation”[20].

Factors relevant to the Prosecutor’s decision whether to open an investigation or prosecution are as follows:

INVESTIGATIONS - The Prosecutor must consider whether:

- The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- The case is or would be admissible
- Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice [21].

PROSECUTIONS- The Prosecutor must consider whether:

- There is a sufficient legal and factual basis to seek a warrant or summons;
- The case is admissible;
- A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime[22]

If he decides to open an investigation, he is required to ask the Pre-Trial Chamber for authorization [23]. The Prosecutor must obtain the authorization of the Pre-Trial Chamber before initiating an investigation. If the Prosecutor plans to initiate an investigation and request authorization to do so from the Pre-Trial Chamber, he must so inform the victims, either individually or collectively.

Notification of victims is key to their participation at this stage.

Victims can participate in such proceedings before the Pre-trial chamber to give their views on whether an investigation should be opened.

Article 15 (3):

If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-trial Chamber a request for authorization for an investigation, together with any supporting material collected. Victims may make representations to the Pre-trial chamber in accordance with the Rules of Procedure and Evidence.

Examples of victims ‘participation in the confirmation hearing is the case of Thomas Lubanga Dyilo. Prior to the hearing to confirm the charges brought by the Prosecutor against Thomas Lubanga the Pre-Trial Chamber held a series of hearings to determine the ways in which victims could participate in that hearing.

The Chamber decided that: “Subject to their intervention being restricted to the scope determined by the charges brought against Thomas Lubanga Dyilo, the victims may participate in the confirmation hearing by presenting their views and concerns in order to help contribute to the prosecution of the crimes from which they allegedly have suffered and to, where relevant, subsequently be able to obtain reparations for the harm suffered”.

In this case, for reasons of security and at the request of the victims, the Pre-Trial Chamber decided that the victims did not have to reveal their identities to the defence. As a result the Chamber restricted the scope of their participation in the hearing.

During the hearing, victims’ legal representatives were allowed to submit written statements and to make oral opening and closing statements at the hearing. Due to the fact that the identities of these victims were concealed from the defense, the Chamber decided that further oral interventions would require authorization by the Chamber and requests would be dealt with on a case-by-case basis. During the confirmation hearing, on 9

November 2006, the Chamber granted the request of legal representative for victims a/0001/06, a/0002/06 and a/0003/06 to intervene on the issue of the jurisdiction of the Court.

On the basis that their identities were concealed, the Chamber decided that victims could only have access to public documents in the case, but reserved the possibility to make an exception in “exceptional circumstances”.

On 10 November 2006, the victims’ legal representatives requested access to all non-confidential documents in the record of evidence in the case (many of which are not available on the website of the Court) . On 13 November 2006, the Pre-trial Chamber granted this request and ordered the Prosecutor and the defense to transmit all non-confidential documents to the victims’ legal representatives without delay Questioning witnesses, experts and the accused and presenting evidence: The Pre-Trial Chamber decided that on the basis of the prohibition on anonymous accusations, the victims’ legal representatives could not question the accused or witnesses. On the same basis, the Pre-Trial Chamber decided that victims’ legal representatives could not present any factual evidence at the hearing.

Also, the Chamber decided that the victims’ representatives could not have access to closed (non-public) hearings, but reserved the possibility to make an exception in “exceptional circumstances”. However, on 24 November 2006, the Chamber allowed victims’ representatives to attend part of a closed hearing

5.2 Victims can participate in a review of the Prosecutor’s decision not to investigate or prosecute

In certain circumstances a Chamber can review a decision of the Prosecutor not to investigate or prosecute. The Prosecutor may decide not to initiate an investigation if he considers that the information that was provided to him is insufficient, or fails to constitute a sound basis for such an investigation. He must then promptly so inform those persons who have provided the information to him, giving them the reasons for his refusal. Such notification must indicate the possibility of forwarding "new

facts or evidence regarding the same situation" to the Prosecutor. If, after the investigation, the Prosecutor decides not to proceed, he must inform the Pre-Trial Chamber and the State that referred the matter to him - or, where applicable the Security Council, if the latter referred the matter to him - of his decision and of his reasons. Victims can participate in such proceedings before the Pre-trial chamber to give their views on whether an investigation or prosecution should be opened [24]. Again, notification of victims is essential for them to be able to participate.

5.3 Participation in proceedings concerning the jurisdiction of the Court or the admissibility of a case

In each case brought before the Court, the judges are required to establish that the Court has jurisdiction and the case is admissible [25]. Challenges to jurisdiction or admissibility must take place before or at the start of the trial, except in exceptional circumstances and with the authorization of the judges.[26] In order to enable them to participate, such proceedings must be notified to “victims who have already communicated with the Court or their legal representatives” [27]. The Registrar is responsible for notification and is required to provide victims with a summary of the grounds on which the jurisdiction of the Court or the admissibility of the case has been challenged [28]. Such notification must take into account the need for confidentiality and protection of victims. Victims and their legal representatives could have a central role in such proceedings. Decisions of the Trial Chamber on the admissibility of a case and the jurisdiction of the Court must be pronounced in public and, wherever possible, in the presence of the victims or the legal representatives of the victims participating in the proceedings, in addition to the accused, the Prosecutor, and the representatives of the States which have participated in the proceedings.

5.4 Participation in proceedings to confirm charges against an accused

Once an accused has been arrested or has voluntarily surrendered to the Court, the Pre-Trial Chamber is required to hold a hearing to confirm the charges brought by the Prosecutor against him

or her (confirmation of charges hearing) [29]. The Pre-Trial Chamber has to determine whether there is sufficient evidence to provide “substantial grounds to believe” that the accused committed each of the crime(s) with which he or she is charged [30]. The Court must notify “victims or their legal representatives who have already participated in the proceedings or, as far as possible, those who have communicated with the Court in respect of the case in question”, of the decision to hold a confirmation of charges hearing. In order to participate in such hearings, victims must submit a written application and receive authorization from the relevant Chamber.

5.5 The participation of victims in trials

The Prosecutor against Thomas Lubanga’s case is the first ICC trial to get underway since its creation in 2002. It is also the first time in the history of international criminal justice that victims have been given a voice: they can now participate in the trial proceedings and are no longer considered only as witnesses. On 26 January 2009 the ICC opened the first trial against the of Congolese militia leader Thomas Lubanga Dyilo, accused of having conscripted and enlisted child soldiers in Ituri, DRC, between September 2002 and August 2003.

The victims' legal representative

In order to participate and to seek reparation before the ICC, victims can have legal representation

The general principle, under Rule 90 (1), is that victims are free to choose whether to be legally represented [29]. Consequently victims may, at any stage of the proceedings, be represented by a legal representative. In this way, their status becomes equivalent to a "party bringing a civil action".[31]

There are two main reasons for encouraging victims to have legal representation:

- Firstly, because victims are unlikely to have experience in criminal proceedings, in particular at the international level, or to have a full understanding of their rights; and
- Secondly, due to the very nature of the crimes within the jurisdiction of the ICC there will potentially be a large number of victims applying for participation.

Under Rule 90 (1), the general principle is that, “a victim shall be free to choose a legal

representative” However, freedom of choice is not absolute. The general principle is subject to two important qualifications:

- Legal representatives are required to meet certain criteria and be admitted to the Registry’s list of counsel
- In certain specified circumstances, the Court can require victims to form groups with a common legal representative.
- According to Rule 90(6), victim’s legal representatives enjoy the same prerogatives and have the same obligations as counsel for the Defense. In order to be able to participate effectively and taking into account the complexity of the proceedings before the Court, victims are free to choose their legal representative provided that this latter meets the criteria of 10 years of professional experiences in criminal proceedings whether as judge, prosecutor, advocate or in other similar capacity, speaks one of the working languages of the Court, has not been convicted for a criminal offence and has not been subject to disciplinary proceedings in his or her country of residence.

In total there are four specific criteria to be fulfilled by a legal representative:

- a. Established competence international and national criminal law and procedure: this can be shown by providing copies of certificates;
- b. The necessary relevant experience in criminal proceedings, whether as a judge, prosecutor, advocate or in another similar capacity. This must amount to at least ten years. Experience could be demonstrated by providing copies of work contracts or reference letters etc. It is not yet clear how the terms “in another similar capacity” are to be interpreted;
- c. Excellent knowledge of and fluency in at least one of the working languages of the court: the working languages of the ICC are English and French;
- d. Counsel must not have been convicted of a serious criminal or disciplinary offence, “considered to be incompatible with the nature of the office of counsel before the Court

By virtue of Rule 91 (3) of the *Rules of Procedure and Evidence*, legal representatives of victims have to be authorized by the relevant Chamber if they wish to question a witness, an expert or the

accused. These limits do not apply during the phase of the proceedings dealing with reparations of the harm suffered by the victims. During this phase, the restrictions on questioning do not apply, in accordance with rule 91(4) of the *Rules of Procedure and Evidence*. When the issue of reparation for damages incurred is considered the victims' counsel may directly question the accused, the witnesses and the experts with the permission of the Chamber concerned (Rule 91 [4]) without directions on the manner and order of the questions and the production of documents. Given the potential high number of victims seeking participation to the proceedings, the Court may invite them to be represented collectively. In this case, the Chamber and the Registrar make sure that the specific interests of each victim are taken into consideration and that any conflict of interest is avoided. When a victim or a group of victims cannot afford to pay the costs for legal representation, they may seek legal assistance paid by the Court. Victims can also be represented by the Office of Public Counsel for Victims.

6. Responsibilities of the Court

Appearing before an international court of justice is very difficult for a victim. This means agreeing to recall traumatic acts that he or she either suffered personally, or witnessed. By agreeing to appear before a court, a witness is sometimes also risking his or her life. In considering the psychological and physical risks involved, the drafters of the ICC Statute decided to provide witnesses and victims as much protection as possible.

The International Criminal Court is responsible for the safety, physical and psychological wellbeing, and the dignity and privacy of victims, witnesses, and of their families.

The right of victims and witnesses to protection

The principles relating to the protection of victims and witnesses should not be viewed as a novelty of the *Rome Statute*. Indeed, they also exist in the Statutes of the *ad hoc* Tribunals, as well as in their respective Rules of Procedure and Evidence. Article 68 of the *Rome Statute* is the central article relating to the protection of victims and witnesses.

“1. The Court shall take appropriate measures to protect the safety, physical and psychological well-

being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

[...]

5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof.

Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]”.

The protection of witnesses and victims is paramount for the proper functioning of the International Criminal Court (ICC) and the attainment of its objectives. This overview focuses on the scope of victims' entitlements to protection, regardless of their possible role as witnesses.[32]

Article 68(1) of the ICC Statute imposes a fundamental duty upon the entire Court to “protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” at each stage of the proceedings.[33]

Generally speaking, victims may be entitled to two types of protective measures. Firstly, there are those specifically related to the proceedings.[34] These include the assignment of pseudonyms (usually a

number) to victims to avoid the use of their name in the proceedings. In addition, victim's applications are "redacted" so that any element that could identify them is concealed from the public and, if requested by the victim, potentially from the Prosecutor, and even the accused (the Defense).[35] Victims can indeed request to be anonymous to ensure their safety. [36] Another example of such protective measures is the alteration of pictures.

Secondly, victims may be entitled to protection as necessary outside the proceedings. The Court has developed a series of protective measures in this regard. It is not clear, however, to what extent these measures have applied to victims who are not also appearing before the court as witnesses.

Protective measures

Protective measures and special measures are measures of protection and support ordered by a Chamber, at the request of the prosecution, defense, witnesses, victims or their legal representatives, or on the Chamber's own initiative. The Chambers have a wide discretion in defining appropriate protective and special measures.

Protective measures can include measures aimed at concealing the identity and whereabouts of victims, witnesses and "other persons at risk on the account of the testimony of a witness" from the public and the media. Special measures can include measures taken in respect of particularly vulnerable witnesses and victims, such as children, elderly persons, and victims of sexual violence, during proceedings before the Court, to assist them in giving evidence.

Protective measures for victims and witnesses are of first importance in order to encourage them to communicate with the Court and to testify without endangering their security. However, these measures cannot be applied in a manner which is prejudicial to or inconsistent with the rights of the suspect or accused and a fair and impartial trial.

Article 43(6) of the *Rome Statute* provides for the creation of a Victims and Witnesses Unit within the Registry in order to assist and advise victims and witnesses, as well as Chambers and participants on protective measures and security arrangements.

This Unit is the only one expressly mentioned in the *Rome Statute* with regard to protection. The protection also extends to persons who are at risk on account of testimony given by a person, e.g. family members of witnesses.

Article 43(6) of the Statute, which speaks of the provision of protective measures to "victims appearing before the Court" has now been clarified by the jurisprudence: Victims at risk may be entitled to some measure of protection as soon as their completed application to participate has been received by the Court [37]

Anonymous testimony

The use of anonymous testimony raises a conflict between two fundamental rights. On the one hand, victims and witnesses must be granted protection. On the other hand, the accused is entitled to a fair trial, which implies that he or she may be informed of the entire contents of the records and have the opportunity to question, or to arrange to have questioned, the prosecution witnesses.

The ICC has provided, in Rule 87 of the Rules of Procedure and Evidence, a series of mechanisms to guarantee anonymity and, at the same time, the rights of the accused. The conditions and modalities by which anonymous testimony may be presented are left to the discretion of the Court. As mentioned earlier, hearings may be conducted in camera in the victims' interest, particularly if they are children or victims of sexual abuse. They may be questioned via videoconferencing. When the safety of a witness or of his or her family is at risk, the Prosecutor may accept certain pieces of evidence and elect to solely disclose a summary thereof. The identity of some witnesses may be withheld from court records.

However, such measures must be compatible with the right of the accused to a fair trial. Witnesses may also, individually, file a request for protection with the Chamber. Such request may include a request for anonymity.

Rule 87 provides a series of measures to protect witnesses and victims:

➤ That the name of the victim, witness or other person at risk on account of testimony [...] be expunged from the public records of the Chamber;

- That the Prosecutor, the defence or any other participant in the proceedings be prohibited from disclosing such information to a third party;
- That testimony be presented by electronic or other special means [...] enabling the alteration of pictures or voice, [...] in particular videoconferencing and closed-circuit television, [...] and other technical means;
- That a pseudonym be used for a victim, a witness or other person at risk [...];
- That a Chamber conducts part of its proceedings in camera.

7. Reparations of the harm suffered

The right of victims of gross violations to reparation is a fundamental principle of international law. The UN General Assembly adopted in December 2005 the Resolution 60/147 which points out that victims are entitled to the following forms of reparations: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, also known as the Van Boven Principles.

One of the key features of the ICC is the possibility for victims to benefit from reparations. Provisions regarding reparations appear in Article 75 of the Statute and developed further in Rules 94 to 98 of the Rules of Procedure and Evidence.

Article 75 (1) provides that

“1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of

representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law”.

Article 75(1) of the Rome Statute requires the International Criminal Court (ICC) to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation” for victims of war crimes and crimes against humanity. [38]

The conviction of Thomas Lubanga is a milestone for the international criminal justice system established by the Rome Statute, and may make an important contribution to the development and definition of the right to reparations in international human rights law. The court’s decisions involving reparations in the Lubanga case made stronger the existing recognition of the right to reparations, a right of victims of gross human rights violations acknowledged by the United Nations through the Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted in 2005 [39]

Lubanga was [sentenced](#) to 14 years – far short of the 30 years asked for by the Chief Prosecutor. His conviction is, however, only a small measure of justice for victims.[40] While the direct, individual victims of Lubanga’s crimes are child soldiers, reparations are also intended to be more collective in nature in order to affect the relevant the families and communities of victims in the DRC as well. To date, only 85 victims have individually applied for reparations in the Lubanga case.

