Journal Of Malaysian And Comparative Law

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

ISSN: 0126-6322

(2016) 43 (ISSUE 2) JMCL

JOURNAL OF MALAYSIAN AND COMPARATIVE LAW

Journal Of Malaysian And Comparative Law

Jurnal Undang-Undang

VOLUME 43 (ISSUE 2) 2016 ISSN: 0126-6322

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

JOURNAL OF MALAYSIAN AND COMPARATIVE LAW 2016

NOTE TO CONTRIBUTORS

The Journal of Malaysian and Comparative Law (JMCL) is a refereed journal that publishes original unpublished works comprising articles, comments, case notes and reviews on the whole spectrum of legal topics and issues.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

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

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

SUBSCRIPTIONS

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

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

Printed by University of Malaya Press, 50603, Kuala Lumpur

JOURNAL OF MALAYSIAN AND COMPARATIVE LAW

JURNAL UNDANG-UNDANG

VOLUME 43 (ISSUE 2)

2016

Faculty of Law
University of Malaya
50603 Kuala Lumpur
MALAYSIA

THE ISSUE MAY BE CITED AS (2016) 43 (2) JMCL

Contents

Emerging Trends in the Regulation of Social Security

Kehinde Anifalaje*

Abstract

This paper explores the trend in the regulation of social security in the developed and developing countries with special attention placed on three major policy areas of social security, namely, coverage, benefit structure and financing. It also discusses several policy options within social security provisions in particular, old age, medical, sickness, unemployment and work injury, in the light of fiscal and administrative constraints. The paper argues that social security is realistically, a functional institution in a developed country. It has been used as a means for promoting political, social and economic stability and for securing a myriad of accompanying advantages that have consequentially resulted in high standards of living. It concludes that developing countries, especially those in sub-Saharan Africa, need to improve their social security schemes (by enacting laws that are more adaptable to the socio-economic realities of the region) and commit to an increased budgetary allocation for social security (as seen in developed communities) in order to enhance social protection for the populace in respect of a defined contingency.

Keywords: Social Security, Regulation, Financing, Coverage, Benefits.

I. Introduction

The trends in social security laws are discernible from the comparative law perspective on the one hand and from the international law perspective on the other. In this paper, I am primarily concerned with the analytical review of relevant municipal laws in the comparative aspect of such trends. The different approaches to the regulation of social security in the group of communities, ranging from developed to the developing, have given rise to a basis of comparison between the two groups and across countries.[1] Generally, the regulation and operation of social security schemes vary from one country to another as the blueprints, the mechanics, financing and administration of social security, its cultural traditions, social values and the nature and extent of competing demands on

* Lecturer, at the Department of Commercial and Industrial Law, Faculty of Law, University of Ibadan, Nigeria.

1 Based upon the classification of countries into four main regions, namely Europe, Africa, the Americas and the Asia and the Pacific as contained in the *Social Security Programs Throughout the World* for the year 2012, 2011, 2011 and 2012 respectively. Developed countries as used in this paper refers to countries in Europe while developing countries refers to countries in Africa, the Americas except the US and Canada and countries in the Asia and the Pacific except Japan, New Zealand and Australia. See Social Security Administration and International Social Security Association. *Social Security Programs Throughout the World Europe* 2012, *Africa 2011, the Americas 2011, Asia and the Pacific 2012*, Washington DC, Office of Research, Evaluation and Statistics.

the national income are different. What is social security is relative to socio-political and economic levels of maturity in each community.

A cursory survey of the social security laws of most countries, especially the developed nations reveal the diversity of institutions erected to deal with a shared problem: how to ensure a basic income for people who are retired, disabled, widowed, orphaned or unemployed. To date, approximately 174 nations of the world have one form of social security scheme or another to administer benefits to those protected thereunder in respect of defined contingencies.[2] While some legal systems, such as Australia, pointedly refer (with sophistication and precision) to the range of schemes available in their jurisdictions as "Social Security",[3] some other jurisdictions like Nigeria refer to their archetype of social security as "Social Insurance" or some similar epithet.[4] In the United Kingdom (UK), only statutory benefits in cash are regarded as social security, while the term social services is used to cover social security, health, education, and housing services, as well as provision for social work and social welfare. In the United States (US), the term social security is narrower as it is restricted to the Federal social insurance system, that is, the Old Age, Survivors and Disability Insurance (OASDI), as distinct from state benefits and "welfare", in Europe, this is called social assistance. The social insurance system generally centres eligibility for pensions and other periodic payments on length of employment or self-employment and is generally financed entirely or largely from contributions, usually a percentage of earnings, made by employers, workers or both. Social assistance, on the other hand, is a service or scheme financed wholly from taxes and provides benefits to persons of small means as of right; an amount sufficient to meet minimum standards of need.[5] Benefits are usually means-tested in the sense that eligibility is determined by measuring individual or family income or resources against a calculated standard, based usually on subsistence needs. An alternative, but wider term for social security in the countries that are members of the European Union is social protection, which includes voluntary schemes not set up under legislation.

Formal social security policies differ considerably, especially among the developed countries, given that such policies are based on the objectives of the government. For instance, the social security laws of social democratic welfare states found mainly in the Scandinavian countries of Sweden, Finland and Denmark, represent a model characterised by extensive social rights. These laws focus on basic security in the sense that they are unified for all citizens and that the social security systems are relatively open (with general access) to all relevant population groups.[6] As such, the schemes are mostly tax-financed

---

2 *Ibid.*

3 See as an example, The Social Security Act, Contributions and Benefits Act 1992; Social Security Act 1998 (UK); The Social Security Act 1935 (US) and the Social Security Act 1991 (Australia).

4 See the Nigerian Social Insurance Trust Fund Act, 1993 (Nigeria); Social Security and National Insurance Trust (SSNIT) Act 1991, (Ghana).

5 International Labour Organisation (ILO), *Approaches to Social Security: An International Survey.* (Geneva: ILO, 1942) p. 14.

6 S E Olsson-Hort, "Models and Countries – the Swedish Social Policy Model in Perspectives" Ed., K. Eklund, *Social Security in Sweden and other European Countries,* (Stockholm: Norstedts Tryckeri AB, 1993), Chapter 2 pp. 15 – 44 at p15; see also J Myles, "How to Design a "liberal" Welfare State: A Comparison of Canada and United States*"*, *Journal of Social Policy and Administration* (1998), Vol. 32(4), pp. 341-364 at p. 350.

and rights are universal rather than corporatist, emphasising equality of citizenship rather than the preservation of status differences. On the other hand, the social security laws of the Continental European tradition that originated from Bismarck have an "insurance" character in the sense that they are work-related and they generally aim to provide earnings replacement rather than basic security. Some countries, such as the Netherlands and Great Britain, are, however, in between because they have the admixture of the two systems that is, the tax-finance and the insurance systems.

The aim of this article is to consider the general trend in social security laws in the developed and the developing communities, especially of sub-Saharan Africa, with a view to identifying and drawing attention to some of the best examples of social security schemes that could be deployed to provide an effective and efficient social safety net for the populace.

II. Comparative Concepts and Coverage for Social Security Across Regions

The International Labour Organisation (ILO), in the Social Security (Minimum Standards) Convention, 1952, (No. 102) ('the Convention'), provides for a minimum standard of benefits in nine distinct branches of social security. These are medical care, sickness, unemployment, old-age, employment injury, family, maternity, invalidity and survivorship.[7] The Convention also introduces the idea of a general level of social security that should progressively be attained everywhere since the system can be adapted to the economic and social conditions prevailing in each country, whatever the degree of its development. A State is required to accept at least three of these nine branches and, at least, one of which must be of a long-term nature (i.e. old age, disability, unemployment, employment injury or survivors' benefits) to ratify the Convention and before it can be given recognition as a State providing social security to its citizens.[8] This way, the pattern of social security schemes vary from one country to another, in terms of the type of social protection accorded as well as the benefit structure; this difference between the developed and developing countries of the world are largely due to the disparate political, social and economic developments.[9]

A. Europe

With the exception of San Marino that does not have any programme to provide for family allowance, the social security laws of most countries in Europe provide adequately for

---

7 See Part II, III, IV, V, VI, VII, VIII, IX and X respectively of the Convention.

8 See Article 2 of the Convention.

9 The developed countries has been said to differ structurally from the developing countries in several respects such as in terms of the annual per capita gross national income which was said to be less than US $1,035 for low-income countries, between US$1,036 and $4,085 for lower middle-income countries, between $4,086 and $12, 615 for middle-income countries and more than $12, 615 for high income countries for 2012. See *Country Classification*. Available at- www.un.org/en/development/desa/policy/wesp/wesp_current2014wesp_country_classification.pdf.
Site accessed on 8 April 2016.

all the nine contingencies recommended under the Convention. Benefits are provided either through social insurance or social assistance, or a combination of both, to all those that come under a defined contingency.[10] In the UK, for example, social security is a comprehensive system of social services which comprises two major components: (1) the contributory, which is in a form of social insurance; and (2) the non-contributory which is a form of social assistance. The social insurance component comprises retirement pension, widow's payment, widowed mother's allowance, widow's pension, incapacity benefit, sickness benefit, maternity allowance and jobseeker's allowance.[11] Almost everyone in the UK is required to contribute towards social insurance on grounds that it is good for the individual and for the community as a whole; and that if individuals are not compelled to insure through the State, they would not insure at all, or be insured sufficiently.[12] The social assistance component, on the other hand, comprises income based benefits which include income support, income based job-seekers allowance, family credit, and disability working allowance. Contingencies or challenges posed by new forms of risk and uncertainties are also adequately provided for under the Disability Living Allowance and Disability Working Allowance Act, 1991 (UK). This Act provides, as social security benefits, a disability living allowance and disability working allowance for the physically or mentally-challenged and the terminally ill citizens – young and old. Similarly in Germany, every segment of the society, including those in kindergartens, are involved and do benefit from various forms of benefit available under the social security system.[13]

B. The Americas

In the Americas**,** seven countries, namely Argentina**,** Brazil, Canada, Chile, Colombia, Mexico and the US, have social security laws that cover all nine contingencies recommended by the ILO.[14] Like Europe, some countries in the region combine social insurance with social assistance to provide social security for its citizens.[15] For instance, Costa Rica*,* Uruguay*,* and a number of Caribbean countries provide non-contributory pensions and health care for indigents. While Chile and Costa Rica have also managed to extend coverage beyond the formal urban sector, Brazil has extended eligibility for primary health care and minimum pensions to low-income rural residents. In Canada, old age benefits are provided on a universal basis and at a flat rate for all residents who have attained the age of 65 under the Old Age Security Act, Cap. 0–9. The Canada Pension Plan

[10] *Supra* n 1.

[11] See generally, Social Security Contributions and Benefits Act 1992; Social Security (Incapacity for Work) Act 1994; Jobseeker's Act 1995 and the Employment and Support Allowance Regulation 2013.

[12] A Seldon and F G Pennance, *Everyman's Dictionary of Economics,* 2nd ed., J M Dent & Sons Ltd., London, 1976, p. 314.

[13] K. Romer, ed. *Facts about Germany,* Lexicon-Institut, Berteshman, 1979, p. 243.

[14] See Social Security Administration and International Social Security Association. 2011. *Social security programs throughout the world, The Americas, 2011, supra* n 1.

[15] Examples of these countries are US, Brazil, Costa-Rica, Dominican Republic, Trinidad & Tobago, Argentina, Barbados, Belize, and Nicaragua. See e.g. sections 2 – 5 and sections 201 – 210, *Social Security Act*, 1935, (US) Title 1. See also Social Security Administration and International Social Security Association. 2011. *Social security programs throughout the world, The Americas, 2011*, *supra* n 1.

also provides retirement benefits to those who have paid the necessary contributions under the Act. In countries with relatively low coverage, social security is more inequitable. In Colombia where only 16 per cent of the population is covered, employers and the State provide most of the finance.[16] Generally, Latin American countries that have the widest social insurance coverage also have the most progressive incidence of the benefits of social security. The US is exceptional amongst the industrialised countries in not providing short-term cash sickness and maternity benefits at the national level. Only six States: Rhode Island (1942); California (1946); New Jersey (1948); New York (1949); Puerto Rico (1968); Hawaii (1969) and the rail-road industry, have provision for cash sickness benefits, otherwise called temporary disability benefits, which they operate on the principle of social insurance. These laws provide workers with partial compensation for loss of wages caused by temporary non-occupational disability. The Railroad Unemployment Insurance Act 1938, which established a system of benefits for persons employed in the railroad industry, was amended in 1945 to include sickness benefit.[17]

C. Asia and the Pacific

In Asia and the Pacific**,** about 13 countries have social security laws that cover all the recommended nine contingencies contained in the Convention.[18] Countries like Azerbaijan, India, Turkmenistan, Uzbekistan and Georgia have a combination of social insurance and social assistance programmes to administer old age benefits. Some other countries like Japan combine their social insurance schemes with universal schemes.[19] In Japan for instance*,* the basic pension provides flat-rate pension and universal coverage to all residents in addition to the second tier pension, which provides an income-related pension. Japan also has a third tier optional scheme for larger pensions, which is provided either by private firms (employers) for their employees or by collective national pension funds for the self-employed with the government as the insurer.[20]

In Australia, the social security system is based on government recognition and community responsibility; measured against the income and assets of the applicant,

---

16 E Ahmad, "Social Security and the Poor: Choices for Developing Countries". *The World Bank Research Observer,* 1991, Vol. 61, pp. 105 – 127 at p.116.

17 See Social Security Administration, *Social security programs in the United States,* Washington DC, Office of Research, Evaluation and Statistics, 1997, p. 45.

18 The countries include Armenia, Australia, Azerbaijan, China, Hong Kong, Iran, Israel, Japan, Kazakhstan, Kyrgyzstan, New Zealand, Thailand and Uzbekistan. See Social Security Administration and International Social Security Association. 2012. *Supra* n 1.

19 See Social Security Administration and International Social Security Association. 2012. *Social security programs throughout the world: Asia and the Pacific* 2012, *Supra* n 1. The universal or demo grant system provides flat-rate cash benefits to the target population, such as residents or citizens, without consideration of income, employment or means. It is usually financed from general revenues and benefits may apply to all persons with sufficient residency and to persons who meet other demographic requirements, such as age and family status.

20 See *Overview of Social Security System/ Social Security in Japan.* Available at www.ipss.go.ip/s-info/e/jasos/overview.html/-6k site accessed on 30 January 2011.

both systems assist those in need. Thus, entitlement to social security is considered as a right, based on an existing need, rather than something that is purchased by paying a contribution, a notion inherent in social insurance schemes.[21] This idea is behind section 37 of the Social Security (Administration) Act 1999 which requires that a claim for a social security payment be granted only when the person is qualified; having satisfied all the qualification criteria set out in the Social Security Act.

In some countries like India, formal social security coverage is fairly patchy as only the formal sector employees are covered by reasonable sickness, maternity, pension, and survivor benefits as well as subsidised housing. Self–employed and informal sector workers, who constitute nearly 90 per cent of all earners, get virtually no benefit from social insurance or social assistance.[22] The social assistance scheme, which is financed exclusively by the government, only provides assistance to needy elderly persons and poor households on the death of the primary breadwinner. However, in 2004, as part of measures to improve the social protection for its citizens, a voluntary old-age, disability and survivors benefits scheme for those in the unorganised sector (a social security scheme for employees and self-employed persons) that are - aged between 36 to 50, earn a monthly wage of 6,500 rupees or less, without mandatory coverage – was introduced in about 50 districts as a pilot programme. Contributions to this scheme are income-related and based on a flat rate.[23]

In the same year, the Mahatma Gandhi National Rural Employment Guarantee Act ('MGNREGA') came into force. It is regarded as India's largest social welfare policy that guarantees 100 days of employment, as a right, for every rural household that wants and seeks work from the Indian State. The Act fixed provisions for remuneration at statutory minimum wage rates and an entitlement to unemployment allowance if employment is not provided within 15 days of application. Available statistics have shown that MGNREGA has created record levels of employment and assets, with approximately 194 million rural households provided with employment over the first six years of MGNREGA's implementation. This created more than 9 billion person-days of employment with an expenditure of US$24 billion.[24] In addition, MGNREGA has had an impact by increasing livelihood and income security, decreasing the incidence of poverty, increasing food intake, reducing mental depression and positively affecting health outcomes.[25] Furthermore, the Supreme Court's rulings in a number of cases have had considerable impact on the progress toward making schooling an implementable

---

21 See "Social Security – Overview and Overarching Issues", *Family Violence and Commonwealth Laws – Improving Legal Framework,* Chapter 5, pp. 129-144, p. 133. Available at - http://www.alrc.gov.au/sites/default/files/pdfs/publications/05_social_security-overview_and_overarching_issues.pdf site accessed on 13 February 2015.

22 E. Ahmad, *supra* n 16, at p.120.

23 *Supra* n 1, at p. 73.

24 See D Chopra, "The Mahatma Gandhi National Rural Employment Guarantee Act, India: Examining Pathways Toward Establishing Rights-Based Social Contracts", *European Journal of Development Research,* 2014, Vol. 26, pp. 355-369, p. 356.

25 *Ibid.* at p. 364.

constitutional right and judicial monitoring has also improved school-meal programmes with good effects on both nutrition and education.[26]

D. Africa

In Africa, lack of social security coverage is largely concentrated in the informal economies, which are, generally, a large source of employment for women than for men.[27] Thus, the social security laws of most countries within the continent are not comprehensive and levels of coverage are considerably low. Most laws provide protection only for the contingencies of old age, disability, death and work injury.[28] Also, for most of these schemes, the employer-liability approach has been adopted, not only for work injury, but for the other contingencies. It is only in Northern Africa that social security laws covering all nine contingencies recommended by the ILO exists. The Algerian social security law is at the forefront in this respect followed by Egypt, which does not have provision only for family allowance. Only five countries in Africa namely, Algeria, Egypt, Mauritius, Tunisia and South Africa provide protection against unemployment.[29] It is also significant to note that, while coverage for cash sickness and cash maternity benefits is a common feature of the social security laws of the developed countries, only 21 out of 52 countries in Africa provide statutory right to maternity leave and out of which less than 10 per cent of the working women are paid cash maternity benefit.[30] While countries like Algeria, Cape Verde, Egypt, Equatorial Guinea, Guinea, Libya and Tunisia have provision for cash sickness and maternity benefits, some others like Burkina Faso, Cameroon, Cote d' Ivoire, Gabon, Mali, Mauritania, Niger and Senegal have provision only for cash maternity benefits. Countries like Nigeria, Seychelles, Morocco, Congo (Kinshasa) and Congo (Brazzaville) provide limited cash maternity and sickness benefits for qualified employees under their respective labour laws.[31]

Only three countries in Africa - Botswana, Mauritius and Seychelles - out of approximately 44 countries in Africa that proclaim to have social security laws, have chosen to introduce pension schemes that place a greater emphasis on universality. In Botswana, for example, all citizens, aged 65 or older, are provided with a flat-rate old age benefits.[32] In Mauritius, there is a combination of elements of universality and social insurance. As such, a basic pension is paid to all residents aged 60 or older without any means test. This is supplemented by earnings–related contributions, paid by employers and employees. The old age benefits are given out to all residents, aged 60 with 12 years of residence, after the age of 18 for Mauritian nationals. No residence qualification is,

---

26 P B Mehta, "India's Unlikely Democracy: The rise of Judicial Sovereignty", *Journal of Democracy,* 2007, Vol. 18(2), pp. 70-83, p. 81.

27 ILO, *Facts on Social Security in Africa.* Available at - www.ilo.org/public/english/bureau/inf.download, site accessed on 27 May 2011.

28 *Supra* note 1.

29 *Ibid.*

30 ILO, "Maternity and Paternity at Work: Law and Practice Across the World, 2014, available at www.ilo.org/wcmsps/groups/public/...wcms_242617.pdf. Site accessed 30 May 2015.

31 See for example, sections 16 and 54 Labour Act, Cap L1 LFN 2004 (Nigeria). See also generally Social Security Administration and International Social Security Association. *Supra* n 1.

32 Social Security Programs Throughout the World: Africa, 2011. *Supra* n 1, at p. 37.

however, required for those aged 70 or older.[33] A few other African countries such as South Africa, Liberia and Swaziland do provide means-tested old age benefits.[34] For instance, in South Africa**,** under the Social Assistance Act, 2004, (No. 13), entitlement to the tax-financed basic pension is subject to a means test for every man and woman who has attained the age of 65 and 60 respectively.[35]

The link between formal wage employment and participation in a social security scheme is thus virtually a common phenomenon in developing countries, especially in Africa. This is attributable to flawed policies and unfavourable extraneous circumstances, including the oil crisis and plummeting exchange rate, which have undermined the growth of African economies in the early 1970s.[36] Other factors include poverty, indebtedness[37] and constraints imposed by globalisation.[38] Moreover, the adoption of Structural Adjustment Programmes (SAPs) by most developing countries has contributed to a decline in the small percentage of the working population in the formal sector and has also led to wage cuts in both the public and private sectors with consequential erosion of the financial base of statutory social insurance schemes.[39] In addition, a major challenge to governance and development, which is also impeding the extension of social security protection in most African countries, is corruption. In a report released by the Economic Commission of Africa in October 2009 titled "African Governance Report 11" (AGR 11), deep-rooted corruption has generated much poverty and turned resource-rich countries into low-income backward societies resulting in the capacity to deliver services efficiently, provide security and maintain peace, order and stability being greatly eroded. It further stated that although Africa witnessed economic growth of 5.5 per cent, the positive change was not reflected in the standard of living of the people.[40]

In general, most of the social security schemes that are currently in Africa have been fashioned after foreign models without regard to the peculiar needs of the local communities. Consequently, the schemes have not had any significant impact on the well-being of the people as a large number of them are without any social protection whatsoever. Available statistics have shown that in sub-Saharan Africa, only an estimated 5 per cent to 10 per cent of the working population has some social security coverage. In middle-income African countries, social security coverage generally ranges from 20 per cent to 60 per cent of the population. The larger percentage of the population, such as the farmers, the self-employed and artisans, who are mostly in the informal sector

---

33 *Ibid.* at p. 124.

34 *Ibid.* at pp.158, 104 and 165.

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

36 J Butare and E Kaseke, "Social Security in Africa: Inherited Burdens, Future Priorities" *International Social Security Review,* 2003, Vol. 56(3-4), pp. 3-9 at p. 3.

37 The total debt of the 53 African countries in 2002 for instance amounted to 295,461 billion - See S Aluko, *History of External Debt of the World,* Being contributions to the Round Table Conference on the Nigerian External Debt Issue held at the Nigerian Institute of Social and Economic Research (NISER) Ibadan on 9 August 2005, p. 12.

38 J Butare and E Kaseke, *supra* n 36, at p. 3.

39 See ILO, *Social Security: Issues, Challenges and Prospects,* available at www.ilo.org/public/english/standards/relm/ic/ic89/pdf/rep-vi.pdf. Site accessed on 28 April 2015.

40 See C Olayinka, "Africa Trapped by Corruption, says AU Report", T*he Guardian,* Nigeria, 22 October 2009.

of the economy, are generally not protected, even in old age. The only option given to this category of people, in most cases, is to join the available social security scheme on a voluntary basis. Indeed, in Benin**,** out of about 46 per cent of the actively employed population, only salaried workers, who are about 5 per cent, have social security protection. Workers in the informal sector, self-employed and employers, who constitute about 59 per cent, domestic servants who are about 24 per cent and apprentices and others who are also about 12 per cent have no protection in any form. Also, in Cote d' Ivoire, with a population of 14 million, none of the 6.5 million people who work in agriculture has social protection.[41]

There is no doubt that efforts have been made in recent years by some African countries to improve both the scope and the level of social protection for the populace by introducing new schemes and improving on the existing ones. Nevertheless, there has not been any significant impact on the major social protection problem in the African region. The economic and fiscal situations are such that in most of sub-Saharan Africa, the prospects for introducing a tax-based social safety net either on a universal or a means-tested basis are poor. The reasons for this are attributable to a number of factors, such as fiscal constraints, which is the consequence of the large number of the poor and the limited scope for increasing tax revenue. Secondly, most of the existing social security schemes cannot easily be extended to the self-employed and the informal sector. This is because the threshold of entry in terms of their contribution and benefit structure is often too high for most of those excluded. Additionally, the benefits provided are inconsistent with the priorities of people living in poor circumstances whose social protection needs are essentially short term. Thirdly, there is the problem of governance and the potential for misuse of funds coupled with the fact that the administrative capacity of the existing public social security schemes is inadequate to take on the task of extending coverage. This is especially so as there is an absence of official records of income received, subsequently posing a difficulty in collecting taxes. In many of these countries, therefore, there is still a pressing need to improve the administrative performance of the available public social security schemes.[42]

III. Comparative Trends In Separate Elements of Social Security

Some branches of social security, such as old age, medical, sickness, unemployment and work injury, are currently witnessing significant reforms in order to enhance social protection for the people.

---

41 *Africa Regional Report on Social Security,* p. 5. Available at - http://www.World-Pensionorg/docus/tres7.doc Site accessed on 15 June 2011.

42 *Africa: regional report on social security, Ibid.* at p. 9. See also J Dethier, *Social Security: What Can Developing Countries Learn from Developed Countries,* Available at http://conferences.ifpri.org/2020chinaconference.pdf/beijingbrief_dethier.pdf. Site accessed on 10 May 2015.

A. Old Age Benefit

It is undisputed that, of all the elements of social security, old age is the most important element because none of the other elements has the inevitability and (apart from permanent total invalidity) the irreversibility as well as the long term incapacitating effects of old-age or death. Protection against old age and death is therefore the most crucial in determining whether or not social security exists in a country. It is not determined by the availability of protection against employment injury or disease, sickness, maternity and invalidity.[43] The contingency covered for old age is survival beyond a prescribed age.[44] In terms of mode of protection, the most common form of old age security provision is social insurance, which is found in about 139 countries. The next most common are the Provident Fund Schemes found in 17 nations –five in Africa and 12 in the Asia and the Pacific.[45] Furthermore, of the 174 countries and territories considered in the Social Security Programs Throughout the World for the four main regions of Africa, Europe, the Americas and Asia and the Pacific, only two of these countries, namely, Bangladesh and Malawi, do not have public or publicly mandated form of old-age security support.[46] All the developed nations and most developing nations offer, at least, minimal support in the form of pension against old age risk in order to strengthen the comfort of those who have worked in the formal sector of the economy and have retired from active service.

(1) Impact of Fiscal Constraints and Demographic Pressure on Old Age Programme

Most old age security programmes, particularly those operated on the Pay-As-You-Go (PAYG) basis,[47] which hitherto have served to offer an unprecedented degree of prosperity and economic independence to older people wherever the programme is instituted and operated with maximal effect, have been undergoing significant structural changes since the latter part of the 20th century. This is largely in response to budgetary deficits in many countries as well as demographic changes which have often led to pressures on PAYG schemes to cut benefits and raise payroll taxes.

The budgetary deficits have arisen mostly from the nature and operation of the PAYG system. Social security systems, especially in the Organisation for Economic

---

43 B O Nwabueze, *Social Security in Nigeria,* Nigerian Institute of Advanced Legal Studies, Lagos, 1989, p. 4.

44 See Art 26 of the Convention, Art. 15 of the Invalidity, Old Age and Survivors Benefit Convention 1967, No. 128.

45 *Supra* note 1.

