Greetings from the Asian Law Students’ Association (ALSA). We are a premier law students’ organization in Asia, connecting over 10,000 members across 15 countries. Our goal is to provide a venue for bright law students to develop as future leaders and major players of Asia, and Academic Publications is the cornerstone of our activities. It is my greatest pleasure to present the combined edition of the Asian Journal of Legal Studies and ALSA Law Review 2016. Founded in 2007, the ALSA Law Review is a student-run journal published annually by ALSA International. Focused on diversity in a shifting legal landscape of Asian countries, the ALSA Law Review has grown significantly over years and seeks to publish timely and important legal articles.

This edition of Academic Publications concerns a wide range of contemporary legal issues within different jurisdictions from Asia to Europe thanks to our partner, ELSA’s support. I sincerely hope this publication would be able to enhance your analysis between distinct legal systems, broaden your view and fill your thirst for knowledge. On a final note, I would like to thank all parties who contributed to this project, primarily the Director of Academic Publications, AJLS Editorial Board, and contributors of the articles. Thank you, and ALSA always be one!

Minami Tsuruta
Vice President of Academic Activities
ALSA International Board 2015-2016
It has always been my dream to publish something that would be useful to the legal community. I have written some articles, and I certainly have read a lot. Today, I have also published one that I am proud of.

This Academic Publication is not just merely combining articles with articles; This is something that would symbolize the work of ALSA, as a pioneer and consistent contributor to Asian Integration. One cannot integrate with another without proper understanding, and by reading articles contributed from different jurisdictions and geographical areas of Asia, we can understand each other’s viewpoints more than ever.

Thank you, and ALSA always be one!

Siegfried Sin
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These are the Articles that are published as Pre-Conference Papers in the ALSA Annual Forum 2015, held in Hong Kong between 1-7 August, 2015.

These Articles are first edited by the writers, then by the editors at the Editorial Board.
How to Execute a Proactive Approach to Prevent Loss from Ponzi Scheme?

Putika Nuralida Herdin, Universitas Gadjah Mada
Yohanes Partogi, Universitas Indonesia

Committee: Control Fraud
Institution: Interpol

An old but sugarcoated phenomenon, popularly termed as “Ponzimonium” or “Ponzi Scheme” is any business or economic entity promising to pay a higher return to its investors than what can be generated by its net operating income. Operations of this type are sustainable only as long as funds from new investors or lenders are available to meet outstanding payout requirements. First scandal was started by Charles Ponzi, whose stamp speculation scheme in the 1920s promised that an initial investment of US $1000 could be turned into US $1500 in just 45 days to the recent US $65 billion Madoff scandal, the core design feature of the charade remains the same. However, Ponzi schemes are susceptible to crash, and the perpetrators usually abscond beforehand. As the result, this phenomenon has made investors withdraw funds from investment sectors around the world. In order to put an end to this precautionary system, Interpol has proposed the implementation of Red Flags which can be executed by having a good understanding of investment, having an external audit, reversing burden of proof and adapting effective laws to give law enforcement officials the powers to combat Ponzi schemes both domestically and internationally.
Recently, fraud has been practiced widely, taking one of the examples from the sentencing of Bernard L. Madoff to 150 years in prison for his involvement in the largest, longest and most expensive Ponzi scheme in history (with fraud in the vicinity of USD $65 billion), directly proves that white-collar crime is very much alive and well in the financial services industry. Statistics show that 19 Ponzi schemes were identified in the United States at the end of the first quarter of calendar year 2009 and the numbers are still growing until 2015. Charles Ponzi who created Ponzi schemes back in the 1920s started up this modus by promising high and consistent returns on investment to investors, which is actually being paid out of the contributions of new investors in the scheme. With little or no legitimate earnings, Ponzi schemes require a consistent flow of money from new investors to continue. Consequently, Ponzi schemes tend to collapse when it becomes difficult to recruit new investors or when a large number of investors ask to cash out.

Taking a look at Ponzi schemes would directly refer to its sibling–Pyramid schemes that are closely related. They both involve paying long-standing members with money from new participants instead of actual profits from investing or selling products to the public. In Pyramid schemes, funds from new participants are used to pay recruiting commissions to earlier investors.

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participants, whereas in Ponzi schemes, funds from new investors are used to pay purported returns to earlier investors. However, both schemes would leave us to a question: Why do people believe lies? It is because the actor delivers on his promises by using later contributions to pay very large returns to initial investors. Another reason is that people are often attracted when their peers are making good money from the schemes, and thus immediately disregard the irrational the explanation. Last, Ponzi or Pyramid investors are often beguiled by the personality and reputation of the actors.³

Furthermore, in this era, some Pyramid and Ponzi schemes are being covertly offered in the form of Multi-Level Marketing (“MLM”), in which participants profit almost exclusively through recruiting other people to participate in the program, making these schemes less suspicious.⁴ For example, in a recently filed litigation, Securities and Exchange Commission (“SEC”) v. CKB168 Holdings Ltd⁵, the SEC filed charges to stop an alleged pyramid scheme perpetrated under the façade of an MLM program for online children’s courses. The promoters of the scheme allegedly solicited investors worldwide, including members of Asian-American communities in New York and California. The SEC alleges that these promoters misrepresented CKB as a legitimate and profitable

³ Dorothy T. Eisenberg and Nicholas W. Quesenberry, ‘Ponzi Schemes in Bankruptcy’ (2014) 30 Touro Law Review


MLM company that sells web-based children’s educational courses when, in fact, CKB has little or no retail consumer sales and no apparent source of revenue other than money received from new investors. The most striking result of Ponzi schemes is the massive evaporation of investor wealth. A comparison of these losses to the annual gross domestic product (“GDP”) of countries provides some alarming statistics. For example, the US $50 billion uncovered in Ponzi schemes from 2008 to 2013 would rank in the top 75 countries in the world by GDP. This equates to roughly US $6.3 billion per year of investor wealth ensnared in Ponzi schemes, which is nearly the annual GDP of the African country Niger.\(^6\)

Series of Ponzi schemes have made Interpol see this as a perilous matter that needs to be prioritized immediately. As the world’s largest international police organization with 190 member countries, Interpol is committed to fighting fraud by building up networks between law enforcement bodies and arresting as many criminals as possible. Because of its results in shutting down Ponzi schemes, Interpol fervently believes that this proposal has been an effective tool. For example, in one case, a Columbian man, who allegedly defrauded thousands of investors through pyramid schemes in Panama, was arrested and deported in less than 24

hours following intensive cooperation between national police and Interpol. Interpol stated that the speed and efficiency that Colombia and Panama were able to carry out the arrest could be credited to the law enforcement officers and agencies of both countries, which clearly demonstrates the effectiveness of inter-agency and cross-border cooperation.\(^7\)

Subsequently, Interpol not only urges all member states to consider Ponzi schemes as a key obstacle in fighting white-collar crime, but also encourages all states to uphold the good system and constructive engagement. Therefore, Interpol has proposed several solutions, which are often classified as Red Flags (or anomalies)\(^8\) to combat Ponzi schemes:

1. **Good understanding of investment** – Investment should not be based on irrational excitement because it leads to risky conditions. Interpol found that the great returns received by investors are usually derived from money invested by gullible people wanting in on the action. Furthermore, any reasonable suspicion might become an alert, particularly if their investments constantly outperform competitors using similar strategies or offer returns above the legal rate or market rate.

2. **Having external audits** – Interpol identifies that external audits can be effectively used by CEOs and

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senior management to support and assist the fraud being enacted through the manipulation of the audit systems and process. This could be supported by simplifying procedures for the production of relevant financial records, removing obstacles that hinder or delay the sharing of financial and criminal information from appropriate agencies and improving the effectiveness of disclosure systems.

3. Reverse the burden of proof – Subject to domestic law, member states should reverse the burden of proof (using the concept of reverse onus) in respect of the confiscation of alleged proceeds of crime.

4. Adopting effective laws – Interpol recognizes the difficulties encountered by law enforcement authorities to identify and prosecute all those who conduct Ponzi schemes. As a result, Interpol recommends that member states adopt effective laws that grant law enforcement officials the power to combat Ponzi schemes i.e. by undertaking the measures as follows:

a. Granting law enforcement officials the authority to investigate such cases;

b. Waiving bank secrecy rules when there are reasonable grounds to suspect that certain transactions are connected with criminal activities;

c. Authorizing law enforcement departments to use techniques, such as covert (undercover) investigations; and

d. Providing adequate resources

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9 Interpol Resolution No. AGN/66/RES/17.
to law enforcement departments in order to increase the likelihood of success of investigations.
Problems and Solutions to Tackle Tax Evasion and Illicit Financial Flows as White Collar Fraud

Hanul Son, Dongeui Hong

What are the boundaries of illegal and lawful activities and how are those boundaries manipulated to ensure that taxpayers can both try to escape tax and stay on the legal side of the boundary? How is domestic resource mobilization hampered by inadequate global tax standards, race-to-the-bottom tax competition, the lack of financial transparency including the existence of secrecy jurisdictions, and a proliferation of other harmful tax policies and practices? What could be the solutions to tackle tax evasion and illicit financial flows as white collar fraud?

The substantial problem of illicit financial flows (IFFs) and the large amounts of resources leaving developing countries untaxed is now well recognized. While estimates are difficult, it is fully accepted that illicit outflows are larger than inflows from aid and that a large proportion is driven by tax abuse. Consequently, national and international tax issues are inextricably linked and are both fundamental. This paper includes our proposals for reforms of international financial and trade systems to ensure that old commitments to address systemic and structural issues are turned into concrete and ambitious action, and are to be supplemented by new and stronger commitments to provide a solid finance framework for the future. This paper provides a summary of our key recommendations related to tax, transparency and illicit financial flows, which should be incorporated in the upcoming negotiating text and ultimately in the final outcome document.
I. The Existing System of Korea: Prevention of Tax Fraud & Evasion

The National Assembly of Korea amended the existing tax law to prevent tax avoidance and evasion towards the ‘Tax Heaven’ in March 2011 (The Law for the Coordination of International Tax Affairs). According to the revised law, every individual and domestic corporation in foreign countries are required to declare credit information about their accounts if they possess more than a billion won in total. If they miss the deadline for reporting or wrote incorrect information regardless of their intentions, they are required to pay 10% of their total assets as a fine. Less than 2 years of imprisonment or considerable monetary penalties can be sentenced to offenders who omit more than 5 billion won.

II. Defects of the Existing System

The revised law was enacted in order to prevent leakage of illegal funds, but several problems still exist under the existing system. Increasingly sophisticated methods of tax fraud and evasion are introduced and the authorities cannot cope with every difficulty effectively. For instance, board members of a company can nominate a foreigner CEO as a puppet and disguise the firm as a foreign-affiliated one. It is almost impossible to grasp the truth since the authorities merely focus on nationals\(^1\). Ambiguous elements of a crime are also noted as a serious drawback. The term ‘fraud or other illegal acts’ under the present law is too broad and ambiguous to capture the exact crime motives of perpetrators. In this situation, potential criminals planning to create secret funds would constantly find a legal loophole.

III. The Need for Transparency

Bank secrecy in intermediate jurisdictions, anonymous shell-companies and the lack of transparency in the reporting

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of multinational companies are key enablers of illicit financial flows. All countries have a common responsibility to reduce illicit financial flows and combat tax evasion and avoidance. However, given that developed countries largely control the international financial system, dictate global tax rules, host headquarters, regulate most multinational enterprises and have a higher capacity, it should be clear that developed countries and developing countries have different responsibilities.

The automatic exchange of tax information is an example where the different levels of responsibility comes into play. While all countries should eventually exchange information automatically, developing countries with low capacity should be allowed to receive information, even if they do not yet have the capacity to send the same information back (reciprocity). Allowing developing countries to participate in automatic information exchange will provide them with information that is vital for them to collect taxes, and thus be a key step towards building their capacity.

Public country-by-country reporting will provide the information needed to assess whether multinational corporations are paying taxes where the economic activity takes place and value is created. Therefore, it is a key tool in the fight against tax avoidance. Country-by-country reporting information should be part of company annual reports in order to be audited. All country-by-country reports must be fully and easily available to the public in order to enable greater accountability of companies, tax authorities and governments to their citizens.

Public beneficial ownership registries of companies, trusts and other similar legal structures will provide transparency around the use of shell-companies, and thereby support the fight against tax evasion, illicit financial flows and money laundering.
IV. Actions at the National Level

Member states can increase tax revenues through systematic action to reduce the shadow economy, to combat tax evasion and to ensure greater efficiency of tax administrations. By reducing tax fraud and evasion, member states can increase tax revenues, which will also give them more leeway to restructure their tax systems in a way that better promotes growth. It can also support member states’ efforts to relieve the tax burden on low-income earners and on the most vulnerable groups. Better tax administration is a particular challenge in a third of member states due to a variety of factors. These include, for example, high administrative costs per net revenue collected, the failure to use third-party information to prefill tax returns, the limited use made of e-filling, and the heavy administrative burden of tax systems for medium-sized companies.

At the national level, member states should implement country specific recommendations addressed to them in order to face the challenge of improving tax governance. Measures to improve tax compliance and promote more efficient tax administrations include the development of a compliance strategy and the targeting of efforts to combat tax evasion, the extension of the use of third-party information, the preparation of pre-filled tax returns, and concerted efforts to reduce the size of the shadow economy by, for example, criminalizing the purchaser of undeclared work, using mandatory electronic payments for purchases over a threshold or using monetary incentives to declare (tax deductions).

Meanwhile, member states should fully implement our recommendations on tax havens and aggressive tax planning, which relate in particular to the identification of third countries that do not apply minimum standards of good governance in tax matters; the provision of technical assistance to third countries willing to comply; and mea-
sures to avoid double non-taxation. We are ready to provide targeted support and technical assistance to any member state to strengthen its tax system against evasion, and improve tax collection. In Greece, for example, the Task Force for Greece, together with experts from member states, is actively engaged in helping to build a more robust tax system to deliver quality revenues, and positive results are already beginning to emerge.

V. International Cooperation for Global Solutions

International cooperation on tax matters will need a legally binding agreement – an international UN tax convention – to ensure a solid framework for the work, including a clear definition of principles, and the implementation of agreements reached. However, as a first and vital step, it must be ensured that the Ministerial Round Table on tax matters commit to establish a truly global, inclusive and intergovernmental body on tax matters under the auspices of the UN. Such a body must have sufficient resources and a strong mandate to ensure that it is able to tackle the problems related to tax, transparency and illicit financial flows. While the current UN Committee of Experts on International Cooperation in Tax Matters has provided, and continues to provide, important useful outputs, it is by nature an expert committee with a very limited number of members who act in their personal capacity and not as government negotiators. Therefore, since this committee cannot serve as the basis of an intergovernmental process, a new intergovernmental UN body on tax matters is needed.

VI. Actions to Further Promote Global Tax Governance

We will take a leading role in the international arena to promote the principles of Good Governance in the tax area and in particular, the automatic exchange of information as well as fair tax compe-
tition principles. Automatic information exchange should become the new international standard. We agree on an ambitious and coordinated position to make the automatic exchange of information a global standard guiding international taxation. In particular, we should speak with one voice in the G20 and the Organization for Economic Co-operation and Development (OECD) so as to secure a firm commitment to the development of new international rules that takes into account existing arrangements for automatic information exchange.