The Chamber furthermore insisted that reparation measures be implemented without discrimination of any kind, seek reconciliation between the children who were forced to enlist and their families and

communities and take into account the age of the victims and the sexual violence they may have suffered. [41]

The Chamber ordered the Trust Fund for Victims (an institution created in accordance with Article 79 of the Rome Statute) to collect the victims' reparation proposals and present them to a newly-constituted Trial Chamber. The Trust Fund immediately indicated it could launch this first reparation process thanks to the 1.2 million euros that had been received as voluntary contributions, especially from States Parties.

So far, the convicted person (Thomas Lubanga Dyilo) has been declared indigent and no assets or property have been identified and that can be used for the purposes of reparations and therefore can only contribute to non-monetary reparations. Any participation on his part in symbolic reparations, such as a public or private apology to the victims, is only appropriate with his agreement.[42]

Forms of Reparation

The general principle under international law is that "reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in all probability, have existed if that act had not been committed". Reparation should be proportionate to the harm suffered. The term 'reparation' therefore encompasses, but goes far beyond, financial compensation.

The various forms of reparation as defined under international law include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition[43]. Restitution, compensation and rehabilitation are the only forms of reparation expressly referred to in the Rome Statute. Nonetheless, this list is not exhaustive. The wording of Article 75 (2) makes this clear: "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation".

Restitution

Is traditionally considered to be the primary form of reparation since it aims to re-establish the situation of the victim as it was prior to the commission of crimes. However, given the types of crimes that will come before the ICC, it will generally be impossible to restore victims to their original situation before violations occurred¹¹. For many victims before the ICC, restitution alone will be inadequate.

"Restitution should, wherever possible, restore the victim to the original situation before the violations occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." [44]

Compensation

Compensation can be awarded as a substitute for restitution. The role of compensation is to "fill in the gaps so as to ensure full reparation for the damage suffered". Awards of compensation should be distinguished from awards to victims for other purposes, such as the costs of the proceeding.

"Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from violations of international human rights and humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) Moral damage; and (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services." [45]

Compensation can be paid directly by the convicted person or through the Trust Fund for Victims which is supplied by the product of confiscated goods and completed by voluntary contributions.

Rehabilitation

Rehabilitation seeks to diminish as far as possible the psychological trauma as well as physical and social Consequences of the crimes committed.

“Rehabilitation should include medical and psychological care as well as legal and social services” [46]

Satisfaction

Satisfaction includes measures aimed at establishing and publicizing the truth about what occurred, including through judicial investigations and prosecutions, and symbolic measures, such as public apologies, monuments and commemorative ceremonies. The judgment of the Court itself can be considered a form of satisfaction, as a record of the truth surrounding violations, but the Court should consider the wide range of other measures.

Satisfaction should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) verification of the facts and full public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the express or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations in international human rights law and humanitarian training and in educational material at all levels.”[47]

8. The Trust Fund for Victims [48]

The Trust Fund for Victims (the “Trust Fund”) was established in September 2002 by the Assembly of

States Parties and complements the reparations functions of the Court.[49] It is administered by the Registry but is independent from the Court and is supervised by a Board of Directors. The Court may ask the Trust Fund to help implementing reparations awards ordered against convicted persons in accordance with article 75 of the *Rome Statute*.

The Trust Fund can also play an important role in the granting of the reparations awards to victims in the case of collective awards or in cases where it is impossible to award compensation to each victim on an individual basis.[50] It may also use the contributions it receives to finance projects for the benefit of victims and their families. The funds collected come from two main sources: firstly, funds collected through fines, forfeiture and awards of reparations ordered by the Court against convicted persons; secondly funds collected through voluntary contributions made by governments, international organizations and individuals.

Moreover, rule 98 of the *Rules of Procedure and Evidence* makes clear that awards for reparations can be made on an individual basis, on a collective basis or both. It also specifies that the Court itself evaluates the extent of any damage, loss or injury of the victim, if necessary appointing experts to assist it, and may invite victims or their legal representatives to make observations on the report(s) of the experts. The Court can also award reparations on its own initiative. Should this be the case, it shall inform the accused and the victims as far as possible. If the number of victims is very important, the Court can consider that reparations on a collective basis is more appropriate and hence decide that the product of the award for reparations against the convicted person be deposited with the Trust Fund for Victims. The Trust Fund will also receive the compensation funds in case it is impossible to reach the individual victims.

9. Conclusion

- With the establishment of the International Criminal Court, victims have gained an unprecedented opportunity to see those responsible for serious crimes under international law brought to justice.

- Involvement of victims at the ICC requires taking into account the realities of each specific

country situation, as well as factors such as the prosecution of complex and lengthy trials, likely involving hundreds or thousands of victims, in locations far from where the relevant crimes have occurred; the need of keeping victims regularly informed in a language they can understand; the logistical difficulties in reaching victims and affected communities, in order to be able to present their views and concerns and therefore represent their interests in the proceedings.

- Numerous terms are used to refer to victims paying special attention to the most vulnerable groups of victims, in particular children, the elderly and victims of gender crime. Therefore, it seems that the term “person” is used to cover people in very different situations, namely, victims applying for participation in the proceedings or for reparations, or persons who were granted the status of victims in the proceedings, members of their family or any person at risk because of their interaction with the Court.

- Some of the greatest challenges to victims’ participation before the ICC are not legal but rather relate to how to enable victims to effectively participate in proceedings. A major challenge is how to inform victims about the ICC in general as well as about their own possible role as participants. Victims need to be not only informed, but also assisted and supported to go through the application procedure.

- The system for participation must be improved by allowing the Section for Victims’ Participation and Reparations of the Registry to undertake activities in the field and inform victims of their right to participate as soon as an investigation is opened, or a warrant of arrest or a summons to appear is issued. Additionally, States must allocate additional funds for the swift review of the requests for participation.

- Victims do not directly participate in court proceedings, but participate through their legal representatives. It is of prime importance that the current reform of legal aid should not render victims’ participation before the ICC meaningless, but should take into consideration the specific nature of their legal representation. It is essential to guarantee that the representatives are independent of the Court, are lawyers from the situation country or who have special knowledge of the situation country, and who have a permanent link with a team in the field.

- The Court can order States to implement reparation orders pertaining to the freezing of the assets of the accused, and, in principle, States are obliged to cooperate. In this framework, the Court needs to reinforce its procedures in this area, including through better coordination between its various bodies and enhanced exchanges with the States in order to press upon them the need for a better cooperation.

- The Court needs to be empowered to set up a mechanism for administering and monitoring seized assets to ensure that their value does not diminish, and States must give the Court precise information for seizing assets. When designing reparations measures, the Court should follow and adequately apply the principles of restitution, compensation, and rehabilitation, bearing in mind the specific needs of women and children.

10. Reference

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[2] ICC-Booklet „Victims before the International Criminal Court: A guide for the participation of victims in the proceedings of the court

[3] Universal Declaration of Human Rights 1948, Article 8. Adopted by the UN General Assembly on 10 December 1948, available at www.un.org/Overview/rights.html

[4] See: Article 1 of the *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, available at www.un.org/millennium/law/iv-1.htm; Articles 4 and 12-14 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment*, adopted by the UN General Assembly on 10 December 1984, entered into force 26 June 1987, available at www.ohchr.org/english/law/cat.htm; Article 6 of the *Convention on the Elimination of All Forms of Racial Discrimination*, adopted by UN General Assembly on 21 December 1965, entered into force 4 January 1969, available at www.unhchr.ch/html/menu3/b/d_icerd.htm; and Articles 8 and 12 of the *Convention for the Protection of all Persons from Enforced*

Disappearance adopted by the UN General Assembly on 20 December 2006.

[5] Article 13 of the European Convention on Human Rights has been interpreted by the European Court of Human Rights as requiring states to carry out criminal investigations and prosecutions in cases involving violations of the right to life and to humane treatment; Articles 8 and 25 of the American Convention on Human Rights have been interpreted by the Inter-American Court of Human Rights and the Inter-American Commission for Human Rights to impose a duty on states to undertake criminal investigations and prosecutions of the perpetrators of human rights violations and to ensure reparation to victims.

[6] *UN Declaration on Justice for Victims*, Principle 4

[7] *UN Handbook on Justice for Victims*, at 35; and *UN Declaration on Justice for Victims*, Principle 6(a).

[8] Principle 6.

[9] Principles 14-17

[10] Principle 10, *Treatment of Victims*

[11] Principle 12 (b), *Access to Justice*.

[12] Principle 12 (c), *Access to Justice*.

[13] Principles 4 and 8 – 13

[14] Principle 11 (b), *Victims' Right to Remedies*; see also Principles 14 – 23.

[15] Principle 31, *Rights and Duties Arising out of the Obligation to Make Reparation*

[16] *Rules of Procedure and Evidence of the ICC 2002 Official Records ICC-ASP/1/3*

[17] Carsten Stahn, Héctor Olásolo and Kate Gibson, "Participation of Victims in Pre-Trial Proceedings of the ICC", *Journal of International Criminal Justice*, (2006), vol. 4, no. 2, pp. 219-238

[18] *ICC Decision Nr. ICC-01/04 dated 17 January 2006 On the applications for participation in the proceedings of VPRS 1 to 6*"

[19] *FIDH Report: Enhancing Victims' Rights Before the ICC - A View from Situation Countries on Victims' Rights at the International Criminal Court Last Update 20 November 2013*

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[20] Article 15(2) - (3).

[21] See Article 53(1).

[22] See Article 53 (2).

[23] Article 15(3).

[24] Rule 92(2).

[25] Article 19(1) and Articles 11-13, 17-18

[26] Article 19(2).

[27] Article 19(3).

[28] Article 19(3).

[29] Article 19(4).

[30] Rule 59(1).

[31] „ICC Manual for legal representaives: Representing victims before the International Criminal Court“

[32] „ICC Manual for legal representaives: Representing victims before te International Criminal Court“

[33] Article 68 (1) of the Rome Statute.

[34] Article 87 of the Statute

[35] *Prosecutor v. Katanga*, ICC, Case N° ICC-01/04-01/07-628, Decision on victim's request for anonymity at the Pre-Trial Stage of the Case.

[36] The jurisprudence so far, however, places certain limitations to the rights of completely anonymous victims to participate, which do not apply to non anonymous victims do not have. This could be problematic in the future for the safety of victims

[37] Prosecutor v. Lubanga, ICC, Case N° ICC-01/04-01/06-1119, Decision on victims' participation, January 18, 2008, para. 137: "In the view of the Chamber, the process of "appearing before the Court" is not dependent on either an application to participate having been accepted or the victim physically attending as a recognised participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of "appearing before the Court", regardless of the outcome of the request. Therefore, once a completed application to participate is received by the Court, in the view of the Chamber, "an appearance" for the purposes of this provision has occurred."

[38] To apply for reparations, victims must make a written application to the Registry, which must contain the evidence laid down in Rule 94 of the Rules of Procedure and Evidence (Rules of Procedure and Evidence), adopted by the Assembly of State Parties, 3-10 September 2002, ICC-ASP/1/3.

[39] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution adopted by the UN General Assembly in December 2005, published on 21 March 2006, A/RES/60/147, available at <http://www.unhcr.org/refworld/docid/4721cb942.html>

[40] REDRESS, 'Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court' (Victims, Perpetrators or Heroes?), September 2006, 60, available at: <http://www.redress.org/downloads/publications/chil dsoldiers.pdf> (last accessed 15 June 2011).\

[41] CC-01/04-01/06-2904

[42] Reparations for Lubanga's Victims: What the ICC Can Do? Posted on August 10, 2012 by Alana Tiemessen
<http://justiceinconflict.org/2012/08/10/reparations-for-lubangas-victims-what-the-icc-can-do/>

[43] Rule 59(2).

[44] Rule 59 (3). Under Rule 101, "[i]n making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defense and the victims".

[45] Article 61.

[46] Article 61(7).

[47] Rule 90 (1): "A victim shall be free to choose a legal representative". According to Article 68 (3), victims are not required to have legal representation in order to be able to take part in proceedings: "Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court..." This provision further states that victims' views and concerns "may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence",

[48] Article 75 (1) of the Rome Statute. The possibility of making orders for reparations against states was debated at length during the Rome Conference, but eventually rejected.

[49] The Rules of Procedure and Evidence, and The Regulations for the Trust Fund for Victims, adopted by the Assembly of States Parties, 3 December 2005, ICC ASP/4/Res.3

[50] The Regulations for the Trust Fund for Victims, adopted by the Assembly of States Parties, 3 December 2005, ICC ASP/4/Res.3.

Bewitchment As A Defence In Divorce Cases: An Analysis From Islamic Law Perspective

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Abstract

There are claims of the use of witchcraft in causing a rift in the relationship of husband and wife. This issue is raised in several marriage and divorce cases in Shari'ah Court in Malaysia, but there is no initiative taken to overcome it. The inexistence of such law makes the processes of consideration and evaluation of the truth of such claims difficult to be conducted. To this day, the issue is left unresolved. This paper aims to evaluate how far the claim that bewitchment can be a defense in divorce cases in Shari'ah Court in Malaysia. By referring to a few relevant cases, this study analyzes the perspective of Islamic law on the divorce cases connected to witchcraft; and how far it can be applied as a defense in a divorce case. The study is very important in helping the judiciary institution to be fair and to fight for the spouse who becomes a victim of witchcraft evilness.

Key words: Witchcraft, Divorce, Defense, Shari'ah Court

1. Introduction

Witchcraft is one of the most ancient knowledge and practices in the world. This practice involves the use of jinn and devil for a particular purpose. It is usually used to eliminate the feelings of love among family members, to cause divorce of a married couple, to make someone loses his mind, to cause disease to the extent that it could kill the victim without touching. Therefore, it is no surprise if a husband claims that he unconsciously and unintentionally divorced his wife, due to being witched. Allah SWT says:

"...And [yet] they learn from them (Harut and Marut) that by which they cause separation between a man and his wife..." (Al-Quran 2: 102)

In Malaysia, the issue of the use of witchcraft to cause a rift in marriage was raised in a few cases in Shari'ah Court, for example the case of *Mustafa Batcha v. Habeeba Abd. Rahman* [1410] JH 41, the case of *Re Wan Norsuriya* [1418] JH 211 and the case of *Muhammad Kamran Babar Nazir Khan and Yani Yuhana Mohd Zambri* (Muhamaad Razis Ismail, 2011). Unfortunately, the issue was not addressed correctly due to absence of specific guidelines and laws related to witchcraft (Mahyuddin, 2012).

2. The Use of Witchcraft in Divorce

Referring to the above verse, Islamic scholars concur with the view that witchcraft is used to cause a rift in the relationship of married couples. Divorce cases related to the use of witchcraft usually occur in strange situations and are out of norm. From the writers' experience, there were few cases where the husband claimed that his tongue felt like it was overpowered by something that made him utter talaq towards the wife. Some claimed that they were not aware of the situation and could not remember when and where they uttered the talaq. There were also claims from husbands or wives that there were tremendous changes in their feelings for example intense dislike and hatred, whereby the feelings rose to the point where they would hit their spouses without them wanting it. The writers came across some cases where the wives became the ones who seriously insisted on a divorce without any reasons. Besides, there was a case where the wives applied for fasakh

with the excuse of the husband being impotent when they were having intercourse even though he was not having the problem with his other wives.