46 *Ibid.*

47 The PAYG system is one in which annual revenues dedicated to the system approximately equal annual expenditures. This means that the revenue collected from current workers and their employers are paid out almost immediately as benefits to retirees. The Pay-as-you-go approach can work provided that sufficient resources are mobilised from the economically active population to meet the needs of those receiving benefits.- H J Aaron, *Economic Effects of Social Security,* Washington DC, The Brookings Institution, 1982, p. 6. See also S J Schieber, *Social Security: Perspectives on Preserving the System.* Washington DC, Employee Benefit Research Institute Education and Research Fund, 1982, p. xxvi.

Cooperation and Development (OECD) countries, have expanded sharply in the 1950s and 1960s when real wages and population were growing rapidly. It was thus natural to rely on a publicly-managed, payroll tax-financed PAYG system to support only a small proportion of older people who survived into old- age.[48] However, real wage growth has slowed and population growth has come to a halt in these countries thereby necessitating an increase in tax rates to sustain the PAYG system.[49] In essence, as the PAYG schemes mature and increasing number of persons become eligible for benefits, there is an increasing pressure on the expenditure side of social security such that the revenues are eventually insufficient to pay the promised benefits. This, it has been argued, placed an intolerable burden on a declining proportion of overtaxed young workers, provoking intergenerational conflict and resulting in serious fiscal problems that undermine the long-term viability of the system.[50]

Similarly, in the US, the "short-term crisis" in social security finance has stemmed from the fact that annual benefits slightly exceed social security tax revenues, a condition that has been persistent since 1974.[51] According to a 1998 projection made by the Board of Trustees of the Federal Old Age and Disability Insurance Trust Funds, social security trust funds would become exhausted in the year 2032 if no corrective legislation were adopted. By that time, according to the projection, annual tax revenues of the trust funds would be sufficient to cover only about 75 per cent of what is needed to pay benefits. This potential social security "crisis" loomed so large that it emerged as one of the defining issues in the 2000 presidential debates and was a hot presidential election topic in 2004.[52]

The demographic challenge, on the other hand, is attributable to population ageing and the retirement of the post-war baby-boom generation (1940s–1950s) as well as the effects of continued low fertility rates and increases in life expectancy, which is the result of positive evolutions in the pattern of healthcare systems, especially in Europe.[53] Indeed,

---

48 E James, "Protecting the Old and Promoting Growth: A Defence of Averting the Old Age Crisis", 1999, Available online at http//documents.worldbank.org/curated/en/581468764139421/pdf/multi0page.pdf. Site accessed 24 April 2015

49 *Ibid.*

50 J. Midgley, "Has Social Security become Irrelevant?" *International Social Security Review,* 1999, Vol. 52, pp. 91-99 at p. 92. See also R.L Clark, "Social Security Reform in the United States: Implications for Japan", *The Japanese Journal of Social Security Policy,* 2003 pp. 14-23 at p. 14*;* World Bank, *Averting the Old-Age Crisis: Policies to Protect the Old and Promote Growth",* Washington DC, World Bank and Oxford University Press,1994, p. 2. Available at http://documents.worldbank.org/curated/en/973571468174557899/pdf/multi-page.pdf, site accessed on 3 October 2013.

51 WA Lovett, *Banking and Financial Institutions Law in a Nutshell,* US, West Publishing Co, 1984, p. 368.

52 P Yang and N Barrett, "Understanding Public Attitudes Towards Social Security", *International Journal of Social Welfare,* 2006, Vol. 15, pp. 95 – 109 at p. *95.* See also AA Samwick, "Social Security Reform in the United States", *National Tax Journal,* 1999, Vol. 4 pp. 819-842 at p. 821.

53 E. James, "Social Security Reform Around the World: Lessons from Other Countries", available at http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN007122.pdf, p. 2. Site accessed on 13 July 2013. Also, in Africa, despite the deepening poverty and the effects of HIV/AIDS such as low life expectancy, the majority of Africans are expected to grow older and, in all probability, live longer than previous generations. It has been projected that the Continent's population of older persons (those aged 60 years and above) currently estimated to be slightly over 38 million would reach 212 million by 2050, thus increasing six-fold in five decades. See African Union – First Session of the African Union Conference of Ministers in Charge of Social Development, Windhoek, Namibia, 27 – 31 October 2008, Social Policy Framework for Africa. Available at - http://www.un.org/esa/socdev/egms/docs/2009/Ghana/au2.pdf. Site accessed on 21 December 2015.

it has been projected that over the next 30 years, the proportion of the world's population over age 60 will nearly double, from 9 per cent to 16 per cent.[54] In the same vein, the OECD has projected an increase in the number of the elderly from 20.6 per cent in 1990 to 39.2 per cent in 2030 for its European member countries.[55] In Germany for instance, the fertility rate has fallen within 10 years from 2 – 4 per cent to 1 – 5 per cent, from baby boom to baby bust and life expectancy has risen by almost 10 years from 1950 to 1990. As at 2012, life expectancy in Germany is 80.89 years.[56] Also, since 1994, it was projected that German elderly would increase from 21 per cent in 1995 to 36 per cent in the year 2035, the highest share among the industrialised countries at that time, while demographic old age dependency ratio will far more than double from 21.7 per cent in 1990 to 49.2 per cent in 2030. In fact, the percentage of elders who are over 60 years of age already exceeds that of the young generation who are 20 years of age since the 1990s.[57]

In Finland**,** studies have also shown that baby boom generation would reach retirement age in 2010 – 2020 and the proportion of the population over 65 years of age would rise from 16 per cent to 27 per cent by 2030. As life expectancy increases, the number of persons who have reached the age of 80 will more than double by 2030.[58]

In Sweden, the number of pensioners to the economically-active population has been on the increase with the result that there are 30 old age pensioners for every 100 economically-active persons and it has been projected that in about twenty-five years, this number would have increased to 41.[59]

Also, in the US, a "long-term crisis" in social security financing has arisen from issues of demography, which also reflects greater longevity and an increasing proportion of the elderly in the population.[60] The rising life expectancy combined with the impending aging of the baby boom cohort have also produced anxieties concerning the long term economic viability of entitlement programmes that are serving a swelling and increasingly more affluent older population.[61]

---

54 E James, *Ibid*.

55 A. Borsch – Supan, *A blueprint for Germany's pension reform.* Text of a paper presented at the Workshop "Reforming Old Age Pension Systems" held at Herbert-Giersch-Stiftung, Magdeburg between May 25 and 26, 2000. p. 3; see also K Hinrichs, *The Politics of Pension Reform in Germany,* p. 4, available at http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/pensions_conference/Hinrichs.pdf Site accessed on 1 November 2016; See also the Commission of the European Communities, "Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee", COM, 2001, 362 final, Brussels, 3 July 2001, at p. 1. Available at - http://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-362-EN-F1-1/pdf. site accessed on 14 June 2013.

56 See Germany-Life Expectancy. Available at -http://www.google.com.ng/webhp?sourceid...20expectancy%20in%20germany Site accessed on 28 March 2016.

57 A Borsch, *Supra* n 55; See also K Hinrichs, *Supra* n 55.

58 H Niemela and K Salminen, "Social Security in Finland", *Finnish Centre for* Pensions*,* (Helsinki, Finland: Social Insurance Institution (Kela), 2003), p. 61. Available at - http://www.kela.fi/documents/12099/12170/socialsecurity.pdf Site accessed on 1 November 2016.

59 See *Social security in Sweden.* Swedish Monograph to the 27th General Assembly of the ISSA, Stockholm, 9-15 September, 2001. Available at www.issaint/pdf/GA2001/2monographs/pdf. p. 27. (Accessed 8 July 2010).

60 WA Lovett, *Supra* n 51, at p. 363.

61 M Silverstain M , TM Parrot, J J Angelli and FL Cook, "Solidarity and Tension between Age-Groups in the United States: Challenges for an Aging American in the 21st Century"*, International Journal of Social Welfare,* 2000, Vol. 9, pp. 270-284 at p. 273.

In general, the combination of an ever more elderly-biased age structure and a shrinking population of what is, at present, defined as employable age, pose severe problems for some welfare states which in their expenditure orientation are, in most cases, elderly-biased since public pensions regularly represent the largest single item of total social spending.

(2) Reform of Old Age Benefit Programme

The measures taken to overcome the fiscal and demographic challenges being experienced in old age programme in most countries have been largely similar. These measures range from increasing the retirement age for both men and women, raising pay-roll taxes to reducing the rate of benefits in their social security laws.

In Germany, for instance, the measures that have been taken, especially in the 1992 and 1999 pension reforms, include downsizing the system by decreasing benefits, increasing the retirement age, tightening the eligibility for disability pensions and hoping for an increase in female labour participation and some help from migration.[62] The retirement age for women, which until 1999 was 60 years, was raised to 65 years as for men in several steps from 2005 onwards.[63] In 2002, the German Government also took a variety of stop-gap measures, which included increasing the contribution rate to the old age pension system from 19.1 per cent of the gross wage to 19.5 per cent.[64]

In Finland, from the beginning of 2005, the effective retirement age was postponed from 65 years by two to three years to adapt the pension scheme to an increasing life expectancy and to pave the way for unification and simplification of the private sector earnings–related pension scheme.[65]

In the UK, the retirement age for the basic State retirement pension and the State Second Pension (SSP) for women would rise gradually from 61 to 65 by November 2018, while the retirement age for both men and women would rise gradually from age 65 to age 68 from 2020 to 2046.[66]

However, the most common feature of change in many countries, especially in Europe and North and Latin America, largely involve shifting from defined-benefit schemes toward greater pre-funding in accounts that are privately managed as an important part of the mandatory social security system. This system is called the Individual Retirement Account or the Notional Account or the Defined Contribution Scheme. Pre-funded scheme was first introduced in Chile in 1981 by General Pinochet's military regime that dismantled the Chilean social security system and replaced it with a system

---

62 A Borsch-Supan, *Supra* n 55, at p. 7.

63 H Siebert, "Germany's Social Security System under Strain", (Germany: Kiel Institute of World Economics, 2003), p. 8. Available at - https://www.files.ethz.ch/isn/103035/kap1155.pdf site assessed on 1 November 2016.

64 *Ibid.* at p. 49.

65 H Niemela and K Salminen, *Supra* n 58, at p. 24.

66 See *Supra* n 1, at p. 312.

of privatised individual retirement accounts managed by commercial firms known as "Administrative Pension Funds."[67]

In a pre-funded scheme, the worker contributes according to a fixed schedule and these contributions, together with the investment returns earned, eventually turn into retirement income. Since the scheme is accumulation based, a given contribution rate will generally support a higher expected benefit rate than under the PAYG system. The government regulates and provides a social safety net, while the private sector invests the funds in the belief that economic rather than political considerations would determine the investment strategy and produce the best allocation of capital and the highest return on savings. Best practices have shown that pension plans operated using pre-funded accounts enhance the sustainability of the pension system, provide better benefits and have beneficial effects on the economy as a whole. It has also been contended, *inter alia,* that pre-funded pension system helps to: build and mobilise long-term national saving, which in turn facilitates capital accumulation, financial institutionalisation and increase in after-tax wages; increase a country's productivity and output, enabling the standard of living to remain high when the ratio of retiree to workers increases; facilitate economic growth for poverty reduction and wealth generation and shrink the burden on younger workers and avoid the peak tax rates that would be required under a PAYG system as population ages.[68] A pre-funded scheme also helps to tighten the link between contributions and benefits thereby engendering greater responsibility and an authentic ownership of the resources accumulated in retirement accounts on the one hand, and making it harder to tinker with the system on the other.[69] Moreover, pre-funded scheme discourages evasion and has few labour disincentives in the sense that those who retire early bear the cost of their early retirement in the form of lower accumulations and benefits rather than passing the costs on to others and undermining the financial viability of the scheme, as it does occur in most defined benefit schemes. This, in turn, provides an incentive for continued work, which increases the nation's labour force and productive capacity.[70]

In recent times, the Chilean 'reform' has been widely embraced and emulated in several countries. To date, about 30 countries in the Americas, especially Latin America, and some countries in Europe, Asia and the Pacific have structurally reformed their social security systems by incorporating pre-funded, privately-managed individual retirement accounts into their mandatory social security systems in order to make the systems more sustainable, equitable and growth enhancing. In the Americas, the countries include Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El-Salvador, Mexico, Panama, Peru, and Uruguay; in Europe: Bulgaria, Croatia, Estonia, Latvia,

---

67 S Borzutsky, "Privatizing Social Security: Relevance of the Chilean experience", J Midgley and M Sheraden, eds.*, Alternatives to Social Security: An International Inquiry,* (London: Auburn House, 1991), pp. 75-90, at p.76.

68 E James, *supra* n 53, at p. 8; See also K Kumado and AF Gockel, "A Study on Social Security in Ghana", p. 35. Available at http://library.fes.de/pdf-files/bueros/ghana/50022.pdf Site accessed on 1 November 2016; S Hansell, "The New Wave in Old- Age Pensions", *Institutional Investor,* 1992, Vol. 26(12), pp. 77-86 at p. 79.

69 A Borsch-Supan, *supra* n 55, at p. 11; See also J Midgley, *supra* n 50, at p. 95.

70 E James, *supra* n 53, at p. 8; see also M Langford, "The Right to Social Security and Implications for Law, Policy and Practice", E Reidel, ed., *Social Security as a Human Right: Drafting a General Comment on Article 9, ICESCR – Some Challenges,* (Berlin: Springer Verlag, 2007), pp. 1 – 29, at p. 21.

Poland, Russia, Romania, San Marino, Slovak Republic and Sweden; and in the Asia and the Pacific region: Brunei, China and Kazakhstan, Kyrgyzstan, and Uzbekistan.[71] In Africa, it is notable that no country, except Nigeria, has reformed its pension scheme in line with the global trend with the enactment of the Pension Reform Act, 2004, which has subsequently been re-enacted as the Pension Reform Act, 2014.

In the UK, the government has, since March 1997, announced plans to transfer from the current PAYG pension scheme to individual cash funded pensions with a view to phasing out the State retirement pension for younger people. Moreover, as a means of improving cost control and saving incentive in the current pension system, the Pension Reform Act of 1988 (UK), gives an individual the possibility of leaving both the occupational pension schemes and State Earnings–Related Pension Scheme (SERPS)[72] completely to buy his/her own pension saving programmes in Appropriated Personal Pension Schemes (APPS). These schemes operate on a defined-contribution basis. The employer and the employee make their respective contributions to the Department of Social Security which, thereafter, pays "minimum contributions" to the APP of the amount by which the contracted–out rate of contributions would have been lower. These schemes are being operated by insurance companies, banks, unit trusts, building societies etc. The structural reform strategy was to decrease compensation levels in the public pension system without the lowering of pension contributions and to introduce special incentives to move pension savings from the State to occupational or private pension (contracting–out). This was aimed at enforcing short–term budget control and a long-term financial balance in the pension promise as well as making it easier to compete with SERPS–level within occupational pension programmes or through private insurance programmes.[73]

In the US, it is remarkable that even before the Chilean initiative reform measure, privately-funded schemes had been authorised since 1974 under the Employee Retirement Income Security Act (ERISA) as an addition to: (1) the pension programmes established under the Old Age, Survivors and Disability Insurance of the Social Security Act, 1935 (as amended); (2) individual savings and asset income; (3) employment earnings; and (4) welfare programmes. As a result of this, an increasing share of the workforce is participating in at least one pension programme or another other than social security.[74] A Commission established by government to consider ways of strengthening social security has also proposed re-allocating part of the social security payroll tax under the Social Security Act to individual accounts that are invested in the financial markets.[75]

It is noteworthy, however, that the extent to which the income redistribution objective of social security is to be fulfilled in pre–funded, privately–managed schemes,

---

71 *Supra* n 1.

72 SERPS is a public income-related supplementary pension which is calculated on earned income. It is a defined-benefit system financed as a pay-as-you-go with contributions without any funding.

73 See J Eriksson, "Social Insurance Problems and Structural Reforms", K Eklund, ed., *Social Security in Sweden and other European Countries –Three Essays,* (Stockholm: Norstedts Tryckeri A B, 1993), pp. 89 – 146 at 98; See also M Howard, "Cutting Social security", A Walker and C Walker, eds., *Britain Divided: the Growth of Social Exclusion in the 1980s and 1990s,* (London: CPAG Ltd., 1997), pp. 84-95 at p. 90.

74 S J Schieber, *Trends in Pension Coverage and Benefit Receipt,* (Washington, DC: Employee Benefit Research Institute Education and Research Fund, 1982), p. 5.

75 E James, *Supra* n 53, at p. 1.

which are currently being adopted in many countries, remains unclear. One of the aims of social security is income re-distribution with a view to reducing social inequalities and inequity, which has also helped to reduce poverty in several countries.[76] While some elements of redistribution among the various income groups take place within the PAYG system, pre-funded schemes contain no redistributive elements as they are basically a compulsory individual insurance system with no intentional redistribution. Indeed, more inequities are being created by privately-funded schemes since the defined-contribution which it entails guarantees larger pensions to the high-income groups whereas the low-income groups will receive small pensions, or only the guaranteed minimum pensions, in countries where there exists this modality. Some of the new inequities are attributable to the performance of the investment and the interest rate at the time of retirement which, in turn, has a direct impact on the size of the annuity. Other inequities arise as a result of the fact that the defined-contribution system has a systematic bias in favour of high earners in view of the way annuities markets and privately-managed defined-contribution systems operate. Low-wage earners are likely to have a higher discount rate and suffer a greater utility loss since their income is lower; the required contribution represents a higher proportion of their total income, and they are less able to have other sources of savings.[77]

The foregoing identified inequities of pre-funded schemes notwithstanding, the introduction of the schemes across countries, coupled with the parametric reform measures, have been, by and large, effective in ensuring that workers are provided with reasonable economic security when they retire.

B. Medical Benefit

Medical benefit is another major branch of social security that is witnessing significant changes across nations. The contingencies covered for this benefit include any morbid condition, whatever its cause, as well as pregnancy and confinement and their consequences.[78] In recent times, there has been a general shift towards the social health insurance system from the tax-financed system as a process of deliberate health care reform aimed at making health care affordable to all in the spirit of Article 25 of the Universal Declaration of Human Rights as well as Article 12(1) of the International Covenant on Economic, Social and Cultural Rights.

Health care reform can be defined as the process of improving the performance of existing systems and of assuming efficient and equitable responses to future challenges.[79] In other words, it is a sustainable and purposeful change aimed at improving the health sector. Thus, health reform issues across both the developed and developing countries have been driven by one or more significant considerations, such as access, universal coverage,

---

76 AW Clausen, "Poverty in the Developing Countries", (Washington, DC: The World Bank, 1985), p. 6.

77 S Borzutzky, "Social Security Privatization: The Lessons from the Chilean Experience for other Latin American Countries and the USA", *International Journal of Social Welfare,* 2003, Vol. 12, pp. 86-96 at p. 93.

78 See Art 8 of the Convention, and Article 7(a) of the Medical Care and Sickness Benefit Convention 1969, No. 130.

79 P Berman, "Health Sector Reform, Making Health Development Sustainable", *Health Policy,* 1995, Vol. 32, pp. 13 – 28, at p. 13.

cost-containment, quality of service and patients' satisfaction, equity, financing, integration and regulation of private providers, political commitment to reform, decentralisation, seamless inter-sectoral linkage to housing, education, nutrition, human or legal rights and alignment of donor-driven agenda to National Health Policies.[80]

The basic goals of a social health insurance scheme are to ensure access to medical care by all persons, eliminate the financial hardship of medical bills and limit the rise in healthcare cost.[81] Other supplementary goals are equitable financing method, easy understanding and administration as well as acceptability to providers of medical services and to the public.[82]

The attraction of the social health insurance for both citizens and policy-makers is attributable to its seemingly private nature in the funding and delivery of healthcare services, its self-regulating nature and stability in organisational and financial terms.[83] The social health insurance schemes also share a number of features which include the facts that: (i) insured persons pay a regular contribution to a health insurance fund based usually on income rather than reflecting their risk of illness; (ii) clinical need instead of ability to pay determines access to treatments and health care; (iii) contributions to the social insurance fund are kept separate from other government-mandated taxes and charges; (iv) both employers and employees pay contributions; (v) government support for those who are unable to pay, such as the unemployed and low-income informal economy workers, goes through the insurance fund; (vi) there may be more than one social health insurance fund, providing a measure of options to citizens; (vii) patients have at least several choices in selecting the doctor and other healthcare providers they use; (viii) social health insurance is compulsory for at least some categories of citizens; (ix) a basic package of health care benefits is defined and this may or may not vary across funds; and (x) health insurance funds may not turn away applicants for membership.[84] It is also important to note that where medical benefits for insured workers are provided through social insurance, similar services are typically furnished to their spouse and young children, and in some cases, other adults or young relatives living with and dependent on the insured.

Furthermore, the social health insurance systems, apart from being a reform process, are generally constructed as part of a social income policy to be redistributive in nature. They are thus consciously designed to achieve a series of societal objectives through a

---

80 See AB Odutola, Centre for Health Policy and Strategic Studies. *Reform Implications of Nigeria's National Health Insurance Scheme*, Being text of a paper delivered the International Conference on Health Care Financing in Low Income Asian and African Countries held at CERDI, Clermont – Ferrand, France, in November, 2000. 3. See e.g. section 2 & 6 of the NHI Act, 1995 (No. 7875) (Philippines) wherein the guiding principles of the Act are stated to include emphasis on the issue of universality, equity, social solidarity and effectiveness.

81 K Davis, "National Health Insurance; Benefits, Costs and Consequences", (Washington D.C: The Brookings Institution, 1975), p. 3; see also G Carrin and C James, "Social Health Insurance: Key Factors Affecting the Transition Toward Universal Coverage, *International Social Security Review,* 2005, Vol. 58(1), pp. 1-15 at p. 1.

82 *Ibid.*

83 *Ibid.*

84 R Jacobs and M Goddard, "*The Role of the Insurer in the Health Care System: A Comparative Study of Four European Countries",* (UK: University of York Centre for Health Economics, 2000), p. 7.

set of financial cross-subsidies – not just from healthy to ill, but also from well-off to less well-off; from young to old and from individuals to families.[85] Thus, social solidarity, which is the belief that bad health is predominantly outside the individual's ability to control and, therefore, the risk of which should fall on society, is a fully integrated value available to all citizens as well as foreigners. The social health insurance has thus become the principal method of health financing in several developed and developing countries such as Germany,[86] Philippines,[87] Japan,[88] Korea,[89] China,[90] Bulgaria,[91] Estonia,[92] Manitoba[93] and Taiwan.[94] Several countries, including Austria, Belgium, Germany and Costa Rica have, through this system, established the principle of universal coverage in their respective countries.[95] Some other countries in Africa, such as Nigeria[96] and Ghana,[97] have also enacted National Health Insurance Laws aimed at facilitating the provision of accessible, affordable and qualitative health care services to the citizenry.

It is noteworthy, however, that in a number of social security systems, particularly in the developing countries, health care insurance extends only to employees in the formal sector. A common procedure is to start the programme in major urban centres, and then extend coverage gradually to other areas.[98] For instance, in Nigeria, coverage under the National Health Insurance Scheme Act, 1999 is mostly limited to the formal sector, especially Federal Government employees, which represents only about 20 to 25 per cent of the Nigerian population.[99]

C. Sickness Benefit

The contingency covered for sickness benefit includes incapacity for work resulting from a morbid condition involving suspension of earning, as defined by national laws or regulations.[100] In realisation of the need to cut down on social security expenditure, there

---

85 R B Saltman, "Social Health Insurance in Perspective: The Challenge of Sustaining Stability", R B Saltman, R Busse and J Figueras, eds., *Social Health Insurance in Western Europe,* (England: Open University Press, 2004.), pp. 3 – 20 at p. 5.

86 K Romer, *Supra* n 13, at p. 242; see also R Jacobs and M Goddard, *Supra* n 84, at p 18.

87 See National Health Insurance Act, 1995 (Republic Act 7875) (Philippines).

88 See *Overview of Social Security in Japan, Supra* n 20.

89 See National Health Insurance Act 2003, No. 6981 (Korea).

90 See National Health Insurance Act 1994, No. 4505 (China).

91 See Law for the Health Insurance, 1998 (Bulgaria).

92 See The Health Insurance Act, 2002 (Estonia).

93 See The Health Services Insurance Act, as amended up to 2005 (Manitoba).

94 See The National Health Insurance Act, 1994 (Taiwan).

95 G Carrin and C James, *Supra* n 81, at p. 1.

96 National Health Insurance Scheme Act, 1993, Cap. N. 42, LFN, 2004 (Nigeria).

97 See the National Health Insurance Act 2003 (Ghana).

98 See e.g. Social Security Administration and International Social Security Association, *Supra* n 1, at p. 9.

99 According to the Executive Secretary of the Council, as at August 2010, only 5.3 million Nigerians or about 3.73% of the population comprising mainly federal government employees and their families is so far benefiting from the Scheme. See *The Guardian* (Nigeria) 22 August 2010 at p.50.

100 See Art 14 of the Convention, and Article 7(b) of the Medical Care and Sickness Benefit Convention 1969, No 130.

has been a general trend across countries towards increased emphasis on wage payment (partly or in full) from the employers during shorter spells of illness. This period is usually followed by a long term pension after periods varying from about six months or less, to a year or more. In Germany, for instance, every employee has a right to continued payment from the employer of wage or salary for six weeks of illness a year. After this, the health insurance pays cash sickness benefit for up to 78 weeks, which can be as high as 85 per cent of regular wages or salary.[101] However, German employer's obligation to pay full wages depends on the length of the employee's employment with the employer. There will therefore be employees who are not eligible for wages during illness and who will have to rely on the insurance system.[102] In Sweden, under the Sick Pay Act, 1991, the employer is required to pay income loss compensation to his employee during the first 14 days of illness. From the 15th day, compensation for income loss is transferred from the employer to the Social Insurance Office and this benefit, unlike in Germany, is payable for an unlimited period. In the U.K., the sickness insurance was partly transferred to employers in 1983 in the Statutory Sick Pay (SSP) system, which covers 28 weeks in a sick spell. After the 28 weeks, short-term incapacity benefit is payable to people who are still incapable of work after they have received sickness benefit for this period.[103] However, by section 1(4) of the Social Security (Incapacity for Work) Act, 1994, (U.K.) the short-term incapacity benefit cannot be paid for more than 364 days. In essence, the long-term rate for incapacity benefit is not payable until the end of the first year of incapacity.[104] In Netherlands**,** the labour market agreements often give full compensation during shorter spells of illness. Under the Civil Code, employers must continue to pay 70 per cent of wages during an employee's absence that is due to sickness for a maximum of 104 weeks, which may be extended to 156 weeks. However, beginning in March 1996, coverage under the Sickness Benefits Act 1966 has been mostly privatised.

D. Unemployment Benefit

Unemployment benefit has also been witnessing considerable change in recent times due to the various demands of technological development, world trade and political ideology which have created a labour market that is characterised by less stable forms of employment. The contingency covered includes suspension of earnings, as defined by national laws or regulations, due to inability to obtain suitable employment in the case of a person protected who is capable of and available for work.[105] In a Report released

---

101 K Romer, *Supra* n 13, at p. 242

102 H Hansen, "Elements of Social Security in Sweden and Four other European Countries", K Eklund, ed., *Social Security in Sweden and Other European Countries. – Three essays,* (Stockholm: Norstedts Tryckeri AB, 1993), Chapter 3:45-87, at p. 60.