Moreover, we must continue to assist developing countries committed to good tax governance principles to build up robust tax administrations by cooperating and providing technical assistance to them. We should coordinate its position in the G20 discussions on base erosion and profit shifting (BEPS) in line with the direction that will be provided in the upcoming conclusions and building on the developments in tackling tax havens and aggressive tax planning. Furthermore, we will work to ensure interconnectivity and interoperability between the European Union’s IT information exchange systems and the United States Foreign Account Tax Compliance Act (FACTA) system and the global standard being developed by the OECD. This will reduce administrative burdens on operators and on administrations.

VII. Annex (Statistics: Case Studies from the European Union)

1. Member states are only collecting around one half of the VAT revenue available to them

2. Offshore financial centers with strong banking secrecy laws continue to dominate the international cross-border deposits market

Trends in foreign non-bank deposits with banks in major selected non EU financial centers (millions of US dollars)²

² Source: BIS(Bank for International Settlements) public aggregate data
3. Cooperation brings substantial economic benefits to Member States. Since 2003, the amounts of tax recovered cross border under the Recovery Directive have increased more than tenfold.

Proposed Clauses

1. Enlarge global alliance such as Tax Information Exchange Agreement to arrest transactional crimes. Adopt a common UN standard of multilateral, automatic exchange of tax information with the option of non-reciprocal information exchange for countries with low capacity.

2. Eliminate secrecy of beneficial ownership worldwide through public registers of beneficial owners. Ensure financial transparency by implementing annual public country-by-country reporting by multinational corporations. International financial institutions or systemic institutions such as the Bank for International Settlements (BIS) should focus on monitoring illicit flows and make their data accessible to governments and the public.

3. Organize a Ministerial Round Table on tax cooperation to ensure high-level engagement in the tax negotiations. Establish an inclusive intergovernmental body on tax matters under the auspices of the UN, which could also initiate and lead negotiations on a new UN framework convention on international cooperation in tax matters as a first step in the reform of international tax rules.

These are Papers that are written by Contributors invited by the Editorial Board.

The Topics are set by the Contributors themselves, based on the main theme of Asian Integration.
Media Trial vs. Right to a Fair Trial: An Endeavour to Learn about Existing Judicial Safeguards and Thinkable Solutions

Md. Pizuar Hossain

Md. Pizuar Hossain has completed his LL.B. (Hons.) from BRAC University, Bangladesh. He was awarded the “Vice-Chancellor’s Gold Medal” for obtaining the highest CGPA from BRAC University. At present, he is working as a Faculty Member at the Department of Law, East-West University, Bangladesh.

This article is concerned about an existing conflict between the rights to freedom of expression and freedom of press, and the right to a fair trial as created by the so-called media trial. The author explains the general notions of media trial providing relevant case studies of Bangladesh, India, and the United States of America (USA). Besides, the author attempts to define ‘prejudicial news reports’ and determine as to whether disseminating prejudicial news reports amount to contempt of Court referring to the relevant legislations and precedents of many jurisdictions. Further, the author tries to discuss certain existing judicial safeguards against media trial including some possible solutions. In other words, the main purpose of this paper is an endeavour to analyze impacts of media trial to reach some conclusions which will ultimately aid in the administration of justice in criminal trials.

I. Introduction

We often read particular news of many criminal incidents in newspaper at our breakfast table and watch the same via broadcast media presenting some individuals as accused for alleged crimes. Then and there, most of us typically start to assess the matters on the basis of the news reports and point our fingers at the persons believing them as true culprits. As a matter of fact, ‘the news media and crime are locked in a symbiotic relationship.’1 Various forms of print media e.g. newspapers, magazines etc., and electronic media e.g. television, film, radio, video, and Internet services including

social media etc. are stereotypically influencing our perception of crimes in this unquestionably influential world.

When the particular matter is initiated into trial proceedings, indeed the leading universal golden principle i.e. *presumption of innocence until proven guilty*, would strictly be acknowledged before determining the accused person’s criminal liability. Yet again, a pertinent question may arise as to what about the role of media in such matters as stated above? Naturally, the response may be drawn in a manner that overlooks this well-established doctrine, sometimes the media used to demonstrate the accused in such a manner that people even forget the gap between an accused and a convict of a crime from time to time. On top of that, the media coverage may, exclusively in high profile cases, influence the judges or jury members of the concerned Courts which are supposed to give their decisions and/or opinion based on hearing of the parties and merits of the case as to who is the decisively guilty beyond all reasonable doubt for any alleged crime.

Therefore, an issue has become very prominent to the people around the world as regards media’s tendency to influence the Courts to provide order/judgment centered on their reportages.

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2 Social media is defined as “a group of Internet-based applications that build on the ideological and technological foundations of [the worldwide web] which allows the creation and exchange of user-generated content” as included in Andreas M Kaplan and Michael Haenlein, ‘Users of the world, Unite! The Challenges and Opportunities of Social Media’ [2010] 53(1) Business Horizons 59, 61; Internet services comprises some social media such as Facebook, Blogger, Twitter, WordPress, LinkedIn, Pinterest, Google+, Tumblr, MySpace, Wiki etc.; See Thomas F Bathurst, ‘Social media: The end of civilization?’ The Warrane Lecture, University of New South Wales (Sydney, 21 November 2012) 1, 7.


that may impede a recognized fundamental principle of law i.e. the right to a fair trial. This norm has been undermined in many legal systems by the offence of sub-judice contempt of Court. Besides, it has been observed by many that the right to 'freedom of expression and freedom of press' to comment or report on pending trials conflict with the right of the accused person to a fair trial. Thus, the question is that whether the freedom of expression and freedom of press should be admitted to supersede the accused individuals’ right to a fair trial?

Concentrating on the above mentioned questions regarding media trial, the paper attempts to focus on the effects of media trial controversy with some prominent case studies of Bangladesh, India and the United States of America (USA), and existing judicial safeguards as well as recommended solutions to prevent it. It also ponders on the protections ensured under the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and European Convention on Human Rights (ECHR) along with the most

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10 UDHR, Art. 19; ICCPR, Art. 19; ACHR, Art. 13; ACHPR, Art. 9; the Constitution of Bangladesh, Art. 39(2); the Indian Constitution, Art. 19.


12 Adopted by the United Nations General Assembly in 1948.


14 Adopted in 4 November 1950, entered into force 3 September 1953.
conventional judicial precedents on contempt of Court.

To elaborate those propositions, the author has divided this article into five parts. **Part I** has already introduced pertinent concerns and questions regarding media trial. **Part II** presents the notions of media trial and its historical background with some illustrious case studies. More convincingly, **part III** discusses the human rights perspectives of media trial addressing the standards of the right to freedom of expression, freedom of press, and fair trial. **Part IV** depends on many relevant legislations and judicial principles to find out the answers of the questions as to whether dissemination of prejudicial materials nullify a trial, and whether the same amounts to contempt of Court. This part also entails the discussion of the existing safeguards and certain thinkable solutions as ways out for minimizing the adverse impacts of the alleged problem. At the end, the author has summed up the main findings of this paper in **part V** with a few good words.

**II. Notions of Media Trial and Certain Gut-Wrenching Case Studies**

In the late 20\textsuperscript{th} and early 21\textsuperscript{st} centuries, the idea of media trial came across the western countries especially in the United Kingdom (UK) and the USA with the purpose of grabbing attention of the scholars\textsuperscript{15}. In effect, the phrase ‘Trial by Media’ or ‘Media Trial’ started to be very conversant to the people of these countries during the spread of Television news coverage in the 1960s\textsuperscript{16}. On the other hand, in Indian sub-continent, several television channels started to flourish during 1990s from when the term media trial emerged eventually\textsuperscript{17}.

\textsuperscript{15} Furqan Ahmad, ‘Human Rights Perspective of Media Trial’ [2009] 1 Asia Law Quarterly 47, 48; See also Derek E. Mix, ‘The United Kingdom: Background and Relations with the United States’ [2015] Congressional Research Service 9.

\textsuperscript{16} Dwight Teeter Jr and Bill Loving, Law of Mass Communications: Freedom and Control of Print and Broadcast Media (University Casebook Series, 6 June 2011) 503-6.

\textsuperscript{17} Prof. Amartya Sen, Broadcasting Sector & Policy, Ch. 1, 4, 9

<http://www.nalsarpro.org/ML/Modules/Module%203/Chapter%201.pdf>
The term “Media Trial” has been defined as, ‘the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a court of law.’\textsuperscript{18} Besides, the term “Trial by Newspaper” can be defined as such ‘[w]hen any report indulges in siding with one of the parties to the cause; derides one party, witness, or counsel; misrepresent Court proceedings by screaming headlines with a view to prejudicing the Court and public; publishes only one side of the case to the detriment to the opposite party; brings out articles on a matter pending in the Court and in diverse ways carry on what has been so aptly called a trial by newspaper.’\textsuperscript{19} To be precise, when the media creates any intuition on any event(s) or accused person(s) that might have a notorious impact on the person’s name, character and reputation\textsuperscript{20}, and presumption of innocence or guilt, before or even after, the Court takes into account of the matter to give a verdict, then this spontaneous action of the media can be depicted as media trial\textsuperscript{21}. Sometimes, the media misrepresents evidences or facts, and provides misinformation about laws\textsuperscript{22}. Through its inflammatory headings and misrepresentation, media creates potentially flawed views, judgments, and ideas about our judicial system and legal process even before a matter goes into trial which is often considered as a consequence of yellow journalism as well\textsuperscript{23}. However, the very notion of media trial would be unfinished, unless and until, certain case studies are presented and discussed in detail. For illustration:

\begin{footnotesize}
\begin{enumerate}
\item Anand v. Registrar [2009] 8 S.C.C. 106, 174 (Delhi, India); See also Banerjee (n 11) 30. 
\item Gest (n 1) 2; Comment, ‘Trial by Newspaper’ [1954-1965] 33(1) Fordham Law Review 61, 70.  
\item Brad J. Bushman and Craig A. Anderson, ‘Media Violence and the American Public: Scientific Facts versus Media Misinformation’ [2001] Iowa State University 477, 481.  
\end{enumerate}
\end{footnotesize}
[A] Sharmin Murder Case (Bangladesh)

In Bangladesh, whenever the matter of media trial becomes very conversant, the people cannot but recalling the Sharmin Murder Case\textsuperscript{24}. Some may state that the matter is very retroactive in comparison to the recent issues and scenarios. Nevertheless, this case will always remain in the upper place of any list of the instances of media trial as the verdict of the case was coherently centered by the then media coverage. In this case, Mr. Munir\textsuperscript{25} was charged for killing his wife, Mrs. Sharmin\textsuperscript{26} in April 19\textsuperscript{th}, 1989 on the way of coming back to Dhaka, Bangladesh after having a short pleasure trip. Mr. Munir’s confessional statement made to the competent Magistrate indicated that he killed her out of grave and sudden provocation made by his wife during driving car\textsuperscript{27}. However, the media represented that merely because of continuing long-running affair with his mistress Hosne Ara Khuku\textsuperscript{28}, Mr. Munir did the same.

The investigation of the incident and subsequent trial by the Court took place. During that period, press started to report on the matter by portraying Mr. Munir as the murderer which created a hue and cry among the general people of Bangladesh. Surprisingly, every new revelation of the facts was presented with dramatic headlines. Thereby, the new details of the case in day by day basis kept the whole nation spellbound for many days. At one time, people became very outraged demanding for Mr. Munir and Ms. Khuku’s capital punishment.

On 21\textsuperscript{st} May of 1990, the trial was concluded while Mr. Munir and Ms. Khuku were found guilty of the offense and thereby, they were condemned to death. After two years, in July 1992, the Appellate Court overturned Ms. Khuku’s sentence and acquitted her

\textsuperscript{24} State v. Munir Hussain [1995] 1 B.L.C. 345.
\textsuperscript{25} Munir Hussain was the son of Dr. Meherunnessa, a renowned physician.
\textsuperscript{26} Sharmin Rima was the daughter of an intellectual and journalist who had been martyred in the Liberation War of Bangladesh.
\textsuperscript{27} Hossain (n 24).
\textsuperscript{28} A middle-aged woman and the wife of a disabled man.
from all charges. Nevertheless, Mr. Munir’s death sentence was upheld in the face of successive legal appeals. Subsequently, he was hanged on either 3rd July or 27th July in 1993.

Now, if we consider the impacts of media coverage in this above discussed case, the impacts can be categorized into two parts. Firstly, regarding effects on the accused, it was found that due to huge media coverage, Mr. Munir desperately attempted to kill himself either by hanging, or by any other means. Secondly, the media coverage, indeed, influenced judges to think freely about the matter since if we take a snap over the actual scenario of the case, it would be precise to us that he killed his wife out of grave and sudden provocation which could be a mitigating factor to minimize his sentence29. Hence, if there would have no excessive media coverage or media trial, the judgment of this case might have been otherwise.

[B] Orenthal James (OJ) Simpson Case (the USA)

OJ Simpson, a football star of the US, was made an accused for the occurrence of murdering his ex-wife Nicole Simpson and her friend Ron Goldman in 199430. From then, media started to publicize many news reports in such a way that if someone would turn on a Television, listen to the radio, or read the newspaper, they would find the news of OJ Simpson’s trial presenting him as guilty31.

Surprisingly, the Los Angeles Times reported this particular incident on their front page for over 300 days32. Besides, the Big Three Networks started to broadcast the alleged matter more time in their nightly news to the trial than to the ongoing Bosnian War and

29 In exception 1 of Section 300 of the Penal Code, 1860 states that culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or cause the death of any other person by mistake or accident.

30 Zachary Swiecicki, How Society’s Opinion of the Case was Affected by the Media Coverage (November 2014) <http://evolutionofcrimenews.tumblr.com/>.
31 Id.
Oklahoma City bombings together\textsuperscript{33}. The Time Magazine was charged for racist editorializing since it published cover photo of OJ Simpson with a darkened appearance making it more threatening\textsuperscript{34}.

Finally, the original grand jury was terminated because of unwarranted media coverage were influencing their perceptions and affecting their impartiality\textsuperscript{35}. At the end of this sensational trial, he was given acquittal since he was not proven guilty beyond all reasonable doubt\textsuperscript{36}. Nevertheless, it was regarded as the most celebrated criminal trials in the judicial history of the US.

[C] \textbf{Jessica Lall Case (India)}

\textit{Ms. Jessica Lall}, a model-cum-bartender, was killed by shooting by a drunken intruder at a party in New Delhi, India. Many witnesses identified that the drunken person was Mr. Manu Sharma. They witnessed that Mr. Sharma shot Jessica Lall as she refused to serve him alcohol. Mr. Sharma was the son of an Indian National Congress (INC) politician and a relative of Mr. Shankar Dayal Sharma, the former President of India.

Immediately after the incident, Mr. Sharma was arrested and subsequently, the proceedings of trial commenced making him as an accused. Astonishingly, during examination of the witnesses, almost all the witnesses renounced their initial statements provided to the police\textsuperscript{37}. As a result, Mr. Sharma was acquitted due to lack of evidence by the trial Court.

In the meantime, it had become viral that Mr. Sharma's family conspired with some police officials and destroyed all the evidences\textsuperscript{38}. Moreover, it was published in a magazine that the witnesses were

\begin{itemize}
\item \textsuperscript{33} Id.
\item \textsuperscript{36} Id, 478.
\item \textsuperscript{38} Id.
\end{itemize}
bribed by Mr. Sharma’s family\textsuperscript{39}. Another news report was broadcast entailing Mr. Sharma’s confession to the police about admitting his guilt of killing Jessica Lall\textsuperscript{40}. Again, he was addressed as ‘a craven killer’ in various news reports by the journalists\textsuperscript{41}. The press also started to criticize the trial Court judge for acquitting Mr. Sharma\textsuperscript{42}. Eventually, all the news coverage led to an uproar among the people in India and several nationwide campaigns were issued with the demand of justice for Jessica Lall\textsuperscript{43}.