In the case of *Mustafa Batcha v. Habeeba Abd. Rahman*, the appellant claimed that he uttered talaq in the condition where he was not even aware of his senses basically because he was affected by witchcraft. According to him, the witchcraft disturbance started after he got a canteen tender in a factory. Since then, his thoughts became disturbed and he felt hatred and anger towards his wife without any reasons. He also hit his wife even though he did not even realise what he was doing. In the condition where he was out of his mind, he made the application to divorce his wife. He, later on, found a strange package in white cloth at his canteen. He sought treatment from a traditional treater and according to the treater, witchcraft was being done to him because he got the canteen tender. The doer felt jealous thus used witchcraft against him so that his marriage would be destroyed. After receiving the treatment and quitting the canteen, he recovered and was able to think back like a normal person. He, then, appealed to the court to reevaluate his 3-times divorce (*talaq*) which has been recorded by the court before that. The Court of Appeal's judge decided that the case was not heard thoroughly and ordered it to be heard again because of the failure of the Judge of Shari'ah Lower Court to get an expert opinion (*ra'yu al-khabir*) regarding the issue. The learned judge suggested that the treater who treated him is called in to gain his expert opinion.

The above case was one of the cases involving witchcraft that was brought to court. In reality, there are hundreds (maybe thousands) of other similar cases encountered by witchcraft victims outside court. Based on the interviews conducted with a few judges of Shari'ah court in Kuantan and Kuala Terengganu, they believe that the use of witchcraft related to divorce cases really exists, and the judges have faced such cases (Mahyuddin, 2011). Due to the absence of guidelines and laws in the enactment regarding this issue, the judges took a safe route in judging such cases, which was basically based on what could be seen from the outside, besides using logic. Other than that, the judges looked at the side factors such as the background and the characteristics of the one who appealed before making any judgements. Hence,

the exhortation by the learned judge in the case of *Mustafa Batcha* should be seen as pivotal for it addresses the importance of providing a specific guideline in the hearing of such cases in order to save marriages from withcraft.

3. Syara' Law With Regards to Divorce Cases in Abnormal Case

Divorce issue specifically divorce by talaq is a sensitive issue and needs to be handled carefully and with discretion. It is something that can occur either with or without a serious intention. Prophet Muhammad SAW said as narrated by Ibn-Majah, Abu Dawood and Tirmizi: "Three things which its reality is reality and its joke its reality. They are: Marriage, Divorce and Freeing of a slave."

Hence, Islamic scholars are very careful in discussing the issues of divorce by talaq. Syeikh Abi Bakr Usman (1995) stated that there are a few conditions which have to be present in order for a talaq utterance to be considered valid. The conditions are husband, wife, sighah, qasad talaq and the husband's power. Husband's power means the desire to divorce in his heart accompanied by a sane mind. Therefore, a talaq is invalid if uttered by a husband in a condition where his mind is not completely sane or when his desire is controlled by someone or something. This is in parallel with the saying of the Prophet Muhammad SAW as quoted by Imam Ahmad (1995) and Abu Dawood (1952): "Divorce and manumission do not count in case of *Ighlaq*." Imam Ahmad said *Ighlaq* means anger whilst some other scholars interpreted it as doing something under force and others said it stands for insanity.

Syeikh Abdul Rahman Al-Jaziri (1987) stated: "there are certain conditions of divorce (talaq), one of them is sanity. Talaq is invalid if the husband is lunatic (possessed) even if the intermittent madness comes for a moment and then disappears. It means, if he utters talaq while he is insane, then the talaq is not taken into account. Insanity (junun) refers to anyone who loses his mind due to severe pain, fever, headaches that come after." The same opinion is shared by Imam As-Shāfi'ī, Imam Al-Mawardi and Dr. Wahbah al-Zuhailly.

Islamic scholars are indeed united in stating that a talaq uttered by someone who is not in his perfect sense or is influenced by something by which he could not control himself, is not valid. Based on the writers' experience and the experience of those who were involved in treating witchcraft victims, the condition of not being in perfect sense and out of control are normally suffered by the victims of witchcraft. Moreover, it also affects the victims emotionally and physically in career, in relationships with people, not to mention in the victims' homes and business areas (Mahyuddin, 2011). Normally, the victims will experience intense and severe depression, disturbance, hatred, anger, despisal and sadness. Sometimes the victims hear whispers that induce them to divorce their wives or see visuals of their spouse having affairs that then will cause their extreme anger towards the spouse.

The Prophet Muhammad P.B.U.H. was a victim of witchcraft whereby at that time he felt like as if he was spending the night at one of his wives' houses but he did not do it. This incident which was written in Sahih Al-Bukhari and Sahih Muslim, shows the capability of the witchcraft practitioner to control the mind and the desire of the victim especially in the issues related to marriage. Magic that separates or causes hatred is used to part a married couple for some particular reasons which normally are linked to personal problems, jealousy, revenge, sabotage and others (Amran Kasimin, 2002). As a result, the feeling of hatred, fights, doubts towards the spouse, anger without any cause, restlessness when being together, the desire to divorce and the feeling that the spouse's face and appearance are ugly and disgusting exist (Wahid, A.B. S & Daud, M.S, 1994). There are witchcraft practitioners who use items taken from clawed animals such as cat's and dog's bones that are worshipped, and then buried under the victim's house or placed on the roof. In the end, the peaceful life of the victim and the spouse is shattered and they would always fight like cat and dog.

In the book of *Fatāwa wa ishtishārāt al-Islām al-Yaum*, chapter 11, page 358, it is stated:

“As to those who are magically enchanted which lead to loss of consciousness and sanity, causing him to say what he does not want, then his utterance of talaq did not take place based on the

hadith of the Prophet: " Divorce and manumission do not count in case of *Ighlaq*.”

This view is in parallel with Syeikhul Islam Ibnu Taimiyyah's view in kitab *Mukhtasar Al-Fatawa Al-Misriyyah* page 544 which stated: "...and anyone who was enchanted to the point he did not realize what he said, then the talaq pronounced does not take place. While if the magic does not cause changes on his sanity and consciousness, e.g. magic to stop him from having sex only, then the talaq is valid.”

The former President of the Islamic University of Medina, Syeikh Abdul Muhsin Ibn Hamd Al-^ᶜAbbād was asked regarding the punishment for someone who commits a crime in the condition where he is possessed or being posed by witchcraft. He answered: "If he is guilty of the offense in the unbalanced state of mind, he would not be punished, whereas if he had committed the offense while his mind is sane, the sentence will be imposed on him despite his pain, depression and discomfort. The only thing that just gives him a relief is insanity. "

Therefore, it can be concluded that if a husband utters a talaq in the condition where he is not in his normal sense due to being a victim of witchcraft, the talaq is considered as not valid. Anyone who performs an action in the condition out of sense (*ghair ʿāqil*) will not bear any consequence of the action based on the Prophet SAW's hadith narrated by Aisyah r.a.: “The pen is lifted from three people: A person sleeping until he wakes up; an insane person until he regains sanity; and a child until he reaches the age of puberty.” (Bukhari & Muslim)

Meanwhile, there are cases of fasakh filings which are filed due to injuries and physical incapacity that are suffered by the spouse such as leprosy, vitiligo or scabies which are difficult to be cured, *ratqa* (vagina is covered by flesh), *qarna* (vagina is covered by bones) and *unnah* (impotency for male). In fact, some cases of sexual dysfunction, erectile dysfunction and impotency which are suffered by males can be caused by witchcraft (Amran Kasimin, 1995). In Malaysia, there are two types of witchcraft that are normally used for these purposes, namely *sihir batang keladi* (refers to a type of black magic ritual using taro or yam) and

sihir jerutan (refers to a type of black magic ritual using tie or rope). According to Walter Farber (1995), these types of witchcraft have been practiced ever since the Mesopotamian civilization and they are around until today. The use of such witchcraft are also reported quite often in the Europe around the 15th century (Richard Kieckhefer, 1990). *Santau* (refers to a popular type of Malay black magic to kill someone) which is produced from items that cause itchiness and are venomous (such as bamboo prickles, bamboo shoots, caterpillar) can cause scabies on the victim's body with foul smell (Jahid Sidek, 2006), whereby the body will feel pain as if it is being poked by a sharp object and the feeling of stings (Amran Kasimin, 2002). When any couple reports that the cause of incapacity or physical injury suffered is believed due to witchcraft based on common signs, the court needs to give the chance to the victim to defend himself.

4. Burden of Proof for 'Bewitchment' as a Defence

The experience of witnessing the cases of broken couples due to witchcraft has sparked an idea that a legal mechanism should be established. It would give an opportunity for the victims to defend and fight for their marriages with the belief that their spouses are 'bewitched'.

To apply the defend of bewitchment, it is suggested that the burden of proof is as follow. If:

- a) a husband claims that the talaq is uttered in the condition where he is under the influence of witchcraft; or,
 - b) a wife claims that her husband uttered the talaq in the condition where he is under the influence of witchcraft;
- he or she, who claims such thing should prove to the court that:
- i). there are signs and 'common symptoms of bewitchment' shown by the spouse;
 - ii). the husband is suffering from insanity due to witchcraft when he is uttering talaq.
 - iii). the magic imposed on the spouse does affect his thinking ability.

Therefore, if a husband claims that he divorced his wife in the condition where he was not in his perfect sense due to bewitchment, the burden of proof is on him to show that there are 'common

symptoms of bewitchment' suffered by him that truly caused him to lose his sanity. However, if a wife claims that her husband divorced her in the condition where he was not in his perfect sense due to bewitchment, the burden of proof is on her to prove that her husband suffered the common symptoms of bewitchment whereby the magic truly caused the husband to lose his sanity. In terms of divorce appeal cases by fasakh for the reasons that only involve physical elements without affecting the victim's mental condition (such as leprosy, vitiligo or scabies, *ratqa*, *qarna* and *'unnah*), the spouse who believes that the adversities happened due to witchcraft, needs to prove to the court that:

- a) There is physical injury or incapacity;
- b) There are common symptoms of witchcraft which are linked to the injury or incapacity;
- c) The injury or the incapacity becomes the reason for the spouse to appeal for fasakh.

If it is successfully proven, the court should release an order for the victim or his spouse to get the treatment for the influence of witchcraft within a certain period before the case is being heard again.

5. Expert's Opinion in Identifying 'Common Symptoms of Bewitchment'

The victims of witchcraft normally experience particular symptoms which can be classified as 'common symptoms of bewitchment' (Mahyuddin Ismail, 2011). To evaluate whether the symptoms claimed are due to witchcraft, the opinions of the experts who understand the area and the practice of witchcraft need to be sought. This issue has already been discussed by Islamic scholars. According to Al-Khatib As Syarbini (1978), a person who used to be famous as a witchcraft practitioner, but has repented from practising witchcraft can be considered as the witness who can provide statements in regards to witchcraft. Therefore, any individual who has a wide experience and is recognised by the community as an Islamic medicinal expert can be considered as the one who is reliable to give opinions. It depends on the judge whether to sustain or overrule the statement. The need of expert opinion on this matter has been stated by the Judge of Court of Appeal in the case of *Mustafa Batcha vs Habeeba Abd Rahman*:

"The learned judge did not record any of the facts from the case and he also did not summon the healer who treated the appellant to get statements in

order to ensure that the appellant was really sick due to witchcraft which caused the divorce.”

Hence, if any spouse in a divorce case claims that there is the use of witchcraft to destroy the marriage, the court can seek the opinion of an expert (which is assigned by the court or the prosecutor) to identify and confirm the matter, as below:

- a) Is it true the symptoms experienced by the victim are due to witchcraft, or they are just symptoms of disturbance by spirit which is due to *saka* (a belief in Malay people that jinn may be inherited from the ascendants), the practice of mystical and superstitious ritual, a misleading traditional treatment or others;
- b) How far is the witchcraft used affecting the mental and physical conditions of the victims;
- c) Is there a correlation and link between the symptoms, witchcraft item (if there is any) and the effects towards the victim;
- d) Is there circumstantial evidence (*qarinah*) that can be linked to the claim made;
- e) And other related matters.

Such methodology is suitable according to the provision in section 33 of the Shari'ah Court Evidence Enactment of the states in Malaysia which gives the power to the court to summon an expert in any science or art to give opinion in court.

If the judge (after scrutinising and hearing the expert's opinion about the matter) has any reasons to believe that the person who claims the matter is really experiencing the symptoms of bewitchment, he can release an order to have the person be referred to any reliable treatment centers and to give the person an adequate time to get the treatment. The main purpose of the treatment is to ensure the fully recovery of the victim from the influence of witchcraft, thus then the victim can be tried in court in a perfectly sane condition. Normally, when a victim is free from witchcraft, he will be able to rationally consider the action that has been taken. In this condition, therefore, the court can have a rehearing about the appeal filed by either the victim or the spouse. This method is fairer because all parties in the appeal or application are being of sound mind.

6. Conclusion

As a conclusion, the use of witchcraft in causing divorce really happens and the issue has been raised in a few cases in Shari'ah Court. Muslim scholars do agree that a divorce which is caused by witchcraft is not valid. Therefore, this issue needs to be scrutinised and discussed in detail so that it will provide guidelines for judges to evaluate the divorce cases that are connected to witchcraft. It is worried that if judges do not understand this issue thoroughly, mistakes in judgment may occur. The scrutiny on this issue does not only provide fairness to married couples, but it brings back the unity and harmony in their marriage. After all, it is worth noting that this paper work highlights one of the ways to defend the victims' spouses who are divorced due to witchcraft.

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Between Choice and Security: Irretrievable Breakdown of Marriage in India*

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Abstract

The Upper House of the Indian Parliament recently approved irretrievable breakdown of marriage as a ground for divorce under the Hindu and secular marriage laws. Prior to this, courts in India were dissolving marriages on this ground without legislative backing. While the liberalization of divorce upholds individual choice, it has adverse consequences upon women in a society where marriage is the primary source of their economic security. This paper argues that the Bill does not adequately protect the economic interests of women upon divorce. It fails to recognize marriage as an economic partnership, but characterizes the wife as a 'dependant' of the husband, worthy of only discretionary 'compensation'. The paper draws from the studies of Kirti Singh and Jaya Sagade to show that 'discretion' in matrimonial litigation is normally exercised adverse to the interests of women. The paper also comparatively analyses the Bill against laws in other jurisdictions, which strike a more favourable balance between financial security and choice.

** Full article will be published in research journal "Jurisprudence", Mykolas Romeris University, Lithuania

VI PLENARY SESSION

Session Chair: Rosaan Krüger, Rhodes University, South Africa

The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign*

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Abstract

This paper considers the application of the doctrine of separation of powers by the South African judiciary in a series of judgments flowing from applications and appeals concerning the disbanding of a specialised crime-fighting unit, the Directorate of Special Operations ('DSO', colloquially known as 'the Scorpions') and the establishment of another unit, the Directorate of Priority Crimes ('DCPI', colloquially known as 'the Hawks') through legislative enactment. It traces the judiciary's stance on the separation of powers in the different stages of the litigation – before, during and after the conclusion of the legislative process. It does so against the background South African precedent on the doctrine and in the light of perceived power imbalance between the branches of government. Ultimately, it questions the appropriateness of the current understanding of the doctrine of separation of powers in the context of a dominant-party democracy.