103 See also, section 33 of the Social Security Contributions and Benefits Act 1992 (UK).

104 See, section 1(5) of the Social Security (Incapacity for Work) Act 1994 (UK).

105 See Art. 20 of the Convention, and article 10 of the Employment Promotion and Protection against unemployment Convention 1988, No. 168.

in 2013 by the ILO, it was disclosed that global youth unemployment rate, which had decreased from 12.7 per cent in 2009 to 12.3 per cent in 2011, increased again to 12.4 per cent in 2012 and 12.6 per cent in 2013 and by 2018, the rate is projected to rise to 12.8 per cent.[106] In another Report entitled "World Employment and Social Outlook – Trends 2015" which was released in 2015 by the Organisation, it was predicted that unemployment would continue to rise in a number of countries as the global economy entered a new period combining slower growth, widening inequalities and turbulence. It further stated that more than 212 million people globally would be out of work up from the then 200 million and that although the employment situation had improved in the US and Japan, it remained difficult in a number of advanced economies, particularly, in Europe.[107] In Europe, unemployment has, for long, remained at historical high levels, even in Britain where rates are said to have fallen considerably since 1993.[108] It is also pertinent to note that the Declaration, made by the African Heads of State and Governments at an Extra-ordinary Summit on Employment and Poverty Reduction in Ouagadougou in September 2004, to reduce unemployment and poverty by placing the issues at the centre of their development policies and programme has not had any significant impact as it was fraught with some bottlenecks.[109] This is evident from the said ILO's Report which disclosed that the employment situation has not improved much in sub-Saharan Africa despite better economic growth performance and that two Regions, South Asia and sub-Saharan Africa accounted for three-quarters of the world's vulnerable employment.[110]

The widespread nature of unemployment has been attributed, *inter alia,* to a number of factors – which vary from country to country – such as: the appearance on the labour market of persons born during high birth-rate periods at a time when the persons reaching retirement age correspond to low birth–rate periods; a very marked increase in the number of economically-active women; a general slowdown in economic growth and production-investment largely due to increases in energy costs and financial charges borne by enterprises or fluctuations in the money and financial markets which make investment operations especially hazardous; slow restructuring of industries and insufficient modernisation of production in the sectors most vulnerable to keen foreign competition; the rural exodus uncompensated by the creation of enough jobs in industry and services; lack of synchronisation between the skills required for the jobs proposed

---

106 ILO, *Global Employment Trends for Youths 2013: A Generation at Risk,* Available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_212423.pdf Site accessed on 1 November 2016.

107 See U Ekwere, "No End in Sight to Nigeria's Unemployment", *The Punch* (Nigeria), 18 March 2015, p. 37. In a release by the US Labour Department in 2015 for instance, the number of people seeking unemployment benefits had reduced considerably "pushing down the four-week average of applications to its lowest level since April 2000. Weekly applications fell 1,000 to a seasonally adjusted 264,000." See Anon. US unemployment claims fall to 15-year low. *The Punch* (Nigeria), 15 May, 2015, p.41.

108 R Walker, "Poverty and Social Exclusion in Europe, A Walker and C Walker, eds., *Britain Divided: The Growth of Social Exclusion in the 1980s and 1990s",* (London: CPAG Ltd., 1997), pp. 48-74 at p. 64.

109 Anon. African finance ministers decry lack of employment generation, rising poverty level. *The Guardian* (Nigeria) 23 May 2006, p. 41.

110 See U Ekwere, "No End in Sight to Nigeria's Unemployment", *The Punch* (Nigeria), 18 March 2015, p. 37.

on the one hand, and the qualifications and skills or aspirations of young persons on the other, as well as an increase in unemployment benefit, which apparently tends to prolong the time spent in the search for employment.[111] In some countries like Germany, the rapid growth of the number of the unemployed is attributable to the economic depression that started from late 1992.[112]

As part of the measures to curtail the negative impact of unemployment, many countries have unemployment insurance schemes in their social security laws.[113] Benefits payable under the schemes are basically designed to tide a worker over a relatively short period of unemployment rather than provide benefits throughout a lengthy period of joblessness. The goal is to provide compensation for the loss of income resulting from involuntary unemployment as well as to ensure that a man's purchasing power is partially protected when he loses his job. It falls, but no longer to zero.

It is noteworthy, however, that the high incidence of unemployment in several countries and the fact that unemployment insurance benefit is generally limited in duration have compelled most governments to institute supplementary programmes, in the form of social assistance, to provide additional benefits to those who have exhausted their entitlements under the regular programmes. Experience has indicated that the extent of pressure to extend unemployment insurance benefits depends on the adequacy of alternative kinds of relief that are available. For instance, in Britain and Germany, it was only when steps were taken to make reasonably adequate public assistance payments available to exhaustees that these countries were able to overcome the pressure to provide greatly extended unemployment insurance benefits.[114] Also, in line with the general tenor of the ILO's Employment Promotion and Protection against Unemployment Convention, 1988 (No.168), which has given recognition to the widespread unemployment and underemployment affecting various countries throughout the world at all stages of development and, in particular, the problems of young people, many of whom are seeking their first employment, a number of countries have institutionalised special unemployment benefit programmes targeted at those who do not have any work history. For instance, in the UK, apart from the contribution-based jobseeker's allowance, a tax-financed, income-based jobseeker's allowance is payable, under section 3 of the Jobseeker's Act 1995, to persons who have no income or an income that does not exceed the applicable amount, as well as to those whose contributory benefit is insufficient or has expired. Also, in Finland, in addition to the basic unemployment allowance and earnings-related allowance for those with work history, there is the labour market subsidy, especially packaged for individuals who had not previously been in work and who are increasingly remaining unemployed, as well as those whose entitlements under the basic unemployment allowance or earnings-

---

111 A Euzeby and C Euzeby, "Social Security Financing Methods, Labour Costs and Employment in Industrialized Market Economy Countries", *Financing Social Security: The Options – An International Analysis,* (Geneva: ILO, 1984), Chapter 3:51-85 at p.54.

112 See *Annual Report on Health and Welfare 1999, Social Security Systems Throughout the World,* p. 3 Available at http://www.mh/w.go.ip/english/wp/wp-hw/vol2/plc/html/. (Accessed 17 July 2008)

113 See e.g. Social Security Administration and International Social Security Association. *Social security programs throughout the world. Europe 2012, Supra* n 1, at p. 12

114 M S Gordon, *The Economics of Welfare Policies,* (New York: Columbia University Press, 1966), p. 105.

related unemployment allowance have ceased and are still unemployed. This has been designed to ensure subsistence and improve the claimant's prospects of returning to the labour market through employment policy measures. Thus, the subsidy is available to any unemployed person aged 17-64 years, who is registered as a full–time job-seeker at the local employment office and who is fit for work and is available in the labour market.[115] Similarly, in Australia, section 593 of the Social Security Act, 1991, provides for payment of means-tested Newstart Allowance to any unemployed person resident in Australia and who also is, at least, 21 years of age, but still under pensionable age. Such person must also be capable of undertaking and actively seeking work, or temporarily incapacitated for work because of an illness. Newstart Allowance is paid after a seven day waiting period for as long as the person remains qualified. The idea of the Newstart Allowance is to give short-term support to those who do not have any barriers to work, that is, those deemed able to work or study. Although the Newstart Allowance was supposed to be a short–term payment to tide people over until they find work, it has been revealed that in year 2009, of the 627,000 Newstart Allowance recipients, 309,000 received the payment for over a year; 222,000 for over two years and 112,000 for over five years.[116]

Generally, unemployment programmes, which exist mainly in developed countries, are compulsory and fairly broad in scope. The programmes usually have in-built mechanisms that improve the claimant's prospect of returning to the labour market as well as other employment policy measures that ensure training and retraining of the unemployed. There are also checks and controls in the administration of the benefits to ensure that claimants are actively seeking and available for work. It is thus a general requirement of the social security laws that claimants must register at employment offices to detail job search activities, show evidence of actively seeking work and report regularly for as long as payments continue. In other words, nearly all unemployment insurance programmes, as well as those providing unemployment assistance, require that applicants be capable of, and available for work. This close linkage between unemployment benefits and placement services ensures that benefits will be paid only after the person has been informed of any current job opportunities and has been found unsuitable. This could also be seen as anti-fraud measures to ensure that all claimants are making strenuous efforts to find work. In the UK, for instance, receipt of benefit, under the Jobseeker's Act, 1995, is conditional upon signing a jobseeker's agreement which details job search activities. Failure to comply with the terms of the agreement can lead to the issue of a jobseeker's direction to undertake a particular task, or attend a training scheme with the threat of benefit sanctions for non-compliance.

In contrast to what is obtainable in developed countries, most social security laws of the developing countries usually make provision for lump-sum grants, payable by

---

115 See H Niemela and K Salminen, *Supra* n 58 at p.18. In the UK also, the shortfall in pension fund according to Pensions Secretary, Alan Johnson has been caused by a number of factors, such as stock market falls since mid-2000; See *The Punch* (Nigeria) 12 October 2004, p.30.

116 See Australian Council of Social Services (ACOSS) Paper 163, April 2010, *Out of the Maze: A Better Social Security System for People of Working Age.* Available at http://www.acoss.org.au/images/uploads/ACOSS_Paper_-_Reform_of_working_age_payments.pdf site accessed on 1 November 2016.

either a government agency or the employer. The employers, in many instances, are required to pay lump-sum severance indemnities to discharged workers.[117] In Nigeria, for example, section 20(1)(c) of the Labour Act, 1974, requires an employer to "use his best endeavours to negotiate redundancy payments to any discharged worker." Section 20(2) of the Act further requires the Minister to make regulations providing generally, or in particular cases, for the compulsory payment of redundancy allowances on the termination of a worker's employment because of his redundancy.

E. Work Injury Benefit

Work injury compensation scheme is the oldest type of social security that provides monetary compensation as well as medical services for work-related injuries and diseases.[118] The contingencies covered for employment injury include, where due to accident or a prescribed disease resulting from employment, a morbid condition; incapacity for work resulting from such a condition and involving suspension of earnings, as defined by national laws or regulations; total loss of earning capacity or partial loss thereof in excess of a prescribed degree, likely to be permanent, or corresponding loss of faculty; and the loss of support suffered by the widow or child as the result of the death of the breadwinner; in the case of a widow, the right to benefit may be conditional on her being presumed, in accordance with national laws or regulations, to be incapable of self-support.[119]

Work injury systems are generally based either on the social insurance system that uses a public fund or the various forms of private or semi-private arrangements required by law. Countries that rely primarily on private arrangements normally require employers to insure their employees against the risk of employment injury.[120] In recent times, it is remarkable that several countries that once used the employer-liability system for compensating victims of work accidents have adopted the social insurance scheme. The advantage of the social insurance scheme lies in the fact that the injured worker is generally assured of being adequately and promptly compensated from the compensation fund to which his employer has contributed, even where the employer becomes insolvent. The social insurance system, it has also been rightly noted, gives the guarantee to workers that the law would be better applied in practice by speeding up compensation procedure, reducing sources of dispute and thereby doing away with many causes of unjustified loss of right to benefit.[121] Experience has shown that the number of accidents for which

---

[117] Social Security Administration and International Social Security Association. *Social security programs throughout the world. Europe 2012, Supra* n 1 at p. 12.

[118] The first workmen's compensation law was the Germany's Accident Insurance Law of 1884, which was enacted as part of the social insurance programmes introduced by the erstwhile Chancellor, Otto von Bismarck, to stave off socialism at that time. See M.S. Gordon, *Supra* n 114, at p.1; see J Myles, *Supra* n 6, at p. 344.

[119] See Art 32 of the Convention and Art 6 of the Employment Injury Benefits Convention, 1964, No. 121.

[120] For instance, work Injury scheme in Finland is a combination of employer liability scheme and the mandatory insurance with private carrier. See H Niemela and K Salminen, *Supra* n 58, at p. 31.

[121] ILO, 1977, *Report of the Fifth African Regional Conference on "Improvement and Harmonization of Social Security Systems in Africa"*, held in Abidjan, Sept – Oct. 1977, p. 3.

compensation is paid rises considerably when a scheme is taken over and run at national level.[122] In Africa alone about 29 countries, including Algeria, Benin, Burkina Faso, Burundi, Cameroon, Egypt, Equatorial Guinea, Gabon, Guinea, Mali, Niger, Nigeria, Rwanda, Senegal, Sudan, Togo and Tunisia, have replaced their employer-liability systems with social insurance schemes.[123] Indeed, in the UK, benefit for industrial injuries has been integrated into the national social security scheme.[124]

IV. Comparative Trends in Financing

Financing of social security could be either contributory or non-contributory. Contributory scheme, usually referred to as the social insurance, is one in which financing is either by a combination of contributions from the workers, the employers and the State, or a combination of workers and employers contributions based on wages or earnings, or a combination of employers' and State financing. Generally, the social insurance denotes publicly-provided or mandated contributory programmes that cover workers and their dependants against major life risks, such as unemployment, health risks and old age, with beneficiaries receiving income or services in exchange for contributions to the scheme. The non-contributory system, on the other hand, is one in which a particular scheme or programme is financed either by the employer alone (such as for accident insurance) or by the State alone, based upon the idea that the community as a whole should be responsible for coming to the assistance of those of its members in need; the individual being able to claim, as a right, that the State should intervene on his or her behalf.[125] In line with para 26(5) of the ILO Income Security Recommendations, 1944 (No. 67), the cost of employment injury benefit is borne entirely by employers across the developed and developing countries. The employer's liability, in this regard, is generally predicated on his responsibility for maintaining the "human capital" that sustains his enterprise and its profitability.[126] Apart from the work injury compensation schemes, the non-contributory schemes are usually means-tested and targeted in some way for the poor or those vulnerable to poverty and shocks.[127]

The predominant means of social security financing across the developed and developing communities is, however, through the social insurance system.[128] For instance, social security is currently financed through pay roll contributions in several countries such as Finland, Ireland, Malta, Norway, Sweden and the UK where the intervention of the State had traditionally predominated.[129] In Sweden, State's contribution to the cost of

---

122 *Ibid.*

123 *See* Social Security Administration and International Social Security Association. *Social security programs throughout the world: Africa, 2011, Supra* n 1.

124 Part V, Sections 94 – 101 of the Social Security Contributions and Benefits Act 1992 (UK).

125 G Perrin, "Rationalization of Social Security Financing", *Financing Social Security: the Options – an International Analysis,* (Geneva: ILO, 1984), pp. 121 – 145 at p. 122.

126 P Mouton, "Methods of Financing Social Security in Industrialized Countries", *Financing Social Security: the Options - an International Analysis,* (Geneva: ILO, 1984), pp. 3-32 at p.5.

127 J Dethier, *Supra* n 42.

128 See Social Security Administration and International Social Security Association, *Supra* n 1.

129 P Mouton, *Supra* n 126 at p. 16.

universal pension and sickness and disability, which was as high as 70 per cent and 34 per cent respectively before 1974, has steadily declined to 49 per cent and 24 per cent respectively by the year 1999. The contributions and fees now amount to approximately two-thirds of the total payments. The portion financed by taxes amounts to just less than one-fourth, while the share of the yield from the national pension fund used for pension payments corresponds to about one-tenth of the annual expenditure.[130] The State has also transferred two-fifths of the costs to employers' contributions which it previously financed for unemployment insurance and two-thirds of the cost for unemployment assistance, with the result that unemployment benefit now accounts for only 9 per cent of government expenditure on social insurance.[131] In the UK, the increasing structural problems, predominantly within the public pension and the health care sector in the 1980s, caused the government to implement a consistent and long-term policy to transfer a large part of the public engagement to the private sector. For instance, changes in the area of sickness insurance followed the same pattern, as in a number of other European countries, towards a welfare mix in which the social protection became a combination of public, collective and private parts. Consequently, public-paid statutory sickness benefits were extended with occupational benefits from the employers, either from own arrangements or through special insurances. Sickness benefits above the public minimum level are generally considered as a natural and important part of the employment contract with the employee. In this wise, sickness insurance was partly transferred to employers in 1983 in a new Statutory Sick Pay (SSP) system which covers the first 28 weeks in a sick spell. The idea was to partly disengage the State from a job which employers had already shown themselves capable of fulfilling and to make public expenditure savings.[132]

A. Developed Countries

A careful study of the regulation of social security financing in countries across Europe, Africa, Asia and the Pacific and the Americas has revealed that developed countries, especially in Europe, tend to spend a larger proportion of their national incomes on social security programmes than the developing countries. Apart from the contributions by the employers and employees, budgetary allocations for the support of social security schemes are both spontaneous and conspicuous. In many of these countries, such as in Belgium[133] and Austria,[134] the contribution from the State takes the form of a subsidy from the general budget, while in some countries like Ireland,[135] the government provides any deficit in the social insurance fund and the cost of means-tested allowance. In the UK, a treasury grant to contributory programmes of up to a maximum of 17 per cent of benefit expenditure is provided annually to cover short falls.[136] In some other countries

---

130 See *Social Security in Sweden, Supra* n 59 at p. 31.
131 *Ibid.*
132 See J Eriksson, *Supra* n 73 at p. 92.
133 See Social Security Administration and International Social Security Association, *Supra* n 1 at p. 48.
134 *Ibid*. at p. 36.
135 *Ibid*. at p.142.
136 *Ibid.* at p. 234.

like Japan, the State provides subsidies to cover a certain proportion of expenditure for pension and medical benefits.[137]

It is noteworthy, however, that the form of the financial contribution from the State is generally dependent upon the branch of social security and the objective thereof. As such, benefits that are geared towards fulfilling the social security objective of social solidarity and social cohesion are being financed entirely by the government in some countries. For example, old age benefits are paid on a universal basis or subject to a means test in Australia,[138] New Zealand,[139] Denmark[140] and Canada, *[141]* in order to provide basic income guarantee to the elderly and the cost is borne entirely by the government. Similarly, the cost of family allowance, payable to almost all residents is being financed entirely from the general revenue in Canada[142] New Zealand[143] and Australia,[144] whereas in some other countries like Austria,[145] government contributes a certain percentage from general tax revenue.

Furthermore, the value that the developed communities placed on social security is reflected in the percentage of the Gross Domestic Products (GDP) that is expended thereon, which now amounts to about 20 to 30 per cent in many of the industrialised countries where it is most developed.[146] Research has also shown that more than 10 per cent of the GDP is spent in most of the developed countries on old-age security and will grow still higher in the years ahead. In Germany for instance, expenditures of the social security system make up 22.6 per cent of the GDP, the largest proportion arising from the pension system and health insurance. France and Italy also have expenditures of a similarly high percentage relative to GDP for the three main social security branches, that is, pensions, health, and unemployment. Each of these three countries spends more than the UK and nearly double the percentage relative to GDP than the US.[147] In Denmark, about two-thirds of total social expenditure is financed by the State through taxes and duties as against one-third for the European Union (EU) countries on average, which has meant that of the EU countries, Denmark has one of the heaviest tax and duty burdens. Social expenditure in this country accounts for 40 per cent of all day-to-day State expenditure and 28 per cent of the GDP. Benefits linked to old age, sickness and families, however, make up over 70 per cent of all social expenditure.[148] Also, in Sweden, the social insurance

---

137 See Social Security Administration and International Social Security Association, *Supra* n 1 at pp. 100 and 104.

138 *Ibid.* at p. 32.

139 *Ibid.* at p. 146.

140 See Social Security Administration and International Social Security Association, *Supra* n 1 at p.78.

141 See Old Age Security Act, 1985; see also Social Security Administration and International Social Security Association, *Supra* n 1 at p. 56.

142 *Ibid.* at p. 75.

143 See Social Security Administration and International Social Security Association, 2012, *Supra* n 1 at p. 151.

144 *Ibid.* at p. 39.

145 See Social Security Administration and International Social Security Association, 2012, *Supra* n 1 at p. 40.

146 A Euzeby and C Euzeby, *Supra* n 112, at p.52; see also E Chantal, "A Minimum Guaranteed Income Experiments and Proposals", *International Labour Review,* 1987, Vol. 126(3), pp. 253 - 276.

147 H Siebert, *Supra* n 63, at pp. 23 & 34.

148 *Denmark – conditions of life – social security*, p. 3. Available at http://www.um.dk/Publikationer/UM/English/Denmark/Kap3/3-2.asp. (Accessed 5 September 2012).

expenditure, including the unemployment insurance and various family allowances and grants, accounts for approximately 20 per cent of the country's GDP,[149] while in Finland, the share of the total pension expenditure in GDP amounts to 11.3 per cent.[150] In the US, dwarfing all other American public welfare programmes in total expenditures and in the number of persons affected is the Federal Old Age Survivor and Disability Insurance (OASDI) which was established under the provisions of the Social Security Act, 1935 (as amended). The OASDI is the largest government domestic programme, an important source of retirement income for a large number of Americans and the only social insurance programme financed and administered entirely by the Federal Government.[151] In 2012 for instance, $774.6 billion in total benefits was reportedly paid to 57 million people.[152] Also**,** in 2009, reports have it that US spent more on health care, about 17.3 per cent, as a proportion of its GDP than it spent on any other sector of the economy. The Congressional Budget Office has also projected that by 2016, the percentage of GDP consumed by health care would equal 20 per cent.[153] In Australia, as at 2010, over two million Australians of working age receive social security payments at an overall cost of $30 billion per year.[154] In all, while financing from pay roll contributions is still the most frequently used method for covering replacement cash benefits, available data has shown that, in developed communities, there is a general tendency towards increasing the share of taxes for the financing of family benefits, health care and basic pensions.

B. Developing Countries

The financing of social security in the developed countries of Europe and the US is in sharp contrast to the general practice in the developing communities, especially, Africa. In Africa, contributions from the employers and the employees are the major source of financing as there is little or no budgetary allocation or any financial input from the government. It is only in South Africa,[155] Swaziland[156] and Liberia,[157] where tax-financed old-age benefits, subject to a means test, are provided on a universal basis, and in Mauritius[158] and Seychelles[159] and Botswana[160] where tax-financed universal basic pension is provided at a flat rate on a universal basis. Indeed, in the developing countries only 2 per cent to 3 per cent of GDP is spent on old age security.[161] Research has also

---

149 *Social Security in Sweden, Supra* n 59, at p. 8.

150 H Neimela and K Salminen, *Supra* n 58, at p. 49.

151 H J Aaron, *Supra* n 47, at p. 1.

152 A Barry Rand, "Social Security's Impact on the National Economy", available at http://www.huffingtonpost.com/a-barry-rand/social-security-economy_b_4071530.html site accessed on 1 November 2016.

153 S A Channick, "Health Care Reform in a New Political Environment: Predicting the Shape of Change", 2009, p. 2. Available https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397689 Site accessed on 1 November 2016.

154 Australian Council of Social Services (ACOSS) Paper 163, April 2010, *Supra* n 117.

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

156 See Social Security Administration and International Social Security Association, 2012, *Supra* n 1 at p. 165.

157 *Ibid.* at p. 104.

158 *Ibid.* at p. 124.

159 *Ibid.* at p. 151

160 *Ibid.* at p. 37.

161 E James, *Supra* n 53, at p. 2.

shown that in most African countries, the contingencies covering the scope of coverage and the real value of average benefits have changed very little over the years.[162] Indeed, the African continent has been consistently berated as the only developing region in the world whose human welfare indicators are worsening and the proportion of people living below poverty line is increasing.

V. Conclusion

In general, whilst the social security laws of the developed communities have been very functional and effective in providing social safety net to all irrespective of social and economic status, the requisite will power and drive to animate the social security experiment in the less developed communities, particularly of Africa, are, as at now, grossly deficient. It is equally noteworthy that the relative quantum of essential investments of labour, capital and other vital resources apportioned to the social security scheme has been dictated logically by the relative level of awareness of the inestimable value of the social security scheme from one country to another, as well as the economic and fiscal situation in each country. The laws, which have permitted the developed communities to commit an average of about one-third to one-fifth of the total national resources to social security expenditures, have, no doubt, contributed immensely to the present developed status of such communities. The gain has also been in a consciousness of security and in the reduction of poverty. Moreover, there is no doubt that the reduction in money barriers in access to health care has contributed to improvements in health and the general quality of life. The example of the success story of such social security laws in the developed countries, therefore, is a glaring fact to which the less developed communities are freely accessible with a view to emulating them to their own great advantage.

Most of the developed countries, it has been discovered, do have programmed cradle-to-grave safety-nets for their citizens which are administered either on a universal basis or by a combination of the social insurance schemes with social assistance schemes. The social assistance schemes play considerable role in supplementing social insurance benefits for those without other sources of income as well as providing for those without rights to social insurance benefit or for whom such benefits have run out.

In Australia, for instance, the underlying principles of the social security law of the country have been identified as the responsibility to assist those in need; the concept of 'mutual obligation' and a person's relationship status and residence, which largely determine eligibility and rates of payment.[163] There is, therefore, the guaranteed minimum income support designed to provide persons unable to work, prevented from working or who cannot find work (the aged, handicapped, sick, sole parents, the unemployed) with uniform, taxable cash benefits, short or long term, as the case may be. Except for persons over 70 years of age, these benefits are subject to an income test. Over the years, the

---

[162] J Butare and E Kaseke, *Supra* n 36, at p. 3.

[163] The client's relationship status is reflected for example, in the concept of 'member of a couple' by which a lower social security payment is given to a member of a couple than one who is single on the ground that a married couple can share the costs of day-to-day living whereas a single person needs a relatively higher rate to enjoy the same living standard. See Social security – overview and overarching issues, *Supra* n 21.

income test has been progressively liberalised with the additional advantage of catering better for the needs of classes of persons who have never been attached to the labour force or whose eligibility has lapsed (the handicapped from birth, new entrants to the labour force, unmarried mothers, the long – term unemployed). For these persons, general revenue financing facilitates equality of treatment.[164] In the US, the social assistance approach is used to meet the medical care needs of low-income persons under the Medicaid programme.

In Netherlands, a programme under the *Algemene bijstandswet (ABW),* that is, the National Assistance Act, provides a minimum income for all persons residing legally in the Netherlands with inadequate financial resources to meet their essential living costs, taking into account also medical and social circumstances. In Germany, no one who falls into material distress needs despair as the State is enjoined to protect each of its inhabitants from social insecurity and to work towards the realisation of social justice. To achieve these aims, the Social Code of Germany demands that the State must, in good time and on an adequate scale, provide the necessary social services and facilities and make social welfare disbursements.[165] The Social Support Act, which was amended in 2003 and makes up Book XII of the Social Code (SGB XII), provides a safety-net, to protect from poverty, social exclusion and hardship, for those unable to help themselves or unable to obtain the help they need from family members or from the various branches of the social insurance schemes. Thus, every inhabitant of Germany - native or alien - is entitled to social support in such crisis situations: to maintenance grants or grants to help cope with particular circumstances such as disability, illness, unemployment or old age.[166]

It is humbly submitted that this is a major secret of the stupendous socio-economic progress, civilisation and affluence of the developed communities, which the developing communities would want to studiously understand and anxiously emulate in the interest of the adequate welfare and security of their people.