To end with, criticizing the trial Court’s decision as “positively perverse” one, the Delhi High Court found Mr. Sharma guilty of murder of Jessica Lall on appeal\textsuperscript{44}. Nonetheless, it was highly estimated that the High Court was accelerated to give such a decision by the wake of the campaign called “Justice for Jessica”\textsuperscript{45}. However, this decision was upheld by the Supreme Court of India in April, 2010\textsuperscript{46}. Even though the accused was found guilty at the conclusion of the trial, this case set an example of media trial as it was observed that disregarding the right of a fair trial of the accused, the media used to reveal the prejudicial news reports randomly in the entire world.


\textsuperscript{40} Brijesh Pandey, ‘Manu Confessed to Jessica’s Murder’, CNN IBN (India, 25 May 2006) \textless www.ibnlive.com/news/run-manu-has-shot-jessica/1 1358-3-single.html\r>.

\textsuperscript{41} B. Dutt, ‘Ram and Manusmriti’ The Hindustan Times (India, 4 November 2006) \textless http://httabloid.com/news/181_1835670, 0008. htm\r>.


\textsuperscript{44} Banerjee (n 11) 30.


III. Human Rights Perspectives of Media Trial: Are the Rights to Freedom of Expression and Freedom of Press in Competition with the Right to a Fair Trial?

Every time, when we talk about broadcasting prejudicial materials, we need to realize that often the right to freedom of expression and freedom of press are in conflict with the right to a fair trial of an accused. Here, the freedom of press to broadcast comprises the right of access to the information and right to know of the general people. Then the question arises regarding which one does inevitably weigh more heavily on the scales of justice? In such circumstances, if the Courts put preeminence on the right to freedom of expression and freedom of press over the right to a fair trial, it may create an apprehension of obstruction of the administration of justice in the long run. Hence, the following discussion highlights the ambits of the rights to freedom of expression and freedom of press, and the right to a fair trial:


As regards, the right to freedom of expression, the United Nations’ Universal Declaration of Human Rights (UDHR), which has become a part of the customary international law, provides in Article 19 that ‘everyone has the right to freedom of opinion and expression … [including the] freedom to hold opinions without interference and to seek, receive and impart information and ideas through

47 The Constitution of the United States, Amendment I.

any media regardless of frontiers.\textsuperscript{53} Ensuring this right to both the natural and legal person is a precondition of a democratic country\textsuperscript{54}. This right facilitates the citizens of a democratic country to express their constructive criticism about the administration of justice in the country\textsuperscript{55}, and to enjoy the right to be informed\textsuperscript{56}.

The concept of the right to freedom of press, i.e. newspapers and periodicals, is nothing but a species of the freedom of speech. Again, this right is closely linked to the notion of journalistic freedom of expression\textsuperscript{57}. They have a duty of imparting information to the common people\textsuperscript{58}. In the matter of public interest, journalists must not compromise on any ground, so as not to deprive people from obtaining relevant information\textsuperscript{59}. Moreover, the right to freedom of expression entails that the people have also the right to receive information\textsuperscript{60} and to discuss public

\textsuperscript{53} UDHR, art 19; ICCPR, art 19; ACHPR, Art 9; ACHR, Art 13; ECHR, Art 10; the Constitution of Bangladesh, Art. 39(2); the Indian Constitution, Art. 19; Chaplinsky v. New Hampshire [1941] 315 U.S. 567.


\textsuperscript{55} R v. Secretary of State for the Home Department, ex p Simms [1999] 3 W.L.R. 328, 337.


\textsuperscript{58} Dalban v. Romania [GC] App no 28114/95 (ECtHR, 28 September 1999).

\textsuperscript{59} Bladet Troms\o and Stensaas v. Norway App no 21980/93 (ECtHR, 20 May 1999).

airs or matters of general interests\textsuperscript{61}. However, these universal rights are not absolute\textsuperscript{62} and are subjected to certain restrictions\textsuperscript{63}. In regards to journalistic freedom of expression, there are some settled principles that the right depends on as to whether there was truth or factual basis for the journalist’s report\textsuperscript{64}, whether there had been adequate previous research done by the journalists\textsuperscript{65}, whether the journalists acted in good faith\textsuperscript{66}, whether the journalists complied with journalistic ethics\textsuperscript{67}, etc\textsuperscript{68}. Moreover, it has been held in several cases that if the form of the statement or report of any media is offensive or insulting\textsuperscript{69}; and is likely to undermine the accused person’s right to be presumed as innocent\textsuperscript{70}, the individual who is responsible to make the statement or report will not be protected under the right to freedom of expression. It is important to mention that Article 12 of the UDHR and Article 17 of the ICCPR prohibit unlawful attack on someone’s honor.


\textsuperscript{63} UDHR, Art. 29.

\textsuperscript{64} Stângu v. Romania App no 57551/00 (ECtHR, 9 November 2004).

\textsuperscript{65} H.N. v. Italy App no 18902/91 (ECtHR, 27 October 1998).

\textsuperscript{66} Savitchi v. Moldova App no 11039/02 (ECtHR, 11 October 2005); Bladet Tromso and Sensaa (n 59); Colombani and others v. France App no 51279/99 (ECtHR, 25 June 2002).


\textsuperscript{68} Gaudio v. Italy App no 43525/98 (ECtHR, 21 February 2002); Maroglou v. Greece App no 19846/02 (ECtHR, 23 October 2003); Lomakin v. Russia App no 11932/03 (ECtHR, 17 November 2005).

\textsuperscript{69} Frankowicz v. Poland App no 53025/99 (ECtHR, 16 December 2008); Azevedo v. Portugal App no 20620/04 (ECtHR, 27 March 2008); Zakharov v. Russia App no 14881/03 (ECtHR, 5 October 2006); Ráchtinov v. Bulgaria App no 47579/99 (ECtHR, 20 April 2006); Gavrilovici v. Moldova App no 25464/05 (ECtHR, 15 December 2009); Czamis v. Hungary App no 12188/06 (ECtHR, 20 January 2009).

\textsuperscript{70} A/S Diena v. Latvia App no 16657/03 (ECtHR, 12 July 2007).
and reputation. Hence, nobody is allowed to injure the reputation of a person in the name of freedom of speech and press.

[B] The Right to a Fair Trial

The right to a fair trial has also become a custom of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of one’s fundamental rights and freedoms. Articles 6, 7, 8, 10 and 11 of the UDHR enshrines fair trial rights such as Article 10 stipulated that ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’ According to Article 14(1) of the ICCPR, the basic institutional framework enabling the enjoyment of the right to a fair trial is that the proceedings in any criminal case or in a suit are to be conducted by a competent, independent and impartial tribunal established by law. The main purpose of these provisions is to avoid the arbitrariness and/or biasness of the Court to give verdict of any event. Every individual of a country deserves this right and thus, while this right is curtailed on unreasonable grounds, the actual notion of democracy is in jeopardy.

It is important to mention that the right to a fair trial is not restricted while the rights to freedom of expression and freedom press are subjected to reasonable restrictions. Nonetheless, in this present world, there is a debate between ensuring the right to freedom of expression and freedom of press

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71 Article 12 of the UDHR reads as follows:
No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR reads as follows:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.


73 See also ECHR, Art. 6(1); ACHR, Arts. 8(1) and 27(2); and AfCHR, Arts. 7(1) and 26.

which is largely uncensored, and the right to a fair trial\textsuperscript{75}. In fact, the debate is about rights of the affected people, and the persons who are involved with media. The proponents of the media trial may contend that by this trend, the affected persons’ rights are protected since it helps to ensure justice, while the opponents may argue that it is one of the factors leading to the infringement of people’s right to a fair trial\textsuperscript{76}.

At this instant, under the purview of the aforesaid rights, we observe two distinct institutions i.e. the press and Courts of law, which are mutually supporting but occasionally adversarial. On one hand, a media or probing press can help the Court to find out the truth of any concerning event by its own exploration. On the other hand, its intensive pre-trial publicity by misrepresentation of the occurrence may prejudice the impartiality of the Courts. In this way, being Constitutional companion, the press can become a villain against the accused. Hence, two questions can be addressed here that whether the prejudicial news reports invalidate a trial of a Court of law or not? And whether it can be considered as contempt of Court or not? The following part efforts to find out the possible answers of these questions:

IV. Broadcasting Prejudicial News Reports: Judicial Safeguards and Recommended Solutions

It has already been stated earlier that an accused is entitled to receive a fair trial by an impartial jury free from the influence of prejudicial and inflammatory news media coverage\textsuperscript{77}. This principle emphasizes on ensuring proper administration of justice to the individuals and negates jeopardous actions of any news media including irresponsible news prints\textsuperscript{78}. Now-a-days, irresponsible prints are equivalently

\textsuperscript{75} The Jessica Lall Case <http://ssrn.com/abstract=1003644>.  
\textsuperscript{76} Fundamental rights involve freedom of expression and speech, right to privacy, right to get fair trial etc.  
\textsuperscript{78} Id.
used as prejudicial news reports. In *Pennekamp* case of the US, it has been observed that the apprehension of influence of prejudicial material on a judge who sits without jury cannot be left out. In the Indian sub-continent, usually the jury system does not exist in practice since it was believed earlier that there would be a prone to huge publicity and peer influence on the juries (l) whereas it exists in the UK, and the USA.

**[A] Publication of Prejudicial Materials: Whether It Nullifies a Trial or Not?**

To define prejudicial news reports, let's concentrate on publication of ‘confessional statements’ saying that if any news report is published portraying the texts of any confessional statements of any accused, it would generally be regarded as a prejudicial news report. However, when such news report is made at the assertion of the accused, questioning the news report as prejudicial one may not arise. After that, both ‘factual but false’ and ‘factual and true’ reports can be prejudicial. In the former case, indeed false reports are harmful but sometimes a report which covers true facts may become prejudicial if the reported facts raise any serious question in any pending case which is not presented at trial for some reasons. For example, confessions of any accused, or prosecution’s statements as its defense, or the accused person’s prior criminal records which might be inadmissible under the rules of evidence of any particular country.

In *Shepherd* case the accused person’s confessional statement in relation to crime of rape was published in a particular newspaper where the sheriffs

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81 Justice Frankfurter has contended the same.
were named as the concerned news source\textsuperscript{92}. Subsequent to that, the accused was convicted based on that confession while the confessional statements were never addressed as evidence in the trial\textsuperscript{93}. However, the conviction was reversed by the Supreme Court of the US in which Mr. Justice Jackson, joined by Mr. Justice Frankfurter, agreed upon the contention that the trial by the jury was precluded by the prejudicial publication of the newspaper\textsuperscript{94}. Next, if it is found that certain facts are presented in a report which creates undue stress on the jury or judges, that report can also be counted as prejudicial one\textsuperscript{95}. Again, when editorial comments include any derogatory statement regarding any matter pending in the Court, it would also be considered as a prejudicial report\textsuperscript{96}.

To determine a report as prejudicial, the time of publishing a news report such as a report made on the day before a trial starts\textsuperscript{97} would be regarded as more suspicious than one which is published a month\textsuperscript{98} or even year\textsuperscript{99} before the trial commences\textsuperscript{100}. Moreover, source of specific news can be considered as an important factor to determine as to whether a news report is detrimental to the rights of the accused. It has been established that a report produced by the reporter himself causes less concern\textsuperscript{101} than one which is produced by the prosecutor\textsuperscript{102}, or the sheriff or defendant\textsuperscript{103}, or the judge itself\textsuperscript{104}. On top of that, if the same is produced by the accused himself which is broadcast in the air would cause serious concern in this regard as well\textsuperscript{105}.

Before moving to the above addressed

\textsuperscript{93} Id.
\textsuperscript{94} Id, 52.
\textsuperscript{95} Rideau (n 77).
\textsuperscript{97} United States v. Milanovich, [1962] 303 F.2d 626; Henslee v. United States, 246 F.2d 190 (5th Cir. 1957).
\textsuperscript{100} Koolish v. United States, 340 F.2d 513 (5th Cir. 1965); Stewart (n 79) 67.
\textsuperscript{101} Shepherd (n 87).
\textsuperscript{102} United States v. Milanovich, 303 F.2d 626 (4th Cir. 1962); Henslee v. United States [1957] 246 F.2d 190; Massicot v. United States [1958] 254 F.2d 58.
\textsuperscript{103} Rideau (n 77); Shepherd (n 87).
\textsuperscript{105} Henderson (n 84); Delaney v. United States [1952] 199 F.2d 107.
question as to whether prejudicial publication on any news report invalidates the trial, the term “Trial” can also be defined which is considered as supplementary with the course of justice. In the case concerning **Bridges**

106, Mr. Justice Black depicted, “[t]he very word “trial” connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper.”

107 The process of justice is for all intents and purposes to be carried on by the competent Courts as established by the judiciary. Most importantly, ensuring fair trial to the accused is an essential component of any judicial system. Traditionally, due process of adversarial trial system requires that both the parties of a case pending in a Court of law should be heard in the presence of each other by an unprejudiced Court.

109 The decision of such case would be taken on the basis of the evidences produced and arguments made in an open Court.

110 It is stipulated that if newspapers are permitted to print extracts of pleadings in advance, the object of ensuring justice would be entirely frustrated while it would constitute a serious interference with the duties of the Courts and diminish public confidence in the criminal justice system.

Now, dealing with the most debated question as raised above, it is interesting to state that in certain Indian cases of **Pillai**

112, **Navjot Sandhu**

113, **Shaukat Hussain Guru**

114, and **Manu Sharma**

115,
it has been considered that judges are emotionally infallible and thereby, prejudicial news reports cannot invalidate a trial. Corresponding to that, Lord Dilhome stated in *BBC* case\(^ {116} \), ‘[i]t is sometimes asserted that no judge will be influenced in his judgment by anything said by the media...This claim to judicial superiority over human frailty is one that I find some difficulty in accepting.’ On the contrary, Justice Frankfurter\(^ {117} \) very lucidly pointed out:

> Judges are also human and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print.\(^ {118} \)

Besides, to quote, ‘when [a] hue and cry is made by the media it is possible that the equilibrium of a Judge is also disturbed.'\(^ {119} \) Sometimes, the media portrays a situation in such a way to the public that if a judge passes an order in contradiction with the so called *media verdict*, he or she is deemed either as corrupted or biased. Accordingly, pre-trial publicity may have widespread deterrent to a fair trial\(^ {120} \) as biased media coverage is prone to prejudice the same.\(^ {121} \) Therefore, making a certain concluding answer of the raised question is not very easy but a standard way can be invoked to dissolve any such dispute depending on the circumstances of each case.

Under the above-mentioned circumstances, two pertinent questions may arise as to whether the operation of public interest factors would create a barrier to conclude that contempt

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\(^ {116} \) *Attorney General v. BBC* [1981] AC 303, 335.
\(^ {117} \) Felix Frankfurter was an Associate Justice of the United States Supreme Court.
\(^ {118} \) *Pennekamp* (n 80).
\(^ {121} \) *Pillai* (n 112).
has taken place in a particular case of publishing prejudicial news reports? On the contrary, whether the factor of public interest is merely a matter that has to be considered to exercise the Court’s discretion to punish or not punish an accused of the offence of contempt of Court? The next discussion attempts to addresses the above-mentioned queries:

[B] Dissemination of Prejudicial News Reports: Does It Amount to Contempt of Court?