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Why Do We Wage This War? Researching the Link between Presidential Discourse, Party Ideology and Foreign Policy Decisions by United States Presidents

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Abstract

Presidential discourse presents the outlook of America on the world. This research takes the existing theories about presidential discourse, foreign policy choices and party ideology and tests them on the United States Presidents and their rhetoric on military interventions between 1950 and 2009. Democratic Presidents are thought to speak of their military interventions in liberal terms, while Republican Presidents would use frames describing a realist view. Analyzing 1663 Presidential Public Papers with the automatic content analysis program AmCAT, we found that for both sides of the political spectrum the hypotheses could be rejected.

1. Introduction

Politics refers to the choices that are made to create government policy. One of the rationales behind political parties is the fact that they have different views on these policies. These principles of political parties are hardly ever tailored towards foreign policy. Usually, political parties target domestic issues first, to which they apply a certain set of norms and values. But to apply these same principles to foreign policy was only a secondary matter, or so theorists thought for a long time (Aldrich, Sullivan & Borgida, 1989, p.123). As Putnam (1988, p. 427) wrote: “Domestic politics and international relations are often somehow entangled, but our theories have not yet sorted out the puzzling tangle.” Around the 1990s it became widely accepted that partisan politics did not stop “at the water’s edge”, as Senator Vandenberg proclaimed at the beginning of the Cold War (Zelizer, 2010, p.5). In 2004, Brian Rathbun wrote

the book *Partisan interventions* in which he for the first time linked party ideologies to decisions about military interventions. Rathbun argues in his book that the party ideology of the government influences the definition of national interest when faced with a possible military intervention. “Parties defend the national interest, but different parties define the national interest in different ways” (2004, p.2). In other words: in order to understand the foreign policy decisions that are being taken, we need to know who is taking them (idem).

This leads us to the research question:

RQ: Can the party identification of a US President be linked to a liberal or realist frame in the discourse on military interventions? With answering this question, we can hypothesize these outcomes:

H1: Democratic Presidents use the liberal frame more than the realist frame in the discourse on military interventions.

H2: Republican Presidents use the realist frame more than the liberal frame in the discourse on military interventions.

Framing is the selection of certain aspects of the perceived reality, where these aspects are made noticeable in a communication text. In this research, we see frames as the vessels in which the party ideology is brought to the public. In order to test the hypotheses we will look at the wording American Presidents between 1950 and 2009 chose to explain and justify their military interventions to the public. We will do so by analyzing the public papers (news conferences, speeches, fire-side chats) of these presidents to see what frame they use most of the time when discussing their wars. This way, we can write a string of search words that belong to both the liberal frame and the realist frame and see which one Presidents use more often. This paper will first describe the existing literature and the

connection between foreign policy, presidential discourse and party ideology. After that, the method of this paper (framing) is shortly described and the role of the President of the United States is touched upon. In chapter four the method is described, after which an analysis follows. This paper ends with possible grounds for further research.

2. Foreign policy, party ideology and presidential discourse

Even when you are not a political scientist, there are some insights about the stances leftist and rightist parties take when it comes to foreign policy that just seems to make sense. Rathbun, in his research about the foreign policy choices made by political parties towards military interventions, agrees with you, stating: "in some sense we know that rightist parties are more inclined to use force and that leftist parties are more supportive of international aid. The right is somehow 'tougher' than the left (2004, p. 2). But even though this seems logical, it is interesting to note that no one before Rathbun has researched the role between party ideology and their choices in foreign policy. In his book, Rathbun (2004) tries to explain what it means to be on the left or right in terms of foreign policy (p.2). He argues the following: foreign policy is based upon the national interest, but what that is, is not yet determined.

The vocabulary presidents use to characterize their enemies and the threats facing the US is important because presidential enemy construction is one of the central components of a president's foreign policy vocabulary, which in turn becomes a guide to understand American foreign policy at large (Edwards 2006; Judis, 2004). The threat environment and its definition can be studied by analyzing the presidential discourse on the subject. Every government has its own agenda - in which they sometimes try to prove their difference with their predecessors - by emphasizing different strategic priorities and diplomatic style (Ikenberry, 1999). The president's rhetoric offers us insight on the definition of the threat environment and the impact this might have on future administrations (Edwards, 2008, p. 381). Borstdorff even describes foreign crises as linguistic constructions, "for it is largely through presidential communication that foreign crises become real for American citizens"

(1993, p. vii). The presidential discourse heightens significance for international events and implores citizens to support US military interventions and to view the president's policy as a great victory (ibid).

During the Cold War, The President could identify the Soviet Union and its proxy states to create a clear image of a monolithic enemy to organize American foreign policy around (Edwards, 2008., p. 830). With the United States representing the civilized world that needed to stop the advancing communist regimes creeping closer every day, American presidents established Soviet culpability for a variety of violent actions within the Cold War environment (Ivie, 1980, p. 280). After the Cold War, the United States lost the focus of its foreign policy. New questions about the threats the US faced, when it should use force and when it should undertake a military intervention arose (see Ikenberry, 2001; MacGregor, Burns & Sorensen, 1999). In this same debate, the question arose on how presidents would adapt their foreign policy discourse to a new threat environment (Edwards, 2008, p. 831). How Clinton drafted the images of America's adversaries on humanitarian terms compared to the management of threats and responses in the time period before could lay the groundwork for a larger understanding of justifications for the use of force after the Cold War (Edwards, 2008, p. 381).

2.1 Democratic party

The most fundamental liberal presumption is based on the democratic peace theory. Wilson (1917) defined it as "a steadfast concert of peace can never be maintained except by a partnership of democratic nations. No autocratic government could be trusted to keep faith within it or observe its covenants." The liberal conviction in the positive effects of the proliferation of democracy forms a red thread throughout the foreign policy of the US in the 20th century. This includes the promotion of international institutions through which the trust between states is enlarged so that it is easier and more efficient to create international treaties. The liberal frame also convinces a common identity is an important source of peace and stability in both domestic and international politics. Politically like states better understand each other and wield the same norms and values when solving

conflicts (Ikenberry, 1999). Finally, the liberal frame puts faith in the stabilizing effect of international institutions, as they are seen as the vessels to canalize differences and competition between states, regions and individuals (Ikenberry, 1999). "Identify a new international problem and it won't be long before American policymakers have imagined an institution to deal with it" (Ikenberry, 1999, p. 62).

Rathbun states the left's stress on equality can be seen internationally in the advocacy of human rights, promotion of democracy and international aid (2004, p.21). The point of equality is also noted in the fight of the left trying to rescue the weak against the strong, fighting for the underprivileged (Rathbun, 2004, p.21). As Rathbun put it: "The self-conception of their nation [by democrats] is not only the protector of its own interests, but also the selfless guarantor of the universal values abroad" (2004, p.189). This inclusive agenda can be found both on the domestic and the international level. Rathbun concludes: "leftists are marked by a broader conception of political community both at home and abroad and can be said to be more genuine believers in an international society" (2004, p.21). Therefore, the proliferation of democratic norms and values, a common identity and the power of (international) institutions are necessary for a stable world order that would serve the US president, the national safety and interests.

2.2 Republican party

The base of the American foreign policy is grounded in the realist belief in which the anarchic world system is built up out of selfish states that have to survive and therefore look after their own self-interest (Beach, 2012). This research adopts the view in which the realist frame would place the highest importance to the American national safety and interests as the goals of foreign policy, displayed in a pragmatic grand strategy. The American strategy is based on the realist belief that stability and the political character of other states (and regions) can have an enormous impact on the possibility of the US to insure its own safety and economic interests.

According to the school of realism, institutions do not play a large role; nation states are the only

building blocks of the international community. The idea of US exceptionalism, or even the role of morals in foreign policy, is not found in the realist view on foreign policy. Differences in policy can be explained by the different means and power that states hold (Waltz, 1996, p.54). International institutions, the most important agent of these peaceful alterations, are seen by realists as creations out of self-interest by the superpowers that only have marginal influence on the behavior of states. International institutions show and are determined by the balance of power in the international community (Keohane, 1989, p.381). According to realists changes happen because of (often violent) shifts in the balance of power. Since institutions are created by states out of self-interest, they (at most) confine the choices and strategies states have, but they hold no influence on their identity or interests (ibid).

Even though the international community does not know a central authority, there can be a situation of peace or security. Parallel to the economic free market, competition between states will create a power balance, a situation of anarchic peace. Alliances, marriages of convenience and betrayals are all responses to changing power structures. International crises, arms races and even wars are not only pathological expressions of the system but also corrections to restore the balance of the system. States view other states as potential enemies and as a threat for national security. The policy of most states is therefore driven by distrust and fear (Waltz, 1988, p.619). To secure survival, states have to maximize their power potential (ibid). Primarily, states will try to enlarge their power base or try to balance the power of other state, for instance by entering into temporary military alliances.

This weaker commitment to equality translates into a general opposition to righting wrongs in other countries by force (Rathbun, 2004, p.197). Although some members of rightist parties feel a compunction to rally around the troops once they are committed ("Supporting our troops, standing by our heroes", "Recognizing and supporting military families" and "Honoring and supporting our veterans: a sacred obligation" in the 2012 Republican Party Platform), this does not overcome their distaste for peace enforcement as a whole

(Rathbun, 2004, p.197). For example, the parts previously mentioned of the Republican Party in their 2012 Party Platform on the support of their troops reads for seventy-eight lines. The part on protecting human rights, only reads six lines (website Republican Party Platform).

2.3 Framing discourse

What we know about the social world is dependent on how we interpret information given to us. The character, causes and consequences of a topic can radically change when we change certain elements that emphasize or describe the issue. Underscoring these elements that can change the light in which we see this information is called framing. Framing was defined by Entman (1993, p.52) as: "To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described." For this research it is important to understand the terms *frame* and *framing* (and variations on them) as there are used by many discourse theorists. The word *frame* can represent a policy perspective, a framework or a structure. This last definition is what Goffman and Schön and Rein use when they speak of frames. Framing is, according to Goffman (1974, p. 8-10) the activity in which experiences are organized within meaningful frames. He uses framing to explain how the term 'principle of organization' to give meaning and defines the importance of social happenings. Schön and Rein define framing as the "structures of belief, perception and appreciation" (1994, p.23). Chilton gives a vague description, as he speaks of a frame as "an area of experience in a particular culture", but he clarifies this by pointing out that framing is also a construction of structure (2004, p. 51).

3. The role of the President

The constitution that rules the United States distributed the power over the Union over three separate branches: the judicial, legislative and executive powers. This Constitution is very explicit when it comes to allocating the executive power to the President. He will be Commander in Chief of the American troops, but only Congress has the power to declare war (although it speaks not about

a situation in which the United States themselves are under attack (Schlesinger, 1973, p. 9). The President is allowed to sign international agreements, but Congress has to ratify them. He is also allowed to appoint people to certain positions, but Congress has to approve his choices. In real terms the framers of the Constitution only envisioned two exclusive tasks for the President: he is the figurehead of the country, the only representative of the United States when it comes to foreign policy and he has to ensure the laws are executed (Constitution of the United States of America).

This research focuses on the President because he is the most important political actor in foreign affairs. His discourse sets and therefore allows us to understand the boundaries and agenda for international situations (Edwards, 2008, p. 832). The power of definition the president has translates into the ability to create and shape political reality. Zarefsky (2004) argued political realities, especially in foreign policy are constructed rather than given. Edelman (1988, p. 103) described languages as the "key creator of the world's people experience." Edwards (2008, p. 833) stated: "a president's discourse on foreign policy imparts a reality that outlines a symbolic universe of allies and adversaries." In the story, the US defends civilization through promoting its values. When a president declares an attack on the US to threaten the order the adversary needs to be countered, possibly with a military intervention (Bates, 2004; Butler, 2002, Ivie, 1980).

Such situations thus place the President in a unique position to take the power into his own hands and coordinate measures by himself (Owens, 2006, p.261), which in turn, is expected of him. All eyes are on the President at such a time, which grants him another advantage: he is able to determine the discourse in which he can frame the way he operates. This gives him ample room to justify his actions. Maybe the most famous example is the way framing played a role after the 9/11 attack, because when G.W. Bush (2001a) described the attack as a "different kind of conflict", it was rephrased within a week to a "war on terror" (Bush, 2001b). This may seem like a small detail, but it had important implications to the power he was able to wage as President. By representing the attacks as a declaration of war by al Qaeda, he was

able to claim all the powers of a Commander in Chief (Rakove, 2003, p.87).

4. Method

To answer the main question this research will use a quantitative content analysis. The automatic content analysis is executed with the help of AmCAT3, a program for automatic, semi-automatic and manual content analyses, designed by scholars of the Vrije Universiteit Amsterdam (van Atteveldt et al, 2008). Using this program we can quickly analyze large amount of data. We will use AmCAT to test how many times a president uses the terms that we would associate with a left or right point of view in his Public Papers. The automatic content analysis is used over the entire research period, this way we can expose the general patterns of framing of military interventions. The results of the automatic content analysis will give us information which we can use to answer our hypotheses. These hypotheses are researched by testing the papers on the occurrence of the frames mentioned in table 2.

The analysis focuses on the number of times the concepts are used by the President. The associations are analyzed by filtering the dataset on sentences that uses at least one of the terms of the frame, which is called parsing. For example, all President Truman's Public Papers are tested for the terms of the liberal frame. Of course we also cross test, meaning we search the Public Papers of President Truman (a Democrat) with the realist frame. Our hypothesis states he will use this frame less than he will use the liberal frame. Per frame we will calculate how many times the frame is used in comparison with the total number of frames. For example, if Truman speaks of military interventions for a total of 200 times and he uses the liberal frame in 60 instances, this means he uses the liberal frame 30% of the time. The same thing is done for the realist frame, after which we can compare the percentages. This will lead to new insights on the differences between actors and the frames they use and test the hypothesis put forward in this paper.

Table 1. Interventions, parties in power and timespan of this research.

Period	President	Party	Interventions
April 12, 1945 – January 20, 1953	Truman	Democratic	Puerto Rico North/South Korea
January 20, 1953 – January 20, 1961	Eisenhower	Republican	North/South Korea China/Taiwan Cuba
January 20, 1961 – November 22, 1963	Kennedy	Democratic	Vietnam
November 22, 1963 – January 20, 1969	Johnson	Democratic	Vietnam Laos
January 20, 1969 – August 9, 1974	Nixon	Republican	Vietnam Cambodia
August 9, 1974 – January 20, 1977	Ford	Republican	
January 20, 1977 – January 20, 1981	Carter	Democratic	
January 20, 1981 - January 20, 1989	Reagan	Republican	Grenada Lebanon
January 20, 1989 - January 20, 1993	G.H.W. Bush	Republican	Panama Iraq/Kuwait

January 20, 1993 - January 20, 2001	Clinton	Democrat	Serbia/Yugoslavia
January 20, 2001 - January 20, 2009	G.W. Bush	Republican	Al Quaida Afghanistan Iraq
January 20, 2009	Obama	Democrat	Al Quaida Afghanistan Iraq

Using the Presidency Project, this research focused on the Presidential Papers found on the website. In order to only find and use papers that speak of the interventions, this research used keywords per year to find the right papers. Because the papers needed to be put in the content analysis program by hand, the other papers that did not speak of the interventions, were let out. In order to prevent contamination (for example, finding results for a president who did not actually say those things himself) transcripts of presidential debates were let out of the results. However, this research chose to include press statements. Even though the transcripts also show the questions asked by reporters, studying a large sample of these transcripts showed that they did not use either of the frames here to be examined.