---

[164] See A Herscovitch and D Stanton, "History of Social Security in Australia", *Family Matters,* 80: 51 – 60 at 51, available at https://aifs.gov.au/publications/family-matters/issue-80/history-social-security-australia Site accessed 1 November 2016.

[165] *Supra* n. 13 at p. 240.

[166] *Ibid.* at p. 245.

The Introduction of the Fourth Estate into Malaysian Jurisprudence and its Impact on Political Libel: A Prefatory View

Jaspal Kaur Sadhu Singh*

Abstract

The paper considers the impact of the Court of Appeal decision in *Utusan Melayu (Malaysia) Berhad v Dato' Sri DiRaja Haji Adnan bin Haji Yaakob* on the role of the media as the Fourth Estate. It focuses on the determination by the court that a political libel suit against a newspaper will result in inhibiting free speech that is in the public interest such as a critique against democratically elected bodies or individuals. This paper argues that firstly, by the court taking the position as laid down in the House of Lords' decision of *Derbyshire CC v Times Newspapers Ltd*, the court introduces the role of the media acting as a Fourth Estate into Malaysian jurisprudence, and secondly, building on the said position, prohibiting a political libel suit being taken by an individual against a media entity. It is contended that there is a foundational basis that by prohibiting a political libel action against a media entity, the court has endorsed this role as being vital in the functioning of a democracy. The paper sets out, firstly, an in-depth understanding of the role of the media as the Fourth Estate, the theoretical underpinnings and the underlying legal rationale, in particular the protection of freedom of speech and expression, for the justification of the said role. Secondly, the paper describes the proposition in *Derbyshire* and its extrapolation into Malaysian common law in *Utusan Melayu*. Thirdly, it establishes a nexus between the judgments in *Derbyshire* and *Utusan Melayu* that the media's role to check on government is a dimension of freedom of speech and expression that should not be suppressed or curtailed, particularly by defamation suits against media entities that are viewed as stifling this role. Finally, the author reflects on several post-judgment considerations drawn from both judgments.

Keywords: Freedom of Speech, Fourth Estate, Media Rights, Political Libel.

[Edmund] Burke said there were Three Estates in Parliament; but in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech, or a witty saying; it is a literal fact…Printing…is equivalent

* The author is grateful for the helpful advice and comments of the anonymous reviewers. PhD (Aberystwyth), LLM (UKM), LLB (Hons) (London), CLP, Advocate & Solicitor (High Court of Malaya) (Non-Practising), HELP University, No. 15 Jalan Sri Semantan 1, Bukit Damansara, 50490 Kuala Lumpur, Malaysia. Tel: +603-2711200, +603-20992920. Email: jaspalk@help.edu.my

to Democracy…Whoever can speak, speaking now to the whole nation, becomes a power, a branch of government, with inalienable weight in law-making, in all acts of authority. It matters not what rank he has, what revenues or garnitures: the requisite thing is that he have a tongue which others will listen to; this and nothing more is requisite[**]

I. Introduction

On 1 March 2016, the Malaysian Court of Appeal in arriving at its judgment in *Utusan Melayu (Malaysia) Berhad v Dato' Sri DiRaja Haji Adnan bin Haji Yaakob*[1] referred to the decision by the United Kingdom (UK) House of Lords in *Derbyshire CC v Times Newspapers Ltd*.[2] The implications from this judgment are manifold. One of these is essentially establishing the role of a newspaper as the Fourth Estate. This is a historical milestone in the recognition of the rights of the media as carrying out a public interest function. Lord Keith, delivering the unanimous judgment of the court in *Derbyshire*, concluded that under the common law of England, a local authority does not have the right to maintain an action of damages for defamation on the basis that it is a democratically elected body. His Lordship clarified that it is a matter of great public importance that public criticism should be directed at democratically elected governmental bodies and that the consequence of a civil action for defamation against such criticism will be an impediment to free speech.[3]

His Lordship premised his findings on two United States' (US) authorities and one South African judgment which will be discussed *infra*. *Derbyshire*, it is worth noting, is not short of criticism. However, its critique is beyond the scope of this paper.

In *Utusan Melayu*, the question before the Court of Appeal was whether the respondent had *locus standi* to initiate and maintain an action for defamation.[4] The appellant had published an article criticising the respondent in his capacity as the Chief Minister of the State of Pahang and his administration. The question before the court in the appeal was the extent to which public officials, in a position similar to that of the respondent, may sue for defamation to protect their reputation. The question also presented before the court for consideration the resolution of the debate arising from the conflict between the right to freedom of speech and expression guaranteed under Article 10(1)(a) of the Federal Constitution on one hand, and the protection of individual's reputation on the other.[5]

The foundation of the contention by the appellant that the respondent's action for defamation was prohibited on the basis that the respondent was an elected representative who could be subjected to public criticism, lies in the English common law decision of *Derbyshire*.[6] The appellant contended that to allow such an action to subsist in the context

---

[**] Thomas Carlyle, On Heroes, Hero Worship and the Heroic in History ([1841] 1993) 141.

1 [2016] MLJU 302.

2 [1993] 1 All ER 1011.

3 *Ibid.* at p. 1017, para (j).

4 *Supra* n 1, at para [6].

5 *Supra* n 1, at para [10].

6 *Supra* n 1, at para [12].

of the surrounding circumstances would be damaging the guarantee of free speech under Article 10 and will have the effect of restraining the public, and particularly the press, from being constructively critical of public administration.

The Court of Appeal found that the article published by the appellant-newspaper concerned the respondent in his official capacity as the Chief Minister of the State of Pahang and not in his personal capacity. The court held that the defamation claim by the respondent against the appellant, if allowed, would result in a chilling effect on free speech and "may prevent the publication of matters which it is desirable to make public."[7]

The essence of the decision is that, a publication comprising of a critical commentary of an elected person or body in its administrative function is an extension, or part of, the right to free speech and expression enshrined in the Federal Constitution. A political libel action therefore will only serve to abrogate the protection of this freedom and curtail the role of the press (or media or journalist) in its role as the Fourth Estate – a role where the press acts to inform the citizenry of matters of public interest at one level, and at a more sophisticated level, act as a checking mechanism on the Executive.

The paper will firstly provide an in-depth understanding of the role of the media as the Fourth Estate, the theoretical underpinnings and the underlying legal rationale, in particular the protection of freedom of speech and expression, for the justification of the said role; secondly, the paper describes the proposition in *Derbyshire* and its extrapolation into Malaysian common law in *Utusan Melayu*. Thirdly, it establishes a nexus between the judgments in *Derbyshire* and *Utusan Melayu* that the media's role to check on government is a dimension of freedom of speech and expression that should not be suppressed or curtailed, particularly by defamation suits against media entities that are viewed as stifling this role. Finally, the author reflects on several post-judgment considerations drawn from both judgments.

II. A Historical Perspective of the Evolution of the Role of Media as the Fourth Estate

In order to appreciate the role of the media as the Fourth Estate, tracing its historical perspective from its inception and acceptance in the UK and the US will set the basis for the acceptance of this role within the higher ideals and principles of a democratic state. This role is enhanced by principles of law established either by the courts in common law or by legislative initiatives founded on constitutional traditions. Media writers and journalists have provided considerable contribution to the appreciation of this role.

---

7 *Supra* n 2, at p. 1018, para (g). A phrase quoted by the Court of Appeal from Lord Keith's judgment in *Derbyshire*.

8 Brian McNair, *Journalism and Democracy: An Evaluation of the Political Public Sphere*, Routledge, 2000, p. 62.

9 Thomas Carlyle, *On Heroes, Hero Worship and the Heroic in History* ([1841] 1993), p. 141.

10 Denis McQuail, Media Accountability and Freedom of Publication, Oxford University Press, p. 52.

11 *Ibid*. at p. 52.

12 Quoted in Boyce; D George Boyce, 'The Fourth Estate: The Reappraisal of a Concept' in George Boyce, James Curran and Pauline Wingate (eds), *Newspaper History: From the 17th Century to the Present Day*, Constable, London, 1978.

From the role of the media as a disseminator of information and reportage, the media has embraced the function of being advocates of change, a mouth-piece for engaging debate and even dissent. Political journalism or the role of the media as the Fourth Estate saw its passionate beginnings, its failings, its critics and continued transformation. From the late 17th century in Europe, newspapers, apart from reporting events, advocated social and political change. McNair refers to this element as being essential, from then to the present, to the role of journalists in a liberal democracy.[8]

The origin of the phrase "Fourth Estate" is unclear. The first reference was made by historian Thomas Macaulay when referring to the Press gallery in Parliament in an essay in 1828 and later by Thomas Carlyle.[9] In 1840, Carlyle made reference to the press as the Fourth Estate in his infamous statement quoted at the beginning of this article.

The role of the press as the Fourth Estate is as an "informative press" which is crucial in its role as the "democratic press". This importance was seen particularly in the US from the 1870s which saw the rise of the "informative press", free from political influence, to act as a check on government and political decision-making as a whole, disclosing political activities and engaging debates. In 19th century Britain, McQuail adds that the said "expression and idea" was adopted by "serious newspaper press, increasingly conscious of its influence."[10] He adds the essential elements of this role comprising of the following: "autonomy from government and politicians; having a duty to speak the truth, whatever the consequences; and having primary obligations to the public and to readers."[11]

Several of the writers and editors of newspapers that subscribed to the role of the press as the Fourth Estate expounded on this role as a standard to aspire to. In England, *The Times* saw itself as the Fourth Estate from the 1830s to the 1850s. *The Times* writer Henry Reeve referred to journalism as "an estate of the realm; more powerful than any of the other estates".[12] John Thaddeus Delane, the editor of the *Times* in 1860 defined this role following the abolition of the paper duties as the business of disclosure when he made the following comment – "The first duty of the Press is to obtain the earliest and most correct intelligence of the events of the time, and instantly by disclosing them, to make them the common property of the nation".

In the US, the vision of the publisher James Gordon Bennett of the New York *Herald* which started its publication in 1835 was "to make the newspaper press the great organ and pivot of government, society, commerce, finance, religion, and all human civilization."[13] In playing this role, taking a balanced approach became essential. *The New York Times,* first published in 1851, became one of the earlier professors of this approach in separating news from views. Henry Raymond, its founder stated; "We do not believe that everything in society is either exactly right or exactly wrong; what is good we desire to preserve and improve; what is evil to exterminate and reform."[14] This led to the American press breaking alliances with political parties in order to play not only a balanced role but a

---

13 Quoted in Asa Briggs and Peter Burke, *A Social History of the Media: From Gutenberg to the Internet*, 2nd ed., Polity, Cambridge, 2005, p 155.

14 Asa Briggs and Peter Burke, *supra* n 13, at p. 155.

more objective one. This role was not always favoured as journalists were already being regarded as hacks but were now being seen as "intruding busybodies".[15]

From the 19th century and into the present time, this view of the press is embedded in liberal theory where democracy and a check on the State are vital.[16] Curran and Seaton added to the liberal theory perspective of the press that whilst press freedom is the right of the publisher to be utilized on behalf of society, its role has to be consistent with the public interest as their actions are regulated by the free market.[17] This freedom of the press, premised on Holmes' marketplace theory discussed *infra,* forwards the position that "the best test of the truth is the power of the thought to get itself accepted in the competition of the market". This position was endorsed by the UK Royal Commission on the Press.[18]

The role of the media as the Fourth Estate is often assumed in recent discussions. McNair comments:

> That the actions of government and the state, and the efforts of competing parties and interests to exercise political power, should be underpinned and legitimized by critical scrutiny and informed debate facilitated by the institutions of the media is a normative assumption uniting the political spectrum from left to right.[19]

The sentiments to reinforce the utility of journalism in a functioning democracy continued to be made by publishers of newspapers. The publisher of the Philadelphia *Public Ledger*, George W. Ochs in a powerful essay in 1906 succinctly observed the importance of the evolution of the role of journalism:

> Journalism has become a very potential, if not a chief, factor in the world's affairs. The advance of civilization may be measured by the dissemination of learning; it received its chief impulse from the art of printing-hence it may be affirmed truthfully that civilization entered upon its latest phase only when printing had attained its latest development, an important manifestation of which is the growth of journalism. The press within a half century has become the chief medium of enlightenment; it has awakened the masses to full perception of their powers, and has established the fact that an alert and aroused public opinion is irresistible, the mightiest force evolved by modern civilization.[20]

Political journalism, the journalism of the Fourth Estate, has in recent times transformed into political commentary which McNair calls the "interpretative moment".[21] He describes

---

15 Comment made by Anthony Trollope; quoted in Asa Briggs and Peter Burke, *supra* n 13, at p. 163.

16 The theoretical underpinnings of this view is discussed in Heading (III) Sub-heading (A).

17 James Curran and Jean Seaton, *Power Without Responsibility: Broadcasting and the Press in Britain*, 6th ed., Routledge, London, 2003, pp. 346-347.

18 Royal Commission on the Press, *Final Report*, HMSO, 1977, p. 109.

19 Brian McNair, *Journalism and Democracy: An Evolution of the Political Public Sphere*, Routledge, London, 2000, p. 1.

20 George W Ochs, "Journalism", *The Annals of the American Academy of Political and Social Science*, 1906 (July), Vol. 28, p. 38.

21 Brian McNair, *supra* n 19, at p. 61.

this as "spaces in the public sphere where evaluation of, and opinion about the substance, the style, the policy content or the process of political affairs replaces the straight reportage of new information."[22]

III. Theorising the Role of the Fourth Estate

Essential to the understanding of the role of the media as the Fourth Estate is to place the appreciation of this role in the context of relevant theoretical underpinnings. Several theories are integral in developing a comprehensive and cohesive premise in establishing the validity of common law principles or legislative initiatives that support the role of the media as the Fourth Estate.

Media theory as a subject, according to Inglis, is a version of political theory which is a matter of trying to work out how the world works and how it ought to work.[23] Inglis commented that, "at its heart, in other words, are the connections between theory and practice, thought and action, knowledge and virtue."[24] The link between politics and media is made when the media acts as the mediator by acting as the public communications system between relations that are central to politics. Politics, which has its preoccupation with power in the study of the public realm and our relations to one another in public, relies on the media for its sustenance. It is in the public realm this interplay between politics and the media takes place.

The theories that support the role of the media as the Fourth Estate, *inter alia*, are the liberal theory of press freedom which will encompass a discussion on Mill and the "marketplace of ideas theory" as propounded by Holmes in his dissent in *Abrams v US*.[25]

A. The Liberal Theory of Press Freedom

Much of the importance of the role of journalism in the Fourth Estate rests on its role in promoting freedom of speech. The jurisprudence on the importance of freedom of speech is drawn from the need to have channels of free speech. The press is seen as one of these channels and it was only natural for the scholars of media theory to take the writings of Milton,[26] Locke[27] and Mill,[28] and categorise them as the liberal theory of press freedom. The theory is one of the strongest cornerstones for press freedom and has been extrapolated by the US Supreme Court in articulating its marketplace of ideas theory, discussed *infra*.[29] John Milton published his famous unlicensed pamphlet, *Areopagitica,*[30] seen as "the first statement of the liberal view that in a free market of ideas, the good will

---

22 *Ibid*.
23 Fred Inglis, *Media Theory: An Introduction*, Basil Blackwell, Oxford, 1990, p 18.
24 *Ibid.*
25 (1919) 250 US 616.
26 John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing*, 1644.
27 John Locke, *Second Treatise of Government*, 1689; *A Letter about Toleration*, 1689.
28 John Stuart Mill, *Of Liberty of Thought and Discussion* (1859).
29 *Supra* n 25, as per Holmes J; *Whitney v California* (1927) 274 US 357, as per Brandeis J; *Kovacs v Cooper* (1949) 336 US 77, as per Frankfurter J.
30 *Supra* n 26.

supplant the bad and that all intelligent people need is access to the fullest expression of ideas for they themselves to distinguish the former from the latter."[31] Milton opposed State restrictions of freedom of expression as it removed the choice of individuals to make their own judgements of what they read. The importance of open discussion to the discovery of truth is one of four of the arguments proffered by Barendt[32] for a free speech principle. This thought is particularly associated with John Stuart Mill.[33] The value of intellectual discussion and the need for all individuals to be able to debate public affairs vigorously is part of the essence of the Millian principle. Mill promoted the values of the free press in his book *On Liberty*. In the opening line of the second chapter of his book titled *Of the Liberty of Thought and Discussion*, Mill sets out the role of the press or media in keeping a check on the State – "the time, it is hoped, is gone by when any defence would be necessary of the 'liberty of the press' as one of the securities against corrupt or tyrannical government."

Mill advocates that the opinion of each person is valuable and this opinion can be valued by other individuals and society to be either true or untrue. If it is untrue, it provides an opportunity for the truth to emerge. Mill, in Chapter 2 of *On Liberty*, comments as follows - "if the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error…"

Curran[34] summarised the theory as one that holds that "the freedom of the press is rooted in the freedom to publish in the free market" and adds that the press therefore serves democracy in three ways – in informing the electorate, the watchdog role of overseeing and checking on the government, and articulating public opinion.

The emergence of the truth being regarded as the most overarching importance of free speech may not always be justified. Barendt assists on this point when he comments that perhaps certain statements need to be suppressed when they do not promote other equally important values such as racist and hate speech.[35] He further adds that Mill's proposition may have "overvalued intellectual discussion" assuming that all individuals are capable of debating public affairs.[36] Several people may find the assumption by Barendt as disagreeable as all individuals should have the opportunity to debate public affairs whether or not they possess the "capability".

Arguments to defend the role of the press and the media in democratic states often draw their merits from the liberal theory of the press. There are four distinguishable but overlapping arguments expanded on by Keane.[37] The first is the theological defence where

---

31 Martin Conboy, *Journalism: A Critical History,* SAGE, London, 2004, p. 32.

32 Eric Barendt, *Freedom of Speech*, 2nd ed, Oxford University Press, London, 2005, pp. 6-7.

33 John Stuart Mill, *On Liberty* (1859), Chapter II 'Of Liberty of Thought and Discussion'.

34 James Curran, 'The liberal theory of press freedom' in James Curran and Jean Seaton, eds., *Power Without Responsibility: Press, Broadcasting and the Internet in Britain: Press and Broadcasting in Britain*, 5th ed., Routledge, London, 1997, p. 287.

35 Eric Barendt, *supra* n 32, p 8.

36 *Ibid.* at p. 9.

37 John Keane, *The Media and Democracy*, Polity, Cambridge, 1991.

Keane makes particular reference to Milton's *Aeropagitica* where he "pleaded for a free press in order to let the love of God and the 'free and knowing spirit' flourish"[38] and that restrictions on the press were "repugnant because it stifles the exercise of individual's freedom to think, to exercise discretion and to opt for a Christian life".[39] The basis of the second argument is rights of individuals premised on writings of Locke,[40] Tindal[41] and Asgill[42] whereby the right of the individual not only includes the right to decide matters of politics or religion but the right to express views freely including views that may not accord with those of the government.[43] The third argument is based on the utilitarian theory where the control of the press by the government which nullifies public opinion reduces the happiness of people. The sentiments are that a free press is an "ally of happiness" checking on government.[44] Keane's last argument is based on the attainment of truth whereby truth can be attained through unrestricted and free discussion drawing this argument's strength from Mill's *On Liberty*.

Apart from the first argument, Keane's extrapolation is extremely relevant in the context of rationalising the media's role as the Fourth Estate.

B. *Marketplace of Ideas Theory*

The "marketplace of ideas" theory was originally derived from Mill and was given judicial recognition by Justice Brandeis and Justice Holmes in the US Supreme Court.

The "marketplace of ideas" theory of free speech has been enormously influential in American jurisprudence. Developed by Justice Holmes in his dissenting judgment in *Abrams* v *US,*[45] the theory suggests that the truth would emerge from "free trade in ideas" or intellectual competition and that the regulation by government distorts the working of a free market for the exchange of ideas resulting in the courts undertaking great scrutiny as a result of a mistrust of government intervention even when it is meant to foster free speech.

Justice Holmes in *Abrams* held that the truth will emerge from a "free trade in ideas":

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[46]

---

38 *Ibid.* at p. 11.
39 *Supra* n 37, at p. 12.
40 John Locke, *A Letter about Toleration*, 1689.
41 Mathew Tindal, *Reasons Against Restraining the Press*, 1704.
42 John Asgill, *An Essay for the Press*, 1712.
43 *Supra* n 37, at p. 13.
44 *Supra* n 37, at p. 16.
45 *Supra* n 25, at pp. 630-31, as per Holmes J.
46 *Supra* n 45.

Justice Brandeis affirmed this in *Whitney,* adding that the "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[47]

In short, if ideas are available and compete with or counter each other, the "good counsels" will prevail.[48] It is essential to note that both Justices Holmes and Brandeis laid out "the clear and present danger" test that may restrict speech in the marketplace whereby speech will not be protected where there is "a clear and present danger that will bring about the substantive evils that Congress has a right to prevent."[49]

Baker sets out the assumptions that need to be appreciated to assess the theory's merits. The first assumption is that the truth must be "objective" or "discoverable".[50] Baker explains that the ability of the truth "to outshine falsity in debate or discussion" is only possible "if truth is there to be seen."[51] The second assumption is that people are rational and that they "possess the capacity correctly to perceive truth or reality."[52] This assumption is based on further assumptions - firstly, that "a person's personal history or position in society must not control the manner in which he or she perceives or understands the world" and secondly, "people's rational faculties must enable them to sort through the form and frequency of message presentation to evaluate the core truth in the messages."[53] The latter is essential as acceptance of the truth in the marketplace of ideas cannot be based on only perspectives that were more attractively and "effectively packaged and promoted."[54] The third assumption comprises several interrelated assumptions. Baker expounds this:

> The discovery of truth must be desirable - for example, because truth provides the best basis for action and, thereby, uniformly promotes human interests. If 'objective' truth provides the best basis of action, then as humanity progressively finds more truth, the diversity of practice as well as of opinion should gradually narrow. Cultural pluralism should progressively diminish. Moreover, truth would provide the basis for resolving value conflicts. For objective truth to be the proper basis of action implies that people's real interests do not conflict. In contrast, if truth is not objective or is not the best basis of action, there could be intractable value conflicts. Then the value of the marketplace of ideas would be unclear. Whether robust debate is useful would depend on whether it advanced or obstructed the interests of the group one favors or the group that 'ought' to prevail.[55]

The media is often perceived as the marketplace but what is available in the marketplace is very much mediated by the powers that own the media or through a process of editorial

---

47 *Whitney v California* 274 US 357 (1927) 375, Brandeis and Holmes JJ dissenting.

48 David A Strauss, "Persuasion, Autonomy and Freedom of Speech", *Columbia Law Review*, 1991, Vol. 91, p. 348.

49 *Schenk v United States* 249 US 47 (1919) 52, revisited in *supra* n 47, p 376, as per Brandeis J.

50 C Edwin Baker, *Human Liberty and freedom of Speech*, Oxford University Press, Oxford, 1989, p. 6.

51 *Ibid*.

52 *Supra* n 50, at pp. 6-7.

53 *Supra* n 50, at p. 7.

54 C Edwin Baker, *supra* n 53.

55 *Ibid.*

gatekeeping. Therefore regulation of the media is required in order to ensure that varied views and opinions can be heard in the marketplace. This is perhaps the model adopted in liberal democracies but not always the case in legal systems where the media is state-regulated or where there are legal filters on the type of speech that can be disseminated.

The media as a platform is indeed representative of "the marketplace of ideas". The idea that the citizenry ought to have access to a variety of views made available through the media ties in with the self-realization value that the theory positions itself on. This is where "the individual needs an uninhibited flow of information and opinion to aid him or her in making life-affecting decisions, in governing his or her own life."[56]

IV. The Legal Foundation for the Fourth Estate Role

The legal basis of the Fourth Estate can be traced back to the tradition of protecting and promoting freedom of speech and expression found in international human rights law and at the national level, in constitutional provisions that enshrine this freedom.

A. *International Conventions*

The right to free speech and expression has developed through the centuries and has now been enshrined in conventions and constitutions.

The idea of a right to freedom of expression is derived from the 17th and 18th century European Enlightenment which saw the struggle against the power of monarchist rulers. In the UK, the earliest source of protecting free speech was the Bill of Rights 1688, where Article 9 sets out that freedom of speech is essential to members of Parliament to speak and debate freely in Parliament. The clause reads – "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." In the First Amendment of the US Constitution, it is provided that – "Congress shall make no law…abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".[57]

The international authority for the freedom of speech and expression is Article 19 of the Universal Declaration of Human Rights.[58] Although the Declaration is not an international treaty, nevertheless, Article 19 provides an international reference for media rights to build on. Article 19 of the Declaration reads – "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

---

[56] Martin H Redish, "The Value of Free Speech", *University of Pennsylvania Law Review*, 1982, Vol. 130, p. 618.

[57] Bill of Rights 1791.

[58] Adopted 10 December 1948 by the General Assembly of the United Nations. The declaration is not a treaty but it is considered as customary international law.

This right is reiterated but qualified in Article 19 of the International Covenant on Civil and Political Rights[59] with the main addition being the proviso in Clause 3 of the said Article. As the covenant is a binding treaty, the inclusion of permitted limits on the rights is highly relevant. The Article reads:

> 1. Everyone shall have the right to hold opinions without interference.
> 2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
> 3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary*:
> (a) *For respect of the rights or reputations of others*;
> (b) *For the protection of national security or of public order, or of public health or morals*.[60] [Emphasis added]

Further, Article 10 of the European Convention of Human Rights[61] adopted by the Council of Europe resembles Article 19 of the United Nations' Universal Declaration of Human Rights 1948, even more so Article 19 of the International Covenant on Civil and Political Rights. The provisions of the Convention were adopted by the UK in the Human Rights Act 1998, which came into force on 2 October 2000, with the various articles contained in Schedule 1 and are treated as constitutional principles.

Article 10(1) reads:

> 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.

This Article qualifies itself in Clause 2 which reads:

> 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.

---

59 Adopted 16 December 1966 by General Assembly resolution, entered into force 23 March 1976.

60 Signed by the US and the UK. Unsigned by Malaysia.

61 The Convention's formal title is "Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, November 4, 1950".

In relation to Malaysia, Article 10 Clause 1 of the Federal Constitution reads that "every citizen has the right to freedom of speech and expression". The Article is limited to citizens and does not expand on what the freedom includes. In the case of Article 10 of the European Convention where the freedom is extended to all with the use of the words "[e]very one" and the right includes "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." There is no explicit extension of the right to the press or the media in general.

Article 10 Clause 1 of the Federal Constitution is subject to certain clauses such as Clause 2 which reads:

> (2) Parliament may by law impose -
> a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

The restriction is deemed as wide and the omission of any qualification on the restrictions leaves the court with minimal jurisdiction to review the constitutionality of a legislation which acts as the restrictive mechanism.

B. *The Relationship between Freedom of Speech/Expression and Media Rights*

The extent of the adoption of Article 19 of the Declaration or Article 19 of the Covenant differs between States and this is evident when discussing this perspective between the US, the UK and Malaysia. The protection of free speech and speech by media varies amongst States.