Whenever the question as to on what situations do the freedom of expression and freedom of press supersede the right to a fair trial peeps into our mind, some people may think that the factor of public interest applies to publications of news reports as regards both criminal and civil proceedings. On the other hand, some other people may believe that the public interest in the publications of news reports should not supersede the public interest in the due administration of justice. Yet again, it is unexpected to indicate that the judicial perceptions of news reporters have been changed, and even there are some judges who have a tendency to give judgment connecting the media reportages with a view to winning more listeners. On the other hand, some judges believe that the Courts are annoyed at the prejudicial media coverage due to proliferation of news channels. In high profile cases,

123 Id.
124 Estes (77).
125 British Steel v. Granada [1981] AC 1096, 1113; Stewart (n 100).
sometimes even the experienced Judges may become morally bound to be biased and to give their decision in compliance with the reports of the media, of course, to avoid being the subject matter of public criticism\textsuperscript{128}. In such situations, two questions can be upstretched here i.e. whether the concerned Courts can apply their contempt powers to penalize the media for committing media trial by broadcasting prejudicial materials; if yes, what are the punishments that should be imposed upon the media for such an offence?

To respond to the first question, it can primarily be stipulated that in determining a publication as contemptuous or prejudicial to the fair trial proceedings, the Court may look into the extent and volume of the circulation of news reports, and the contents and forms of the same\textsuperscript{129}. This has been established that ‘[a]ny colouring of the reports upon the merits of any case during trial of the same, by dramatic headlines or otherwise tending to prejudice the matter which may prevent both the parties from obtaining a fair decision, are all actionable in contempt.’\textsuperscript{130} In Bangladesh, the \textit{Contempt of Court Act}, 1926\textsuperscript{131} does not provide any definition or list as to what are the acts that constitute contempt of Court. However, contemptuous publications are being restricted to exercise the right to freedom of expression and freedom of press under the \textit{Constitution of Bangladesh}\textsuperscript{132}. Generally speaking, it has become settled principle that any conduct that tends to bring the administration of law by a Court into disrespect or to contumaciously disregard its processes to interfere with or prejudice parties or their witness during the litigation

\begin{itemize}
\item \textsuperscript{128} Anamika Ray, ‘Media Glare or Media Trial: Ethical Dilemma between two Estates of India Democracy’ [2015] 5 Online Journal of Communication and Media Technologies 1, 99.
\item \textsuperscript{130} W.R. Arthur and R.L. Crosman, \textit{The Law of Newspapers} (1st edn, 1928) 224.
\item \textsuperscript{131} \textit{The Contempt of Courts Act}, 1926 (Act No. XII of 1926); Under this Act, if an individual is found as guilty of contempt of Court, he/she will be given either simple imprisonment not exceeding six months or fine that may extend to two thousand taka or both; In the case of Md. Samirullah Khan v. State [1963] 15 D.L.R. (SC) 150 it was stipulated that the categories of contempt are too manifold that it is not possible to attempt an exhaustive classification of what may or may not constitute contempt.
\item \textsuperscript{132} \textit{The Constitution of Bangladesh}, 1972, Art. 39(2).
\end{itemize}
becomes contemptuous one\textsuperscript{133}. In this regard, the depicted proposition of the case of \textit{Advocate General vs. Shabir Ahmed}\textsuperscript{134} is mentioned below:

It is not possible to accept the contention that mere expression of an opinion on question of law which is \textit{sub judice} cannot amount to contempt of Court. It is not possible to accept the contention that in law knowledge of the pendency of the proceedings is necessary. All that is necessary to show is that a proceeding was actually pending at the time or was imminent.\textsuperscript{135}

Even, the media cannot publish any report by anticipating the judgment of a Court since anticipation of an order which the Court might make is a species of contempt of Court\textsuperscript{136}. Thus, it can be concluded that the interference of the media on any matter pending before the Courts amounts to contempt of Court in Bangladesh for in most of the cases it is observed that its publicities bring together prejudice into a process that ought to be necessarily unprejudiced.

In India, the \textit{Contempt of Courts Act, 1971} defines that civil contempt includes non-compliance of Court’s orders, where criminal contempt entails publication of any event which tends to prejudice or interfere with the due course of any pending judicial trial, or interferes with or obstructs the administration of justice\textsuperscript{137}. Nevertheless, news reports comprising “a fair and accurate report

\textsuperscript{133}See also the case of \textit{Saadat Khialy v. Satte \& ors} [1963] 15 D.L.R. (SC) 81 where it has been held that by reading any article or reports of newspaper, if it seems that it has a tendency to prejudice mankind against one or other of the parties involved in a proceedings in a Court of law, then it results an interference with the course of justice and ultimately amounts to contempt of Court. Hence, the act of interfering the justice system can be referred to ‘contempt of Court’ as per the contention of the case mentioned above.

\textsuperscript{134}[1963] 15 D.L.R. (SC) 335.

\textsuperscript{135}Id.


\textsuperscript{137}The \textit{Contempt of Courts Act, 1971}, Section 2(c); Section 2(c); See also Section 15 of this Act; A person found guilty of contempt of court may be punished with a fine or imprisonment. However, under Section 12, a court may waive punishment if a contemnor issues an apology to the court’s satisfaction.
of a judicial proceeding” are exempted from liability\textsuperscript{138}. Moreover, on the ground of public interest, the Act allows publishing reports covering “truth” regarding any event\textsuperscript{139}. Therefore, it seems that the avowed provisions would play a significant role in cases concerning media trial in upcoming time. Besides, the rights to freedom of expression and freedom of press recognized under Article 19 of the Constitution of India do not allow a person to contempt the Courts in relation to it\textsuperscript{140}. In the case of Re Arundhati Roy\textsuperscript{141} the Supreme Court of India quoted the view of Justice Frankfurter of the US Supreme Court\textsuperscript{142}:

If men, including judges and journalists, were angels, there would be no problem of contempt of court. Angelic judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to judges. The power to punish for contempt of court is a safeguard not for judges as persons but for the function which they exercise.

What’s more, newspaper publications presenting a defendant as a “bribe giver,”\textsuperscript{143} and two defendants as “smugglers” without adding the adjective “alleged,”\textsuperscript{144} were held as contempt of Court. Next, a confessionary statement of an accused of murder made to the police was published in a newspaper

\textsuperscript{138} The Contempt of Courts Act, 1971, Section 4; Court on its Own Motion v. State [2008] 151 D.L.T. 695-6.
\textsuperscript{139} The Contempt of Courts Act, 197, Section 13(2) as amended by Contempt of Courts (Amendment) Act, 2006, Section 2.
\textsuperscript{140} The Indian Constitution, Arts. 129, 215; The Constitution designates the Supreme Court and the High Courts as Courts of record and gives them the power to punish for contempt of Court.
\textsuperscript{141} [2002] 3 S.C.C. 343.
\textsuperscript{142} Pennekamp (n 80).
which was held liable for contempt of Court\textsuperscript{145}. In this particular case, the Court realized that the editor of the concerned newspaper was trying to generate feelings of hatred among the people by creating guilty impression about the accused\textsuperscript{146}. On the contrary, a magazine published that false charges of rape and murder have been brought against the accused individuals while the matter was pending in the Court\textsuperscript{147}. Therefore, the Court held that the editor committed contempt of Court for his \textit{sub-judice} publication and comments on merits of the case\textsuperscript{148}. Apart from contempt of Court, the Supreme Court of India perceived, ‘[a] trial by press, electronic media or public agitation is the very antithesis of rule of law.’\textsuperscript{149} In \textit{Jessica Lall case} the Court very clearly depicted that we must be alert of being unduly influenced by the media to ensure fair enquiry, hearing, defense of accused and non-interference in the administration of justice in the matters \textit{sub-judice}\textsuperscript{150}.

In the jurisdiction of some western countries such as the UK, the USA, Canada etc., Lord Chancellor Hardwicke’s opinion regarding the case of \textit{St. James Evening Post}\textsuperscript{151} created a trend of giving penalty to any individual liable for broadcasting prejudicial materials as contempt of Court\textsuperscript{152}. In this particular case he expressed his concern about the publication of news media saying that it is a must for the Courts to preserve their proceedings from being tainted in order to ensure justice to the people\textsuperscript{153}. He also says that prejudicing the minds of the people is one of the most malicious results of publication of prejudicial news reports\textsuperscript{154}. From his opinion, contempt has been classified into three kinds as well such as scandalizing the Court; abusing the concerned parties of a particular case; and prejudicing

\textsuperscript{146} Id, 18.
\textsuperscript{151} Also known as Roach v. Garvan and Read v. Huggonson [1742] 2 Atk. 469
\textsuperscript{153} Id.
\textsuperscript{154} Id.
people's mind against the accused even before trial\textsuperscript{155}.

It is strictly maintained for the British news media that they do not comment on any \textit{imminent} or \textit{pending} proceedings which may tend to interfere the course of trial with the purpose of preventing undue interference of the media with the administration of justice\textsuperscript{156}. Various kinds of punishments are ensured for the person(s) liable for contempt of Court including publisher, editor, reporter and printer. For instances, the offenders are sent to prison for a certain period of time, or imposed fine or even both\textsuperscript{157}. To determine as to whether a publication is prejudicial to a fair trial, the “\textit{clear and present danger test}” is popularly being used which implies that the publication must apparently be a malicious interference to a pending trial of a specific case\textsuperscript{158}.

Moreover, under the \textit{Contempt of Court Act}, 1981, the rule of ‘strict liability’ is applicable in the UK jurisdiction\textsuperscript{159}. This rule indicates that an action lies in contempt against a prejudicial news provider even if he or she did not publish the same with \textit{mala fide} intention but the news creates a “\textit{substantial risk}” or “\textit{real risk of serious prejudice}” to the proceedings of criminal trial\textsuperscript{160}. However, when the publication is made with \textit{good faith} for

public interest, the strict liability rule may not be applicable but it has to be proved that the publication is merely incidental\textsuperscript{161}. Hence, from the above discussion, the realization is that the individuals liable for media trial can be punished under the realm of contempt of Court otherwise massive negative media coverage before and during a trial may result in denial of the due process and natural justice to the concerned parties of any criminal trial\textsuperscript{162}.

[C] Recommended Solutions

After discussing all the answers of the questions raised in this paper, it can be affirmed that in this modern age, various types of media are coming into play and they are expanding their influence on the people by publishing information, facts or figures and giving chance of commenting to the massive viewers straightway. This trend has radically changed the communication landscape around the world. Therefore, a responsible media is expected to take into consideration the reliance entrusted on it by the general public whereby the common people blindly accepts the truth of the news published by the media. From the author’s point of view, one of the best modes of regulating the media can be exercised by ensuring objectionable types of journalistic conduct and by all other means to build up and implement a Code or exhaustive policy in accordance with the highest professional standards instead of following the political wills in a concerned country. On top of that, the author recommends that enactment of a statute, independent of the contempt power, deterring all those liable for broadcasting prejudicial materials or violation of the right to a fair trial is the most effective and realistic way to prevent media trial in the entire course of trial proceedings\textsuperscript{163}.

The question of the constitutionality

\textsuperscript{161} The Contempt of Court Act, 1981, Section 5 which says that “[a] publication made as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as contempt under the strict liability rule if the risk of... prejudice ... is merely incidental to the discussion.”; R. v. Thibodeau [1956] 23 C.R. 285, 116 (N.B.Q.B.). However, it has been held in Re Regina and Carocchia [1972] 14 C.C.C. (2d) 354, 357 that neither truth nor good faith alone is a defence; Notes (n 152) 487.

\textsuperscript{162} Maxwell (n 77).

\textsuperscript{163} Comment (n 21) 61; Bersten (n 122) 237.
of such a statute would certainly be subject to particular country enacting and enforcing the same.

The proposed Act may include different list of certain categories of publications which can be differentiated following the “clear and present danger test” to determinethemagnitudeofpunishments as specified in the particular Act. However, such a determination would be made by the concerned judges or jury of the Courts case-by-case basis. For this purpose, the judges or the jury should depend on the evidences to evaluate any real risk of the concerned publication and while it would be found that the publicity alone provided no grounds for interfering into the trial, the penalty for contempt should be reduced\(^\text{164}\). As regards punishments, it should be considered that simply delivering symbolic proclamations against journalists may not be sufficient in this modern age of new technologies and media, the Courts should have the authority to provide at least soft punishments as an alternative\(^\text{165}\).

Under this statute, it should be highlighted here that every individual involved in investigation or criminal proceedings e.g. the Police, prosecutors, parties, attorneys, witnesses, jurors, judges must be proscribed from discharging any material in relation to a concerned trial\(^\text{166}\). Further, they have to be prohibited to make any statement or comment regarding either the guilt or innocence of any accused of criminal offence as well as relevant facts or evidence presenting an accused as guilty or innocent before the trial concludes.\(^\text{167}\)

Above and beyond, media must be very responsible and follow a few norms, inter alia, in reporting of any news such as:

i) Every press must maintain accuracy of particular case and verify the same by a truthful, comprehensive and intelligent

\(^{164}\) Professor Michael Chesterman, ‘Media Prejudice during a Criminal Jury Trial: Stop the Trial, Fine the Media, or Why Not Both?’[1999] 1 University of Technology, Sydney Law Review 71, 71.

\(^{165}\) Banerjee (n 11) 49.


\(^{167}\) Id.
account of the day’s events before reporting or publication of the same. Again, in cases of any error, statement of rectification must be provided as early as possible;

ii) It must follow the extent of its right to report on Court proceedings while it has to avoid any act that amounts to interference of course of justice;

iii) When anyone is made accused on mere suspicion, no personal opinion against the said person shall be published;

iv) Along with providing an opportunity for the exchange of comment or opinion or criticism or attitude, it must undertake some efficient steps to avoid any such act that is based on either favouring or defaming any person;

v) It must not purposely make sensational or provocative heading of report that ultimately create public outrage or hamper the presumption of innocence of any accused person;

vi) The press must encourage the growth of the sense of responsibility and public service among all those engaged in the profession of journalism168;

vii) It must improve the methods of recruitment, education and training for the profession of journalism, if necessary, by the creation of suitable agencies for the purpose such as a press institute169.

V. Concluding Remarks

To conclude, corresponding to Jeremy Bentham’s assertion it can be stated that public opinion and free press as its most effective organ are forces not to be feared, but trusted170. Indeed, the media’s importance is not less than that of Bentham’s time in this modern century. Now-a-days, in the garb of rights and duties, the media arrange some TV shows and reports, and publish such prejudicial information in

168 Id.
169 Id.
relation to any crime which generally tends to influence the Courts to take decision in line of their portrayal of the event. Sometimes, the media coverage create outrage among the people and thereby, it is seen that judges also start to consider media reports and criticisms during giving decision even after hearing of both the parties. Often they are fallen in such situation that makes them bound to think that if they give contrary decision against the media depiction, they will be subjected to public criticism which may lead to wound his or her reputation, or may invade his or her social life. In so doing, the media trial causes interference to the Court proceedings and questions the impartiality of the system of ensuring justice to the people which may amount to contempt of Court, and would violate the rights of individuals guaranteed under international norms and laws. They forget that the accused person, who has been charged for any crime, also has the right to be presumed innocent until he is proven guilty beyond all reasonable doubt. Regrettably, the justice cannot reach at the door of the person who deserves so when those biases ultimately affect the merits of the case disgracefully. As an endnote, it can be mentioned that freedom of press is important and crucial, especially in the era of global technological progresses. However, some information must be restricted not to publish or criticize publicly, and no way should be invoked that causes interference of the trial procedures. It has to be remembered that the freedom of speech has to be exercised carefully and cautiously so as to avoid interference with the administration of justice that may lead to undesirable results in the matters sub judice before the Courts.\(^\text{171}\). Again, no one should ignore the well-established principle that justice should not only be done but should manifestly and undoubtedly be seen to be done by the impartial Courts of justice.\(^\text{172}\).