The documents were copied and saved as plain text files, and uploaded into AmCAT3. The units of analysis that this research will analyze are Public Papers from American Presidents, between 1950 and 2009. We chose this period because it coincided with the inter-state conflict database from the Uppsala Conflict Data Program and the confirmation of a complete set of Public Papers by the American Presidency Project. We did not look

at the years between 2009 until now, as the intervention President Obama leads in Iraq and Afghanistan still continues. Therefore, it would be impossible to get a complete overview on his second term in office. Also, we left two presidents (Ford and Carter) out of this research, because there were no military interventions that qualified for the Uppsala database during their time in office. In this research we have chosen to analyze all the public papers the American Presidents have held since 1950, as recorded and save by the Presidency Project (website the American Presidency Project). The Public Papers of the Presidents contain most of the President's public messages, statements, speeches and news conference remarks (website the American Presidency Project). The American Presidency Project was established in 1999 as collaboration between John T. Woolley and Gerhard Peters at the University of California, Santa Barbara. The archive contains more than 103,517 documents related to the American Presidency (website the American Presidency Project).

4.1 Operationalization

Using the mentioned research a temporary coding scheme was compiled. Before the actual content analysis can start the reliability of the coding scheme has to be confirmed. There was no need to conduct an intercodor test, because the content analysis is done automatically. To determine which words had to be included, we based the search strings upon keywords used by left and right wing parties as described by several authors (Lakoff, 2004, McCarty, 2007, Rathbun, 2004). While testing the search strings, certain words were omitted, because they either showed up too many times and had little to do with the political side ('institutional') or because they had no direct link with the war ('oil'). After this, the final search strings were created, seen in table 2.

Table 2. Search strings for the automatic content analysis.

Frame	Words
realist frame	interest* invest* econom* terror* stability financ*

liberal frame	peac* human* aid free* sustainabl* civil* communit* institution* lead*
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5. Analysis

On the base of the search strings described in the method section of this research, a total of 1663 public papers were selected. In table 3 we find an overview the ANOVA analysis on the percentage of times a president used one of the frames. These were not split into different groups per intervention, as our hypothesis states that the different frames should be used by Presidents from different political parties. Which intervention we speak of, should therefore be irrelevant.

Table 4. Results of frame research per president (Democrat or Republican)

Descriptives

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		
					Lower Bound	Upper Bound	Minimum
RealFrame 0	5	,2760	,02510	,01122	,2448	,3072	,26
1	5	,2780	,02591	,01002	,2335	,3225	,24
Total	10	,2770	,02917	,00923	,2561	,2979	,24
LibFrame 0	5	,2970	,06082	,02944	,2153	,3787	,24
1	5	,2790	,02559	,01145	,2472	,3108	,24
Total	10	,2880	,04803	,01610	,2636	,3224	,24

Descriptives

	Maximum
RealFrame 0	,32
1	,32
Total	,32
LibFrame 0	,41
1	,31
Total	,41

ANOVA

		Sum of Squares	df	Mean Square	F	Sig.
RealFrame	Between Groups	,000	1	,000	,010	,921
	Within Groups	,008	8	,001		
	Total	,008	9			
LibFrame	Between Groups	,001	1	,001	,325	,564
	Within Groups	,020	8	,002		
	Total	,021	9			

There are a few things interesting to note. First, the percentages of the use of frames are fairly consistent and range from 23,5% (use of realist frame by President Eisenhower) to 40,5% (use of liberal frame by President Clinton). Also, we see that there is no overwhelming use of the expected frame over the frame that the President supposedly would not con scribe to. Even though some Presidents did use their expected frame more of the time (Truman, Johnson, Nixon and Clinton) it is apparent that there is no overwhelming support for our hypotheses. Six out of ten Presidents

(Eisenhower, Kennedy, Reagan, G.W. Bush, H.W. Bush and Obama) did not use the framing that was expected from our hypotheses about party ideology more of the time. When we look at H1: 'Democratic Presidents will use a liberal frame when discussing their military interventions' we can see that from the five Democratic Presidents there were during our research we could confirm our hypothesis twice and it was rejected three times. Therefore, we can reject H1. H2 states that Republican Presidents will use a realist frame when discussing their military interventions. From the five Republican Presidents the United States had during our research period, our hypothesis is confirmed two times and rejected three times as well. Therefore, we can conclude that we can also reject H2.

So why can we not apply Rathbun's theory on the United States? There are two possible answers to this question. One of the possible explanations for the rejection of the hypotheses could be because of the unspoken commitment to certain values ingrained to the political party the president belongs to. It could be argued there is no need for a Democratic president to mention typical liberal keywords because it is already understood he adheres to these values. He might, on the other hand, need to ensure it becomes clear he also stands strong on the keywords used by the other side of the political spectrum (such as national interests, investments etc.).

A second reason for being able to apply Rathbun's theory in the United States could be the method used in this research. One might state that the linguistic or political communication route chosen to research the hypotheses applied the theory of party ideology in too literal a sense upon the analyzed text. Even though Rathbun (2004) describes the motives parties have to engage (or not engage) in military interventions from their underlying ideology, he never explicitly said that the parties would also frame their decisions in that same manner. One could argue that even though a Republican President might wage a war for reasons of national interest, but chose to frame it towards

the public in terms of peace or humanitarian aid, because it is better for his image to (also) mention these issues. Another possible road for further research is to look at historical conditions that affect the frames in combination with party identification. With national security frames being more common during the Cold War and the frames around humanitarian help becoming more prevalent since the 1990s further research should look for period effects and other alternative explanations.

6. Conclusion

American Presidents use public discourse to create images for the public to identify and construct the adversaries America faces prior and during armed interventions (Edwards, 2008, p. 830). There has been much research into the words used by US Presidents and the power these words have. This study has tried to answer the following research question: "Can the party identification of a US President be linked to a liberal or realist frame in the discourse on military interventions?" From this research question stemmed two hypotheses: H1: Democratic Presidents use the liberal frame more than the realist frame in the discourse on military interventions.

And H2: Republican Presidents use the realist frame more than the liberal frame in the discourse on military interventions. After conducting an automatic content analysis on 1663 Presidential Public Papers, consisting of news conferences, press statements, fire-side chats and more, this study concludes that both hypotheses can be rejected. Between 1950 and 2009, there were five Republican and five Democratic Presidents, but only two out of three from both parties used the frame that (according to Rathbun) they were expected to use. This study therefore concludes that in Rathbun's theory of party ideology and foreign policy decisions cannot be as easily placed upon the United States as Rathbun mentioned (2004, p. 37-38). There are two reasons why this cannot be done in this study. First, it might be that the party cleavages Rathbun has examined in Europe do not exist or are at least different in the United States than he imagines. Second, it might be that the method chosen in this research makes it impossible to detect the differences in party ideology and the choices the different parties make. Indeed, for there

might be some difference between what the President says and what (and why) he does it.

But if we take the conclusions of this research to heart, it means there is plenty to be discovered about the presidential discourse and foreign policy in the United States, especially when it comes to decisions about military interventions. For this research it was not possible to research more than the Presidential Public Papers, but it might be more comprehensive to research documents from Congress (for example floor statements) too. Another way of delving deeper into the theory would be to research each intervention independently. That way, it would become more obvious why a President chose to intervene and these reasons might be a better fit with his theory.

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The Reservation of Islamic Countries on Human Rights Treaties: Roots of Political and Religion

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Abstract

As a matter of fact, International treaties are contradiction issues, which deal with some sort of problems in per formation, among other international right cases. Moreover there are some kinds of treaties, in which the benefits of the both sides are not completely concerned.

Besides that, Human Right treaties are the International documents that obligate both sides of the treaty on accepting all its conditions. Although in some cases, all of the treaty's conditions are not satisfied in both sides' benefits. Therefore, Reservation right is an offered way in order to solve these kinds of issues.

Human Right treaties have been registered by western countries and it's resumptions are almost based on Christian religion, because of that, the position and the role of Islamic Countries has been really specialized and it has been expected from Islamic countries to concern about the right treaties, more than before. But here there is an important question that if the reservation is completely based on Islamic roots or the political thoughts are also emphasized on the reservations.

1. Introduction

International court of justice issued an advisory opinion on reservations to the convention on the prohibition of genocide and it was a milestone reservation system.

Significant of reservations appears more in treaties which related to human rights. Hence, studying of legal rules governing the reservation of this document is necessary. States are permitted to reject some regulations of international treaties if they know that their own rules contravenes in time of sign, ratify, accept or accession to international treaties. Islamic countries and members of the

organization of Islamic conference have demonstrated the different responses proportionality increased international human rights treaties and conventions in recent years.

Such reaction have been Islamic states opposed with using of reservations, due to incompatibility some content of human rights instruments with the Muslim religion.

Accepting some considered subject to compliance with Islamic law.

What the certain many countries with religious, identity and culture specific have not signed some conventions and have not done. So check the reservations of Islamic countries and their positions are required.

The purpose of this research is to provide suitable solutions to help increase the member of human rights conventions and multilateral treaties also help to Islamic countries to join and participate in human rights treaties with allowed and accepted reservations and reducing the amount of conflict between Islamic countries and human rights treaties to expand the role of Islamic countries in such treaties. In this study, we sought to answer the following questions:

- 1- What is role of Islamic countries in the ratification of human rights treaties?
- 2- Is there a conflict between Islam and human rights treaties?
- 3- According to various reservations imposed by the Islamic states, do apply this reservation according to Islamic law or political roots?
- 4- What were Islamic countries positions regarding human rights conventions?

2. Human rights treaties

Using a political document known, one could say that the world was faced with a ghost. Since 1945, it was human rights doctrine the doctrine would revolutionize some such ministers or diplomats. Some people put in difficult position and some people are forced to move and work and they are thrilled.¹¹⁸

Human rights in some countries were among the first foreign policy goals after World War II and as an effective means of condemning the actions of other countries were used. Or it was used to guide the actions of nations in the international arena like a Polaris. But the doctrine was seen as a nightmare by some countries. As the scales on behavior which were assessed and was criticized.¹¹⁹ The goal of doctrine was remove the mask on the face of sovereignty. This mask was caused elegant and appearance to any country that no one could penetrate in it. After World War II, international support for human exposed quickly just because being human. Then the subject was people as individual human being must be protected. This change was due to the common belief of all victorious powers. They had understood that the Nazi crimes are the result of vindictive philosophy.¹²⁰

The philosophy was based on the lack of respect for human dignity. One of the most effective ways to prevent the recurrence of such a tragedy is declare a number of principles relating to human rights. Since then the modern human rights was born in the context of international human rights treaties and the guarantee of respects for human rights was part of the main purposes of the charter of the united nations. Rules of human rights are including gains over time.¹²¹

Unmistakable, there are differences between human rights treaties and customary in international treaties in terms of substantive. The roots of these differences are that unlike conventional treaties,

human rights treaties represent the interests of trade between members states are not. Indeed, unlike conventional treaties, human rights treaties not have the nature of trade. The essential purpose and main functionality of human rights treaties are fundamental differences of human rights treaties. In fact, the main functionality and essential purpose are protecting individual rights and fundamental freedoms. The central point of these treaties is the protection of individual's rights against potential abuses of this right by governments, other people, and other countries.¹²²

American court of human rights to conclude Because of these characteristics of human rights that the criteria of human rights treaties are not include common criteria of treaties between countries.

According to the court's interpretation:

«Modern treaties on human rights in general and the American convention on human rights , in particular multilateral treaties are not the common type of treaties . There are formed in order to achieve a mutual exchange of rights and mutual benefits of the member states. The objective and topic of these treaties are protecting the fundamental rights of individual regardless of their nationality, both in his home country and in the other member states. In the situation of human rights treaties, countries which abiding legal order have accepted. They accept variety of obligations in relation to individuals within their jurisdiction for adopt the public interest.»¹²³

3. Review the reservation from begin to now

It is common to use a reservation in the second half of the nineteenth century and especially in the case of multilateral treaties have been used in many cases.

Always had been existed two main viewpoints in the history duration of reservations. The first view of Western Europe and we have been that by the

¹¹⁸ Bagher and Rosi Mir abbasi, Tehran, 2009.

¹¹⁹ Hossein Mehrpour, Tehran, 2008.

¹²⁰ Hedayatollah Falsafi, Tehran, 2012.

¹²¹ Reza Mousazadeh, Tehran, 2009.

¹²² Bagher Mir abbasi, Tehran, 2011.

¹²³ Mohammad Reza Ziai Bigdeli, Tehran, 2007.

secretariat of the League of Nations and then the UN did run until 1950. This view is based on the principle of treaty solidarity of the issuing time.

If a member of the treaty objected to the reservation of another country. This country was not permitted to be a member of the treaty, but this view was changed to a flexible approach by the countries of pan American and using the theory of the universality of the treaty and then countries represents the reservation could be party of treaty against countries that no objection.

The second view is related to the former Soviet Union and socialist theory of international law. This view was founded on the principle of state sovereignty and this view thought that the essence of government in the international arena is that. This view advocated from freedom in placing reservations on treaties.¹²⁴

4. Verdict of international court of justice about reservation on genocide convention

Change the traditional system of reservation began when the four socialist countries have announced reservation on some articles of the convention against genocide.

The international court of justice issued its advisory verdict in 1951. Court's original sentence was: «Represent the reservation can be a member of the convention if its reservation is compatible with the purpose of convention. Even if it is being contested by some member. »¹²⁵

The court ruled contrary to past practice and performance that it was emphasis on maintaining the solidarity of the treaty. the court stated that the purpose of the reservation must agree with purpose of the treaty which recognizes and the court accepted relative rights effect for reservation.

International law commission on the drafting of the treaty in 1969 relied largely on advisory mandates in 1951 and the Vienna conference will examine the basic aspects of the problem and was given a limited release formula that based on it: a reservation is compatible with the treaty if by a

¹²⁴ Hossein Sharifi Tarazkoohi, and et al, Tehran, 2007.

¹²⁵ Mohammad reza ziai bigdeli, Tehran, 2013.

majority of the righteous to be recognized (usually two-thirds of the participants).¹²⁶

5. The positions of Islamic countries delegates about the universal declaration of human rights and the civil and political rights covenant

From January 1946 to June 1948 , the commission of human rights held three sessions about the universal declaration of human rights at different time.

Together with the human rights commission , a committee was formed to write the pattern of declaration. At the first the project had three members and later expanded and consisted of delegates from eight countries.

Finally , after much debate in the writing committee and in the human rights commission and text of the final draft adopted in the second session of the commission at June 1948. The role of envoy of Lebanon (Dr Habib Malik) in the preparation and drafting of the Declaration in the writing committee meetings and meetings of the commission on human rights was very broad a basic. Also the president of the general assembly's third committee in talks about the universal declaration of human rights was Dr habib malik.

Islamic countries participated in the third committee negotiations very actively. Afghanistan, Egypt, Iraq, Iran, Lebanon, Syria, Saudi Arabia and Pakistan have raised their positions and views.

The delegate of Saudi Arabia rejected some provisions, including article 18 of the universal declaration of human rights according to the traditional interpretation of Islamic jurisprudence.

On the other hand, Pakistan foreign minister who head of the countries delegation at the general assembly in 1948 (and later was appointed as a judge of the international court of justice) when discussions concerning UDHR was raised in the assembly .first he had selected silent position but in the final hearing he has done historical and passionate speech about rejecting the opinions and positions of delegate of Saudi Arabia. However, all Islamic countries voted favor to the declaration in

¹²⁶ Reza Mousazadeh, Tehran, 2011.

the final vote and only Saudi Arabia voted abstained.