Certain States exert control over dissemination of news and information and certain others encourage, within acceptable limits, the same. These are the polar extremes of the level of media and press freedom that exists. The relationship of the State and the press is two-dimensional – on one hand, the use of power to limit or suppress discussion to protect *inter alia* individual interests against untruthful, unjustifiable and intrusive publications and protection of the community and security;[62] and on the other hand, affirmative State initiatives to encourage communication of news and ideas and accessibility of information. Whichever the case, there is no denying the continued determination by states to rise up to the standards of Article 19 of the Universal Declaration of Human Rights 1948 either voluntarily or under the pressure of its increasingly informed, connected and educated citizenry.

Within States, the development of free speech in general and in terms of the press, depends on the importance given to constitutional provisions that provide for the said

---

[62] Similar to the proviso in Article 19 of the Covenant.

freedoms and to the importance of the role of the mass media[63] in promoting them. The freedoms which were propounded to guarantee freedom of individuals are extended to the mass media in view of the role played by the media in public discourse. In reference to the extension of this freedom to the media, Barendt [64] comments that in view of the media providing readers, listeners and viewers with information, it facilitates the active participation in political democracy, playing the vital role as the "public watchdog"[65] and the "eyes and ears of the general public".[66]

C. The First Amendment and the Fourth Estate in the US

In the US, the First Amendment to the Bill of Rights protects freedom of speech as the most fundamental of all rights. The First Amendment forbids Congress to make laws "abridging the freedom of speech, or of the press."

The rich heritage that has given the First Amendment its voice in the writings of Locke, Paine, Bentham and Mill has also provided the US press and the media in general, its freedom. Rich summarised this:

> Underlying these First Amendment guarantees is the belief that the key to effective government is an informed citizenry, one that is not told by the government what is right, but instead makes those determinations itself, through its own education. Armed with the knowledge provided to them in a free 'marketplace of ideas', these citizens elect officials who, with the citizens' informed consent, steer the government on its proper course.[67]

The marketplace theory became the soap-box for judges and legal scholars upon which to build democratic participation in effective government. It is precisely this positioning that has given the press a preferred constitutional position in the context of the First Amendment.

Barron[68] when writing on the First Amendment and access to the press commented that "little attention" has been paid to the definition of the purposes the said amendment seeks to achieve. He directs us to the opinion of Justice Brandeis in *Whitney v California*[69] and Justice Murphy in *Thornhill v Alabama*[70]. Barron summarises Brandeis's concurring

---

63 Freedom of the press amounts to freedom of 'the media' and the term 'press' and 'media' are used interchangeably. Melville B Nimmer, "Introduction – Is Freedom of the Press A Redundancy: What Does it Add to Freedom of Speech?", *Hastings Law Journal*, 1974-1975, Vol. 26, p 639; See also *Gertz v Robert Welch, Inc.* (1974) 418 US 323; *United States v Paramount Pictures, Inc.* (1948) 334 US 131.

64 Eric Barendt, *Freedom of Speech*, 2nd ed, Oxford University Press, Oxford, 2005, pp. 417-8.

65 Borrowing the phrase from the decision in *Observer and Guardian v UK* (1992) 14 EHRR 153, para [59].

66 Phrase used by Sir John Donaldson MR in *AG v Guardian Newspapers Ltd* (No.2) [1990] 1 AC 109 (CA) 183.

67 R Bruce Rich, 'The United States of America' in Nick Braithwaite (ed), *The International Libel Handbook*, Butterworth-Heinemann, Oxford, 1995, p. 1.

68 Jerome A Barron, "Access to the Press – A New First Amendment Right", *Harvard Law Review*, 1967, Vol. 80 1641, p. 1648.

69 (1927) 274 US 357, 375.

70 (1940) 310 US 88, 102.

opinion as follows – " …that underlying the first amendment guarantee is the assumption that free expression is indispensable to the 'discovery and spread of political truth' and that the 'greatest menace to freedom is an inert people.'…"[71]

In *Thornhill v Alabama*, Justice Murphy emphasised the importance of "the public need for information and education with respect to the significant issues of the times." However, the Supreme Court has held that protection could be restricted where there is "imminent lawless action" or speech that was likely to produce such action,[72] or if the speech presented "a clear and present danger" that will bring about imminent danger and substantive evil to the State.[73]

Barron also highlights the further purpose of the First Amendment in providing protection of the right of access to the mass media – the "public order function"[74] relying on Justice Cardozo in *Palko v Connecticut*[75] and Justice Brandeis in *Whitney v California* who both emphasised the importance of the opportunity to communicate ideas.[76] Justice Cardozo in *Palko* made reference to the freedom of thought and speech as "the matrix, the indispensable condition of nearly every other form of freedom."[77] Justice Brandeis stressed the dangers of suppressing speech:

> …it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies…[78]

Justice Brandeis in his concurring opinion in *Whitney v California*, reaffirmed the justifications for free speech as essential in allowing a citizenry to develop its faculties, that it is an end in itself as it is the secret of happiness, that "public discussion is a political duty" and adds that freedom of speech is the "path to safety" if there is an opportunity to discuss matters freely.[79]

The wording of the First Amendment that speaks of the "freedom of speech" and "freedom of the press" has led to the discussion that there is a possible construction of a constitutional role for the press in addition to the freedom of speech being the right of individuals. In the construct of the First Amendment, freedom of the press could be subsumed under freedom of speech or as a distinct freedom with differing scope. Barendt proposes three perspectives on the relationship between the two freedoms – freedom of speech and freedom of the press.

---

71 Jerome A Barron, *supra* n 68.
72 *Brandenburg v Ohio* (1969) 395 US 444, 447.
73 *Schenck v United States* (1919) 249 US 47, 52.
74 Jerome A Barron, n 68, p 1650.
75 (1937) 302 US 319, 327.
76 Jerome A Barron, *supra* n 68, at p. 1650.
77 *Supra* n 75.
78 (1927) 274 US 357, p. 375.
79 *Supra* n 78.

The first perspective is that both the freedoms are equivalent. References are made to Dicey, the UK Court of Appeal decision in *AG v Guardian Newspapers Ltd*[80] and the attitude of the US Supreme Court. Barendt[81] comments that Dicey "treated freedom of speech and liberty of the press as interchangeable terms."[82] Further, in *AG v Guardian Newspapers Ltd*, Sir John Donaldson expounded that the right of the media to know and to publish "is neither more nor less than that of the general public."[83] On the attitude of the US Supreme Court, Barendt forwards the view that the US Supreme Court has not accorded the First Amendment "freedom of the press" limb a distinct coverage over and above the freedom of speech enjoyed by any other individual.[84]

The second perspective that freedom of the press is a distinct freedom from freedom of speech is based on the rationale that the press carries out the function of checking on government. This perspective forwards the role of the media as the Fourth Estate. In support of this stand, Barendt refers to Supreme Court Justice Potter Stewart[85] who contends that the "free press" guarantee is a "structural provision" of the US Constitution.[86] Justice Stewart relies on Supreme Court cases[87] to support his contention such as where the privilege of a journalist to refuse disclosure of confidential sources was lost only on a slim five to four majority in the court,[88] where the court refused to grant a restraining order against the *New York Times* and other newspapers from publishing the Pentagon Papers,[89] where the court declared a Florida statute as unconstitutional as it compelled newspapers to grant a "right of reply" to political candidates who they were critical of,[90] where the court ruled that political groups did not have a right of access to federally regulated media[91] and a series of decisions where the court ruled that a public figure could not sue a publisher for libel unless the claimant could prove that the publication was a malicious damaging untruth.[92] This contention is premised on Justice Stewart's opinion that it would be a constitutional redundancy if the freedom of the press was not treated distinctly from freedom of speech in view of the inclusion of both guarantees in the First Amendment.[93] Justice Stewart comments that the primary purpose of the constitutional guarantee of a free press is "to create a fourth institution outside the Government as an additional check on the three official branches" and that it would be a mistake to limit the role of the press, or which purpose the constitutional guarantee to merely being "a

---

80 [1990] 1 AC 109.
81 Eric Barendt, *supra* n 32, at p. 419.
82 AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed., MacMillan, London, 1959, Ch. VI, The Right to Freedom of Discussion, 239.
83 *Supra* n 80, at p. 183.
84 Eric Barendt, *supra* n 32.
85 Potter Stewart, "Or of the Press", *Hastings Law Journal*, (1975, Vol. 26, p. 631.
86 Potter Stewart, *supra* n 85, at p. 632.
87 *Ibid.* at pp. 632-633.
88 *Branzburg v Hayes* (1972) 408 US 665.
89 *New York Times Co v United States* (1971) 403 US 713.
90 *Miami Herald Publishing Co v Tornillo* (1974) 418 US 241.
91 *Columbia Broadcasting System Inc v Democratic National Committee* (1973) 412 US 94.
92 *Rosenbloom Metromedia Inc* 403 US 29 (1971); *Curtis Publishing Co v Butts* (1967) 388 US 130; *New York Times Co v Sullivan* (1964) 376 US 254.
93 Potter Stewart, *supra* n 85, at pp. 633-634.

neutral form for debate, a marketplace of ideas'' or "a kind of Hyde Park corner for the community."[94]

The third perspective forwarded by Barendt is where the protection is accorded only to "the degree to which it promotes certain values at the core of our interest in freedom of expression generally."[95] This perspective views freedom of the press as an instrument to promote values of freedom of speech such as pluralism in the sources of information in areas of public interest.[96]

Barendt forwards two attractions for taking this perspective – firstly, it brings in line the role of the media in disseminating ideas and information to the public; and secondly, it does not draw a distinctive line between rights of institutional media and other individuals who may also provide information to the public on matters of public interest. This protection, however, requires some form of recognition either by the courts or the legislature.

The second and third perspective promotes the role of the media as the Fourth Estate highlighting a distinct right role of the media to check on the Executive and to provide information in matters of public interest.

D. English Common Law, Article 10 of the ECHR and the Fourth Estate

The UK signed the European Convention of Human Rights[97] as member of the Council of Europe in 1950[98] and became subject to the jurisdiction of the European Court of Human Rights[99] ("the ECtHR") in 1966 where the right of individual petition was allowed to bring a case to the Strasbourg court. The Strasbourg court's jurisdiction is evoked under Article 34 of the European Convention, where "any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."

Prior to the incorporation of the European Convention of Human Rights by virtue of the Human Rights Act 1998 ("the HRA") into the UK domestic law, the Bill of Rights 1688, Article 9, only speaks of freedom of speech being essential to members of Parliament to speak and debate freely in Parliament. Protection of freedom of expression and speech of the individual or the press was left in the hands of Parliament and the courts – meaning freedom of speech existed where it was not limited or restricted by Parliament and the courts. Common law principles were developed by the courts but were nevertheless limited constitutionally by Parliament. This echoes Sir Robert Megarry's statement, inspired by Dicey, in *Malone v Metropolitan Police Commissioner* stating – "England, it may be said,

---

94 *Ibid.* at p. 634.

95 Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media*, Cambridge University Press, Cambridge, 1990, p. 104.

96 Eric Barendt, *supra* n 32, at p. 422.

97 *Supra* n 61.

98 The UK ratified the Convention on 8 March 1951.

99 The court was constituted in 1959.

is not a country where everything is forbidden except what is expressly permitted: it is a country where everything is permitted except what is expressly forbidden".[100]

The third Royal Commission on the Press reported on the need for and importance of press freedom and defined it as:

> …that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing the facts and opinions without which a democratic electorate cannot make responsible judgments.[101]

Subsequent to the coming into force of the HRA on 2 October 2000, the Convention became incorporated into the UK domestic law. The HRA makes available a remedy in the UK courts for the breach of the Convention rights without the need to go to the ECtHR. It should be made clear that the UK courts are required to take into account the jurisprudence of the ECtHR in cases concerning rights protected under the Convention and does not permit the courts to override clear statutory language.[102] The HRA adopts in Schedule 1 the Convention rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[103] The Convention right central to the discussion of the rights of media is Article 10(1) which is qualified by Article 10(2).

In *Handyside v UK*,[104] the ECtHR described freedom of expression as "one of the essential foundations of … a [democratic] society, one of the basic conditions for its progress and for the development of every man." In relating it directly to the importance of the exercise of this expression by the media, the inspiring observation of Lord Bingham in *McCartan Turkington Breen v Times Newspapers Ltd* requires notice:

> In a modern, developed society it is only a small minority of citizens who can participate directly in the discussions and decisions which shape the public life of that society. The majority can participate only indirectly, by exercising their rights as citizens to vote, express their opinions, make representations to the authorities, form pressure groups and so on. But the majority cannot participate in the public life of their society in these ways if they are not alerted to and informed about matters which call or may call for consideration and action. It is very largely through the media, including of course the press, that they will be so alerted and informed. The proper functioning of a modern participatory democracy requires that the media be free, active, professional and enquiring. For this reason, the courts, here and elsewhere, have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction.[105]

---

100 [1979] Ch 344, p. 357.
101 Royal Commission on the Press (Cmnd 6810, 1977) [2.3].
102 Section 2 Human Rights Act 1998.
103 Adopted 4 November 1950, entered into force 3 September 1953.
104 (1976) EHRR 737, para [49].
105 *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, pp. 290-291.

The types of expression that are broadly protected can fall into three categories – political, artistic and commercial expression. In the context of the role of the press as the Fourth Estate, the most relevant type is political expression which covers, in general, matters of general public interest. In *Reynolds v Times Newspapers Ltd*[106], Lord Nicholls commented that political discussion should not be distinguished from "other matters of serious public concern". Greater protection has been accorded to political expression in contrast to the other types of expression although it has been commented that there is no "express theoretical basis" for it.[107]

One of the characteristics of protected speech under Article 10 is speech made in the public interest. The requirement of public interest is essential in a number of areas such as successfully raising the defences of fair comment and qualified privilege against a claim in defamation, in upholding open justice and prior restraint, and generally, the right of the press to obtain and receive information and/or impart information. The standard of public interest in these areas differs where the element of public interest in the defence of fair comment is much less exacting in comparison to the defence of qualified privilege.

In recent years, the judgments of the House of Lords in *Reynolds*[108] and later *Jameel*[109] have provided a basis upon which such rights can be determined. Both cases dealt with the media relying on the defence of qualified privilege. In order for the defence to succeed, the element of public interest must exist in the information published. These decisions also echo the need for the standards of responsible journalism to be met before the law will accord any protection. Both *Reynolds* and *Jameel* have a doctrinal basis in Malaysia and their place in the Malaysian jurisprudence is strong.[110] The discussion of the defences of fair comment and qualified privilege, the relationship of public interest to these defences and the test of responsible journalism is beyond the scope of this article.[111]

E. *Article 10 of the Federal Constitution and the Fourth Estate in Malaysia*

As stated *supra*, the restrictions found in Clause 2 of Article 10 of the Federal Constitution are wide. For instance, in the Indian Constitution, the phrase "reasonable restriction" indicates a clear qualification and more importantly, an avenue for the courts to undertake the balancing exercise, discussed *infra*. Undeniably, the application of the provisions for revocation could be justified but they must be exercised by achieving a "balance between individual liberty and social control"[112] and a degree of proportionality in the powers that

---

106 [2001] 2 AC 127, 204.

107 John Wadham, Helen Mountfield, Caoilfhionn Gallagher and Elizabeth Prochaska, *Blackstone's Guide to the Human Rights Act 1998*, 5th ed, Oxford University Press, Oxford, 2009, para 7.370, p. 235.

108 *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127.

109 *Jameel v Wall Street Journal Europe SPRL (No 3)* [2006] UKHL 44, [2006] 4 All ER 1279, [2007] 1 AC 359, [2006] 3 WLR 642.

110 See *Dato' Seri Anwar Bin Ibrahim v Dato'Seri Dr Mahathir Bin Mohamad* [1999] 4 MLJ 58 (HC); *Dato'Seri Anwar Bin Ibrahim v Dato' Seri Dr Mahathir Bin Mohamad* [2001] 1 MLJ 305 (CA); *Dato'Seri Anwar Bin Ibrahim v Dato' Seri Dr Mahathir Bin Mohamad* [2001] 2 MLJ 65 (FC).

111 Note that the Reynolds "public interest defence" has been abolished in the UK by virtue of section 4(6) of the Defamation Act 2013 and is replaced by a statutory defence of "Publication on a Matter of Public Interest".

112 *Supra* n 110.

may be exercised under the restrictions. Raja Azlan Shah, FCJ (as he then was), in *Public Prosecutor v Ooi Kee Saik & Ors*[113] commented that the Indian Supreme Court "has conceded that fundamental rights are subject to limitations in order to secure or promote the greater interests of the community" quoting *AK Gopalan v State of Madras*[114] where the court commented that:

> There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint; for that would lead to anarchy and disorder. The possession and enjoyment of all rights ... are subject to such reasonable conditions as may be deemed to be, to the governing authority of the country, essential to the safety, health, peace and general order and moral of the community ... What the Constitution attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

In the case of Malaysia, there is a plethora of statutes that stipulate restrictions of the freedom of speech and expression. One of the earliest statutes to do this was the Printing Presses Act 1948. It was replaced with the Printing Presses and Publications Act 1984[115] and is the main legislation that regulates the press. There have been some welcomed amendments to the said Act. It was amended by the Printing Presses and Publications (Amendment) Act 2012 on 22 June 2012. The amendments to the older Act are progressive in nature, and include the removal of the absolute discretion of the Minister in granting of the permit to print and publish a newspaper, the licence to publish which required an annual renewal will remain valid for so long as it is not revoked and the right to be heard which was expressly excluded has been explicitly included before a decision to revoke or suspend a licence is made.

Further, there is the Sedition Act 1948.[116] The Act defines that an act is "seditious" when it is applied to or used in respect of any act, speech, words, publication or other thing qualifies the act, speech, words, publication or other thing as one having a seditious tendency; and "publication" includes all written or printed matter and everything whether of a nature similar to written or printed matter or not containing any visible representation or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy and reproduction or substantial reproduction of any publication.[117] Section 3 enumerates what may be tantamount to "seditious tendency"[118] and the provisions within the section are quite general and widely worded. The Prime Minister announced

---

113 *Ibid.*

114 AIR 1950 SC 27.

115 Act 301. The long title of the Act read, "An Act to regulate the use of printing presses and the printing, importation, production, reproduction, publishing and distribution of publications and for matters connected therewith."

116 Act 15. The Act was revised in 1969 with the revision taking effect on 14 April 1970.

117 Section 2 of the Sedition Act 1948.

118 Section 3(1) of the Sedition Act 1948.

in June 2012 that the Act would be abolished and replaced with a National Harmony Act. However, it appears that the Act is here to stay in view of the amendments made to the Act in April 2015, suggesting its continued relevance and that its position has strengthened in view of the increased number of prosecutions. Although it is not the purview of this paper to discuss the amendments, however, in order to understand the context for its continued existence and reliance by the State, it is essential to highlight that the amendments have been made to curtail speech disseminated through social media platforms. The amendments include the insertion of the definition of "by electronic means" in the definition section of the Act as well as an introduction of a new section 10A which introduces a special power accorded to a Sessions Court Judge to make an order to prevent access to a seditious publication made by electronic means where the person who published the seditious statement cannot be identified.

Other legislation that has been used or can be utilised in controlling the media includes the criminal defamation provision in the Penal Code.[119]

The position of journalists is not a special or privileged one and journalists are subject to the same law as the ordinary man. The sentiments can be summarised by Justice Ahmad's phrase in *Anwar bin Ibrahim v Abdul Khalid @ Khalid Jafri bin Bakar's* case (W-02-741-2000)(unreported) where he stated that "the freedom of the press ends where the force of the law begins." In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v Bre Sdn Bhd*,[120] the High Court commented that "journalists, editors and newspapers do not have any special positions so as to entitle them to rely on the defence of qualified privilege on any matters which they may publish."

It is therefore clear that the media's exercise of the role as the Fourth Estate under Article 10 Clause (1) is restricted by the legislative restrictions enabled by Clause (2). Harding commented that Article 10 of the Federal Constitution "is remarkable for what it takes away rather than for what it gives."[121] He adds:

> The idea that restrictions are sometimes necessary on political rights is common place. Art. 10, however, is unusual in its failure to place any real restrictions on the restrictions. They are so widely drafted that in practice there are likely to be very few possible restriction which could not be said to come within the kinds of restriction permitted by Art.10, especially there is nothing in Art.10 to suggest that the courts have any right to review the necessity of legislation restricting one of these rights. The result is therefore quite different from that achieved in the Indian Constitution, which allows only such restrictions as are reasonable, such reasonableness being a matter for the courts to decide on judicial review.[122]

---

119 Act 574. Section 499 reads; "Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person."

120 [1996] 1 MLJ 393 (HC), p. 411.

121 Andrew Harding, *Law, Government and the Constitution in Malaysia*, (Malaysia: MLJ, 1996), p.189.

122 Andrew Harding, *supra* n 121, at pp. 189-190.

V. The *Derbyshire* Judgment

The central issue for determination in *Derbyshire* was "whether a local authority is entitled to maintain an action in libel for words which reflect on it in its governmental and administrative functions."[123] The action involved two publications in *The Sunday Times* concerning the administration of the superannuation fund of the Derbyshire County Council and which questioned the propriety of the utilisation of the said fund in investments made by the council.[124] The council contended that it had "been injured in its credit and reputation and has been brought into public scandal, odium and contempt, and has suffered loss and damage."[125]

His Lordship, Lord Keith, setting out the unanimous judgment of the court, considered a number of cases involving libel suits initiated by local authorities, namely, *Bognor Regis UDC v Campion*.[126] Lord Keith overruled the decision in *Bognor Regis* on the basis that Justice Browne in that case did not provide any consideration to the fact that a local authority may not be in a "special position" to take a libel action in contrast with the "special position" of a trade corporation, trade unions and charitable organisations.[127] His Lordship distinguished the position of the local authority with other bodies:

There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines.[128]

The judgment presents the position of the English common law "…where a local authority does not have the right to maintain an action of damages for defamation."[129] The basis for this position is three pronged. The first is that any government body can be subjected to "uninhibited public criticism". The second is that a political libel action will have an "inhibiting effect" on free speech. Lord Keith affirmed this when His Lordship commented:

> It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.[130]

The third prong is the "public interest" argument. The public interest aspect was raised in relation to firstly, the impact a libel civil action may have on a publication which is in the

---

123 *Supra* n 2, at p. 1013, para (a).
124 *Supra* n 2, at p. 1013, para (c) – (e).
125 *Supra* n 2, p 1013, para (h).
126 [1972] 2 All ER 61, [1972] 2 QB 169.
127 *Supra* n 2, at p. 1017, para (e)-(h).
128 *Supra* n 2, at p. 1017, para (j).
129 *Supra* n 2, at p. 1020, para (e), as per Lord Keith.
130 *Supra* n 128.

public's interest to be made public on the basis that it was a critique of the government, its Ministers or the Executive, in particular the impact in the manner of the chilling effect the action may have on free speech;[131] and secondly, that there is no public interest that favours institutions of government to sue for libel and that rather it is contrary to public interest that they should possess such an interest.[132]

His Lordship took inspiration from several decisions of the US courts that lent support to His Lordship's pronouncements namely the case of *City of Chicago v Tribune Co*,[133] a decision of the Illinois Supreme Court, which was confirmed by the US Supreme Court in *New York Times Co v Sullivan*.[134] Although the US decisions were related to First Amendment free speech protection, Lord Keith justified the use of these decisions as they were made on the public interest consideration which His Lordship felt were "no less valid" in the UK.[135] His Lordship cited two paragraphs from the judgment of Chief Justice Thompson in *Chicago*, a decision which was subsequently confirmed by the US Supreme Court in *Sullivan*. His Lordship quoted two paragraphs from the Chicago judgment. The former is related to the first two prongs and the latter is related to the "public interest" prong:[136]

> The fundamental right of freedom of speech is involved in this litigation and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government he may be punished … but all other utterances or publications against the government must be considered absolutely privileged. While in the early history of the struggle for freedom of speech the restrictions were enforced by criminal prosecutions, it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution. If the right to criticise the government is a privilege which, with the exceptions above enumerated, cannot be restricted, then all civil as well as criminal actions are forbidden. A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions …[137]

> It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely.[138]

---

131 *Supra* n 2, at p. 1018, para (f).
132 *Supra* n 2, at p. 1019, para (d).
133 (192) 307 Ill 595.
134 (1964) 376 US 254, p 277.
135 *Supra* n 2, at p. 1018, para (f).
136 *Supra* n 2, at p, 1018, para (a)-(e)
137 (192) 307 Ill 595, pp. 606-607.
138 *Supra* n 137, at pp. 607-608.

These sentiments are in line with the Privy Council's views in justifying the protection of speech that is critical of government and public administration in *Hector v A-G of Antigua and Barbuda*.[139] In *Hector*, Lord Bridge held that a statutory provision, which made the printing or distribution of any false statement likely to undermine public confidence in the conduct of public affairs a criminal offence, contravened the provisions of the constitution protecting freedom of speech. His Lordship clarified the position taken as follows:

> In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind.[140]

It is essential to note that in *Derbyshire* the common law prohibition against a libel civil action by the local council was qualified. The general principle of the said prohibition is followed by two exceptions – firstly, that a local council could maintain an action in malicious falsehood;[141] and secondly, if the individual reputation of councillors "is wrongly impaired by the publication any of these can himself bring proceedings for defamation."[142]

VI. The *Utusan Melayu* Decision

The appellant-newspaper is the printer and publisher of the Sunday edition newspaper "*Mingguan Malaysia*". The basis of the libel action filed by the respondent is an article published on 9 November 2014 titled "*Hebat Sangatkah Adnan*" where references were made to the respondent who held the positions of an elected representative of his constituency and Chief Minister of the State of Pahang. The respondent claimed that the allegations in the article were, as the learned Court of Appeal put it, "outrageous and unsubstantiated."[143] The appellant-newspaper pleaded the defences of fair comment and qualified privilege. The Court of Appeal reiterated the salient points of Lord Keith's judgment in *Derbyshire* and confirmed its applicability in Malaysian jurisprudence. Delivering the decision of the court, His Lordship Yang Arif Tan Sri Idrus bin Harun, upholding the first and second prong, clarified as follows:

> The decision rendered by the House of Lords is, in our opinion, no less valid in Malaysia and should apply alike under and be part of our defamation law as the principle is related most directly to the protection of the right to freedom of speech and expression under Article 10 Clause (1)(a) of the Federal Constitution and that public interest does not favour the right of the government and those holding public office to sue for libel.[144]

---

139 [1990] 2 All ER 103, [1990] 2 AC 312. Decision of the Judicial Committee of the Privy Council.

140 *Supra* n 140, at pp. 106 and 318 respectively.

141 His Lordship made reference to Balcombe LJ at the Court of Appeal in this case. See *Derbyshire County Council v Times Newspapers Ltd and others* [1992] 3 All ER 65.

142 *Supra* n 2, at p. 1020 para (d).

143 *Supra* n 1, at para 2.

> We consider that it is one of the fundamental principles that, in the exercise of the right to such freedom within the ambit of the Federal Constitution and other relevant laws, the public should have the right to discuss their government and public officials conducting public affairs of the government without fear of being called to account in the court for their expression of opinion.[145]

His Lordship further emphasised that the issue was not whether the English common law principle in *Derbyshire* was applicable but more importantly whether there is "the right to discuss or criticise the government and public officials by the citizens in the exercise of their right under Article 10 Clause (1)(a) of the Federal Constitution." The court felt the right to be a fundamental right that has to be accorded "due recognition and protected as one which is guaranteed by the Federal Constitution."