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Imagine that at some point in the past, one individual are being exposed to the nationwide media with high coverage for convictions in criminal offences, for controversial issues surrounding people or specific incident, or for other issues. As time goes by, the story’s coverage diminished, and eventually after some time, it disappeared from public eye. That individual later applies for work where background check is required, but failed the background check as a result of “negative publicity” from the past that the media or the police bureau retained. The negative publicity surrounding the individual, if discovered, could have reject every other opportunities, thus individual has to demand them be removed to cover up their traces.

The example provided above serves as a basis for the “right to be forgotten”, the right for individual to continue living their lives by leaving their past behind and not being brought up to jeopardize the life as it be at current. While this concept was recognized as a human rights by the jurisdiction that started it all, the European Union, there are still problems whether it will be fully compatible to the digital era where contents may be distributed, captured or recorded in any medium. This article aims to discuss the origin of this right and its implication on enforcing the “right to be forgotten”.

I. The Development of the Right to be Forgotten

The concept about personality rights is known as rights attached to person and aimed to protect individuals itself; the concept with respect to right to be forgotten has only been developed recently to ensure the non-prejudice treatment to the integrity of individual and, to a lesser extent, allow unfavorable record that may be otherwise unrelated to the act done in the present be forgotten.

1 Chelaru Eugen, Chelaru Marius, Right to be Forgotten, 16 Anales Universitatis Apulensis Series Jurisprudentia (2013)
removed from public view, of which the example includes the criminal record and the media depiction of controversial action done by that person. In 1973, on what is known as Lebach case, the convict of armed robbery filed a preliminary injunction against German court requesting the television station producing documentary about robbery to halt broadcasting. The two lower courts rejected the application, but the Federal Constitutional Court granted injunction, citing the provision in German constitution that “free development of personality and right to dignity are protected by law”.

Lebach served as one of the milestone in development of right to be forgotten, which was reinforced in the European Convention on Human Rights (ECHR). In particular, Article 8 stated in part that:

“Everyone has the right to respect for his private and family life, his home and his correspondence”.

The development of a so-called “Right to be forgotten” resurfaces in European Union in a reference to the deletion of information which is incomplete or inaccurate in Article 12 of Data Protection Directive; it does not, however, give a clear view over how can individual request the “forgotten” to take place. It wasn’t until 2012 proposal by European Commission of General Data Protection Regulation to which the “Right to be forgotten” is explicitly mentioned. The Proposal outlined several instances where the data shall be deleted upon request and provides the ground for the data to be retained or disclosed, to which the details is to be described in the foregoing section.

The Right to be forgotten is best known in the case Google Spain et. al. v. Gonzalez et. al. Mr. Gonzalez, a Spanish national, filed a complaint to Agencia Española de Protección de Datos (Spanish Data Protection Agency; AEPD) that Google displayed the link of newspaper news showing that Mr. Gonzalez is facing auction attachment, of which they are no longer relevant and was in fact resolved. While the AEPD dismissed the claims against newspaper, it upheld the complaint.

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4 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5
5 Formally, Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (24 October 1995)
6 Proposal 2012/0011 (COD) for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (25 January 2012)
7 European Court of Justice, case C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja Gonzalez, Judgment of 13 May 2014
against Google, citing that if the access of data compromises fundamental rights of data protection and prohibition of access, AEPD has the power to order the data not to be displayed. Google contested the decision in the Spanish High Court, to which the case was sent to the Court of Justice. While Google contested to the Court of Justice that the contest should be sent to the publisher of the website, the Court of Justice noted in the case that:

Given the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to European Union legislation, effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites.

The question that was established in the case is that whether the information should be removed when the information is, by the view of data subject, prejudicial. Google, and a number of amicus curiae brief filled by governments argued that the removal is strictly limited to those in Data Protection Directive, while Mr. Gonzalez argued that it should apply to all cases. The Court only answered this question by stating that the necessity for the data not to be link by its subject, and the interests to general public shall be balanced. Following this decision, Google and other search engine were required to permit individuals to have their context removed; they responded by setting up specific mechanism for European jurisdiction, including the form to request removal and the notice noting that some contents are excluded from view in Google only for the domain in Europe, and not others. Google noted that, as of 11 June 2016, it has received at least 440,148 requests for 1,539,176 URLs to be removed, approximately 43% (three-seventh) of which Google choose to process.

8 Google’s URL is https://support.google.com/legal/contact/lr_eupda?product=websearch for request for removal of results, while for Microsoft-owned Bing, the form is at https://www.bing.com/webmaster/tools/eu-privacy-request
9 See https://www.google.com/transparencyreport/removals/europeprivacy for the exact figure as periodically updated
II: What is, in essence, the right to be forgotten

As the Right to be Forgotten is actively developed in the European Union, a recite to General Data Protection Regulation is an ideal to examine what constitute the right to be forgotten, and to which extent does it apply. Article 17 of the 2012 Proposal\textsuperscript{10}, titled “Right to be Forgotten and to Erasure” describe that the data subject (the person related to those data) may request the data controller (one who acquired data) to remove and stop distribution of such data when it satisfies the following ground:

(1) The data is no longer necessary for the proposed collection;
(2) The data subject withdrawn the consent for data to be collected, or (in case the collection is done with time limit specified) the consent has expired and there are no grounds to retain such data, or the data subject disputed the collection and utilization of such data, or the data was not collected in accordance with the law

The law also specified that person receiving data from collected parties shall be informed that the data subject has requested the reference be removed. It also provides exception that the data must be erased except:

(1) The retaining of data is required for exercising the right with respect to freedom of expression, public interests (healthcare), historical, statistical and scientific purpose, unless the need is no longer required after a specific period of time;
(2) The data shall be retained in accordance with law of each country, which shall subject to the balance strike between public interest and removal of such data;
(3) If the data subject disputed accuracy of such data, the data requires to be kept for proof, the use of data is unlawful but the subject does not require the data be removed, or for the purpose of transferring data to another system, the data usage must be restricted but may not erase them. It shall be solely kept for proof or for right protection, and the subject shall be informed of

\textsuperscript{10} supra Note 8
the process on deletion or retention of such data.

While there is no international law that touch directly with this law, the international organization such as Organisation for Economic Co-operation and Development (OECD) attempted to establish the milestone on right to be forgotten which is valid across participating countries. The results is the Recommendation of the OECD Council in 1980, which, with respect to the right to be forgotten, provides that the data subject has the right to challenge the data and have them erased, rectified, completed or amended. As a recommendation, it does not have legally binding effect, though it served as a development for other laws to similar effect.

III: “Does it work, too?”

A number of scholars pointed out that the concept with respect to right to be forgotten is vague when it was written into law, but even more confusing when it comes to practice. Meg Leta Ambrose, in her paper jointly authored with Jef Ausloos, pointed out that certain activities, such as collection by virtue of household activities, national security and criminal investigation, were deliberately excluded off the Proposal, which means it may still be theoretically possible to retain data for the purpose of criminal investigation. If such retention is possible, it will be in contrary to the purpose of right to be forgotten that ex-convict may request the record be cleared for their fresh start. The author also noted that the introduction of concept relating to the consent and the withdrawal is a new development to the Proposal, but if the consent was granted for the data controller who later passed on such information to other party (whether in form of information purchase, exchange or other means), and the consent was later withdrawn, the controller may have to request the recipient of data to upheld the withdrawal of the subject by means of communicating to the recipient. Article 17(2) of the Proposal, however, noted that the controller is still liable if it allowed the recipient access to the data that should have been deleted.

A number of critics to the “right to be forgotten” noted that it is

13 npra Note 8, Article 2, paragraph 2 et. seq.
It is almost impossible to make someone “disappear” by invoking the right to be forgotten, as the data as it is being processed nowadays is very impossible to be eliminated out of presence. Bert-Jaap Koops, in his paper\textsuperscript{14}, broke down the right into three main primary uses, which will be described here in two:

1. To request removal of data in due course. The implication behind it is who should be treated as data controller when the current trend of Web allowed for user-generated content to be posted (such as by taking photos or videos in public appearance, to which consent from data subject are not obtained) into specific platform (which is essentially similar to Google Spain v. Gonzalez case above and shall be referred to at later point). This does not include the fact that the same publication may be reproduced in a “mirror” site, with or without permission from the source, which makes the tracking down be much more difficult.

\textsuperscript{14} Bert-Jaap Koops, \textit{Forgetting Footprints, Shunning Shadows. A Critical Analysis Of The ‘Right To Be Forgotten’ In Big Data Practice}, 8(3) SCRIPTed 229 (2011), at 237 \textit{et. seq.}

It is worth noting that the exception on criminal investigation as stated in 2011 Proposal may allow the police or court authority to retain the record of suspected wrongdoings in database, which may adversely affect the background check in profession that required so. In 2008, the European Court of Human Rights decided in S and Marper v United Kingdom\textsuperscript{15} that the retention of DNA from the convicted for a criminal charge that was later dropped is unlawful. It noted that (emphasis added):

\ldots the Court finds that [...] the powers of retention of the fingerprints [...] of persons suspected but not convicted of offences [...] fails to strike a fair balance between the competing public and private interests [...] the retention at issue constitutes

\textsuperscript{15} [2008] ECHR 1581, Judgment of 4 December 2008
a disproportionate interference with the applicants’ right to respect for private life and cannot be regarded as necessary […]

The balance strike shall be subject to further discussion on a revisiting of Google Spain case, the landmark milestone of “right to be forgotten”.

2. The “restart”. The restart as referred here reflects the issue in the opening paragraph of this article which people should have right to demand the outdated and prejudicing data be removed or at least not used against them (if the consideration so requires), like in bankruptcy and criminal law. For example, the data subject who is making a negative publicity but has since emerged from them (such as in tax convictions, defamation, bankruptcy, etc…) should have right to demand news media to remove or to refrain from reporting the negativity in the past. Koops noted the concept to be how to approach the data when it was released and used, not a pre-emptive prohibition on the extent the data may or may not be used in order that the data subject can discuss freely without having to require a “restart” if the data is misrepresented or prejudicial later.

While Jef Ausloos16 also identified other issues that the nature of privacy issue are very abstract and became issue when it was late to react, as the current society are tracking and/or using a big data nowadays, in the manner that people are much obliged to comply without appropriate framework to safeguard their interests, though if this “right to be forgotten” are abused, it may constitute form of censorship, and if there is no actual information to collect in the first place (as in most site claimed “anonymous, non-identifiable information”, then this right to be forgotten cannot be invoked to forget anything. The critics, however, agrees that there are some point the public interests may be claimed to forbid people to forget itself, such as the freedom of expression and freedom of press. While 16 Jef Ausloos, The ‘Right to be Forgotten’ – Worth remembering?, 28(2) Computer Law & Security Report 143 (2012)
The ECJ in Google case noted that Google’s index is disproportionate, it noted that (emphasis added):

“…the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out ‘solely for journalistic purposes’ and thus benefit, by virtue of [exception of Data Protection Directive]…”

11 months before the ECJ reached the decision in Google case, the Advocate General Niilo Jääskinen presents his non-binding opinion which argued that the right to privacy (and to private right in general) shall be subject to justified limitation, and by removing information which is publicly available for the purpose to be forgotten by the data subject, it would “entail sacrificing pivotal rights such as freedom of expression and information”, whereas the freedom of expression are enjoyed at the same level of right to privacy, and both need to be balanced.

In March 2016, French data regulator Commission Nationale de l’Informatique et des Libertés (CNIL) imposed an 100,000 Euro fine against Google for failing to comply with the right to be forgotten in its entirety. They noted that Google did indeed hide the website index from Google if the request came from European countries, but not from other continents (i.e. if the request was made in Asia or North America, it will still display the information as usual), which the CNIL claimed that the approach to suppress the result shall not depend on “geographic origin of those viewing the search results.”

Google published an open letter in French newspaper Le Monde nothing that such restriction would means the information would be censored worldwide when it is legal in other countries not the country of origin (in this case, France). It also noted that this may set a dangerous precedent for the

17 Julia Fioretti, France fines Google over ‘right to be forgotten’, Reuters (March 24, 2016), at http://www.reuters.com/article/us-google-france-privacy-idUSKCN0WQ1WX (accessed June 11, 2016)
law governing data and data protection to be apply worldwide when its applicability is solely for the exclusive jurisdiction only. In May of the same year, Google appealed the decision to the Conseil d’État, the Supreme Administrative Court in France, for the review of CNIL decision\textsuperscript{19}.

While the issue on how the effectiveness of right to be forgotten remained debatable on the issue not being an equivalent right, there are some approaches such that the data may “forget” itself without user intervention, such as by adding the expiry date or any technological measures to control them similar to Digital Rights Management (DRM) used in the online purchases, though there shall be governing regulation to ensure the control mechanism are not being circumvented\textsuperscript{20}. 

**IV: How about Asia, in a way?**

The major player in a game of big data are two countries and one entity: Japan, South Korea and Hong Kong. As such, these three countries shall be put greater emphasis.


\textsuperscript{20} supra Note 18, at 153

**IV/I: Japan**

In Japan, there is a conflicting standpoint over how to balance freedom of information with right to be forgotten prior to the introduction of the right recognized in Google case. In one instance in January 2014, the Tokyo High Court decided that removing the auto-prediction related to a person whose link tied with alleged crime not committed by him “cannot be taken into account the damage general public would loss from displaying information”, while in September of the same year, Kyoto District Court ruled against the man who asked the arrest record be purged; without concluding on the merit of the case, the Court throw the case away as Google is effectively American company, and the American division shall be responsible for this oversight\textsuperscript{21} (similar to forum non conveniens doctrine). Yahoo, who is also operated in Japan, were also face a takedown request and, after several court decisions, has decided to establish oversight procedure which is said to remove privacy-sensitive issue while

granting freedom of information. This standpoint was changed when the influence of the “right to be forgotten” was accepted. A case in Tokyo District Court in October 2014 saw the Court ordered an interim injunction for the removal of search results linking to criminal activity. The Court in this case do not exactly touch into the right to be forgotten in the essence, but rather note that people has right to privacy, which is a bigger picture of the right to be forgotten. In 2016, however, the Saitama District Court rendered the interim injunction for Google to remove details of 3-year-old arrest with explicit mention to the right to be forgotten as established in EU. The presiding judge noted that people who was unduly exposed shall be entitled to have their private life honored and shall be given another opportunity to restart the life without hindrance from the past.