In 1960, the third committee has reviewed the article 18 of the civil and political rights covenant .jamil baroudi (Saudi envoy) again strongly objected to article 18.also Yemeni delegate repeat the reasons of Saudi Arabia and refused it. And Egypt government announced that advocate of the universal declaration of human rights and is bound to performance but with exist of article 18, ratified the civil and political rights covenant will be problem but the Pakistan envoy defended from the draft text and apparently lead to a dispute between the Pakistan envoy and the Saudi Arabia envoy. Also some Islamic states like Turkey and Morocco supported from the stance of Pakistan. Iran and Afghanistan tried to take a middle position. This problem was repeated about the article 16 of The Declaration .there was not article about human equality between women and men in the first draft of the civil and political rights covenant which was submitted in the general assembly. So Ms badi'a afnan (Iraqi diplomat) considered to it in the third committee and she believed that such provisions are necessary and therefore that she proposed to add such article to covenant and the common article 3 of the both covenant were adopted in the result of her insistence.

There fore the equality of men and women in common article 3 was proposed by Islamic countries and USA and Europe and Saudi Arabia were the main opposition of it.¹²⁷

6. The Islamic countries practices regarding convention of the elimination of discrimination against women and child's rights convention

Most Islamic countries have ratified the convention with reservations and their most reservations are on article 9 and article 15 and article 16.Pakistan declared the declaration for implementing the convention. If it is not presented conflict with the constitution of Pakistan and sharia ,the convention will implemented by Pakistan government.

The convention on the rights of the child in article 2 is written that member states should ensure that juveniles are entitles to exercise their rights without discrimination. Tunisia ,Syria and Malaysia have

¹²⁷ <http://treaties.un.org/>.

put reservation on this article .according to Islam :boys and girls are different in terms of maturity and inheritance but it seems ,some Islamic countries have not put reservation on this article but in practice they did not enforce this article of convention.¹²⁸

7. Review the reservations imposed by the Islamic countries to human rights treaties

In general, the positions of Islamic countries in relation to the using of reservation on human rights treaties as follow:

1. Countries that have joined to human rights treaties without reservation.
2. Countries that have joined to human rights treaties with using a general reservation.
3. Countries that have joined to human rights treaties with using the specific and certain reservations.¹²⁹

These are described briefly in the following:

A - Accepting the treaty without reservations:

In relation to human rights treaties, the first significant case is acceptance such treaties without reservation. And this state is separable into two distinct statuses:

1- Status is when countries are committed to an international treaty without limiting effect on its legislation system. Because of Their view is that International regulations and requirements contained in the document reflect the Goals which they are seeking and supporting. In such case, the desired country will make the effort to take the necessary measures that Internal performance will aligned with treaty, Even if it is required to review its internal rules.

2- The second situation in a way that Countries are committed to human rights treaties without adds any commitment to their previous commitments. Even no real intention to execute. In this situation, action of state to accept rules of international human rights without real intention for its implementation is factitive. In this situation, treaty was not happen never usually and accession to it is purely symbolic features and a diplomatic courtesy. In general, it also confirms the weakness of

¹²⁸ <http://www.unhchr.ch/>.

¹²⁹ Herbert Briggs, New York, 1965.

international law and validates imposed problems of international law on countries.¹³⁰

7.1. The first pattern can be well demonstrated in the following examples

Lebanon's accession to the International Covenant on Civil and Political Rights. Egypt's accession to the International Convention on the Elimination of racial discrimination.

Iran's accession to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and the Convention on the Rights of the Child.

Tunisia's accession to the International Convention on the Elimination of racial discrimination, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural.¹³¹

7.2. The second pattern is a more common practice among Muslim countries It is important to mention the following examples

Among the countries that joined without reservation to the International Convention on the Elimination of All Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture, the Convention on the Elimination of All Forms of Discrimination against Women of child rights conventions are: Benin, Burkina Faso, Ivory Coast, Chad, Kyrgyzstan, Nigeria, Tajikistan, Togo, Sierra Leone and Senegal.

Yemen has ordained political and Technical Reservations on treaties that Has no effect on the nature of the norms mentioned in this context. Nigeria experience , according to numerous reports by international human rights organizations also violations of human rights treaties in the country illustrates that the way of admission of international treaties are most aspects of appearance, in fact and

are not according to the norms of the content contained therein.¹³²

The inner function of government reflects the gap between provisions of the text of the convention and practical realities of running text of the conventions.

Also warranties and enforcement of international law is weak. Violence related to the country's presidential election in April 2007. Another example of breach of basic citizens civil and political rights. According to the reports that fraud , closure of polling centers despite the fact that queue of people still remained as well as transfer papers and ballot boxes to the house of local government head as a result of this measures. The flawed elections held.¹³³

8. Conclusions

To actually definition of human rights cannot easily human rights are fundamental rights also human rights are rights that cannot be suspended. Human life is based on it. With all, there are not consensuses about the examples of how the rights should be. The legal is called human rights is rights that are defined with respect to specific characteristics of each community and takes on a different form.¹³⁴

Hence, human rights are not always within the broadly and general accepted defined. This has created a dilemma in international law.

Another problem that has considerable role in impossible to define human rights is in majority of countries. Look to human rights as a part of national legal systems. Not as an issue that the international system is involved. In other words, how a state to behave with its citizens? The question is not something that governments to accept international monitoring of its easily. The main purpose of human rights treaties is imposing minimum standards for the protection of all human rights, they are everywhere, and all are equal in human dignity.

¹³⁰ Katrina Tomasevski, London, 1993.

¹³¹ Muhammad Khalid Masoud, London, 2012

¹³² Nisrine Abiad, Sharia, London, 2008

¹³³ Nisrin Abiad, and et al, London, 2010

¹³⁴ United Nations, United Nations, 2003

Unlike other international treaties, human rights treaties are not going to make mutual commitments between countries. Subject of reservation on human rights treaties among the topics that many minds has attracted in local and regional and international area. Regulatory elements of human rights treaties have examined the issue in the entire world, also in local area. Because the issue is related to demarcation of sovereignty directly. States deal with it by different approaches.

Islamic countries clearly have different and quite opposite approaches to human rights to human rights treaties. Majority of Islamic countries had position of liberal and secular until the eighties. Even was seen there was disagreement between Saudi Arabia representing traditional Islam and Pakistan represented as a transformational approach. the heterogeneity of Islamic countries in representatives to provide other international human rights instruments to provide other international human rights instruments was seen at that time.¹³⁵

For example:

In preparing the convention on the elimination all forms of racial discrimination, convention against genocide, etc. The result of such stances by majority of Islamic states was joining treaties without reservation. But positions of Muslim countries to join human rights treaties , including the convention on the rights of the Childs and Convention on the Elimination of All Forms of Discrimination against Women was more inclined toward traditional Islamic gradually. The result of such a tendency is acts of different reservation to human rights treaties articles.

In particular, general reservations also diverse reservations as a result, it is a deal with universal human rights.

Because all Islamic countries that apply following international human rights instruments with reservation are members of united nation charter also members of the universal declaration of human rights. The result of this observation is on the one hand, conflict between universal human rights and

¹³⁵ Susan Waltz, Baltimor, 2004.

procedures of many Muslim countries to accept treaties with reservation.. As the international law commission pointed in 2006:¹³⁶

«clearly , the ratification and acceptance of a treaties is a treaty starting point, if not implemented effectively, action is meaningless.»

In particular, multiple and conflicting reservations were applied by Islamic countries whereas they have the same religion and it is sobering.

It should be noted that the issue of human rights is not relate no longer to internal matter while it is an international concern.¹³⁷

Now, we express the two basic questions:

1- If Islamic countries were so active, so why had they allowed exist a lot of dispute between Islam and human rights?

According to Islamic countries positions as well as how joined Islamic countries to the conventions.

It seems to me that Muslim states at that time did not believe in Islam but pursued the progressive thoughts.

In the eighties, a transformation occurred among the states. And they are in negotiations regarding other human rights instruments, such as:

Convention on the Elimination of All Forms of Discrimination against Women,, Convention against Torture. Bound themselves to Islamic religion means. Like:

Positions on Article 14 of Convention of Rights of the Child and Article 20 adoption, bail, Article 1 of the Convention against Torture... Etc.

2- Is it possible to imagine that such representatives of Islamic countries were not true representatives of their culture and values?

The answer to this question is not easy. Because the answers to these question need to answer another question.

¹³⁶ Mashood, A. Baderin, London, 2007.

¹³⁷ Mashood, A. Baderin, London.2001.

This question is:

Which countries execute true Islam that we could know its representative shall representative of real Islam?

It seems, most Islamic countries think they are the true representative of real Islam. And therefore the answer is relative. Three main patterns about Islamic countries processes relate to reservation on human rights treaties were explained earlier.

They have contradictions with the treaties. This is true especially about the general reservation and vast reservation so everyone can suspect about the real intention of the governments about the two others reservations, we can say:

Although they have limited but they target the treaties foundations.

In their case that multiple although they cannot do alone any harm to treaties but all of them affect the purpose and the subject of the treaties in this respect, there are similar concerns. Unfortunately, reservations are accepted, namely the reservations are explicit and clear and precise are low among Islamic countries more over.

When religion is used to justify some reservations, states are unable to express any specific reason for it. The ultimate goal of human rights treaties is guarantee the development rights and personal freedom.

Islamic countries should try to make a deal between civil law, religious and cultural barriers on the one hand and international human rights treaties on the other.

Also experts can use dynamic religious jurisprudence, to achieve appropriate solutions to adapt to Articles of human rights conventions and Islamic religion.

Expected, the united nation committee on the rights of children and women's rights confront with Islamic countries reservations realistically and understand their limitations. And thus, instead of discredit Islamic countries reservation, go to way of dialogue. Hence, Islamic countries should try to convince its international critics.

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An International Answer to Capturing Corporate Criminality*

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Abstract

In the era of increased corporate globalisation, the lingering principles of directing mind and will have plagued South Africa, the United Kingdom, New Zealand, Luxembourg and the United States amongst other neighbouring territories from manufacturing a realist model of corporate fault. The incorporation of absolute corporate liability in international governance documents has repeatedly fallen short of the expectations in the aftermath of Bhopal, Sveso and P & O European Ferries and other ecological disasters alike. It is of fundamental importance to combat transnational corporate activity from a world order perspective by establishing a legal regime which supports the philosophy that corruption becomes entrenched within the corporate culture. A culture that is indicative of corporate guilt. This paper will suggest that the corporate culture doctrine within the Australian Criminal Code Act 1995 is the first step in the courses of action required against the evolution of structurally complex corporate arrangements.

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**Wilted roses in Afghanistan:
A study of the impact of microfinance initiatives on
rights and opportunities for Afghan women**

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Abstract

Three decades of war have destroyed the political, social, and economic infrastructure of Afghanistan. Improving economic opportunities and rates of infant mortality, maternal deaths, literacy, life expectancy, access to clean water and sanitation, and per capita income are key factors to the nation's sustainable development and security. Since 2001, Afghans have launched several microenterprise projects based loosely upon the Grameen Bank model, making modest loans to women's collectives of home-based businesses. This paper analyzes Afghan microenterprise initiatives and evaluates the impact that they have had on political, economic, social, security, and legal issues in Afghanistan.

1. Introduction

Physical security and political stability within a nation is a multi-dimensional issue, and social, economic, and legal rights are the foundation of a sustainable government [1]. This paper seeks to answer the question, "Can increasing entrepreneurial opportunities for Afghan women through microfinance programs promote broader societal, economic, legal, and political stability in Afghanistan, and if so, how?"

2. Background

The nation of Afghanistan sits along the fabled "Silk Road", where trade caravans traversed between the Eastern and Western worlds since ancient times.

This landlocked country shares borders with six nations: Pakistan, Iran, China, Tajikistan, Turkmenistan, and Uzbekistan. For centuries, it has been the site of conquest by foreign armies seeking to expand empires. Alexander the Great, Genghis Khan, Babur, and other lesser known military leaders have fought on Afghan land over the years. In the 19th Century, Afghanistan was the playing ground of "The Great Game" between Great Britain and Russia, as they sought to expand their influence in Southwest Asia and buffer their colonial conquests against each other.

In the 20th Century, Afghanistan was one of the last battles of the Cold War between the US and USSR, with the US supporting the Afghan and foreign *mujahedeen* fighters seeking to expel the Soviets after their December 1979 invasion and occupation of Afghanistan. The Soviets waged war in Afghanistan for 10 years, suffering 14,000 deaths and nearly half a million non-fatal casualties. Estimates of Afghans killed during the decade of war with the USSR exceed 1 million. The Soviet losses in Afghanistan contributed greatly to the subsequent dissolution of the Soviet Union into separate nation-states.

2.1. Post-Cold-War Afghanistan

Following the Soviet withdrawal, Afghanistan descended into civil war among various warlords and religious factions. Rubin notes:

. . . When the Soviet Union withdrew and then dissolved, and the United States disengaged, Afghanistan was left with no legitimate state, no national leadership, multiple armed groups in every locality, a devastated economy, and a people

dispersed throughout the region, indeed the world [2].

In 1996, the Taliban took nominal control of the Afghan government while the civil war with the Northern Alliance and other factions waged on. The Taliban received financial and military support from a few foreign governments and terrorist associations, but was largely a pariah on the world stage due to its harsh oppression of the Afghan people, particularly women.

Afghanistan and its 31 million people have suffered more than three consecutive decades of war. The government of Afghanistan has little revenue aside from World Bank loans and handouts it is given by the United Nations and foreign government coalitions. Lack of access to healthcare services due to geography and poor infrastructure, lack of knowledge of disease and pregnancy prevention methods, lack of access to clean water and sanitation facilities, and the existence of cultural and societal barriers have hindered individual opportunities and broader economic development in Afghanistan [3].

2.2. Afghanistan since October 2001

Since October 2001, the NATO and US have deployed large numbers of military forces in Afghanistan and spent billions of dollars to rebuild the country, and yet, Afghanistan remains the fifth poorest country in the world. O’Connor notes that despite the foreign assistance, the quality of life of the average Afghan remains mired in poverty, and “stories of graft and corruption are common at the lowest levels of civic activity and at the highest levels of the Afghan Government” [4].

The nation is believed to possess large quantities of mineral and energy commodities, but most of these materials are in or near the Hindu Kush mountains, making exploration, extraction, and transportation of infrastructure improvements resulted in 60% of Afghans in urban areas and 30% of Afghans in rural areas having access to the means to safely dispose of human waste, refuse, sewage, and other used water [12].

The growth seen to date is not sustainable. The Afghan government, as it has little revenue aside from World Bank loans and handouts from the

these resources difficult, notwithstanding war or civil unrest. Reliable access to electricity is available to only 10% of the population [5]. Only 12% of the land in Afghanistan is arable under the best of conditions – recent droughts have reduced crop output, with the notable exception of poppies, which are currently used in production of heroin, but the poppy crop could be put to legitimate use by the pharmaceutical industry to produce opiates, such as morphine, codeine, etc. Legal use of the poppy crop would require the pharmaceutical industry were to make capital improvements and investments in Afghanistan, however, and that is unlikely given political corruption, security risks, and the lack of infrastructure.

Marked improvement has been made in the lives of most Afghans during the past decade. In 2005, the infant mortality rate in Afghanistan was 115 per 1000 live births, compared with 82 per thousand in “low income” countries and 7 per 1000 in the U.S. [6]. By 2011, the situation in Afghanistan improved to 73 infant deaths per 1000 live births [7]. In 2005, maternal mortality rates were reported as 1600 per 100,000 live births in Afghanistan, compared with 671 per 100,000 in “low income” countries and 17 per 100,000 in the U.S. [8]. By 2010, the maternal mortality rates had by substantially reduced to 460 per 100,000 [9].