Related to the element of "public interest", the third prong, His Lordship's sentiments were strongly worded – "…as public interest dictates, a democratically elected government and its official should be open to public criticism and that it is advantageous that every responsible citizen should not be in any way fettered in his statements where it concerns the affairs and administration of the government."[146]

The learned appellate tribunal held that political libel civil action in this case was not actionable by the respondent on the basis the reference to the respondent was made in his capacity as Chief Minister, an elected representative who was accountable to the people. The Court of Appeal directed us to the point that this was averred by the respondent's Statement of Claim where it was stated that he was suing in his capacity as Chief Minister. The court's conviction of its stand was supported by its sentiments that to allow such an action "will sadly result in political censorship of the most objectionable kind" and that the claim clearly fell within the perimeters of the *Derbyshire* principles making it "unsustainable".[147]

The appellate tribunal concluded with a statement that in its consideration of the central question on whether a political libel action is sustainable, it did not consider the truth or falsity of the article as it was beyond its consideration.[148] This can be interpreted to mean that the court had not ventured to consider the quality of journalism or in other words the standards of adopting the responsible journalism test in *Reynolds* and *Jameel*.[149]

VII. Drawing A Nexus between *Derbyshire*, *Utusan Melayu* and the Fourth Estate

Where the functioning of a democracy involves a recognised role of media or journalism as the Fourth Estate, discussed in depth *supra*, it is therefore vital for the law to recognise and protect this role. If media entities are not allowed to carry out this role, Malaysia

144 *Supra* n 1, at para 18.
145 *Supra* n 1, para 19.
146 *Supra* n 1, para 20.
147 *Supra* n 1, para 36.
148 *Supra* n 1, para 36.
149 *Supra* n 108 and 109.

cannot be viewed as a functioning democracy. Essentially, the *Utusan Melayu* decision, by relying on *Derbyshire*, has introduced into Malaysian jurisprudence the recognition of this role. It has gone further by laying down the importance of both democratically elected individuals and institutions to be the subject of public criticism as they are accountable to the citizenry and the media plays an integral part in publishing news, critique or commentary of these individuals and institutions in its Fourth Estate role. The role is premised on the constitutionally protected freedom of speech and expression. Therefore, any action that serves to curtail this role through, for instance in the present case, a political libel suit, will be viewed as having an inhibiting effect on our freedoms. The *Utusan Melayu* decision has served to enhance democratic discourse of a socio-political nature through the medium and the message of the media.

VIII. Reflections of *Derbyshire* vis-à-vis *Utusan Melayu*

It is vital to reflect on *Derbyshire* with reference to three aspects – the first being the consideration by the court of the European Convention of Human Rights and the UK's HRA; the second, its consideration and review in the House of Lords' decision of *Reynolds* that followed at the heels of *Derbyshire*;[150] and finally, the exception laid down in *Derbyshire* as to when a prohibition against a libel civil action may not be applicable.

With reference to the HRA and the Convention, since the court's consideration of the matter was delivered prior to the coming into force of the HRA, reference to Article 10 of the Convention[151] was made as a basis of protecting freedom of expression albeit cursorily.[152] The court concluded on the point with reference to Lord Goff in *AG v Guardian Newspaper*,[153] stating that His Lordship "expressed the opinion that in the field of freedom of speech there was no difference in principle between English law on the subject and Article 10 of the convention."[154] Lord Keith added that the "common law of England is consistent" with the Convention.[155]

Hence, much of the basis of the jurisprudence that can be drawn from *Derbyshire* is premised on English common law principles. In respect of extending a vein from *Derbyshire* to the Malaysian context in respect of protecting speech that is in the public interest, the Court of Appeal in *Utusan Melayu* had an advantage of heavily resting its rationale on Article 10 of the Federal Constitution, the spirit of which is closely reflected in Article 10 of the Convention.

With reference to *Reynolds*, their Lordships' judgment is of vital importance to future consideration of how *Utusan Melayu* will be viewed. In a case involving the reputation of a politician and the rights of a newspaper to publish a story, the judgment has received much attention. Without being excessively extensive, three references are made to the judgment in *Reynolds*.

---

150 *Supra* n 108.
151 *Supra* n 61.
152 *Supra* n 2, at p. 1020, para (e).
153 *Supra* n 80, at pp. 283-284.
154 *Supra* n 2, at p. 1020 (f).
155 *Supra* n 151, as per Lord Keith.

Firstly, Lord Bingham had to undertake a review of *Derbyshire*. In an argument submitted to the court with reference to the "chilling effect" ratio in *Derbyshire*, it was submitted that 'the publication of criticism of an individual politician will be chilled in exactly the same manner, and that therefore the corollary of the *Derbyshire* decision must be to accord a defence of qualified privilege in actions by individual politicians or public servants.'[156] Lord Bingham was not in agreement as His Lordship took a cautionary position that "the *Derbyshire* case leaves this question completely open, and we think it dangerous to speculate how their Lordships would have decided the present question had it fallen for decision."[157] The Malaysian court in *Utusan Melayu* was perhaps less cautionary, and more courageous, a view that is discussed *infra*.

Secondly, Lord Nicholls emphasised the importance of the two countervailing interests involved and the problem it presents to the court and the law. Lord Nicholls emphasised that the:

> …freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy…To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.[158]

His Lordship highlighted the importance of upholding both the rights of the media and the protection of an individual's reputation and addressed the challenges of the balancing exercise that the court must undertake. In assisting this endeavour, His Lordship infamously proposes the 10 indicia-test.[159] In future cases post-*Utusan Melayu*, Malaysian courts when dealing with political libel suit involving the publication of potentially libellous information by the media may have to delve deeper into this test and its further refinement in *Jameel*.

Thirdly, the court perambulated through the jurisprudence of the European Court of Human Rights to clarify the position it is taking on the general duty of the media to inform the public of political matters and the public's right to be so informed.[160] The Malaysian courts may draw greater inspiration from the Strasbourg jurisprudence when making a stronger case for the Fourth Estate based on the Malaysian Article 10 of the Federal Constitution.

A final observation of *Reynolds* is its distinguishing aspect from *Derbyshire*. Whilst there was a degree of reliance in *Derbyshire* to invoke Article 10, however in *Reynolds* the court did not resort to Article 10 but felt that the common law rules needed to be adequately developed to deal with the defence of qualified privilege raised by the media

---

156 *Supra* n 108, at p. 171.
157 *Supra* n 156, as per Lord Bingham.
158 *Supra* n 108, p. 200.
159 *Supra* n 108, at p. 205.
160 *Supra* n 108, at pp. 214-215, as per Lord Steyn; pp 203-204, as per Lord Nicholls.

when publishing materials it claims to be in the public interest but which may bring disrepute to an individual. Loveland in his article summarised the position in *Reynolds*:

Rather the court took the view, expanding the principle that it had embraced in *Derbyshire*, that common law rules now needed to reflect a pervasive societal awareness that citizens should be afforded access to critical news stories addressing the behaviour of government bodies and politicians.[161]

Finally, with reference to the non-applicability of the prohibition in *Derbyshire*, Lord Keith had laid down two exceptions to the prohibition, as set out *supra*.[162] The second exception may be more relevant in the context of *Utusan Melayu*'s decision where the exception provides that if the individual reputation of councillors is "wrongly impaired" by the publication then the individual may initiate proceedings for defamation."[163]

It appears at first glance to be a surrendering point suggesting that individual politicians will be allowed to bring actions in libel. However, upon closer reading, it does not open the floodgates. The individual will have to substantiate the action on the basis that the publication "wrongly impaired" the individual's reputation. This will take us deep into the realms of defamation law and its defences, which is outside the scope of this paper but may require consideration by the courts should the exception be invoked.

Turning to the reflection on *Utusan Melayu*, the Malaysian courts have further built on the prohibition laid down in *Derbyshire*. Where the English decision was dealing with the determination of whether a local government authority could sue in defamation, the Malaysian court was dealing with the determination of whether an elected representative could sue in defamation. The inspiration drawn from *Derbyshire* led the Malaysian court to draw an analogous parallel between the two cases whereby whether the defamation suit is brought by an elected body or an elected official, the ramifications of a political libel suit against the media will bear the same consequences as highlighted by Lord Keith in his judgment and by the Malaysian judgment. The outcome of the case in Malaysia pivots on the "combined effect of the interrelation between the constitutional guarantee of the fundamental right in Article 10 Clause (1)(a) of the Federal Constitution and the public interest considerations."[164] The strength of the position taken by the Court of Appeal rests on the bedrock of the Malaysian legal system, its constitutional guarantees.

IX. Concluding Thoughts

The role of the media as the Fourth Estate is not a new one. In a democratic State, the tools for check-and-balance have evolved beyond the traditional organs of State to involve the media, and today, this has evolved into the Fifth Estate, where citizens, with the utility of the Internet and its platforms, may be empowered to play the role of checking on government.

---

161 Ian Loveland, "Freedom of political expression: who needs the Human Rights Act?" *Public Law*, 2001, p. 233.
162 *Supra* n 142.
163 *Supra* n 142.
164 *Supra* n 1, para [21].

When dealing with a legal system where the media has established rights, such as the US and the UK, the role of the media as the Fourth Estate is recognised albeit not free from legal challenges. In the case of Malaysia, it is rather challenging for the right of the media to act as the Fourth Estate to be built on any existing right or privilege that is accorded to the media - aside from the right to publish and distribute - there is little more in that regard. It is a case of filling the unfilled legal basin. A bottom-up approach needs to be taken in view of the insufficient development of jurisprudence related to media rights which are built on and derived from constitutional provisions namely freedom of speech and expression. Filling the unfilled legal basin must be constructed from building those rights for both established and recognised media entities as well as citizens.

There needs to be a stronger development of the freedom of speech jurisprudence as seen in the US and the UK in the context of the realities of an increasingly well informed citizenry. In a media model that is increasingly decentralised as a result of social media actors on the Internet playing the role of alternative news providers and conduits for democratic discourse, the government, Parliament and the courts need to re-engage with the social and political importance of the role discharged by the media both traditional and on the Internet. The courts' non-recognition of the importance of speech by media outlets is non-progressive to a citizenry that demands increased public speech and engagement.

Only when the constitutional principles of protection of free speech and expression are strengthened in Article 10(1) of the Federal Constitution through sound development of precedent by the apex court will the constitutionality of Acts of Parliament that erode that protection be called to challenge. A precursor to this is the recognition of the role of the media in a democratic State whereby a liberal and sophisticated media encourages or engages in socio-political dialogue, the exchange of ideas, opinions, recognising the importance of executing this role for the benefit of the citizenry and the society at large. Upon a strong constitutional foundation, a review should be initiated with consideration of some basic rights that ought to be accorded to the media such as, *inter alia*, the limitation of prior restraint, upholding the principle of open justice and the basis for the protection of confidentiality of sources. The *Utusan Melayu* decision is prefatory to the development of this type of progressive jurisprudence.

Malaysian Preventive Detention Laws: Old Preventive Detention Provisions Wrapped in New Packages

Safia Naz* and Johan Shamsuddin Bin Sabaruddin**

Abstract

Preventive detention has become a common feature of the modern democracies, including Malaysia. The Malaysian Federal Constitution in Article 149 allows the enactment of preventive detention laws without the precondition of an emergency. The Internal Security Act (ISA), 1960 was the first preventive detention law which was passed under this constitutional provision. It was enacted to deal with the armed insurgencies of the Communist Party of Malaya (CPM) and permitted the Executive to keep individuals in preventive custody for indefinite periods of time. However, a series of amendments were introduced into the ISA, which drastically broadened the scope of the exercise of the power of preventive detention by inserting new grounds of preventive detention. Additionally, an amendment introduced in 1989 took away the authority of the courts to review the lawfulness of the detention orders. The life of the ISA ultimately came to an end in 2012 when the government repealed it in the face of constant criticism from opposition political parties and human rights organisations. However, the government subsequently brought back the old draconian provisions of the ISA through the enactment of three new security laws, namely, the Security Offences (Special Measures) Act, 2012 and the Prevention of Crime (Amendment and Extension) Act, 2014 and the Prevention of Terrorism Act, 2015. Since there is a dearth of literature concerning the extent and implications of the exercise of the power of preventive detention under the new security Acts, a comparative analysis of these laws has been carried out in this Article to demonstrate how the new laws are reincarnations of the old ISA.

Keywords: Preventive Detention, Federal Constitution, Human Rights.

I. Introduction

According to the International Commission of Jurists, the power of preventive detention, due to its extraordinary nature, should only be used during an officially declared state of emergency which threatens the life of the nation.[1] Lord Atkinson in the case of *R v Halliday*[2] observed:

* LL.B, Faculty of Law, University of Malaya, LL.M by Research Candidate, Faculty of Law, University of Malaya

** LL.M (UCL, London), PhD (SOAS, London), Associate Professor and Dean, Faculty of Law, University of Malaya, 50603 Kuala Lumpur, Malaysia.

1 The Oral Intervention of the International Commission of Jurists on Administrative Detention to the 41 Session of United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities. U.N.Doc.E/CN.4/Sub2/1989/SR.32 at para 66, Site accessed on 15 January 2015.

2 *R v Halliday* [1917] AC 260.

> [H]owever precious the personal liberty of the subject may be there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war or escape from national plunder or enslavement.[3]

Nevertheless, the power of preventive detention which has become a common feature in modern democracies is no longer contingent on the existence of an emergency which is evident from the constitutional provisions of countries, such as, India, Pakistan and Malaysia. In Malaysia, the power of preventive detention is incorporated in statutes enacted in pursuant to Article 149 of the Federal Constitution which authorises the deprivation of liberty of a person without trial during peace time.

The law which laid the foundation of the exercise of such power during peace time in Malaysia after its independence was the Internal Security Act, 1960[4] ('ISA'). Since its enactment, this piece of legislation has been constantly criticised for being oppressive and draconian in nature. This is because as from 1960 to 2012, the Malaysian government and its ruling party used the Act and its powers of endless detention to their utmost limits to silence political dissidents and government opponents.[5]

Consequently, due to extensive criticisms after 52 years of operation, Prime Minister Datuk Seri Najib Tun Razak finally on 15 September 2011 announced that this Act would be repealed.[6] Accordingly, this Act was repealed by the Security Offences (Special Measures) Act,[7] 2012 ('SOSMA'). The legacy of the preventive detention provisions of the repealed ISA, however, did not leave the Malaysian legal system and have been brought back through the new security laws enacted in pursuance of Article 149 of the Federal Constitution, namely, the SOSMA, the Prevention of Crime (Amendment and Extension) Act[8], 2014 ('PCA') and the Prevention of Terrorism Act[9], 2015 ('POTA').

Significant academic works have been carried out in relation to the ISA but there is a dearth of literature with respect to the three new security Acts which contain the power of preventive detention exercisable during peace time. An endeavour has been made in this article to examine the preventive detention provisions of these three new security laws and to shed light on the recurring features of the repealed ISA which are identifiable in these laws. This article demonstrates that within a short span following the repeal of the ISA, Parliament has revived the draconian preventive detention features of the ISA through the enactment of new security laws. An attempt has also been made to explicate the Malaysian Judiciary's conventional and illiberal response in majority of the preventive detention cases under the ISA and it is argued in this article that the Judiciary should adopt a liberal interpretative approach when reviewing the legality of detention orders under the new laws.

---

3 *Ibid.* at p. 271.

4 Act A82.

5 The US Department of State, 11 March 2010, "2009 *Human Rights Report: Malaysia"*, available online at - http://www.state.gov/j/drl/rls/hrrpt/2009/eap/135998.htm. Site accessed on 4 April 2015.

6 *PM Announces Repeal of ISA, Three Emergency Proclamations*. 15 September 2011.The Star Online, http://thestar-online.blogspot.my/2011/09/star-online-nation_15.html Site accessed on 2 November 2016.

7 Act A1472.

8 Act A1459.

9 Act A769.

II. The Power of Preventive Detention and Article 149 of the Federal Constitution

At the time of the drafting of the Constitution in 1957, the country was under a state of emergency proclaimed by the Colonial Government in June 1948 to deal with the insurgency caused by the Communist Party of Malaya ('CPM'). This situation persuaded the Federation of Malaya Constitutional Commission ('Reid Commission') to recommend for the insertion of special powers against subversion in the Constitution, which would operate irrespective of any emergency. The Reid Commission in paragraph 174 of the Report of the Federation of Malaya Constitutional Commission, 1957 stated that:

To deal with any further attempt by any substantial body of persons to organise violence against persons or property, by a majority we recommend that Parliament should be authorised to enact provisions designed for the purpose notwithstanding that such provisions may involve infringements of fundamental rights or State rights. It must be for the Parliament to determine whether the situation is such that special provisions are required but Parliament should not be entitled to authorise infringement of such a character that they cannot properly be regarded as designed to deal with the particular situation.[10]

However, one of the eminent members of the Commission, Justice Abdul Hamid[11] disagreed with the recommendation for the insertion of Article 149 and opined that:

> If there arises any real emergency, and that should only be an emergency of the type mentioned in [Article 150], then and only then should such extraordinary powers be exercised. It is…. unsafe to leave in the hands of the Parliament power to suspend constitutional guarantees only by making a recital in the preamble that conditions in the country are beyond the reach of the ordinary law. Ordinary legislation and executive measures are enough to cope with a situation of the type described in [Article 149]. That article should be …omitted. There should be no half-way house between government by ordinary legislation and government by extraordinary legislation…[12]

Despite the note of dissent given by Justice Abdul Hamid, Article 149 containing the special powers to enact preventive detention laws were inserted in Part XI of the Constitution, entitled "Special Powers against Subversion, Organised Violence and Acts and Crimes Prejudicial to the Public and Emergency Powers". This enabled Parliament to enact laws to deal with circumstances prejudicial to public order and national security in a non-emergency state.[13]

---

10 Report of the Federation of Malaya Constitutional Commission, 1957, Kuala Lumpur Government Printer.

11 Justice Abdul Hamid was a High Court Judge and former Secretary to the Ministry of Law in (then) West Pakistan.

12 Note of Dissent by Mr. Justice Abdul Hamid, para 13 (vii), Report of the Federation of Malaya Constitutional Commission 1957.

13 The present Article 149 of the Federal Constitution empowers the Parliament to pass special laws to prevent any substantial body of persons from taking or threatening the commission of six categories of acts stipulated in paragraphs (a-f) of Article 149(1).

Notably, the Commission, in addition to the recommendation for the insertion of Article 149, proposed for affording the detainees of preventive detention laws the right to have the lawfulness of their detention orders reviewed by the judiciary in paragraph 174 of the Reid Commission Report in the following words:

> It would be open to any person aggrieved by the enactment of a particular infringement to maintain that it could not properly be so regarded and to submit the question for decision by the Court.[14]

Nevertheless, this right is not stipulated in Article 151 of the Federal Constitution, which deals with the procedural safeguards afforded to the detainees of the preventive detention laws. The original Article 149 of the Federal Constitution, however, provided an important safeguard against the arbitrary use of the laws in Clause (2) which read as follows "A law…. shall if not sooner repealed cease to have effect on the expiration of a period of one year from the date on which it came into operation." Therefore, the law passed to deal with special circumstances would have automatically ceased to have effect within one year of its coming into force and ensure that the power of preventive detention is not misused to put the critics of the government behind the bars.

The Constitution (Amendment) Act 1960, however, amended Article 149 (2) and the present clause reads 'the Act passed under clause (1), if not sooner repealed, shall "cease to have effect if resolutions are passed by both Houses of Parliament annulling such law". Consequently, the first law, the ISA, passed under this constitutional provision continued to be in operation until 2012 when it was finally repealed by Parliamentary resolutions.

III. Abuse of Power for Preventive Detention During Peace Time

Since the power of preventive detention usually authorises the executive to deprive any person of his personal liberty for the purpose of national security, it always carries with it the risk of being abused by such authority especially when it is being exercised in a non-emergency state. In this context, the words of Lord Shaw of Dunfermline in *R v Halliday*[15] is of particular significance. Lord Shaw observed that:

> Vested with this power of proscription and permitted to enter the sphere of opinion and belief, they, who alone can judge as to public safety and defence, may reckon a political creed their special care, and if that creed be socialism, pacifism, republicanism, the persons holding such creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime. The inmost citadel of our liberties could be thus attacked.[16]

---

14 Report of the Federation of Malaya Constitutional Commission, 1957, Kuala Lumpur Government Printer.
15 [1917] AC 260.
16 *Ibid.* at p. 293.

Furthermore, the absence of adequate safeguards regulating the scope of preventive detention laws facilitates the use of these laws by the executive branch of the government: a) for oppressing political opponents by putting them behind bars, and b) as a substitute for the ordinary criminal legal framework. Unfortunately, the ISA during its operation has been heavily criticised for providing such unfettered power to the executive and also for the misuse of this power for the above mentioned two purposes when it was originally enacted to combat communist activities in Malaysia.

In the case of *Tan Sri Raja Khalid Raja Harun v The Inspector-General of Police,*[17] it was alleged that whilst the applicant was a member of the loans committee of the Perwira Habib Bank, he provided consultancy services through his company, the Malayan Commercial Services Sdn Bhd. His consultancy services resulted in the loans committee approving large sums as loans to various parties, thereby causing the bank to suffer substantial losses. The applicant was arrested and subsequently detained under section 73(1) of the ISA on the basis that the police officer had

> …reason to believe that the substantial losses suffered by the bank caused by the manner in which loans were approved by the loans committee to certain parties, particularly through the acts of the applicant, has evoked feelings of anger, agitation, dissatisfaction and resentment among members of the armed forces and it is likely that such feelings may be ignited and lead to their resorting to violent action and thereby affect the security of the country.[18]

The main argument for the applicant in the hearing of the application for *habeas corpus* was that the allegations brought against him were purely criminal in nature which could have been dealt with by the ordinary criminal legislation. Furthermore, the applicant contended that none of the documents seized by the police during his arrest were subversive in nature or in any way involved matters of national security. The High Court issued the writ of *habeas corpus* and held that there was absolutely no such evidence or suggestion to indicate that the applicant will be a threat to national security except the only evidence, if at all, was the suggestion that his past acts were prejudicial to the security of the country.

Additionally, the ISA was also used as a weapon by the Government to detain persons holding views contrary to that of the ruling party. The most significant incident of misuse of the power of detention under the ISA was '*Operasi Lalang*'. On 27 October 1987, *Operasi Lalang* saw the arrests of 106 persons under the ISA.[19] Most of the detainees were prominent opposition leaders, academics, prominent human rights activists, university lecturers and businessmen.[20] They were alleged to have been involved

---

17 [1987] CLJ (Rep) 1014.

18 *Ibid.* at p. 1015.

19 Yatim R, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy,* Endowment Publications, Kuala Lumpur, 1995, pp. 240-241.

20 *Ibid.* at pp. 240-241.

in activities "prejudicial to the security of Malaysia," a term often used as the basis of arrest and detention in Malaysia.[21]

Another instance of such misuse of power was the arrest of five persons in 2011 under the ISA. On April 10, 2001, Member of Parliament Chua Tian Chang, activist Hishamuddin Rais and Hulu Kelang assemblyman Saari bin Sungib were arrested under section 73(1) of the ISA. Later on April 20 and April 26, 2001, Gobalakrishnan a/l Nagapan, a former Member of Parliament and Raja Petra Raja Kamaruddin were arrested under the same section of the ISA. Subsequently the Home Minister issued detention orders against these persons pursuant to section 8 of the ISA. They were detained in relation to a "Black 14" rally to mark the second anniversary of the conviction of the opposition party advisor Datuk Seri Anwar Ibrahim for abuse of power. These individuals were later released in June 2003. They sued the Inspector General of Police, the Home Ministry and the government for unlawful detention under the ISA and for defamation.[22] The Court of Appeal found that

> ...the instant case involved not persons in criminal activities for personal gain, but persons in political activities whom the police stated it 'had reason to believe' was involved in activities prejudicial to the security of Malaysia but at the trial, neither evidence for such reason to believe was produced nor reasons for the failure to do so was presented in the trial, leading to the conclusion there was no basis for the arrest and detention, and that the plaintiffs were arrested for their political activities. The grounds of detention were frivolous and devoid of merit, the detainees were not a threat to the security and that they were detained for their political beliefs.[23]

IV. Preventive Detention Laws that Methodically Replaced the ISA

The ISA was officially repealed by the SOSMA in 2012. However, the repeal of the ISA did not affect the detention orders issued under it; therefore individuals detained in pursuance of the ISA are still interned.[24]

The SOSMA is basically a procedural law which does not lay down the offences but only the procedure to be followed when a security offence has been committed under certain sections of the Penal Code and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007. This law only enables the police force to detain a person for a maximum of 28 days without trial.

---

21 *Ibid.* at pp. 240-241.

22 *Appeals court awards RM4.55m to Tian Chua, Hishamuddin Rais, 3 others*. 12, December 2014. The Sun aily. http:// www.thesundaily.my/news/1265144 Site accessed on 29 November 2015.

23 *Tan Sri Norian Mai & Ors v Chua Tian Chang & Or*s [2015] 4 MLJ 464, 485.

24 The SUHAKAM (the Human Rights Commission of Malaysia) in its Annual Report of 2012 urged the Government to release the 15 people detained under the ISA as of 10 July 2013 as the ISA has already been repealed.

It is noteworthy that in 1960, the Government retained power of preventive detention which was available under the Emergency Regulations of 1948 and preserved it through sections 8 and 73(1) of the ISA when the Regulations was repealed. In 2011, the three Proclamations of Emergency – 1966, 1969 and 1977 – were lifted which rendered the Emergency Public Order and Prevention of Crime Ordinance 1969 (EO)[25] void and in 2012 the ISA was repealed. As a result, the Government was only left with the power of 28 days of preventive detention under the SOSMA and felt the need to resuscitate the draconian preventive detention provisions of the ISA.

Accordingly, the Prevention of Crime Act 1959 was extensively amended and extended in 2014 through a new Act, the Prevention of Crime (Amendment and Extension) Act 2014. This piece of legislation contains the recital of Article 149 in its preamble as it is the only condition precedent[26] for the enactment of a special law under this particular Article of the Federal Constitution and brought back the oppressive provision of indefinite detention without trial. The PCA came into effect on 2 April 2014.

Following the passage of the White Paper titled 'Towards Combating the Threat of the Islamic State' on 26 November 2014 in Parliament, the Government promised to enact a new law to reflect the concerns in the White Paper.[27] The Prime Minister, Datuk Seri Najib Tun Razak, urged the country's parliament to adopt stronger legal safeguards against terrorism.[28] In particular, he expressed concern about Malaysian citizens returning home with extremist views after having fought beside Islamic State (IS) militants in Syria and Iraq, noting that 39 citizens had already joined IS and that its radical ideology should not be allowed to spread.[29] Home Minister Dato' Seri Dr Ahmad Zahid Hamidi, in debating the Prevention of Terrorism Act 2015 (POTA), asserted that terrorism is a real threat and preventive measures must be carried out.[30] Giving effect to the concerns of the Government, the POTA was passed by a majority of 79-60 after more than 12 hours of debate[31] and came into effect on 1 September 2015. Similar to the ISA and PCA, this Act contains the harsh provision of indefinite detention without trial.