IV/II: South Korea

In April 2016, South Korea’s Communication Commission proposed a Guideline for Requesting Access Restriction on Media Posted Online. Essentially, this is similar to “right to be forgotten” that individual may request removal or restriction of access for media posted by other or by itself that cannot be removed online. The Commission described this as guideline that this is a “minimum” guideline in supplement of other laws, and, in a unique move, recognized that family members or spouses may exercise this right post mortem (after the subject’s death). The non-binding guideline is set to become effective in June 2016.


24 Simon Mundy, Asia considers ‘right to be forgotten’ ruling prompted by Google, The Financial Times (March 12, 2015), at http://on.ft.com/1b3qhr8 (accessed May 29, 2016) (paywall)


IV/III: Hong Kong

In 2014, there is an administrative appeal in Webb v. Privacy Commissioner for Personal Data. David Webb is a founder of private business database, which linked to the public case database operated by the authority. A complaint from one accused in an unrelated case leads to the redaction of names in the public database, but the name was not erased from the database Webb operates. Webb appealed the order of Privacy Commissioner, and the Administrative Appeals Board heard them in July 2015. It decided that, while Webb contested over the necessity and proportion of the law, there must be a balance struck. The Report by Privacy Commissioner, to which the Appeals Board agrees, noted that:

“…Whether the published data concerns matters of public interest is a factor that I will take into account when striking the balance between freedom of press and data privacy. In considering whether public interest is served in any news reporting, our stance is that public interest must involve a matter of legitimate public concern. There is a distinction to be drawn between reporting facts capable of contributing to a debate of general public interest and making tawdry descriptions about an individual’s private life. […]"

In weighing the freedom of press and expression against the personal data privacy of the Complainant, […] the balance should be tipped in favor of protecting the personal data of the Complainant in the three edited judgments.29"

IV/IV: Elsewhere in Asia

In India, sometime around April to May 2016 and perhaps being the first of its kind, a banker claimed the right to be forgotten over the news coverage over the marital dispute, demanding it be removed from the website and search engine. The Delhi High Court is scheduled to hear the case at the end of the year while awaiting the parties to


29 id, para. 45, pp. 24-25
V: Conclusion

The issue of right to be forgotten are often derived from right to privacy, and since privacy are recognized in equal scale to the freedom of expression, taking balance into either issue often is not an easy task. The ground to be forgotten is often associated with the cleaning of prior traces which may be unfavorable (such as criminal record or civil litigation) or do not serve public interests, but may be otherwise used in background checks, though the ground for retention is often for the purpose of reporting history as it appeared for public interests, and there are also some technical difficulty associated with the vague term and enforcement of such law in practice, as in the world of big data, it is very unlikely that the information may be completely removed out of sight while it is under processing by data controller or other entity, and the exercise of right will not only become problematic to the intermediary of the data, but to the ultimate entity when the request to be purge was served to.

Several Courts attempt to determine the fair balance between the freedom


32 Freedom of Expression is recognized in almost every human rights instruments, namely in Article 19 of Universal Declaration of Human Rights, Article 19 of International Covenant on Civil and Political Rights and Article 10 of European Convention on Human Rights
of expression and right to be forgotten, and for such purpose, has outline some unofficial practice for the exercising of the right to be forgotten, such as by requiring the data subject to present sufficient information and probable causation associated with the display of such information, by means of removing direct and identifiable reference to the data subject but is otherwise remain in place, and by taking account of public interests associated with freedom of expression, and to some extent, freedom of journalism. However, the lack of law governing the purge of online media when it becomes obsolete also makes some other Court to turn and resort to other law, such as Data Protection Law. Theoretically, it is possible to use such law to resolve the issue, but its interpretation cannot go as far as lex specialis; Data Protection Law, as its name suggests, is design for the protection of data, not the “purge” of data.

While in the cyberspace of big data, individual would require more control to the data and how it was processed, it poses a problem on how would such data be regulated (in Data Protection Law) or be removed upon it is likely to become prejudicial (for the right to be forgotten) in conjunction with the balance of freedom for free access of information, journalism and expression. The recognition of right to allow people to request unfavorable content, as it is known in Google case as “right to be forgotten”, serves as a good milestone for the development on how person could exercise the right for non-interference (privacy), though until the issue was revised and set into stone, any development in this field remains open for all kind of interpretation and for any and all favor.

33 See also Article 19, *The “Right to be Forgotten”: Remembering Freedom of Expression*, online at https://www.article19.org/data/files/The_right_to_be_forgotten_A5_EHH_HYPERLINKS.pdf (accessed May 30, 2016)
These Articles are written by Contributors recommended by each National Board. They focus on the
I. Introduction

On March 2, 2016, the world’s longest filibuster in South Korea finally ended. It lasted for 192 hours to delay the proposed legislation of anti-terrorism bill backed by President Park Geun-hye and her ruling Saenuri Party. Recently a spate of terrorist attacks by Islamic State(IS) affected even many countries in Asia, and the need for comprehensive measure to prevent terrorism became apparent in Korea. The bill includes the article that allows National Intelligence Service (NIS), national main spy agency, to collect a wide range of personal data and monitor any suspect of terror attacks. Though Minjoo Party opposed to the bill asserting it could be abused for political oppression as NIS takes power to check civilians’ communication and financial information, it was passed after the filibuster ended. This law review will analyze the controversy over new anti-terrorism legislation and the problematic issues so far regarding anti-terrorism law that have been raised by National Human Rights Commission of Korea and many non-governmental organizations. Suggesting the directions of improvement of the law, this review will further examine the status and potential of Korea in Asian legal cooperation to counter terrorism, which is the theme of 2016 Asian Law-Students’ Association(ALSA) Law Review. Therefore, the study will mainly investigate (1) recent legislation of anti-terrorism law in Korea, (2) the issue of human rights violation and po-
itical dissension that have blocked the legislation, and (3) the connection and possible role of Korea regarding future Asian anti-terrorism cooperation.

First, the definitions for ambiguous terms as “terrorism,” or “international terrorism” must take precedence to discuss anti-terrorism law. Generally the word “terrorism” or “terror” means the vicious acts of violence committed for specific purposes. In this study terrorism is considered to have the same meaning with the term “terrorist attack”. The definition of terrorism is still a controversial issue and it is difficult to find a clear definition that is agreed internationally. However, the precedent study in Korea reviewed various definitions of terrorism by scholars such as Hoffman, Merari, and Jin-Tai Choi. It defines terrorism as an intentional, systematic and organized combat or strategy that poses a threat to the general public for the purpose of political intimidation by force, expecting the psychological pressure and reaction.¹ Also, regarding the complexion of the terrorism after the 1990s, the post-Cold War era, experts are using the term “new terrorism” as it features vagueness of the agent and the attack targeting unspecified masses unlike conventional terrorist attacks.² As the aspects of terrorism changes significantly, it becomes impossible to prevent terrorism effectively by just a few countries’ action, and international cooperative efforts to counter terrorism are prompted. In 1937, the first international attempt to define terrorism was made by the League of Nations’ “Convention for the Prevention and Punishment of Terrorism”. In article 1.1, it defined “acts of terrorism” as “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public”. There

are other various precedents of defining international terrorism by the United States, The Council of Europe, and United Nations General Assembly.³

In Korea, the government limited the ambiguous definition of terrorism in anti-terrorism bill proposed by NIS in November, 2011 to the acts defined by terrorism crime in the generally approved international conventions. Also the term terrorism agent is defined as a terrorist organization or linked groups identified by international society including United Nations(UN). The new anti-terrorism law in 2016 defines terrorism as the actions conducted to threaten the public or disturb the enforcement of authority by the state, local governments, or foreign governments including international organizations established by international treaty or conventions. Then it specifies subordinate provisions regarding homicide, holding a hostage, attacks on means of transportation such as flight and vessel, and even use of nuclear weapon. As exact definition agreed by all parties cannot be drawn, Korean government must exert utmost effort to decide the definition not only complying with international precedents but also establishing specific range of terrorist acts so that it can reduce the risk of human rights violations by too expansive definition.

II. Disputes regarding newly enacted Counter Terrorism Law - Articles

In Korea, anti-terror law was enforced in 2016. As Korea has the previous example of passing the similar law article during the 1970s under the President Park Jung Hee’s dictatorial government in the name of ‘state of national emergency, before passing the law, there has been a long filibuster going on between members of national assembly. Even after the filibuster ended, there are still ongoing negotiations regarding the
concerns of the probability of violating human rights by the personal information collection of the National Intelligence Service while the specific measurements to avoid these situations are unprepared. Besides the legislation of the anti-terror law, passing the anti-cyber terror law is also being discussed since the recent incident which is being suspected to be related to North Korea.

The issue of implementation of anti-terrorist law in South Korea has been disputed since 2002 when the anti-terror law based on the first draft of National Intelligence Service submitted. But this submission was rejected because many organizations and NGOs like National Human Rights Committee and Korean Lawyers’ Association showed strong disagreement about this idea. The major reasons why these organizations disagreed with the anti-terrorist law were that current law systems are believed to be sufficient to prevent and punish the terrors occurred and since the definition of the ‘terror’ itself is so ambiguous and undecided that it has a huge percentage of depriving the human rights by the government power.

In 2016, ‘Anti-terror law for protection of the citizens and public safety’ was passed. And these 9 articles are mostly about collecting the individuals’ information who are suspected to be terrorists, which in turn is not free from the concerns of human rights violation. Additionally, there are no regulations regarding the cases of the compensation of the innocence misunderstood as a terrorist.

According to the declaration submitted by the National Assembly, the main background of issuing this law is to explicitly regulate the duty of the nation and successfully protect the public health and property. The law is mainly consisted of three parts; the definition of the terror, establishment of new governmental agencies to handle the cases of terror, and empowering the related agencies to collect the personal information and investigate the suspected
terrorist.\textsuperscript{4}

Article 2 recognizes the concept of terror as the actions that jeopardize the national security and the public safety which are mostly related to the acts of criminals regulated by the domestic related law. The 8th and 10th article states that special agency for discussing and declaring measures to combat terrorism to be established under the control of the president. And a standing committee will take charge of the prompt decision making and implementing the law. Article 16 legitimates the personal information collection and investigation of the suspected terrorists.\textsuperscript{5}

Article 9 is about collecting information about individuals considered a security risk, but is also not immune from human rights violation. In particular, according to the paragraph 4, NIS is supposed to report before or after the inspection. Obtaining ex post facto approval can be effective in immediate response, but it possibly allows the abuse and indiscreet investigation on individuals. The Article 7 provides that there must be a anti-terrorism human rights protector to prevent the abuse, but it may be asked whether the presence is effective in that there is only one position for the role. In addition, the anti-terrorism law has no practical Articles regarding the compensation for individuals who are mistakenly suspected as terrorist act criminals.

\textbf{III. Historical and Political Background of Counter-Terrorism Law Controversy}

As previously mentioned, chaos erupted as the concept of a counter-terrorism law emerged in South Korea. Mainly, it was attributed to the history of such security laws abused within the nation. In this section, various occasions on which such security laws were enacted and taken into account will be discussed in chronological order.
In 2002, the anti-terrorism bill based on the draft by NIS was proposed. However, statements from National Human Rights Commission of Korea and Korean Bar Association were also proposed to oppose the bill. The associations were against the bill mentioning that the current law on punishment of violent acts is sufficient to prevent and punish terrorist crimes. Also the definition of terrorism in the bill was so ambiguous that it runs counter to the principle of nullum crimen sine lege (no crime without law). They rather expressed concern about the abuse of governmental authority and the infringement of human rights. Moreover, since NIS is expected to take the initiative of the investigation, there was a controversy over the institution to lead all the comprehensive executions of anti-terrorism law. The practical procedure for relief and compensation regarding unfair surveillance is also needed.6

The initial phase of South Korea was quite unstable. After an abrupt independence followed up by a forced dividing, South Korea suffered from the Korean War. But the war was not the only problem the nation faced. From over 60 years of the government’s history, more than one third was taken over by a dictator, or a coup’dé dat. Under such sovereignty, laws, most notably the National Security Act, originally enacted to secure the nation became tools for the government to restrain those who were proclaimed as a threat by the government. Additionally, it violated human rights, specifically such as freedom of expression.

During the ‘Seung-Man Lee’ regime, the government widely abused the National Security Act. One such example was the ‘Bong-Am Cho Incident’ in 1958. As the citizens were losing their confidence with the government, Bong-Am Cho, a liberal politician ran for president and although he failed, he emerged as a potential threat to Lee’s next presidential term. Later that

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year, Cho started the Liberal Political Party. Lee’s party became very popular throughout the period. In 1958, Cho was arrested, indicted under the National Security Act for allegedly working as a spy for North Korea. Cho asserted that the Koreas should have a peaceful reunification, an idea opposed to the government’s intention to re-unify by force. In 2009, the Truth and Reconciliation Commission proposed to reconsider this decision and the Supreme Court found Cho not guilty in 2011. Despite the fact that Cho was not actually planning treason, but rather just having a different political view with the government, he received the death penalty and was hung to death later on.\(^7\)

The National Security Act also enabled the government to use its police force and military force to physically assault citizens. In 1960, citizens from Masan, Gyeong-Sang Namdo Province protested against the results of that year’s presidential election. The polls did not match with the actual number of voters, leading to possible fabrication. Throughout the process, a high school student was killed by a gunshot from the police. Freedom of Expression was restrained based on the assumptions that such actions were deemed as anti-government.\(^8\)

Although Seung-Man Lee resigned afterwards, such patterns repeated in later governments as well. In the 1970s, Dae-Jung Kim (later elected as 15\(^{th}\) president of ROK) was kidnapped by the then government after he was deemed as a political threat to the incumbent president. In 1972, it also closed all political activity including the National Assembly, with reason that the nation is in emergency, for it is under potential threat from North Korea. Any citizen who blamed the government during the period was taken into custody. In the 1980s, the government used its

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military forces to “neutralize hostiles who are against the government” in Gwangju, Jeon-ra Namdo Province. All such actions were deemed as having broken the law.

As such illegal or abusive actions made by the government under the National Security Act transpired, there should be much consideration put into the newly enacted Counter-Terrorism Law. The situation is much similar, for in the past, National Security Act was billed under the purpose of combating threats, mostly North Korea, yet was used to restrain political actions and infringe human rights.

IV. Expectations about South Korea’s role in the international terror prevention cooperation

South Korea cannot be expected to lead a role in international terror prevention cooperation through offering a model suitable to other nations. This is mainly due to its lack of terror experiences. Korea had been known as a terror-free zone, ranking 124th in the Global Terrorism Index. Though the 11 September 2001 World Trade Center and Pentagon attacks had prompted South Korea to organize a new national system of emergency response for terrorism-related events, no such events had occurred since and the country had no reason to pay extensive attention on the issue of terrorism. The feedback of the emergency response system and the setup of an effective and consistent system has happened only recently in 2014. Prior to this, the emergency response has been handled by broad, unprofessional organizations, but with not much effectiveness as proven during the Sewol Ferry Accident.

However, Korea can be expected to serve a role, namely in counterpoising between the terror prevention efforts and its possible adverse effects utilizing

9 Global Terrorism Index, Institute for Economics & Peace, 2015
its historical and experiential legacies. All kinds of terror prevention efforts are prone to bringing along issues like human right violation and government hypertrophy.\textsuperscript{11} In the international stream of terror response efforts, Korea can be expected to take the lead in study the possible side effects of the terror prevention measures and the ways to prevent them. As an example, the filibuster in 2016 to delay the terror prevention legislation from passing was one such effort as this much of intense opposition was not seen in any other countries when working with terror prevention measures. Behind this exists Korea’s experience of human right violation during the times of dictatorship of 1960s to 1980s. During these times, Korea has suffered long time of human right violation under the cause of terror prevention and national stability. South Korea may not be able to suggest a complete, applicable model, but it can be expected to contribute by finishing up a more sustainable terror prevention model.