In 2005, the GAO reported that 70% of the Afghan population was undernourished, only 13% of its children had received necessary immunizations, only 23% had access to safe water, and only 12% had access to adequate sanitation facilities; each of these figures is likewise well below those reported for “low income” countries and the U.S. [10]. By 2010, 78% of Afghans in urban areas and 42% of Afghans in rural areas had access to clean drinking water, and two-thirds of Afghan children had received all necessary immunizations [11]. As to sanitation, the impact

United Nations, foreign government coalitions, and international non-governmental organizations. Financial support provided by foreign governments and NGOs has constituted 97% of the funding for government operations and development in Afghanistan since 2001. The aid workers of many international humanitarian relief organizations have worked to improve the lives of millions of Afghans.

Research has shown, however, that development programs directed by the indigenous community, rather than foreigners, generally have greater rates of success and lower security risks, due to increased trust and “buy-in” by the population to be served by the programs [13]. A common exhortation of blame that this author has heard from Afghans is that all of their country’s problems are the fault of “foreigners,” primarily the Russians, the Americans, the ‘Arabs,’ and the Pakistanis.

3. Governance and security issues

Throughout history, Afghan society has been centered on “the extended family, the locally based clan (or sub-tribe), the tribe, large ethnic group, and the state” [14]. For centuries, the traditional community ruling structures within Afghanistan were *shuras*, local tribal-based councils that make laws and resolve disputes [15]. On a macro scale, communities would meet and hold *jirgas* to resolve issues of regional or national concern [16]. Afghans’ reliance on *shuras*, coupled with a culture that has historically distrusted both centralized national government and foreigners, makes microfinance-based development projects more likely to succeed if the programs are managed and controlled by local leaders [17].

Many critics fault the US and its allies for Afghanistan’s difficulties in the post-2001 era. Ayub and Kouvo contend that the root cause of post-invasion difficulties lies in the motivation of the occupiers:

The intervention was conducted not to promote security or stability in Afghanistan, but to ensure that Afghanistan could no longer be a source of insecurity for the United States and its allies. This has resulted in a state-building process hampered by competing and largely incompatible agendas, with major actors remaining involved for reasons other than humanitarian ideals and state-building, and the logic of the war on terror colliding with visions of ‘a broad-based, multi-ethnic, politically balanced, freely chosen Afghan administration’ [18]. Others contend that the problems are rooted in resistance to change that is endemic to Afghan society:

In Afghanistan, however, the culture defines itself by what it has always been. It resists change. It resists outside authority, as the Soviets and the British before them discovered. The culture can accept minimal change, as it is presently doing, driven by the historical disaster and upheaval it has experienced. But it cannot accept wholesale societal transformation, particularly at a pace that would satisfy Western expectations [19].

3.1. Resurgence of the Taliban in Afghanistan

Giustozzi notes that the neo-Taliban insurgency began in earnest in 2003, in Southern Afghanistan, and that by the Spring of 2006, its tentacles began encroaching upon Kabul [20]. The resurgence of the Taliban has been quite perplexing to many Westerners. Daxner posits that occupying powers have had little real concern for the needs or goals of Afghans, but rather, have focused on their own security and power goals [21]. Daxner contends, “The Afghans want their collective integrity and dignity restored. They want and need the traumas from 30 years of terrible violence to be eased with food, justice, and employment, They want their long efforts toward modernity revived” [22]. While the needs of the Afghan people are great, Donini suggests that Western ethnocentrism and paternalism made matters worse, not better:

Accepting as the default position that ‘we are essential’ to Afghanistan’s recovery is an unhelpful, patronizing and potentially dangerous proposition. It may be useful to start looking for alternatives that are more grounded in local realities, more sustainable, more empowering and more in line with the needs of ordinary people [23].

Sinno argues that such the resurgence of the Taliban has been inevitable, given the “protracted and inconclusive” nature of the Afghan conflict since 2001 [24].

In addition to the “certainty” that the Taliban rules provide [25], the Taliban also represents an indigenous force of rulers, rather than foreign or puppet rulers, to many Afghans [26]. The Taliban have not only rejected Western cultural norms, but have also put forth political isolationism as a formal policy; this is attractive to many Afghans who view their nation’s problems as the direct result of foreign conquest and interference, not only from the West,

but also from the Soviets, Arabs, and Pakistanis [27]. Moreover, the Taliban do not have to wage conventional war. As DeVillafranca notes:

The Taliban cannot defeat NATO militarily, but they do not have to; their best weapon is time. They can retard governance, reconstruction, and development, diminish security for the population, and erode national will. In essence, they can shorten the time available for state building[28].

Although the neo-Taliban has affiliated with foreign volunteers, the resistance forces remain under the command of Afghans [29]. The contingent of mercenaries affiliated with the neo-Taliban is estimated to compose 10-20% of the fighting force [30]. It is also important to note that while some Taliban elements have cooperated with Al Qaeda, the two organizations are neither synonymous nor operationally connected. Daxner notes: While the two organizations may occasionally share a common cause, they do not share a religious doctrine. The extreme Saudi form of Wahhabism is not attractive to most Afghan tribes. In fact, from the tenth century on, the Afghan interpretation of the Koran differed from the Arabic. And Afghans, especially those from the northern parts of the country, have long considered Arabs inferior to their own Iranian/Aryan ancestry. . . the Taliban, with their ability to blend in with the larger Afghan populace, are an insurgency that can and will only be defeated by the Afghans threat letters going out to parents, particularly parents of girls, warning them to stop sending their children to schools, as the schools are “centers for the propagation of Christianity and Judaism” [34]. Such letters begin the decline in enrollment, and are then followed up with attacks on school facilities at night, then assassination of teachers [35]. These schools are then replaced with “safer” alternatives by the neo-Taliban, and teach “an Islamic curriculum” that serves to indoctrinate children and teens [36].

Similar attacks on doctors and medical treatment facilities have decimated the ranks of NGOs providing services in Afghanistan during the last five years [37]. Distrust of international forces and foreign government initiatives in Afghanistan has been rising in recent years. Additionally, although the Taliban and other factions previously lefts foreign NGO groups undisturbed, attacks on foreign NGO facilities and personnel have been deemed “fair game” in the past two years, as factions no longer view such agencies as neutral humanitarian

themselves – not by any external force. As for Al Qaeda, we can diminish its ability to recruit in Afghanistan if we support the building of an effective national security structure instead of importing such forces [31].

The Taliban have adopted and made great use of available technology in their efforts to retake Afghanistan. Video cameras are used to record speeches, meetings, interviews, propaganda, and training materials, as well as attacks upon occupying forces; video content is disseminated through VCDs, DVDs, and the Internet [32]. Afghans are particularly susceptible to recruitment efforts by the Taliban as tales of their victories spread. Christia and Semple note that Afghans have a history of “switching sides” to end up on the side of the victor – “in a war that drags on, changing camps means living and holding on to power, as well as saving one's family and one's village” [33].

3.2. Attacks on NGOs and other “soft targets”

The neo-Taliban have also been successful at undermining the Karzai government through threats and attacks against soft targets, such as schools, medical treatment facilities, and markets. Attacks against schools, for example, generally begin with efforts, but rather, as a co-opted arm of the occupying forces [38].

The decline in security throughout the country has mirrored that which occurred following the Soviet withdrawal, which led to the initial rule of the Taliban [39]. The Taliban's repositioning within Afghanistan is not merely the result of military and terrorist operations, but also is economic, psychological, and political in nature [40]. Sinno notes further that:

Economic growth is driven largely by drug production and the nonsustainable spending of Westerners in Kabul; the state is extremely weak, while many regional leaders (including some particularly brutal and predatory ones) conserve the potential to reemerge; and militiamen still outnumber members of an Afghan army that is completely funded and directly controlled by the United States [41].

3.3. Continuing governance woes

Despite the fact that Afghanistan has had a series of free elections since 2001 and has ratified a new Constitution, the country still lacks proper governance because the elected indigenous leaders are not able to rule the country without the aid of foreign donors and security forces.

The U.S. has sought to “export” its brand of democracy several times in the past century, with mostly failed results. “One size doesn’t fit all” when speaking of government structures and political systems because one must take into account the inherent social, cultural, and historical struggles of the nation or people. Alexis deToqueville wrote of the success of early America, attributing it in large part to the fact that “the United States was colonized by men holding equal rank, there is as yet no natural or permanent disagreement between the interests of its different inhabitants” [42]. In an ancient land, such as Afghanistan, tribal and caste affiliation and affronts run deep.

Dealing with fundamental human needs and providing the means for self-sufficiency are essential to long-term peace and security in Afghanistan [43] [44]. The level of aid to Afghanistan has historically depended on media coverage, perceived interests at stake for the donor countries, and the number of NGOs actually present in the country [45]. Between 2006 and 2008, US aid to Afghanistan has actually decreased, and the total amount of American and other foreign aid to Afghanistan since 2001 is “barely 5 percent of the per capita level of assistance that has been lavished on Iraq” since 2003 [46].

Security issues and a weak national government incapable of defending itself and its people have created a power vacuum in which warlords are looked to by communities for protection [47]. Norchi notes “Although almost all Afghans want to get rid of the warlords, they also want their own to be the last to disarm” [48]. Despite their tribal loyalties, Afghans have historically stood united against any foreign invader or enemy [49]. DeVillafranca notes: “Afghans want a better life, but as is often reflected in the more rural areas, they do not necessarily want our better life” [50].

Governance is more than simply creating a series of ruling bodies to enact and administer laws. Governance encompasses “a complex interplay between government, the market and civil society” [51]. One core question that has perplexed philosophers writing on government, economics, and societal structure is that of which comes first: the economy, the government, or the social bonds between groups of people?

Aristotle argued that among social organizations, the *polis*, or state, was “the most sovereign and inclusive association” to be directed toward the attainment of higher goals [52]. Ibn Khaldun noted in the 14th Century, “Social organization is necessary to the human species. Without it, the existence of human beings would be incomplete” [53]. Thus, the ancient view was that the foundation of any government or economy was social ties between people. As societies modernized, families, clans, and tribes joined to form nation-states.

Fukuyama identifies four factors that determine political development: “(1) organizational design and management, (2) political system design, (3) basis of legitimization, and (4) cultural and structural factors” [54]. While it is possible to copy the design of political systems from other nations, absent legitimacy and cultural ties, the fledgling government will ultimately fail. In Afghanistan, the issues of tribal striation are further compounded by the power of warlords who have been de-facto regional rulers for much of the past three centuries. Jalali notes, “[The] failure to build attractive alternatives to the life of a warrior can lead to the renewal of fighting as well as proliferation of criminal activity and banditry” [55].

Compounding the problems is Afghanistan’s high level of narcotic production and drug lord-incited violence. Koehler and Zuercher argue that the existence of sectarian violence in a country leads to increased narcotics trafficking, and the trafficking protracts ongoing civil wars, thus creating a vicious circle of sorts [56]. Large-scale illegal narcotic economies within countries weaken political and police authority, increase corruption, and decrease public faith in government and societal institutions [57]. Currently, revenues generated from heroin production exceed foreign donor funds to Afghanistan by 15% [58]. Afghans, particularly in

rural areas, are conflicted by competing personal loyalties and the need to provide for and safeguard their families.

4. Microfinance and shari'a compliance

Nearly all (99 percent) of Afghans are Muslim, primarily (85 percent) belonging to the Sunni school [59]. As is the case in many Muslim majority countries, Islam is not viewed simply as a religion to be practiced at mosques, but as a philosophy and guiding law that permeates every aspect of daily life and societal governance. El Fadl (2004) explains that Muslim jurists argue that *shari'ah*, or law based upon the *Qur'an*, "fulfills the criteria of justice and legitimacy and binds the governed and governed alike. . . it is based on the rule of law and thus deprives human beings of arbitrary authority over each other" [60].

Entrepreneurship can provide both a means of financial support as well as an opportunity for Afghans to break free of feudalistic warlords. Lack of access to capital with which to generate income is one of the root causes of poverty in both developed and developing worlds. Microfinance programs give small loans to individuals or groups of individuals seeking to start or grow small businesses. These programs are of even more importance in Islamic countries, where it is illegal to charge interest, according to *shari'a*, the codification of interpretations of Islam by holy scholars [61]. Muslim jurists contend that *riba*, the charging of interest, is an "unjust gain" and grievous sin that "exploits the needy" [62]. Absent the incentive of earning interest, traditional lenders would refuse to loan money to either individuals or businesses. This, in turn, inhibits entrepreneurship and economic growth.

4.1. The role of microfinance in economic development

Lack of access to capital with which to generate income is one of the root causes of poverty in both the developed and developing worlds. The underlying theory behind the microfinance movement is "access to microfinance through micro-credit and micro-savings will lead to increased investment in the short and the long term, including the acquisition of productive assets, health and

nutrition improvements, and increased education for adult and child household members" [63].

Improving economic opportunities and *per capita* income are key factors to the nation's sustainable development and security. The World Bank notes that the biggest economic challenge to Afghanistan in the post-Taliban era has been and remains "finding sustainable sources of growth" [64]. Since the 1970's, international policymakers have utilized microfinance programs in other nations as part of post-conflict reconciliation and poverty remediation efforts [65]. Post-conflict microfinance programs were initiated in Sri Lanka, Kosovo, Bosnia, Mozambique, Rwanda, the Balkans, Nepal, Angola, and Georgia [66]. While there have been many studies on the successes and failures of microfinance initiatives in post-conflict settings, the findings have been fairly specific to the conflict and country assessed, with no generalizable results that cut across all post-conflict scenarios.

4.2. The Grameen Bank Model

The Grameen Bank model, created by the Nobel Laureate, Dr. Muhammad Yunus of Bangladesh, overcomes prohibition of interest. The Grameen Bank model of microfinance complies with *shari'a* by employing *mudaraba* and *musharaka*, forms of partnership finance that are akin to profit sharing [67]. The difference between the two forms is that *mudaraba* is used with a single borrower, and *musharaka* is used with loans to multi-party cooperatives. In both *mudaraba* and *musharaka*, the lender and borrower(s) form a partnership wherein the lender provides the capital for a business venture and assumes all of the risk. Borrowers contribute their labor toward the venture. If the business is successful, all members of the group profit, including the lender, but if a venture fails, only the lender suffers economic loss. Since the lender assumes all risk of loss, any profit repaid to them over the initial amount of principal loaned is an earned, rather than "unjust" gain [68]. In order to minimize risk, lenders prefer to work with borrowers who form cooperatives to operate a business or group of related businesses. Business education and planning are prerequisites to obtaining loans in most microfinance projects, and this suits *mudaraba* and *musharaka* based investments because it helps to

reduce risk for the lender and investors who provide the capital [69].

The underlying theory behind the microfinance movement is “access to microfinance through micro-credit and micro-savings will lead to increased investment in the short and the long term, including the acquisition of productive assets, health and nutrition improvements, and increased education for adult and child household members” [70]. The importance of a positive correlation between these programs and measured improvement in economic opportunity is immense. Dr. John Nagl notes:

Afghanistan is the fifth-poorest country in the world. For political stability to happen there, people have to have some form of economic opportunity, the ability to feed themselves and their families and the potential to build a better life. If they don't have that hope, they are much more easily convinced or coerced by the Taliban or other disruptive, in some cases, terrorist organizations to do things that are not in the long term interest of the country of Afghanistan. Anything humanitarian organizations can do to help the people of Afghanistan, not only to minimize human suffering, but that also helps build long-term stability, that is essential to creating a country that could stand on its own [71].