---

25 This Emergency Ordinance which provided for the power of preventive detention ceased to exist in accordance with Article 150 (7) of the Constitution within six months from the date on which the Proclamation of Emergency was lifted.

26 Lord Diplock in the case of *Teh Cheng Poh v Public Prosecutor* [1970] 1 MLJ 101 at p.103 stated that "On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past viz. that action of the kind described "has been taken or threatened". It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed."

27 Bilveer Singh, 7 April "New Law Gives Malaysia Teeth in Fight Against Terror" NUS Website, available online at - https://news.nus.edu.sg/news-media/8839-new-law-gives-malaysia-teeth-in-fight-against-terror Site accessed on 2 November 2016.

28 Wendy Zeldin, *Malaysia: Anti-Terrorism Law Proposed*. Library of Congress, Global Legal Monitor, available online at- http://www.loc.gov/law/foreign-news/article/malaysia-anti-terrorism-law-proposed/ Site accessed on 2 November 2016.

29 *Ibid.*

30 Vasudevan Sridharan*, Malaysia passes controversial anti-terror bill stoking concerns among activists,* International Business Times, 7 April 2015, available online at - http://www.ibtimes.co.uk/malaysia-passes-controversial-anti-terror-bill-stoking-concerns-among-activists-1495164 Site accessed on 2 November 2016.

V. Similarities Between the ISA, SOSMA, PCA And POTA

This section of the article demonstrates that the harsh preventive detention provisions of the ISA have been resurrected through the three new security laws and these laws, in the absence of adequate safeguards, provide opportunities for abuse of the power of preventive detention by the executive branch, similar to the ISA.

A. Grounds of Preventive Detention

This point will be discussed in two parts, namely, in Part (1), light will be shed on the ambiguous and vague grounds of preventive detention and in Part (2), attention will be drawn towards the amendments made by Parliament to broaden the scope of those grounds.

(1) Obscurity of the Grounds of Preventive Detention

The ISA provided for two types of preventive detention, namely, police detention under section 73 and Ministerial detention under section 8. Under section 8 of the ISA, if the Minister was satisfied that a person has acted in a certain manner which was prejudicial to the security of Malaysia or maintenance of essential services or economic life then the Minister was empowered to direct the detention of a person for a period not exceeding two years.

Difficulties and debates were always encountered in interpreting the grounds of detention under the ISA, as the phrase 'acts prejudicial to the security, maintenance of essential services or economic life' were not defined in the Statute. Therefore the acts which could amount to prejudicial actions were ambiguous. The Minister was the sole judge to decide whether a person had committed such a prejudicial act under the ISA.

Malaysia followed the subjective satisfaction test propounded by the majority of the judges in the infamous case of *Liversidge v Anderson*[32]. In this case, the appellant was detained under a detention order issued pursuant to Regulation 18B of the Defence (General) Regulations 1939[33] in the midst of World War II. The House of Lords decided against the appellant by a majority of four to one (Lord Atkin dissenting) and held that a subjective approach was relevant when reviewing the legality of the detention order made by the Secretary of State.[34] Lord Macmillan was of the view that the executive's belief should not be measured against the objective standard but against that of the Secretary of State's personal standard.[35]

---

31 *Ibid.*

32 [1942] AC 206.

33 This Regulation was made under the authority of the Emergency Powers (Defence) Act 1939 which authorised the enactment of regulations which provided for the detention of persons in the interest of public safety or the defence of the realm.

34 *Supra* n 32, at p. 213

35 *Supra* n 19, at p. 267.

The majority decision of this case was strongly embraced in Malaysia through the Federal Court decision in the leading case of *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs)*[36]. In this case, the Court was asked to review a detention order issued under section 8 of the ISA. The Federal Court refused to interfere with the discretionary power vested in the enabling authority and abstained itself from determining the relevancy and sufficiency of the allegations of fact and grounds of detention communicated to the detainee.

Ironically, the PCA and POTA also provide for indefinite period of detention identical to the repealed ISA but the enabling authorities are different, namely the Prevention of Crime Board and the Prevention of Terrorism Board.

Under the PCA, the Inquiry Officer first decides whether a person falls under the Registrable Category and consequently, the Board 'may' in accordance with section 19A(1), "after considering the report of the Inquiry Officer submitted under section 10 and the outcome of any review under section 11, direct that any registered person[37] be detained". The further detention of the same person by the Board depends on its satisfaction of the fact that "such detention is necessary in the interest of public order, public security or prevention of crime".[38] These terms, similar to the ISA, are not defined in the PCA and their interpretation depends on the good judgment of the Prevention of Crime Board.

Similarly, under section 13(1) of POTA, the Board, if after considering the complete report of the investigation submitted under section 3(4) and the report of the Inquiry Officer submitted under section 12,

> is satisfied with respect to any person that such person has been or is engaged in the commission or support of terrorist acts involving listed terrorist organizations in a foreign country or any part of a foreign country, the Board may, if it is satisfied that it is necessary in the interest of the security of Malaysia or any part of Malaysia that such person be detained, by order ("detention order") direct that such person be detained.

The words 'terrorist acts' and 'listed terrorist organisations' are not defined in the POTA, but the Act refers to other statutes for the definition of these terms. Section 2 POTA states that the term 'terrorist act' will have the same meaning assigned to them in section 130B (2), Chapter VIA of the Penal Code.

Moreover, section 2 of POTA states that 'listed terrorist organisation means any specified entity declared under sections 66B and 66C of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001'. However, Parliament had abstained from defining other significant words used in section 13(1), for

---

[36] [1969] 1 LNS 65.

[37] Registered person is someone who falls under the Registrable Category which refers to nine categories of activities prescribed in the First Schedule of the Prevention of Crime Act, 1959.

[38] Section 19A(1), Prevention of Crime (Amendment and Extension) Act 2014, Act A1459.

instance 'engaged', 'commission', 'support' and 'involving'. According to the Malaysian Bar, due to the use of these words,

> the reach of the legislation is extremely wide and lends itself to abuse. It opens up the possibility that almost anyone could be targeted under POTA. We have seen how ISA, which had been meant to deal with the communist insurgency, was used to stifle political dissent and imprison political opponents.[39]

Thus, similar to the ISA, these Acts also contain broad and vague grounds for preventive detention and consequently make the power of preventive detention easily susceptible to exploitation by the executive.

(2) Broadening the Scope of Preventive Detention through Amendments

In addition to the original ground, two new grounds – actions alleged to be "prejudicial to the maintenance of essential services" and actions "prejudicial to the economic life of Malaysia" were incorporated in sections 8 and 73 through the Internal Security (Amendment) Act 1971[40]. It is noteworthy that the ground 'prejudicial to economic life' does not appear in Article 149 of the Constitution which would entitle Parliament to enact a security law on that ground.

Moreover, the ISA was originally enacted to combat communist insurgency but in a number of cases, the Judiciary decided that the scope of this law should not be confined to communist activities only. The Judiciary in both the cases of *Theresa Lim Chin Chin v Inspector General of Police,*[41] and *Mohd Ezam Mohd Noor v Ketua Polis Negara & Other Appeals,*[42] held that there was nothing in Article 149 of the Federal Constitution or in the ISA that gave rise to the interpretation that the latter was limited in its application to the communist threat only.

The grounds for detention under the ISA were broadened almost 11 years after its enactment but within two years of its coming into effect, SOSMA was amended through the Security Offences (Special Measures)(Amendment) Act 2014[43] which broadened the list of security offences enumerated in the First Schedule. The Amendment Act included in the First Schedule, in addition to Chapters VI and VIA, Chapter VIB of the Penal Code and Offences under Part IIIA of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007.

---

39 Steven Thiru, 5 April 2015, *Press Release: Prevention of Terrorism Bill 2015 Violates Malaysia's Domestic and International Commitments, is an Affront to the Rule of Law and is Abhorrent to Natural Justice*, The Malaysian Bar http://www.malaysianbar.org.my/press_statements/press_release_%7C_prevention_of_terrorism_bill_2015_violates_malaysias_domestic_and_international_commitments_is_an_affront_to_the_rule_of_law_and_is_abhorrent_to_natural_justice.html Site accessed on 14 August 2015.

40 Human Rights Commission of Malaysia, 2003, *Review of the Internal Security Act, 1960,* p- 65 < http://www.suhakam.org.my/wp-content/uploads/2013/12/review-of-the-ISA-1960.pdf> Site accessed on 13 August 2015.

41 [1988]1 LNS 132.

42 [2002] 4 CLJ 309.

43 Act A1472. The Act came into force on 31 December 2014.

In the same vein, reference can also be made to the First Schedule of the PCA which defines the expression '*registrable categories'*. Paragraph 2 of the original First Schedule of the Prevention of Crime Act, 1959 listed as a registrable category, "Persons who belong to any group, body, gang or association of five or more persons who associate for purposes which include the commission of offences involving violence or extortion." Notably, no amendments were brought to the First Schedule through the PCA, 2014 but later a new paragraph 2 was introduced in the PCA by the Prevention of Crime (Amendment of First and Second Schedule) Order 2014 which is significantly wider in scope than the original provision. The new paragraph 2, of the First Schedule reads as follows – "Persons who belong to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code".

Significantly under the new paragraph 2 of the PCA, it is no longer necessary for an offence to be committed under the Penal Code; it will suffice that the person concerned "*consorts"* with at least one other person for purposes which include the commission of offences under the Penal Code.[44] Following in the footsteps of the ISA, the grounds for preventive detention under these new Acts are also being constantly amended to broaden the scope of the power of preventive detention.

B. The Power of Preventive Detention Still Rests with the Executive

The ISA authorised the Minister under section 8 to preventively detain a person for an indefinite period of time. In both the PCA and POTA, this power is given to respective Boards, namely, the Prevention of Crime Board and Prevention of Terrorism Board, which consist of members appointed by the *Yang di-Pertuan Agong* (the King). It is pertinent to highlight here that Article 40(1) of the Federal Constitution provides that "In the exercise of his function under this Constitution or federal law the *Yang di-Pertuan Agong* shall act in accordance with the advice of the Cabinet….". Thus, it is obvious that the executive will be in a position to influence the appointment of the members of the Board.

Nevertheless, the PCA 2014 required the Chairman of the Prevention of Crime Board to be a person "who was or is or has the qualification to be a judge of the Federal Court, Court of Appeal or High Court"[45]. Following from this, the possibility of the abuse of such power was comparatively lesser. However, within one year, through the Prevention of Crime (Amendment) Act 2015, this provision has been amended and Parliament made the composition[46] of the Prevention of Crime Board provided in section 7B identical to the composition of the Prevention of Terrorism Board[47] stipulated in section 8 of

---

44 Lau Sara, *Old Wine In A New Wineskin?* http://www.skrine.com/publications/legal-insights/639-old-wine-in-a-new-wineskin Site accessed on 13July 2015

45 Section 7B(1)(a), Prevention of Crime (Amendment and Extension) Act 2014 Act, A1459.

46 Previously section 7B of the PCA provided that the Board shall comprise of a Chairman and four other members appointed by the *Yang di-Pertuan Agung*.

47 The composition of the Prevention of Terrorism Board is stipulated in section 8 of the POTA and it states that the Board shall comprise of a Chairman, Deputy Chairman and not less than three and not more than six other members.

the POTA. Both sections 7B and 8 of the PCA and POTA respectively only require the Chairman of the Boards to be a person who has at least 15 years of experience in the legal field. Moreover, there are no prerequisites enumerated for the appointment of the deputy chairman and other members of the Board in the respective Acts.

Additionally, the termination of the members of the respective Boards is also dependent on the *Yang di-Pertuan Agong* by virtue of sections 7B(4)[48] and 8(4) of the PCA and POTA respectively. Therefore, it can be argued that the particular Boards cannot be expected to be free from executive influence when the powers of appointment and termination of the Boards are indirectly entrusted on the executive as the *Yang diPertuan Agong* acts on the advice of the Cabinet.

Non-governmental organization, *Suara Rakyat Malaysia* (SUARAM) in the Human Rights Report, 2014 in relation to the Prevention of Crime Board stated that "the purported safeguard to the Act [the PCA], the Prevention of Crime Board is merely cosmetic and ineffective"[49]. Furthermore, the identity of the appointees of the Board is also shrouded in secrecy as the Home Minister only revealed that "they were individuals of high integrity with more than 27 years of experience in the field of security. They are also law practitioners of good credentials".[50] The Malaysian Bar, with reference to the Prevention of Terrorism Board, opined that:

We have seen from the practice of POCA [the PCA] that the names of the members of the Prevention of Crime Board have not been made public. It is likely to be no different for members of POTB. The fact that POTB hearings will not be held in public means, in effect, that POTA will allow secret hearings by a secret panel. There will be no transparency.[51]

Moreover, the Inquiry Officer, based on whose report the respective Boards under both the Acts will direct the detention of individuals, is also appointed by the Minister.

C. *The Duration of Preventive Detention without Trial*

The ISA through section 8(1) sanctioned the deprivation of liberty of a person for a period not exceeding two years which was renewable for an indefinite period of time.[52] The renewal may be made either on the same grounds on which the original order was made or on different grounds or partially on the same and partially on different grounds.

In the years 2014 and 2015, Parliament has ornamented both the PCA and POTA with the power to detain a person for an indefinite period of time similar to the ISA. The PCA and POTA, in sections 19A(1) and 13(1) respectively authorise the Prevention of Crime

---

48 When the PCA came into force it did not empower the *Yang di-Pertuan Agung* to terminate the members of the Board but subsequently through the Prevention of Crime (Amendment) Act 2015 new section 7B(4) was inserted.

49 Suara Rakyat Malaysia (SUARAM), *Malaysia: Human Rights Report 2014,* at p. 5, available online at - http://www.suaram.net/wordpress/wp-content/uploads/2014/12/Suaram-Human-Rights-Overview_2014_9-Dec.pdf. Site accessed on 1 April 2015.

50 *Ibid.*

51 *Supra* n 39.

52 Section 8(7) Internal Security Act 1960, Act 82.

Board and Prevention of Terrorism Board to detain a person for a period not exceeding two years which can be further extended[53] to a period not exceeding two years at a time.

Even though SOSMA in section 4(5) has reduced the period of police detention from a maximum 60 days (under the ISA) to a maximum of 28 days but it should be stressed here that originally, under the ISA, the duration of police detention was also less – a maximum of 30 days under section 73(3). But subsequently, through the Internal Security (Amendment) Act, 1971 it was increased to 60 days.

According to the Explanatory Statement accompanying the Bill for the Amendment Act, it was stated that the increase in the length of the detention was made "based on difficulties which have arisen in practice".[54] From the Parliamentary Debates of 30 July 1971, it appeared that the practical difficulties referred to in the Explanatory Statement to the Bill was the apparent insufficiency of 30 days for the files of a person detained under section 73 to be brought from the police at contingent level to the headquarters of the police force and subsequently to the Minister.[55] SUHAKAM, however, commented that the rationale behind the increase in length of detention under section 73 of the ISA was no longer a valid reason given the advancement in telecommunication and transportation technology in this day and age.[56]

The ISA has been amended a number of times, resulting in harsher provisions on preventive detention. As the SOSMA has similarly been amended several times after it was first introduced in 2012, there is a risk that the duration for police detention may also be increase, thereby following the trend set by the ISA. SOSMA, however, in section 4(11) provides a sunset clause[57] which states that – "subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision". Except for SOSMA, the other two security laws do not contain such sunset clauses.

D. *Right to Judicial Review of the Detention Order*

Article 5(2) of the Federal Constitution safeguards the right to liberty of a person, by allowing an unlawfully detained person to make a complaint to the High Court or any judge against such detention order and be subsequently released.

Notably, the proviso to Article 149 only validates a law passed under Article 149 (1) notwithstanding its inconsistency with Article 5. But neither Article 5 nor Article 149 expressly mention that the rights provided in Article 5 shall not be available to a person detained under such preventive detention laws. This is in contrast to the express prohibition in Article 22 of the Indian Constitution which in subsections (1) and (2) provide protection

---

53 Section 19A (2) Prevention of Crime (Amendment and Extension) Act 2014, Act A1459 and section 17(1) (a), Prevention of Terrorism Act 2015, Act A769.

54 *Supra* n 40, at p.37

55 Parliamentary Debates, Dewan Rakyat, 30 July 1971, p. 4095.

56 *Supra* n 40, at p. 67

57 Sunset clauses are a mechanism to acknowledge the extraordinary and therefore temporary nature of the powers under the security laws, as Parliament will review such power periodically and renew it only if a majority of the Parliament decided it is still required. Surabhi Chopra, "National Security Laws in India: The Unraveling of Constitutional Constraints", *Oregon Review of International Law,* 2015, 17(1), p.42

against arrest and detention by affording an individual with certain rights, that is, right to be informed of the grounds of arrest, right to be defended by a legal practitioner of his choice and brought before a magistrate within 24 hours of arrest. In the absence of such express prohibition in Article 5 or Article 149 of the Federal Constitution, the right to have the lawfulness of the detention order reviewed by a court of law both on substantive and procedural grounds should be available to the detainees of the security laws.

Accordingly, this right was given to the detainees under the original ISA. The Internal Security (Amendment) Act, 1989, however, introduced subsections 8A, 8B, 8C and 8D which unduly restricted the ambit of judicial review of the Ministerial detention order issued under section 8 of the ISA. The Prime Minister while tabling the Internal Security (Amendment Act) explained the main concern behind the amendment of the ISA as follows:

> The interventionist role of judicial decisions and the trends of foreign courts should not be copied because such actions were against the concept of separation of powers between the executive and the judiciary which was upheld in Malaysia. If the courts can reverse executive's decision, it would make it impossible for the executive to make any decision for fear that the courts would intervene. The ruling party would then be waiting for the decisions of the courts and the results of appeal to higher courts[58].

Furthermore, the Explanatory Statement accompanying the Bill for the Internal Security (Amendment) Act 1989 echoed the explanation put forwarded by the Prime Minister as follows:

> This provision is necessary to avoid any possibility of the courts substituting their judgment for that of the Executive in matters concerning security of the country... In matters of national security and public order, it is clearly the Executive which is the best authority to make evaluations of available information in order to decide on precautionary measures to be taken and to have a final say in such matters; not the courts which have to depend on proof of evidence.[59]

The amendments were purposefully introduced to curtail the right to *habeas corpus* of detainees which was evident from the wordings of section 8B(1) which stated that:

> There shall be no judicial review in any court of law and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agung or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question or compliance with any procedural requirement in this Act governing such act or decision.

---

[58] Charles Hector, 23 January 2006, *Detention without Trial Laws in Malaysia,* The Malaysian Bar, http://www.malaysianbar.org.my/human_rights/detention_without_trial_laws_in_malaysia_.html Site accessed on 4 July 2015.

[59] *Supra* n 40, at p.81.

Section 8C (c) which defines the term 'judicial review' included, among others, any proceedings instituted by way of a writ of *habeas corpus*. The effect of these two subsections can be gathered from the observation of the Federal Court in the case of *Ng Boon Hock v Penguasa, Tempat Tahanan Perlindungan Kamunting, Taiping & Ors*[60]:

> …reading section 8B together with section 8C of the said Act, the only action anyone can take to court for any offence under the said Act is 'in regard to any question on compliance with any procedural requirement in this Act governing such act or decision'. This means that one can only challenge the act done or decision made by the Yang di-Pertuan Agung [the King] or the Minister on a question of non-compliance with any procedural requirement governing such act or decision.[61]

Following in the footsteps of the ISA, the two new Acts, namely the PCA and POTA also contain provisions that are worded identically to sections 8B(1) and 8C of the ISA. However, the wordings of the ouster clauses in these two Acts are inconsistent with the provisions which empower the Boards to detain individuals. The PCA and POTA, in sections 19A(2) and 13(10) respectively, on the one hand state that the 'direction' of the Boards concerning preventive detention shall be subject to review by the High Court but on the other hand, in sections 15A and 19, expressly prohibit judicial review of 'any act done or decision made by the Board in the exercise of its discretionary power' except on procedural grounds.

At the time of the passing of the PCA 2014, section 15A(2) which defines the term 'judicial review' did not include writ by way of a *habeas corpus* within its purview. However, with the passing of the Prevention of Crime (Amendment) Act 2015,[62] a new section 15A(ba) is introduced which includes a writ of *habeas corpus* within the ambit of 'judicial review.' Thus, similar to section 19(2)(c) of the POTA, the PCA also prohibits the bringing of an action by way of a writ of *habeas corpus*.

From the wordings of sections 15A of the PCA and 19 of the POTA, it is apparent that the provisions were drafted with the intention to oust the court's power to review all acts done or decisions made in the exercise of its discretionary powers. However, these sections did not incorporate the exact word 'direction' used in sections 19A(1) of the PCA and 13(1) of the POTA which enumerate the power of preventive detention. Therefore, in the absence of the express usage of the word 'direction' in the ouster clauses, it will depend on the interpretation of the judiciary whether such provisions can prevent the courts from reviewing the legality of the detention orders on substantive grounds. While interpreting these provisions, apart from giving effect to the intent of Parliament which it previously did in the ISA detention cases, the judiciary has to remind itself of its sacred duty of preserving the rights of the individuals who approach the courts for redress.

The above discussion of the relevant provisions reveal that Parliament has essentially resuscitated the oppressive preventive detention provisions of the repealed ISA, through

---

60 [1998] 2 MLJ 174.
61 *Ibid.* at p.178.
62 Act A1484.

the new security Acts, especially the PCA and POTA. The Chairman of the Society for the Promotion of Human Rights, Datuk Kuthbul Zaman Bukhari opined in relation to the PCA that ''the reintroduction of preventive laws and detention without trial is akin to putting old wine into a new bottle''[63] and Datuk Raja Kamarul Bahrin Shah Raja Ahmad, MP of Kuala Terengganu and Wong Chen, MP of Kelana Jaya concerning the POTA articulated that the new Act is just a ''reincarnation of the ISA.''[64]

VI. Role of the Judiciary in Preventive Detention Cases

Judicial independence is a constitutional value which is vital to all democratic nations and is a check on the growth of authoritarianism.[65] Hon. P.N. Bhagwati lucidly puts it:

> The judiciary is [an] institution on which rests the noble edifice of democracy and the rule of law. It is to the judiciary that is entrusted the task of keeping every organ of the state within the limits of power conferred upon it by the constitution and the laws and thereby making the rule of law meaningful and effective.[66]

Prior to 1988, the Federal Constitution of Malaysia in Article 121 provided that – "the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status . . . and in such inferior courts as may be provided by federal law". However, through the Constitution (Amendment) Act 1988[67], this Article was amended and the present Article reads as follows:

> There shall be two High Courts of co-ordinate jurisdiction and status….and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

Sultan Azlan Shah detected troubling ramifications with this amended Article and remarked that:

> The precise reason for this amendment remains unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly, the High Courts have been stripped of their inherent jurisdiction. Their powers are now only to be derived from any federal law that may be passed by Parliament.[68]

---

63 June Moh, 12 August, 2014, *PCA: the return of an old foe.* The Ant Daily, <http://www.theantdaily.com/Article.aspx?ArticleId=15011> Site accessed on 13 June 2015.

64 *Supra* n 30.

65 *Supra* n 17, at p. 389.

66 *Supra* n 17, at pp. 388-389.

67 Act A704.

68 Raja Azlan Shah, *The Role of Constitutional Rulers and the Judiciary Revisited*, Visu Sinnadurai, ed., "Constitutional Monarchy, Rule of Law and Good Governance: Selected Essays and Speeches", (Kuala Lumpur: Professional Law Books, 2004), p. 385.

Sultan Azlan Shah drew attention to the Report by the International Commission of Jurists where it was signified that by making the jurisdiction and powers of the High Court dependent upon federal law meant that there could be no "constitutionally entrenched original jurisdiction".[69] The International Commission of Jurists in its report also stated that

> This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.[70]

Even before the amendments, the Malaysian Judiciary's viewpoint in the ISA detention cases can be gathered from the judgment in the case of *Theresa Lim Chin & Ors v Inspector General of Police*[71] where it was observed that:

> In a proceeding like the present one where both the legislation and the executive act under it are challenged, our duties are not to substitute our decision for that of the executive. We are only concerned with the procedural aspects of the exercise of executive discretion. We have no interest, nor desire, to embark upon trespassing into the domains of the legislature or the executive.

After the 1988 constitutional amendment and 1989 amendment of the ISA, the Judiciary was more inclined to give effect to the intent of Parliament and refrained from exercising its power of judicial review of the detention orders on substantive grounds in majority of the cases under the ISA. This is especially so following the decision of the Federal Court in the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*[72] involving section 59A of the Sabah Immigration Act, an ouster clause[73]. The Federal Court held that:

> By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the decision maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act[74]….In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision[75].

Accordingly, in the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir*[76], the Federal Court stated that:

---

69 *Ibid.* at p. 403.
70 *Ibid.* at p. 403. Cited Report on Malaysia, International Commission of Jurists, 13 August 2001.
71 *Supra* n 41.
72 [2002] 3 MLJ 72.
73 *Ibid.* at p. 91.
74 *Ibid.* at p. 92
75 *Ibid.*
76 [2004] 1 CLJ 81.

> the words in s. 8B are explicit. They are clear and precise. They are exclusionary in nature and effect. The intention of Parliament is unmistakably obvious i.e., that the jurisdiction of the court is to be ousted in terms stated in s. 8B. In the premises, adopting the test taken by the Federal Court in *Sugumar Balakrishnan*, the court must give expression to Parliament's intention.[77]

Since the amendment of Article 121 of the Constitution, the judicial power is now considered to be subject to the federal laws passed by the Parliament and is no longer vested in the Judiciary. In this context, the Court of Appeal's decision of *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*[78] is worthy of quote where Gopal Sri Ram JCA, after referring to the Constitutions of Sri Lanka and India, stated that the absence of the express mention that the judicial power is vested in the judiciary does not necessarily mean that after the amendments the power is no longer with the judiciary. Gopal Sri Ram JCA opined that:

> … the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely with the judiciary.[79]

Moreover, Bhagwati CJ in the case of *Sampath Kumar v. Union of India*[80] concerning the power of judicial review stated that "… judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is".

Therefore, the Judiciary while interpreting the ouster clauses incorporated in the PCA and POTA should not follow its precedents of the ISA detention cases where it abstained from reviewing the detention orders on substantive grounds. Rather, the Judiciary should interpret the clauses so as not to take away its power of reviewing the legality of the detention orders completely. An instance of such interpretation can be seen from the decision of the case of *Raja Petra Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri*[81] where the High Court held that:

> the Minister's decision is not completely unfettered and arbitrary but is confined by the provisions of the Act in question, here the ISA….where the Minister has acted outside the purview of the express objects of the ISA, then he has acted outside the jurisdiction accorded to him by the Act. In short he has acted ultra vires the object of the Act. In such an instance the ouster clause does not come into play, or does not take effect. This result follows from a simple reading of the section 8B….

---

77 *Ibid.* at p.95.
78 [1998] 3 CLJ 85.
79 *Ibid.* at p. 111.
80 [1987] SC 386.
81 [2008] 1 LNS 920.