Once an Asian, integrated anti-terror agreement is made, it is important to necessitate the countries to practically monitor each other. As for the international legalization, clear contents, well-set procedures, judgmental organization independent from individual nations and creation of legal precedent should be referred to in the step of legalization.\textsuperscript{12} According to precedent studies, territorial principle, personal principle, protection principle should be noticed in the universal jurisdiction. Also according to the precedent studies on international flight and naval terror, it is important to keep the foreigner’s terrorism crime under offshore jurisdiction and cognize jurisdiction as a responsibility so that prosecution and hand-over of the criminal can be possi-


ble. Especially in order to disintegrate terror organization and prevent terrorism from taking place, international cooperation in the field of finance is crucial; for instance, by stopping the financial organizations from procuring the terror funds. 130 countries have signed the International Convention for the Suppression of the Financing of Terrorism on December 1999 and most of the developed nations use it in the working-level. Also, FATF recommendation developed within each Asian nations’ criminal law is capable of bringing changes.

V. Conclusion

Considering terrorist attacks that occurred recently in Asian countries including Indonesia and Iraq, it is obvious that there is an urgent and acute need for establishing stable and effective legal cooperation to combat terrorism in Asia. As acts of terrorism are getting more and more cunning and the range of potential terrorism targets has become wider than ever nowadays, it is impossible for any country to deal with the threats of terrorism by itself because of both technical and legal limits. As an initial step towards international anti-terrorism cooperation, Asian countries should make efforts to form a strong alliance against terrorism. South Korea rightly needs to participate in the cooperation as well, as it could likely serve its own role and be provided with better protection.

This law review suggested 1) defining terms such as ‘terror’ or ‘terrorist’ in order to prevent domestic power abuse, 2) securement of practical legal force through the establishment of universal jurisdiction and control of the terror capital, 3) establishment of system and precedent that allows practical surveillance, and 4) pre-stipulation of human right protection. It especially focused on anti-terrorism law recently legislated

in South Korea and concerns about its side effects, namely human rights violation and abuse of the anti-terrorism law with political purpose of strengthening governmental power. Several clauses were specifically pointed out as potential threats to the innocent public as those clauses give excessive authority to the National Intelligence Service, the spy agency of South Korea. Historical precedents for political oppression and human rights abuse in South Korea were also mentioned in order to explain why there are so many citizens who do not trust the government thoroughly.

Furthermore, due to its lack of experience, South Korea is not considered suitable for serving a leading role in suggesting an effective model of anti-terrorism cooperation. It might fail to consider important threats that many Asian countries face, or underestimate the impacts of potential terrorist attacks. However, it is emphasized in this law review that South Korea has been under military dictatorship for decades and therefore deeply aware of the danger of the abuse of legal authority. The controversy recently raised in South Korea over its anti-terrorism law could be clear evidence which shows how much South Korea is concerned about the probability of human rights violation and political repression under the guise of anti-terrorism. Thus, South Korea can effectively serve a role as a monitor which makes sure that the basic human rights of the public are guaranteed under terrorism prevention policies.

As a result of considerable discussion, Asian nations will come up with an outline for legal cooperation to combat terrorism in the form of a treaty or a convention. If any changes to the anti-terrorism law of South Korea are required in order to make it compliant with international agreements, the National Assembly and the government should put their efforts to make appropriate amendments. Despite the fact that South Korea has been considered
as a terror-free country for a long time, it should start trying to form a solid legal cooperation against terrorism with its neighbors as the threat of terrorism is rising more than ever.

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I. Introduction

July 13th, 2013, the death of a young army conscript, Hung Chung-chiu, generated outrage across Taiwan. He was sent to military detention for bringing a mobile phone with built-in camera, after days of confinement and harsh punishment he was found weak and his body came overheat and died from organ failure afterwards. Hung’s death triggered the anger of the public, and the missing evidence and unreasonable military prosecution service system brought the Taiwanese people out on the street, urging for reasonable explanation and asking for further reformation. Finally, Legislation Yuan passed the third read of an amendment to the law governing punishment measures in Taiwan’s military in better protection of human rights.

II. The death of Hung Chung-Chiu

Background

Hung Chung-Chiu (8 Sep 1989 – 4 Jul 2013) was a 24-year-old army conscript served in 542nd Armor Brigade in Hsinchu. He graduated from National Cheng Kung University majoring in Transportation and Communication Management Science. Hung chose to serve his conscription as a priority despite that he was accepted to the master’s program in said department.

Incident

Less than two weeks before his discharge date, Hung was found bringing a mobile phone with built-in camera, which disobeyed the rules in the army. He was sent to military detention at a Yangmei base. During his detention, Hung experienced days of confinement and was ordered to perform tough exercise without having proper health care. In suffer of a heatstroke Hung was hospitalized on 3 July and transferred from Ten-Chen Medical Hospital Hung to Tri-Service General Hospital as his health condition got worse.
Investigation

According to the report released by Taiwan’s Defense Ministry, in Hung’s case, only administrative punishments should have been given. Also, no physical drills under the heat and humidity were allowed in military detention punishment that Hung experienced. Moreover, the unusual process of approving the medical and psychological report on Hung before sending him to detention was worth questioning. Normally it takes a week to complete, but in Hung’s case it was expedited within half a day.

Another question raised during investigation is that a Taiwanese media Closed-Circuit Television (CCTV) recorded that when Hung fell into coma, the ambulance traveled at an unusually slow speed and delayed the treatment. However, several witnesses that spoke to the media in the record of CCTV claimed to be threatened by unknown sources.

Public Reaction

The death of Hung Chung-Chiu has sparked the anger of Taiwanese people, and led to tens of thousands of people protest in Taipei in the name of seeking justice. The protest was taken place at Ketagalan Boulevard on the eve of Hung’s funeral, and those people in white were singing a Taiwanese version of the revolutionary song Do You Hear the People Sing? They demanded that the military ministry had the responsibility to reveal the truth about Hung’s death and that the legislation should re-examine the human rights protection in Code of Court Martial Procedure.

III. The regulation of Taiwanese military prosecution service

Before the incident

Before Aug 13th, 2013, any military personnel on active duty who committed crimes of Criminal Code of the Armed Forces or special codes concerned should be subject to prosecution and punishment under these codes whether the country is confronting a war or not. (Art.1, Code of Court Martial Procedure) The military prosecution system was controlled by Defense Department for tens of years, but its legitimacy had been questioned as Taiwan gradually transferred to a country under the rule of law.

According to the concept of “separation of power”, which is the foundation of law-ruled countries, any one branch of government should not exercise the core functions of another. In another words, Administrative Yuan shall not take control of judicial power.

The Constitution of Republic of China implicitly delivers the concept of separation of power in its articles and the justice of the constitutional court,
for example, in art.77 “The Judicial Yuan shall be the highest judicial organ of the State and shall have charge of civil, criminal, and administrative cases, and over cases concerning disciplinary measures against public functionaries.” Hence, the article 1 of Criminal Code of the Armed Forces before revision could be undoubtedly claimed “unconstitutional”.

Reform made after the incident

The amendment passed after the death of Hung Chung-Chiu including the article 1, 34, 237. The major revise in this amendment was to transfer jurisdiction of most criminal cases involving servicemen in peacetime to civilian courts. Article 1 of Criminal Code of the Armed Forces was amended as “Any military personnel on active duty who commits crimes of Criminal Code of the Armed Forces or special codes concerned shall be subject to prosecution and punishment under these codes at war time. Any military personnel on active duty who commits the following crimes shall be subject to prosecution and punishment under the Code of Criminal Procedure while not at war time…”

V. My Comment

The death of Hung Chung-Chiu was indeed a tragedy in a wrongful judicial system, but its influence also led to the re-examination of the legitimacy of military court. The revision of Criminal Code of the Armed Forces could at the same time be seen as a milestone of the young democracy, for those who went on the street in the protest were mainly the young generation. From the incident we can conclude that: To finally become a mature country rule by law, Taiwan still has its long path to go through.
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I. Introduction

The phrase “white-collar crime” was coined in 1939 during a speech given by Edwin Sutherland to the American Sociological Society, as he defined the term as “crime committed by a person of respectability and high social status in the course of his occupation.”

Although there has been some debate as to what qualifies as a white-collar crime, the term today generally encompasses a variety of nonviolent crimes usually committed in commercial situations for financial gain. Many white-collar crimes are especially difficult to prosecute because the perpetrators use sophisticated means to conceal their activities through a series of complex transactions. The most common white-collar offenses include, inter alia, antitrust violations, computer and internet fraud, credit card fraud, government fraud, tax evasion, insider trading, kickbacks, public corruption, money laundering, embezzlement, and economic espionage.

White-collar crime in Asia, like many other crimes, has taken on an international dimension in recent years. It is now common for corrupt public officials to hide or launder bribes or embezzled funds in foreign jurisdictions, or for them to seek safe haven in a foreign country. Bribers may


keep secret slush funds in bank accounts abroad, or they may launder the proceeds of corruption internationally. Bribery of foreign public officials has also become a widespread phenomenon in international business transactions, including trade and investment, as well as humanitarian aid. Consequently, Asia countries increasingly recognize the need for international cooperation to fight and repress corruption more effectively.

Any discussion of extraterritorial law enforcement operations and white-collar criminality must begin with an explanation of the concept of sovereignty and the principle of non-intervention. It has been noted that:

sovereignty and non-intervention are two of the principles that provide order in an anarchic world system.”4

These two principles are interrelated in that sovereignty implies the legal and de facto control by a government over a defined territory, whereas “non-intervention” implies a prohibition against that undermine sovereignty. The ideas are irrevocably intertwined as the latter implies the inviolability of the former. As an elucidation of these principles demonstrates, each is central to an understanding of the legality of extraterritorial law enforcement activity.

Extradition and mutual legal assistance in criminal matters (MLA) are two essential forms of such international cooperation. Extradition is the surrender by one state, at the request of another, of a person who is accused of or has been sentenced for a crime committed within the jurisdiction of the requesting state. MLA is a formal process to obtain and provide assistance in gathering evidence for use in criminal cases, transfer criminal proceedings to another State or execute foreign criminal sentences. In some instances, MLA can also be used to recover proceeds of corruption. Both extradition and MLA are indispensable means of international cooperation in

criminal law enforcement.  

II. The Legal Basis for Extradition and MLA

Asia countries may seek or provide extradition and MLA in corruption cases through different types of arrangements, including bilateral treaties, multilateral treaties, domestic legislation and letters rogatory. A country may rely on one or more of these bases to seek or provide cooperation, depending on the nature of the assistance sought and the country whose assistance is requested.

In recent years, Asia-Pacific countries have increasingly resorted to multilateral treaties in international cooperation. This is likely a response to the cost and time required to negotiate bilateral instruments. The various members of the Initiative are signatories to some multilateral conventions that provide MLA and/or extradition in corruption cases:

United Nations Convention against Corruption

The UNCAC requires States Parties to criminalize (or consider criminalizing) a number of corruption-related offenses, including the bribery of domestic and foreign public officials, and bribery in the private sector. In addition, it provides the legal basis for extradition as follows. First, offenses established in accordance with the Convention are deemed to be included in any existing bilateral extradition treaty between States Parties. States Parties must also include these offenses in any future bilateral extradition treaties that they sign. Second, if a State Party requires a treaty as a precondition to extradition, it may consider the UNCAC as the requisite treaty. Third, if a State Party does not require a treaty as a precondition to extradition, it shall consider the offenses in the UNCAC as extraditable offenses.

The UNCAC also provides a legal basis for MLA. States Parties are obliged to afford one another the widest measure of assistance in investigations,
prosecutions and judicial proceedings in relation to the offenses covered by the Convention. If two States Parties are not bound by a relevant MLA treaty or convention, then the UNCAC operates as such a treaty. To deal with these cases, the UNCAC details the conditions and procedure for requesting and rendering assistance. These provisions are comparable to those found in most bilateral treaties.

**OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

The OECD Convention contains provisions on both extradition and MLA. Bribery of foreign public officials is deemed an extradition offense under the laws of the Parties and in extradition treaties between them. As for MLA, a Party is required to provide prompt and effective assistance to other Parties to the fullest extent possible under its laws and relevant treaties and arrangements. A requested Party must inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request.

**Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty**

This Treaty obligates parties to render to one another the widest possible measure of MLA in criminal matters, subject to a requested state’s domestic laws. The Southeast Asian MLAT provides for many forms of MLA that are commonly found in bilateral treaties, such as the taking of evidence, search and seizure, confiscation of assets etc.

**United Nations Convention against Transnational Organized Crime**

The UNTOC requires States Parties to criminalize bribery of their officials where the offense is transnational in nature and involves an organized criminal group. As for international cooperation, the UNTOC provides the legal basis for extradition and MLA in relation to offenses established in accordance with the Convention. It does so in the same manner as the UNCAC,
i.e., by acting as a treaty between Parties States or by supplementing existing bilateral treaties and arrangements

**III. The Case of Extradition Act**

Fugitive case flows of Bank Indonesia Liquidity Assistance (BLBI) who escaped to Australia, Adrian Kiki Ariawan, finally successful returned to Indonesia on Wednesday, January 22, 2014. In the process of his return, Adrian picked up from Perth Australia by 9 persons of integrated team of seeker of suspects/convicts and assets of crime. The Integrated team formed by the Coordinating Minister for Politic, Law and Security on January 6, 2014 was composed of elements of INTERPOL Indonesia, Indonesian Police, General Attorney, Ministry of Law and Human Rights, as well Ministry of Politic, Law and Security.

Besides the extradition of Adrian Kiki Ariawan, integrated team also seized the assets from Adrian Kiki Ariawan, fugitive of BLBI Corruptor extradited to Indonesia”. Interpol, http://www.interpol.go.id/en/news/606-adrian-kiki-ariawan-buron-koruptor-blbi-diekstradisi-ke-indonesia (March 30, 2015) Rp 2.7 billion. Adrian Kiki Ariawan also imposed the burden of the compensation of Rp 1.5 trillion, jointly and severally with Bambang Sutrisno, deputy commissioner of Bank Surya who is still fugitive and allegedly be in China. Bambang also sentenced to life imprisonment. Adrian Kiki Ariawan, President Director of PT Bank Surya and Sutrisno, Deputy Commissioner of PT Bank Surya in the trial in-absentia has been sentenced to life imprisonment by the Central Jakarta District Court on November 13, 2002. Both suspects have been found guilty of corruption (misappropriation of funds BLBI) and defrauding the state of Rp1, 5 trillion. Adrian escaped to Australia since 2002 and has been an Australian citizen with changing his name to Adrian Adamas.