Sustainable economic development is essential to long-term peace and stability in both Afghanistan and the surrounding region.

4.3. Deployment of the Grameen Bank Model in Afghanistan

Since October of 2001, several microfinance projects based upon the Grameen Bank model have been launched in Afghanistan. These programs make modest loans to collectives of home-based businesses or microenterprises. These programs initially appeared to quite successful, with marked improvement in the economic wellbeing and lives of the participants served. In 2006, Woodworth claimed that microfinance initiatives in Afghanistan were “thriving” and had trained and assisted over 10,000 Afghan women become entrepreneurs [72]. Since 2008, however, microfinance programs in Afghanistan have sharply declined in number of organizations, participants served, and amount of investment capital available [73].

5. Economic opportunity is the path to security and stability

Inglehart and Welzel have described the linkages between modernization and industrialization with security and democracy. Modernization and industrialization efforts “penetrate all aspects of life, bringing occupational specialization, urbanization, rising educational levels, rising life expectancy, and rapid economic growth” [74]. As individuals increase their financial worth and personal self-esteem, they become more involved in social and political institutions and will work to protect and improve them. Modernization and economic development are not exclusively Western or Judeo-Christian concepts, as is evidenced by the rapid growth and development seen in the Gulf States and Southeast Asia in the past two decades [75]. Identifying means by which modernization can be successfully advanced in Afghanistan will benefit Afghans, others in the region, and NATO and its allies.

Most Afghans are currently struggling to survive and care for their families. As history has shown, populations in protracted wars are susceptible to revolution, insurgency, and extremism as a way to try to improve their lives. Offering an indigenous (i.e. non-foreign) solution for economic development and personal opportunities may be the best way to prevent Afghanistan from continuing its decline back into a lawless haven for terrorists, warlords, and drug cartels.

6. The marginalization of Afghan women

One issue that cannot be ignored in economic development efforts in Afghanistan is that of the marginalization of women. When half of the population is banned by culture and tradition from participating in the marketplace, either as producers or purchasers, growth of an economy will be stunted.

During the official reign of the Taliban, Syed Ghaisuddin, former Minister of Education of Afghanistan, remarked that women are “like having a flower, or a rose. You water it and keep it at home for yourself, to look at it and smell it. It [a woman] is not supposed to be taken out of the house to be smelled” [76] This statement underpinned most

governmental policies within Afghanistan from 1994, and sadly, continues to hamper efforts at economic development and security stability through the current day.

Under the Taliban, Afghan women were forced to wear the burka, were not permitted to work, and could not even leave their family home or compound unless a male relative accompanied them. Girls were forbidden from attending school and were often forced into marriages, sometimes as young as the age of three. All Afghans were subject to inspection and harassment by armed militia operating as “Officers for the Promotion of Virtue and the Prevention of Vice.” Simple pleasures, such as art, photography, kite flying, music, and dancing, were outlawed, punishable by public flogging and/or imprisonment.

Gender disparity remains a huge factor in both the national and organizational cultures of Afghanistan. While the burka is no longer required to be worn as a legal matter, few women venture out in public without a burka, even in Kabul. Additionally, despite the guarantees of equal rights given to women in the Afghan constitution and in the Koran, the traditional roles of women and limitations on their lifestyles remains engrained in the culture. Although women needn’t always have a male relative with them when they leave their family’s compound, as was the case during the time of the Taliban, women nonetheless rarely venture out on the streets alone.

Most unmarried Afghan women still feel the need to live with a male relative for their safety. Many of the women leaders and professionals that I met during my trip to Afghanistan had neither husbands nor children; they told me that the notion of mixing marriage, motherhood, and careers simply is not an option available to them due to the provincial paternalistic nature of Afghan culture and societal mores. Women have been traditionally looked to in Afghanistan as those who carry the solemn responsibility of ensuring the education and imposition of morality within youth” [77]. In rural areas of Afghanistan, “young rural women (and children) are subjected to forced prostitution, forced labour and practices akin to slavery (abduction and forced marriage, exchange of women to settle disputes, or marriage in exchange for debt repayment)” [78].

Studies have shown a high number of mental health disorders within the Afghan population, with women suffering more than men. Within the Afghan population, 73% of women and 59% of men suffer from depression; 84% of women and 59% of men also suffered symptoms of anxiety disorder [79]. The outlook for youth is bleak as well - 60-70% of Afghan children suffer from post-traumatic stress disorder (PTSD) as a result of the violence that surrounds their daily lives; PTSD is impeding their ability to learn and remember [80].

7. Afghan-led NGOs and microfinance efforts

Like many nations who have suffered the plight of civil wars, Afghanistan requires international support and financial assistance in order to maintain stability and establish a solid foundation for development [81]. The funding of humanitarian relief through NGOs has become an essential element of foreign policy in many nations [82]. While International Security Assistance Forces (ISAF) and NATO military members serving on Provincial Reconstruction Teams (PRT) are valuable, they are not the panacea to Afghanistan’s development problems [83]. Neither democracy nor development can flow from the barrel of guns.

There are also many Afghan non-governmental organizations (NGOs) that have been formed to alleviate the nation’s many problems by starting at the grassroots level. Little has been written about these Afghans helping Afghans and the successes that they have had in the past eight years. Research has shown that community directed development programs generally have greater rates of success and lower security risks, due to increased trust and “buy-in” by the population to be served by the programs [84]. The traditional role of the shura makes microfinance and grassroots development projects more likely to succeed than programs imposed from centralized government agencies, particularly in the rural areas [85].

Afghan-led NGOs have problems of their own, however. They are not immune to the actual and perceived corruption that Afghans feel permeates the governance and infrastructure of the country. Donini found that:

Afghan NGOs – because they are poorer – are seen as more susceptible to corruption than international

aid agencies. Aid is going to the people who are 'connected', and to those who are rich and powerful and are able to occupy key links in the chain of intermediaries, not to the most needy [86].

The period of 2001-2008 was a booming time for both indigenous and foreign microfinance initiatives in Afghanistan. There were "15 registered limited liability companies providing microcredit, 428,929 clients, 373,080 borrowers and a portfolio outstanding of approximately US\$107 million [86]. This was not sustainable, however. Current figures are approximately one-third of this amount, with only six organizations remaining active, and the lion's share of the sector being occupied by The First Microfinance Bank of Afghanistan, a subsidiary of the Aga Khan Foundation.

7.1 Cooperation for Peace and Unity (CPAU)

In 1996, a group of Afghans formed the Cooperation for Peace and Unity (CPAU), a non-governmental non-profit organization. The primary objectives of the organization are to facilitate peace and sustainable development by promoting social justice, protesting violence, encouraging governmental reforms, and providing access to health care and education for all Afghans. CPAU served both men and women. It is not a microfinance project itself, but it works closely with them to provide educational, legal, and community support.

CPAU currently has projects in Kabul, Badakhshan, Wardak and Ghazni provinces. These projects seek to reach a diverse mix of Afghans; CPAU notes that the projects currently serve Hazara Shiite Muslims in Jaghuri, Ghazni province; Pashtun Sunis in Saidabad, Wardak province; a mix of Uzbaks and Tajiks in Faizabad, Badakhshan province; and a mix of Pashtuns and Tajiks in Farza, Kabul province. CPAU works with the consultative councils (*shuras* and *jirgas*) in each community by providing training in conflict resolution, humanitarian assistance, and development. Additional CPAU resources are committed to the vocational training for former Afghan combatants and the reintegration of Afghan refugees back into their home communities. The key to CPAU's success has been its focus on the resolution of differences between Afghans at the local level, rather than waiting for reconciliation

between larger groups at the regional or national level to occur [87].

7.2 PARWAZ

PARWAZ was an Afghan-led microfinance agency that funds women's businesses. The name of the agency is derived from the Dari word that means, "to fly." PARWAZ was established in Kabul in 2002, with assistance from the American NGO, Global Exchange. It was the first women-led microfinance institution in Afghanistan.

This NGO was funded by private contributions and trusts. PARWAZ is a grassroots effort whose goal is to help women form businesses. PARWAZ forms "collectives" of 12 women, typically within a community or extended family, and has them each design a business plan based on their skills and talents. Often, the businesses contained within a collective are co-dependent, i.e. weavers, tailors, wholesalers, and retailers bond together to make and market clothing. Business managers, accountants, and industry experts volunteer to mentor PARWAZ clients as they begin these ventures. The loan money was paid out incrementally, and PARWAZ supervisors maintained contact with business owners to provide advice to grow the businesses. The typical loan was for \$250-300; this relatively modest sum is sufficient seed money to begin a collective's activities.

PARWAZ helped thousands of women begin businesses between 2001-2010, and up to 2008, had a phenomenal 100% repayment rate on their loans. The PARWAZ program not only provided a source of income and investment for the women and their families, but it also empowered the women to become independent and self-sustaining. The program sought to reduce the vulnerability of women and their families to poverty, while promoting the aims of social justice and self-sufficiency.

In 2011, PARWAZ was consolidated into Mutahid, a new Afghan-led organization. "Mutahid" means "united" in Dari, and it has become the umbrella organization for Afghan-led microfinance efforts.

7.3 Women for Women International – Afghanistan Chapter

Women for Women International (WWI) is an NGO that seeks to empower and educate women, promote social justice, and increase opportunities for women in a number of countries. The Afghan chapter of WWI was run by Afghans and was so large that it employed supervisory staff of over 110. It assisted thousands of Afghan women start businesses from 2001-2011. Like PARWAZ, it was forced to join Mutahid to pool resources and continue its mission.

WWI in Afghanistan offered micro-credit loans to women throughout the nation. The organization was instrumental in voter registration drives in the post-Taliban era, helping thousands of women to vote. WWI also provided literacy programs and midwife training courses to Afghan women. Vocational training in the areas of knitting, embroidery, dressmaking and stitching, creative home design, dairy production, gardening and fruit-growing, weaving, medicinal herb-growing, poultry farming, jewelry-making, shoe-making and carpentry provided by WWI enabled women to become self-sufficient.

WWI operated several co-operatives, including stores at the Women's Garden in Kabul, and partnered with individuals abroad to export and sell the crafts and products made by members of WWI. After receiving training, funding, and support from WWI, thousands of Afghan women have become self-sufficient as merchants, tailors, artisans, farmers, jewelers, beauticians, and nurses' aides. The Internet made additional opportunities available for women to sell their products abroad via WWI's online bazaar.

7.3 Mutahid & MISFA

In 2003, The Microfinance Investment Support Facility for Afghanistan (MISFA) was created through a partnership of the Afghan government and international donor nations. The organization was designed to serve as a coordinating support agency for microfinance groups operating in Afghanistan, and was originally led by a Scottish expatriate, Steven B. Macqueen. Mr. Macqueen was killed in an insurgent attack in 2005.

As the security situation and foreign donations declined, MISFA established Mutahid as an umbrella microfinance institution to subsume the remaining Afghan-led microfinance initiatives. As was noted previously, PARWAZ and WWI-Afghanistan were taken over by Mutahid. The most recent data on Mutahid is from 2012. The data shows liabilities in excess of assets and deposits, with a 50% declining balance between March and December 2012, with the end result being a negative balance sheet [89].

8. Areas for further inquiry

A gap exists in current literature as to why Afghan microfinance programs have not been sustainable. This author plans to conduct additional research to address this gap by increasing an understanding of the vulnerability and capacity factors that have influenced the success or failure of post-conflict microfinance initiatives in Afghanistan. A qualitative case study strategy will use Anderson and Woodrow's Capacities and Vulnerabilities Analysis (CVA) framework to investigate the Physical/Material, Social/Organizational, and Motivational/Attitudinal realms of capacities and vulnerabilities that exist in Afghanistan. Anderson and Woodrow define "vulnerabilities" as "long term factors which affect the ability of a community to respond to events or which make it susceptible to calamities" [90]. "Capacities," as used in the framework, are "strengths that exist within a society" [91]. This framework will be used as a diagnostic tool to "organize and systematize knowledge and understanding" of factors that are impacting the sustainability of microfinance programs in Afghanistan [92].

The Anderson-Wilson Capacities-Vulnerabilities Analysis (CVA) framework will be used to analyze internal and external factors that impact the sustainability of microfinance organizations in Afghanistan. This framework is well established in diagnosing factors that impact reconstruction and economic development in the aftermath of both man-made and natural crises. The approach of this framework is similar to that of External Factor Evaluation (EFE) and Internal Factor Evaluation (IFE) matrices commonly used in Strategic Management. Capacities (strengths or benefits) and vulnerabilities (weaknesses or risks) are assessed in three realms, to wit, Physical/Material (What

productive resources, skills, and hazards exist?); Social/Organizational (What are the relations and organization among people?); and Motivational/Attitudinal (How does the community view its ability to create and change?) [93].

A qualitative case study will be conducted, designed to answer the following research question: “What factors of vulnerability and capacity exist in Afghanistan, and how do these factors impact the sustainability of microfinance?” This research will also address the following sub-questions: (1) How do physical/material factors impact the capacity and vulnerability of microfinance organizations in Afghanistan? (2) How do social/organizational factors impact the capacity and vulnerability of microfinance organizations in Afghanistan? (3) How do motivational/attitudinal factors impact the capacity and vulnerability of microfinance organizations in Afghanistan? and (4) What, if anything, can be done to make microfinance programs in Afghanistan sustainable?

9. Conclusion

After the fall of the Taliban, many development experts predicted that the most successful development strategies in Afghanistan would be those that focus on grassroots reconciliation, literacy, and small business projects [94]. Investing in programs that promote social justice and economic opportunity increases the security, stability, and prospects for long-term peace on a local, provincial, national, and regional scale [95].

Donini summarized his research on the perceptions and frustrations of Afghans as follows:

The survey of local perceptions of assistance agencies in Afghanistan suggests that Afghans feel ‘wronged’. The rewards they expected have not materialized. Consequently, a narrative that is often heard goes as follows: we have endured 25 years of war, we put the final nails into the coffin of the Soviet Empire and provoked its demise, we have suffered great abuse and displacement during the civil war years and under the Taliban, we have missed out on education opportunities for our children and on economic development for the longest time. We had great hopes when the Americans chased away the Taliban, only to then

realize that the hated warlords were back in power. The Americans installed Karzai and we voted for him, but he has been a major disappointment. We deserved better from the international community, but the Americans are only interested in Al Qaeda, not in the development of our country; that is why we are only getting small NGO projects that are totally unsustainable. There are no infrastructure projects so employment is not picking up and our expectations are being dashed. In the meantime the security in the country is deteriorating, the narcotics economy is triumphant and corruption is everywhere [96].

Lasting change in the social, political, and economic conditions of Afghanistan will be far more likely from empowerment programs that lay the foundation for sustainable development, rather than by massive grants of aid and building projects carried out by foreign workers who come to a country and then leave. Sustainable development and the growth of indigenous business enterprises lead to the development of a tax base upon which a government can support itself and not rely upon the mercies of donor governments and agencies. When a government must rely on handouts, loans, and security forces from foreigners to sustain itself, its credibility with the people it serves is severely undermined, and terrorist movement recruiting efforts that rely on stirring nationalist and anti-imperialist sentiments are strengthened. Economic opportunity promotes both hope and a greater stake of individuals in the larger society – and both of these factors are essential to lasting peace.

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