> In order to ascertain whether the Minister has acted ultra vires the fundamental objects and provisions of the Act, the Courts are entitled to inspect and consider the grounds put forward by the Minister in explaining the basis for the issuance of the detention order.[82]

The Judiciary is the protector of the fundamental liberties of the citizens and this is a sacred duty or trust which the Judiciary must constantly uphold[83]. In the absence of judicial scrutiny on substantive grounds there will always remain the possibility of people being arbitrarily detained under the new preventive detention laws similar to the detainees under the ISA. It is well known that ISA has been used during its 52 years of operation, to suppress legitimate political dissent and for ulterior purposes. For instance, Raja Petra Kamarudin, editor of *Malaysia Today* on September 12, 2008 was arrested and detained for a period of two years under the ISA. It was claimed that the reason behind his detention was his charge that the then Deputy Prime Minister, Najib Tun Razak and his wife were involved in the murder of a Mongolian woman.[84] Furthermore Tan Hoon Cheng, a newspaper reporter was also arrested on the same day in 2008 for reporting a ruling party MP's racist statement that Chinese citizens of Malaysia are 'squatters and therefore not entitled to rights.'[85] There are more instances of such misuse of power which can only be prevented from recurring under the new preventive detention laws if the Judiciary can play an effective role. It should be stressed here that:

> the power of judicial review…is a most potent weapon in the hands of the judiciary for maintenance of the Rule of law. The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the Rule of Law would become a teasing illusion and a promise of unreality.[86]

VII. Conclusion

Preventive detention has been claimed to be an imperative component of the Malaysian democracy since independence. Article 149 of the Federal Constitution was drafted with the intent to accommodate the Executive with the necessary power of preventive detention to deal with circumstances like communist insurgency in a non-emergency state. But over the years, the ISA has been heavily criticised for its usage as a weapon to suppress political dissent; criticism which led to the Prime Minister's announcement (on 15 September 2011), to the repeal of the ISA. Nevertheless, the repeal of the ISA did not liberate the legal system from the exercise of such powers as Parliament brought

---

82 *Ibid.* at p. 937.

83 *Abd Malek bin Hussin v Borhan bin Hj Daud* [2008] 1 MLJ 368, 383.

84 James, T. & Jeffery, B, Preventive Detention in Malaysia: Constitutional and Judicial Obstacles to Reform and Suggestions for the Future. Georgia Journal of International and Comparative Law, 2013, Vol. 41:535, pp. 549-550.

85 *Ibid.* at pp. 549-550.

86 [1987] SC 386, p. 388.

back the oppressive provision of an indefinite period of preventive detention even before Malaysian citizens could breathe a sigh of relief.

The Prime Minister promised that the new laws which will replace the ISA will aim at maintaining peace and wellbeing and safeguard the rights of those involved[87]. But the above examination of the new laws reveal that these laws are also enacted in total disregard of the freedom of liberty of persons as these laws, similar to their predecessor, allow for an indefinite period of preventive detention. The Prime Minister guaranteed that no person will be detained under the new laws for their own political ideology and, to this effect, the SOSMA, PCA and POTA incorporated provisions stating that no person shall be detained for his political belief or political activity. It is pertinent to note that when individuals are detained under the security laws, the grounds shown on papers are for the maintenance of national security and public order rather than their political activities. There is no mechanism in place to ensure that people will not be detained for holding different political opinion and thus, the presence of such a provision in the new laws is a false safeguard.

It is undeniable that the power of preventive detention is necessary during exigencies but the government should be mindful that in a democratic country like Malaysia, the fundamental rights of the citizens should not be arbitrarily encroached upon in the disguise of the maintenance of national security. A balance has to be struck between the necessity of maintaining national security and the rights of the citizens not to be detained arbitrarily which can be ensured with an independent judiciary possessing its power of judicial review on substantive grounds over the detention orders and by providing adequate safeguards to the detainees of such laws.

---

87 *Supra* n 6.

A Copyright Tale of Two Collecting Societies: *Public Performance Malaysia Sdn Bhd & Anor v PRISM Berhad*

Tay Pek San*

I. Introduction

Under the Copyright Act 1987 ('CA 1987'), a society or organisation which is set up to negotiate and grant copyright licences for and on behalf of copyright owners is referred to as a 'licensing body'. Essentially, a licensing body grants licences and collects royalty on behalf of its members who are copyright owners. In *Public Performance Malaysia Sdn Bhd & Anor v PRISM Berhad,*[1] the High Court presided over a dispute between two licensing bodies which centred on the issue of copyright ownership in a number of licensing documentations used in the course of royalty collection. It is the first reported case involving licensing bodies in Malaysia.

II. Legal Context

A 'licensing body' as defined in section 3 of the CA 1987 means a society or organisation which is declared as a licensing body under section 27A of the Act. Section 27A(1) requires any society or organisation which intends to operate as a licensing body for copyright owners or for a specified class of copyright owners to apply to the Controller of Copyright to be declared as a licensing body. Every licensing body operates within the terms of its own licensing scheme. Pursuant to section 27AA(2), a licensing scheme is a scheme which sets out both the following matters. First, it sets out the types of activities in relation to the copyright work which the licensing body or the person on whose behalf it acts, is willing to grant copyright licenses. Secondly, it sets out the terms on which licences would be granted.

Prior to the enactment of the Copyright (Amendment) Act 2012 ('CA(A) 2012'), a licensing body need not apply to the Controller of Copyright to be declared as a licensing body. However, over time, it was recognised that there was a need for governmental supervision and control over licensing bodies in order to prevent potential abuse of power on their part. As a result, section 27A of the CA 1987 was amended to require any society or organisation which intends to operate as a licensing body for copyright owners to apply to the Controller of Copyright to be declared as a licensing body. With the coming into effect of the Copyright (Licensing Body) Regulations 2012 on 1 June 2012, all existing and proposed licensing bodies have to apply for the Controller's declaration to operate

* BSc (Sydney), LL.B (Sydney), LL.M (UM) and PhD (UM), Associate Professor, Faculty of Law, University of Malaya.

1 [2015] AMEJ 1736.

as collective licensing bodies for and behalf of their members. The government does not determine the rate of royalty fixed by the licensing bodies but leaves it to the private parties involved to determine the rates on a contractual basis.

Although there is no requirement for a proposed licensing body to submit to the Controller the terms of the licensing scheme which the licensing body intends to operate, section 27B allows any organisation which represents persons claiming that they require licences under any proposed licensing scheme to refer to the Copyright Tribunal the terms of the scheme for determination. The Tribunal is empowered to confirm or vary the licensing scheme or licence. Disputes between the operator of a licensing scheme and applicants for a licence under a licensing scheme may also be referred to the Copyright Tribunal. In addition, a person who claims that he has been refused a licence by the operator of a licensing scheme is also entitled to apply to the Tribunal for an order.

Historically, the collective administration of copyright for and on behalf of copyright owners was first introduced into Malaysian copyright landscape in the late 1980s, shortly after the passage of the CA 1987. In a sense, the setting up of bodies to collectively administer copyright was a late arrival in the country's copyright scene bearing in mind that the historical origin of Malaysian copyright law may be traced back to as early as 1902.[2] The earliest collective management body that was established in Malaysia was the Public Performance Malaysia Sdn Bhd ('PPM') which was set up in 1988 to act for Malaysian and international recording companies in the collective management of the public performance rights in sound recordings in Malaysia. PPM is a private shareholding company and is a wholly-owned subsidiary of the Recording Industry Association of Malaysia ('RIM'). PPM will only act as the collecting body for sound recording companies who are members of RIM. The public performance may be live or recorded, from broadcast stations as well as mobile and online service providers.

In 1989, the Music Authors' Copyright Protection ('MACP') was incorporated as a public company limited by guarantee to grant copyright licences to users of music including radio and television stations, entertainment outlets, shops, online and mobile service providers and to pay the songwriters and publishers when their works are broadcast and publicly performed.

In the year 2000, in response to Malaysia's international obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the CA 1987 was amended to introduce some degree of protection for performers through the inclusion of performers' rights. Pursuant to section 16B of CA 1987, performers are entitled to an equitable remuneration for the public performance, broadcast or other communication to the public of a sound recording. What amounts to 'equitable remuneration' or its calculation is not provided in the CA 1987. However, it would appear that the quantum of the remuneration would depend on the work that is used, the economic importance of the work to the licensee and the royalty collected. Following the introduction of section 16B, in March 2001, the licensing body known as Performers & Artistes Rights (Malaysia) Sdn Bhd ('PRISM Sdn Bhd') was set up to protect and enforce the rights of performers who are its members and to collect and administer royalties for its members in respect

[2] Khaw, LT, *Copyright Law in Malaysia* (LexisNexis: Petaling Jaya: 2008) 3rd ed. at p. 2.

of performers' rights. It is the first entity that was set-up to represent performers' rights in Malaysia.[3] In 2012, PRISM Sdn Bhd was dissolved and its function in protecting performers' rights and granting licences accordingly ceased. In its place, a new entity known as the Performers Rights and Interest Society of Malaysia, which has the acronym PRISM Berhad, was established to collect, distribute and protect the rights of performers.[4] In addition, in 2012, another licensing body for performers known as the Recording Performers Malaysia Berhad ('RPM Bhd') was established to represent the interests of recording artistes and musicians. Currently, PPM is authorised by RPM Bhd to issue licences and collect royalties for and on behalf of RPM's members in respect of the public performance, broadcast or other communication to the public of all commercial sound recordings containing their performances.

At the time of writing, there are four organisations that operate as licensing bodies under the CA 1987. They are the PPM, MACP, RPM Bhd and PRISM Berhad.

III. Facts

In the present case, both the first plaintiff and defendant are licensing bodies set up under the CA 1987. The first plaintiff operated as a licensing body in 1988 while the defendant was declared a licensing body by the Copyright Controller in 2013. As a licensing body, the first plaintiff had the mandate and responsibility to collect royalties on behalf of recording companies who were members of its parent company, which was RIM. The royalties were in relation to licences which were granted to third parties to publicly perform sound, music videos and karaoke recordings of RIM members. The second plaintiff was the Chief Executive Officer of RIM. The defendant acted on behalf of the recording performers being artistes, musicians and persons entitled to performers' rights in any sound recording.

In the year 2002, the first plaintiff entered into an agreement with a licensing body, PRISM Sdn Bhd, under which PRISM Sdn Bhd authorised the first plaintiff to collect and administer royalties for its members who were all performers. As mentioned above, PRISM Sdn Bhd was the first entity in Malaysia that was set up to represent performers' rights on behalf of performers in Malaysia. It had the responsibility to protect and enforce the rights of performers as well as to collect and administer royalties for its members. Pursuant to that agreement, the first plaintiff was authorised by PRISM Sdn Bhd to issue licences and collect royalties for the public performance, broadcasting and communication to the public of recordings of performances of PRISM Sdn Bhd's members. The first plaintiff's administrative charges for carrying out this task was deducted from the royalties collected and the balance remitted to PRISM Sdn Bhd for distribution to its members.

For the purpose of issuing licences on behalf of PRISM Sdn Bhd under the agreement, the first plaintiff directed its employees to prepare three sets of documentation.

---

[3] Unfortunately, Performers & Artistes Rights (Malaysia) Sdn Bhd was wound up in 2015.

[4] See the website of Performers' Rights and Interest Society of Malaysia at www.prismberhad.com.my Site accessed on 10 November 2016.

These were the application form for a PRISM copyright licence, the terms and conditions of the licence agreement and the list of standard public performance tariff. In 2011, the agreement was terminated by the first plaintiff. The first plaintiff then acted for another licensing body, RPM, to issue licences in respect of performers' rights and collect royalties. PRISM Sdn Bhd remained inactive after that and was wound up in 2015.

In June 2012, by virtue of its Board and Management Resolution, PRISM Sdn Bhd handed over the three sets of documentation prepared by the first plaintiff's employees to the defendant which succeeded PRISM Sdn Bhd. The defendant's role was to grant licences to the public and collect royalties from licensees in respect of the public performance of recorded performances controlled by its members, who were all performers. The defendant used the licensing documentations which were handed to them by PRISM Sdn Bhd in connection with its licensing activities with the public and music users.

The dispute between the parties arose because the first plaintiff alleged that the defendant had *inter alia* infringed its copyright in the three sets of documentation.[5]

IV. Reasoning of the High Court

The court found that the defendant had infringed the first plaintiff's copyright in the three sets of documentation based on the following reasons:

(1) In a claim of copyright infringement, the onus is on the plaintiff to establish, on the balance of probabilities, three elements. First, the work is eligible for copyright protection. Secondly, the plaintiff owns the copyright in the work. Thirdly, the defendant has infringed the plaintiff's copyright.

(2) The first plaintiff's licensing documents came within the category of literary works as defined in section 3 of the CA 1987. This is because section 3 defines a 'literary work' as including 'novels, stories, books, pamphlets, manuscripts, poetical works and other writings and tables or compilations, whether or not expressed in words, figures or symbols and whether or not in a visible form'. In addition, in the landmark English case of *University of London Press Ltd v University Tutorial Press Ltd*,[6] it was held that a literary work for the purpose of copyright law need not be one of high quality or style but it suffices if the work is expressed in print or writing.

(3) Apart from establishing that the licensing documents came within one of the categories protected by copyright, it was also necessary to prove that the work was original in character. The court cited section 7(3) of CA 1987 which provides that a literary work shall not be eligible for copyright unless sufficient effort has been expended to make it original in character. In elaborating on the scope of this section, the court referred to an earlier decision in *Kiwi Brand (Malaysia) Sdn Bhd v Multiview Enterprises Sdn Bhd*[7] where the High Court held that:

---

5 The other cause of action brought against the defendant in the suit was for passing off. As the remit of this chapter is confined to copyright issues involving licensing bodies, the passing off aspect will not be dealt with in the chapter.

6 [1961] 2 Ch 601.

7 [1998] 2 CLJ Supp 194 at para [14].

> [t]he word original that appears in section 7(3)(a) of the Copyright Act 1987 does not mean that the work must be the expression of original or inventive thought. I am of the considered view that the originality, which is required, relates to the expression of the thought; it does not require that the expression must be an original or even novel form. The work must not be copied from another work. It should originate from the author.

On the facts adduced before the court by the second plaintiff, who was the Chief Executive Officer of the first plaintiff, it was clear that the licensing documents were created by the employees of the first plaintiff as those were needed when the first plaintiff became the exclusive agent of PRISM Sdn Bhd to issue licences and collect royalties in respect of performers' rights.

(4) The issue of subsistence of copyright in the licensing documents as required by section 10 of CA 1987 was also satisfied because the work, being created by the employees of the first plaintiff, was made in Malaysia. Under section 10(3) of the Act, copyright shall subsist in every work eligible for copyright if the work is made in Malaysia.

(5) Having determined that the licensing documents enjoyed copyright protection, the court considered the issue of ownership of the copyright in the documents as literary works. Evidence was given by the second plaintiff that the first plaintiff's employees, in the course of their work, used the first plaintiff's resources and materials in creating the documents. The second plaintiff approved and finalised the format, style and content of the documents. Accordingly, the copyright in the licensing documents, which vested initially in the employees as the authors pursuant to section 26(1) of the CA 1987 was deemed transferred to the first plaintiff as the employer under section 26(2)(b). Furthermore, the statutory declaration affirmed by the second plaintiff pursuant to section 42 of the Act was evidence of the first plaintiff's ownership in the licensing documents. Referring to the Court of Appeal's decision in *Elster Metering Ltd & Anor v Damini Corp Sdn Bhd & Anor,*[8] the court reiterated the five requirements of section 42 when a statutory declaration was used as a means to prove ownership. First, the statutory declaration must be made by or on behalf of the person claiming to be the copyright owner. Secondly, it must state that copyright subsisted in the work at the time specified. Thirdly, it must state that the person named in the statutory declaration is the owner of the copyright. Fourthly, a true copy of the work must be annexed to the statutory declaration. Fifthly, the person who is authorised to act on behalf of the copyright owner and who signed the statutory declaration must produce such authorisation in writing. Upon satisfaction of the five requirements, the statutory declaration shall be admissible in evidence in a court proceeding and shall be *prima facie* evidence of the facts contained therein. Having considered the statutory declaration of the first plaintiff, the court held that it had complied with section 42 of the Act in establishing *prima facie* evidence of copyright ownership. Once the statutory declaration is admitted as

[8] [2011] 8 MLJ 253.

prima facie evidence of copyright ownership, the burden is shifted to the infringer to rebut the prima facie evidence. The court referred to the decision of the Court of Appeal in *Microsoft Corporation v Yong Wai Hong*[9] on this point. In attempting to rebut the prima facie evidence of ownership, the defendant stated that pursuant to PRISM Sdn Bhd's Board and Management Resolution, the Chairman of the Board of Directors of PRISM Sdn Bhd had agreed to transfer ownership of the documents to the defendant. However, no evidence was adduced by the defendant to prove that copyright in the licensing documents belonged to PRISM Sdn Bhd and that it was in a position legally to transfer copyright to the defendant. In the absence of this, the court held that there was no dispute to the first plaintiff's assertion that copyright in the licensing documents vested in the first plaintiff.

(6) The mere fact that PRISM Sdn Bhd was in possession of the licensing documents did not mean that it owned the copyright in the documents. Copyright did not vest in a person solely because of his physical possession of the work. Neither is there any provision in CA 1987 that vests copyright in a person by reason only of physical possession.

(7) As copyright in the documents clearly vested in the first plaintiff, the defendant had to prove that there had been an assignment of the copyright in the first plaintiff's licensing documents to PRISM Sdn Bhd or the defendant. The assignment had to be proved by the existence of a written document because section 27(3) of CA 1987 provides that an assignment of copyright must be in writing. However, the defendant did not adduce any evidence of an assignment from the first plaintiff to them or to PRISM Sdn Bhd.

(8) The issue as to whether the defendant had infringed the first plaintiff's copyright in the documents by reproducing or causing the reproduction of the documents or a substantial part thereof without the licence of the first plaintiff was determined by section 36(1) read with section 13(1) of CA 1987. Section 36(1) provides that copyright is infringed by any person who does, or causes any other person to do, without the licence of the owner of the copyright an act the doing of which is controlled by copyright. Section 13(1) spells out the exclusive rights of a copyright owner. Referring to the decision in *Megnaway Enterprise Sdn Bhd v Soon Lian Hock*,[10] which in turn cited the English authority of *Purefoy Engineering Co Ltd v Sykes Boxall & Co Ltd,*[11] the court summarised the three elements that had to be established in an action for direct infringement. First, there must be sufficient objective similarity between the original work or a substantial part thereof, and the infringing copy. Secondly, there must be a causal connection between the original work and the infringing copy, that is, the infringing work must have been copied from the original work, whether directly or indirectly. Thirdly, the portion that has been infringed must constitute a substantial part of the original work.

---

9 [2008] 6 CLJ 223.
10 [2009] 2 MLJ 525.
11 (1955) 72 RPC 89.

Insofar as objective similarity is concerned, the court quoted the passage from the House of Lords decision in *Designers Guild Ltd v Russell William (Textiles) Ltd*[12] where it was stated that:

> … the first step in an action for infringement of artistic copyright is to identify those features of the defendant's design which the plaintiff alleges have been copied from the copyright work. The court undertakes a visual comparison of the two designs, noting the similarities and the differences. The purpose of the examination is not to see whether the overall appearance of the two designs is similar, but to judge whether the particular similarities relied on are sufficiently close, numerous or extensive to be more likely to be the result of copying than of coincidence. It is at this stage that similarities may be disregarded because they are commonplace, unoriginal, or consist of general ideas. If the plaintiff demonstrates sufficient similarity, not in the works as a whole but in the features which he alleges to have been copied, and establishes that the defendant had prior access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

Based on the above-quoted passage, the court made a visual comparison between the first plaintiff's licensing documents and the defendant's licensing documents. It found that there were substantial similarities in both documents with regard to the format used, the headings, the lay-out and the wordings appearing in them. Indeed, almost the whole of the first plaintiff's licensing documents had been copied and reproduced by the defendant's infringing documents.

In relation to causal connection between the first plaintiff's licensing documents and the defendant's documents, the court held that it must be shown that the defendant's licensing documents had been copied from the first plaintiff's licensing documents. Based on the decision in *Plastech Industrial Systems Sdn Bhd v N&C Resources Sdn Bhd & Ors* [13] where it was held that prior access to the copyrighted work may establish causal connection between the works in issue, the court noted that the defendant had itself conceded that it had prior access to the first plaintiff's licensing documents through PRISM Sdn Bhd. The fact that the defendant had no knowledge of the first plaintiff's copyright in the licensing documents was irrelevant in copyright infringement proceedings. The court referred with approval to the Court of Appeal decision in *Elster Metering Limited & Anor v Damini Corp Sdn Bhd & Anor*[14] where it was held that in copyright infringement proceedings, it is no defence that the defendant was unaware that what he was doing infringed the copyright of the plaintiff's work. No knowledge or intent to commit infringement is required. As the court pointed out:

---

12 [2000] 1 WLR 2416 at 2425.
13 [2012] 5 MLJ 258.
14 [2011] 8 MLJ 253.

> … neither intention to infringe, nor knowledge that he is infringing on the part of the defendant … is a necessary ingredient in the cause of action for infringement of copyright. Once the two elements of sufficient objective similarity and causal connection are established, it is no defence that the defendant was unaware (and could not have been aware) that what he was doing infringed the copyright of the plaintiff's work.[15]

V. Legal Analysis

A. Copyright Ownership

The fundamental principle that copyright subsists in a work automatically if the prerequisites are met without the need for any formality or registration raises a unique difficulty which does not exist in the case of intellectual property rights which are acquired by way of registration such as patents, registered trade marks or registered industrial designs. Establishing copyright ownership can be difficult because it entails the production of relevant evidence to prove the creator of the work or, in the case of assignments, the supporting documents to prove the transfer of copyright or changes in copyright ownership.

Obviously, the best way of proving ownership is for the copyright owner himself to be present as a witness in court to adduce evidence of his copyright ownership. However, this may not always be feasible especially if the work emanates from overseas and it is too inconvenient, impracticable or uneconomical in terms of time and finance for the copyright owner to be present in this country to testify during the trial in court. As a result, Parliament enacted section 42 of the CA 1987 to provide an additional means of establishing copyright ownership. The purpose is to facilitate and ease the process of proving copyright ownership.[16] Nevertheless, this mode of proving ownership, though advantageous in many ways, has its drawbacks as is evident from court decisions over time. For instance, in *Solid Gold Publishers Sdn Bhd v Orang-Orang Yang Tidak Dikenali Yang Kononnya Berniaga Sebagai Shenton Video Centre (Terengganu) Sdn Bhd & Anor;*[17] the defendant successfully argued that the plaintiff had failed to comply with the requirements of section 42, particularly with regard to the need for a sworn declaration by the copyright owner or the agent authorised by him. Also, in *Ultra Dimension Sdn Bhd v Ketua Pengarah, Lembaga Penggalakan Pelancongan Malaysia & Ors*,[18] a true copy of the photograph in which the copyright ownership was in dispute was not annexed to the affidavit filed pursuant to section 42. It was held that the affidavit was defective as the requirements of section 42 were not complied with.

The CA(A) 2012 introduced a further means of proving copyright through a voluntary notification system of the copyright work with the Controller of Copyright.

---

15 [201] 1 AMEJ 1736 at para [43], quoting the Court of Appeal's judgment in *Elster Metering Ltd & Anor v Damini Corp Sdn Bhd & Anor* [2011] 8 MLJ 253 at para [12].

16 *Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552, 560.

17 [1998] 5 MLJ 122.

18 [2010] 8 CLJ 245.

With this notification system, a Register of Copyright was created. Pursuant to section 26B(5) of the CA 1987, the registration serves as evidence in any court proceedings of copyright ownership. Certified extracts of the Register of Copyright are admissible in evidence and are prima facie evidence of ownership of copyright in the works concerned.

On the facts of the case under discussion, PRISM Sdn Bhd had authorised the first plaintiff to act on its behalf in issuing licences and collecting royalties for its members. From the royalties collected, the first plaintiff was paid a certain amount for its services. In this regard, the nature of the work carried out by the first plaintiff for the defendant was essentially a commissioned work. More specifically, it cannot be doubted that the parties to the agreement would have contemplated that documents relating to the licensing and royalty collection, such as the application form for copyright licences, terms and conditions of the licence agreement and the public performance tariff would be part and parcel of the commissioned work. Pursuant to section 26(1) of the CA 1987, copyright shall vest initially in the author. However, where the work is a commissioned work, section 26(2)(a) provides that the copyright is deemed to be transferred to the person who commissioned the work. It is submitted that one plausible argument that could have been raised by the defendant in rebutting the prima facie evidence of copyright ownership adduced by the first plaintiff via the section 42 statutory declaration was to assert that the work that was carried out by the first plaintiff was in the nature of a commissioned work. Being a commissioned work, copyright in the licensing documents would have been transferred from the first plaintiff's employees as authors to PRISM Sdn Bhd as the party who commissioned the work. In turn, PRISM Sdn Bhd, through its Board and Management Resolution, assigned the copyright in the licensing documents to the defendant by way of a letter in June 2012.

B. Copyright Infringement as a Strict Liability Tort

In attempting to exculpate itself from liability for copyright infringement, the defendant testified that it did not know that copyright in the relevant documents belonged to the plaintiff. To demonstrate its innocence, the defendant adduced evidence that the Board of Directors of PRISM Sdn Bhd had written to the defendant stating that the documents pertaining to tariffs and licences would be given to the defendant. In addition, the Board of Directors also stated that PRISM Sdn Bhd owned the copyright in the tariffs and licensing documents and it would be transferred to the defendant. As rightly noted by the court, mere possession is not good evidence of copyright ownership. More relevant to the present discussion is the court's reiteration that intent or knowledge of infringement is not a prerequisite in an action for copyright infringement. Copyright infringement is a strict liability tort. This is also the position in the United Kingdom and Australia. In the United States ('US'), knowledge or intent is also not a requirement to establish direct copyright infringement. However, there is provision in the US Copyright Act 1976[19] for liability to arise as a result of contributory infringement. A person who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing activity

[19] 17 U.S.C. § 106.

may be held liable as a contributory infringer. Knowledge is an essential element for contributory copyright infringement. However, the concept of contributory infringement does not exist in Malaysian copyright law.

C. Commercial or Industrial Significance

The immediate commercial consequence of the decision on the defendant is that it had to create afresh its own set of licensing documentations independently without copying from the first plaintiff's licensing document. This would be unlikely to pose any serious obstacle to the defendant's business operation. However, as an industry, the continued collection of fees from music users by the defendant on behalf of performers for the public use of their music is currently plagued with a major problem. This is because there are two licensing bodies in Malaysia which collect royalties on behalf of performers. These are the defendant and RPM. As a result, at times, music users find themselves having to pay two collecting societies for the use of the same copyright. The need for such double payments has caused much dissatisfaction among business owners, such as shopkeepers, restaurant owners, retailers and the like. A resolution of this difficulty is unlikely to be easy. This is because the Controller of Copyright, though empowered to declare a society or organisation as a licensing body under section 27A(1) and check its accounts, balance sheet and auditor's report under section 27A(5), may only revoke the declaration under the circumstances mentioned in section 27A(6). None of the circumstances therein deal with the overlap which arises when two licensing bodies collect fees in respect of the public use of the same musical work. In the light of this, it is submitted that the proper channel to address this issue is the Copyright Tribunal. Pursuant to section 28(2), the Copyright Tribunal has the power to hear and decide on any reference made to it by a licensing body. It remains to be seen how this issue may be resolved for the joint benefit of music users and performers.