**IV. Grounds for Denying Cooperation**

Almost all MLA and extradition arrangements in Asia allow a requested state to deny cooperation on certain enumerated grounds. The following are
some that could be relevant in white-collar crime cases.\textsuperscript{7}

**Essential and Public Interests**

Several jurisdictions in Asia deny cooperation that would prejudice their essential interests. The meaning of essential interests is not always well-defined, but may include sovereignty, security and national interests. It could also include the safety of any persons or an excessive burden on the resources of the requested state. International instruments such as the OECD Convention have recognized that the investigation and prosecution of corruption cases can sometimes be affected by considerations of national economic interest. If a requested state includes these factors as part of its essential interests in deciding whether to cooperate with another state, then the effectiveness of extradition and MLA could suffer.\textsuperscript{8}

**Political Offenses**

Asia jurisdictions deny extradition for political offenses or offenses of a political character. Although the concept of political offenses is found in many arrangements, there is no precise definition since the concept is applied on a case-by-case basis.\textsuperscript{9}

**Double Jeopardy**

Many extradition and MLA arrangements in Asia-Pacific refer to the principle of double jeopardy. A requested state will deny cooperation if the person sought has been acquitted or punished for the conduct underlying the extradition request. Under some arrangements, cooperation may also be denied if there are on-going proceedings or investigations in the requested state concerning the same crime.\textsuperscript{10} In some rare instances, some Asia-Pacific countries may refuse extradition if it has decided not to prosecute the person sought for the conduct underlying an extradition request; a conviction or an acquittal by a court is not required.

\textsuperscript{8} Ibid, p. 325
\textsuperscript{9} Ibid.
\textsuperscript{10} Ibid, p. 326
Bank Secrecy

Investigations into economic crimes such as corruption will often require banking records as evidence. However, national banking legislation usually contains secrecy provisions that could prevent disclosure of banking records. To ensure that these provisions do not frustrate MLA requests, multilateral instruments may prohibit its signatories from denying MLA on grounds of bank secrecy (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT).\(^\text{11}\) Also, none of the members’ domestic MLA legislation contains such a prohibition, though many of their anti-money laundering legislation do so.

V. Recovery in Criminal Proceedings

It has become increasingly easy to conduct transnational financial transactions. Corrupt officials have taken advantage of this situation by siphoning and hiding the proceeds of their crimes abroad, including bribes and embezzled funds. Asia countries have seen examples in which corrupt officials transferred millions of dollars of proceeds overseas. Bribers may also deposit the proceeds of bribery abroad, such as proceeds from a contract obtained through bribery. The confiscation of proceeds of corruption through MLA has therefore become a focal issue in recent years. An even more complicated question is whether confiscated proceeds should be retained by the requesting state, the requested state or a third party.

The recovery and return of proceeds of corruption generally involves several steps:\(^\text{12}\)
1. Tracing and Identification of Assets
2. Freezing and Seizure
3. Confiscation to the Requested State
4. Repatriation to the Requesting State

\(^{11}\) Ibid.

\(^{12}\) ADB/OECD Anti-Corruption Initiative for Asia and the Pacific. Op. Cit, p. 75
VI. Conclusions & Recommendations

Many countries in Asia and the Pacific have taken significant strides in implementing systems for extradition, MLA and recovery of proceeds of corruption. At the international level, there is a sizeable body of bilateral extradition and MLA agreements among countries in the region, as well as between the region and OECD countries outside Asia and the Pacific. Many states have also ratified multilateral treaties – including some that deal exclusively with corruption – that can be used to seek international cooperation in corruption cases. More countries are expected become parties to these instruments in the coming years. In many instances, states may also provide assistance in the absence of an applicable international agreement.

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I. Introduction

Environmental sustainability is the sine qua non for sustaining quality of life and economic competitiveness for a country\(^1\) like Brunei Darussalam. Environment includes everything in the world as Albert Einstein quoted “Environment is everything that isn’t me”. The Brundtland Commission\(^2\) defined sustainability as “a development that needs the needs of the present without compromising the ability of future generation to meet their own needs”. Hence, sustainable development can be explained as the ability to move forward and make continuous adjustments in response to changes in the environment.

In Brunei, environment matters continue to be the concurrent responsibility of several ministries, especially the Department of Environment, Parks and Recreations (DEPR), as well as the dominant Shell Petroleum Company. The inter-agency National Committee on Environment (NCE) coordinates some measures as well. It is established to pursue the overall goal of environmental protection and service, to ensure a more comprehensive approach to environmental management, through consultation on stakeholders and formulation of appropriate policies.\(^3\)

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1 As per Minister of Development at National Environment Conference.
Brunei Darussalam is well known for its densely-forested areas in the world with a diverse ecosystem. It was reported in the 5th National Report\(^4\) that the tropical evergreen rainforest is estimated to be around 75% of the country’s total land area of 576,500 hectares, where 41% of it is terrestrial protected area, and are protected by law.\(^5\) The Human Rights Report in April 2014 observed a steady progress in the country’s achievement of the Millennium Development Goals (MDG) with almost all of the targets already been reached. Brunei is progressively improving the sustainable safeguard of its environment and natural resources.\(^6\) This, indeed, is a step closer towards the Brunei Vision 2035.

Brunei is taking immeasurable steps to ensure a successful environmental development despite its considerably well position in environment. We are not concerned only with today, but also for future. Our concern for future will ensure sustainable development. In this regard, the government has taken significant steps to introduce changes in the institutional structure to enable integration of environment consideration in the economic planning and development.

II. Measures

Environmental protection and conservation remained as the integral components of the country’s development process to ensure a sustainable development. They are aligned with the long-term objective of maintaining a clean and healthy environment. The measures to achieve these include implementing formulated policies and strategies on the environment, on moving towards Brunei Vision 2035, which stresses a sustainable development. The following are some issues and its immeasurable steps:

\(^4\) 5th National Report to the Convention on Biological Diversity, Brunei Darussalam. 2014.
Air

Environmental pollution is currently not a major problem in Brunei Darussalam. However, with diversification of the economy and industrial growth coupled with the increasing population, it is bound to become severe in the future. In this regard, not only the government but every individual, private sector and NGOs are playing their role in ensuring environmental sanitation.

The air quality in Brunei is good in general. Its Pollutant Standard Index (PSI) falls below the guidelines set by the US Environmental Protection Agency (EPA), European Union and the World Health Organization (WHO). However, there are some factors that sometimes contribute to impairment of air quality, which includes open burning and trans-boundary haze pollution.

Nevertheless, the government of Brunei is taking sustainable measures for a healthier and cleaner air.

In Brunei, open burning is still rampant, mainly backyard burning in residential and commercial areas. The most relevant piece of legislation pertaining to this issue is the Penal Code Amendment Order. This act states that anyone found guilty of open burning activities that cause pollution or endanger human life or property may face an unlimited amount of fine and or imprisonment up to five years. The Department of Economic Planning and Development is currently working on enforcing a provision that specifically applies to minor open burning violators as well.

When an open burning report is made by a member of the public, the officers will only advise the open burning perpetrator against the act. However, according to a professor of Brunei Darussalam’s Geography and Environmental Studies, this approach is rather reactive than proactive that advising and telling members of the public individually in such cases can be

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7 In 2016, the PSI is 28.


less effective. He added that, instead of reacting to any bush or forest fires that occur, the Fire and Rescue Department can get help of academic experts by focusing on areas which may be predisposed to fire and prevent them from happening.

Up until now, Brunei Darussalam has no specific law dealing with air pollution yet. In contrast with some country i.e. the United States, the Clean Air Act\textsuperscript{10} is designed to control air pollution on a national level and is one of the United States’ first and most influential modern environmental laws, and one of the most comprehensive air quality laws in the world. This Act regulates air emissions from stationary and mobile sources, regulates the hazardous air pollutants and etc.\textsuperscript{11} This Act is also implemented by Malaysia and other countries.

Hence, this means that there is no law that deals with other type air pollutants that impairs Brunei’s air quality. Regardless of that, the government still tries to mitigate air pollution by being a member of the ASEAN Agreement on Trans-boundary Haze Pollution. Although Brunei has never experienced severe cases of haze, it attempts to protect the air from such pollution. This agreement comprises the measurement to prevent, monitor, and mitigate land and forest fires that may lead to trans-boundary haze pollution especially during traditional dry seasons. That is through concerted national efforts, regional and international cooperation.

Sea

Water pollution is not a major problem in this country. Even so, the government has improved the quality of its water supplies by ensuring its sustainability for years to come. However, none of the laws of Brunei Darussalam on water quality and pollution specifically addressed to the protection of water quality in Brunei though there exist Water Supply Act (Cap. 121) only to provide for the control and regulation

\textsuperscript{10} 1990 Amendments to the Clean Air Act of 1970

\textsuperscript{11} Summary of the Clean Air Act. https://www.epa.gov/laws-regulations/summary-clean-air-act. (Accessed on 1\textsuperscript{st} April)
of the supply of water. Nonetheless, there are few regulations concerning sea pollution.

The Prevention of Pollution of the Sea Order, 2005 give effect to the International Convention for the Prevention of Pollution from Ships, 1973 and to other international agreements relating to the prevention, reduction and control of pollution on of the sea and pollution from ships. Section 2(1) defines “Brunei Darussalam waters” to mean the whole of the sea within the seaward limits of the territorial waters of Brunei Darussalam and all other waters, including inland waters, which are within these limits and are subject to the ebb and flow of the ordinary tides.

In 2008, in exercise of the powers conferred by sections 8, 9(4), 12 and 33 of the Prevention of Pollution of the Sea Order made the Prevention of Pollution of the Sea (Noxious Liquid Substances in Bulk) Regulations. Under this order, the Director of Marine has the power to grant exemptions from all or any of these regulations for any ship.

It includes to inspect any ship in order to verify that it carries a valid Certificate for the Carriage of Noxious Liquid Substances in Bulk, the prohibition on proceeding to sea without a BNLS certificate.

There also exists a regulation that provides a duty of the master of ship to report discharges of harmful substances into any part of the sea while implementing some of the provisions of the Prevention of Pollution of the Sea Order, 2005 which is the Prevention of Pollution of the Sea (Reporting of Pollution Incidents) Regulations.

Moreover, there are also some measures for the prevention of disposal into the sea of garbage in the Prevention of Pollution of the Sea (Garbage) Regulations. The disposal into the sea of all plastics, including but not limited to synthetic ropes, synthetic fishing nets, plastic garbage bags and incinerator ashes from plastic products which may contain toxic or heavy metal residues, is prohibited outside special areas as specified in this Order. As for within special areas it also includes all other
garbage, including paper products, rags, glass, metal, bottles, crockery, dunnage, lining and packing materials.

Land

Solid waste

One of the regulations pertaining to land is the Land Code. Section 4 of this code declares, that all “forest, waste, unoccupied or uncultivated land shall be presumed to be state land and all cultivated lands… abandoned or suffered to lie waste shall be deemed to be forest or wasteland..” with a few minor exceptions. This code however, only focuses on ownership, registration and alienation of land rather than on how land is used or managed.\(^{12}\) As far as waste is concerned, the law in Brunei Darussalam only deals specifically with hazardous waste\(^ {13}\).

Now, municipal solid waste has become a major concern worldwide as the amount of waste generation has increased tremendously due to rapid urbanization and industrialization, population growth and improved lifestyle. In this country, the main issue and challenge is the lack of comprehensive legislation and enforcements of the laws and regulations regarding such wastes. It is thus necessary for the government to formulate legislations and laws which can protect the environment in-line with the international or global standards. For example, the government can also enforce stricter waste management laws such as only allowing non-recyclable materials into the landfills, mandatory source separation and recycling, usage of recycling bins in government buildings including schools and etc.\(^ {14}\)

Nevertheless, Brunei has set itself on a path proactively in managing its waste in a long-term waste management strategy that will cater to the needs of all identified waste stream. For instance, Brunei has committed itself for an engineered or sanitary landfill which

\(^{12}\) The Coastal Resources of Brunei Darussalam: Status, Utilization and Management

\(^{13}\) Hazardous Waste (Control of Export, Import and Transit) Order 2013

\(^{14}\) Ibid.
includes modern waste management facility with an area of 110 hectares.\textsuperscript{15} It is constructed for landfill design and operation with environmental consideration such as proper leachate treatment, provision of environmental monitoring and etc. In this regard, Brunei will have a secure, safe and effective waste management system.

Other than that, Brunei has taken a step to declare zero waste which is an innovative approach of waste and it goes much beyond recycling i.e. restricting the use of polythene plastic bags from Friday to Sunday “No Plastic Bag Weekend”. However, this initiative is only a government policy, not a law. Although several countries in the world have banned plastic bags, it is still not impossible for Brunei to follow suit.


Environmental Planning and Management Division, it is not feasible to ban plastic bags as other factors need to be taken into account such as in terms of penalizing the retailers and the public is not an action they can take because it involves other stakeholders.

Rather than banning the use of plastic bags immediately, the government it aims to gradually phase out the import of plastic bags, as well as its distribution for purchase of products at retail outlets in the near future.\textsuperscript{16} The government also does not encourage the replacement of plastic bags with paper bags as it goes against the country’s stance of forest preservation which means encouraging cutting down of trees.\textsuperscript{17}

\textit{Littering}

The relevant law which governs littering in the country is the Minor Offences Act (Cap. 30). This provision prohibits


\textsuperscript{17} Ibid.
any person from depositing refuse and etc. in any public places and section 12 (1) of the Act specifically dealt with littering which reads “Any person who places, deposits or throws any dust, dirt, paper, ashes, car case, refuse, boxes, barrels, bales or other article or thing in any public place shall be guilty of an offence under this Act and may be arrested without warrant by any police officer and taken before a Court of a Magistrate and shall be liable on conviction to a fine of $1,000, and in the case of a second or subsequent conviction to a fine of $3,000” There are few cases in Brunei where not only are they fined but are also imprisoned due to the seriousness of the case in causing harm to the environment.

The law’s expressive function is to change behavior of the society. With the existence of this law, individuals believed that others in society will be more likely to punish them when they litter as they are violating a law.

Besides that, cigarette butt litter has been a concern that harms the environment and our local communities. The butts itself contain thousands of toxic chemicals which takes for 12 years to biodegrade. Not only does it harm the wildlife, it also contaminates water supplies and in serious cases can cause fires. In reducing this problem, under the Tobacco Order 2005, 28 categories of specified buildings that have been identified as smoke-free i.e. indoor workplaces, government premises, restaurants and public transport.

Other than that, smoking is also banned on sidewalks near business premises and within a six-metre radius from any smoke-free building as well as public staircases, hospitals and clinics. In order to raise the effectiveness of anti-smoking efforts, the law was amended in 2012 to include a greater number of smoke-free areas. In addition to the expansion of smoke-free places, the government has also increased tobacco taxes from 62 to 83 per cent of the actual price\(^\text{18}\) and seeks to make all public places smoke-

free by 2016. However, there are no specific laws in Brunei which ban smoking at all regardless of the place.

Other than the effort of preventing any person from littering, Brunei are also taking step in reducing the amount of litter where the community have already been practicing a multi-bin collection system for educational institutions, offices, retail establishments and in public places for recovering recyclable cans, bottles and paper.

**Hazardous waste**

In the management of hazardous waste, Hazardous Waste (Control of Export, Import and Transit) Order 2013 seeks to give effect to the implementation of the Basel Convention of which Brunei is a member. It is to control the import, export and transit of the hazardous substance. Industries that need to import, store and the usage on hazardous substances are required to obtain approval from the DEPR. Then, any waste falling under the categories of waste listed in the 4th Schedule of this Order is defined as hazardous waste such as explosives, poisonous and etc.

In Brunei, there has been no report of both illegal import and export of hazardous waste.

**Biodiversity**

Brunei is one of the few countries that have much of its biodiversity still intact because of strict forestry and conservation laws. A study, published in 2014 by PLOS ONE journal has estimated Brunei’s forest to be covered around 54% in comparison to its neighboring Malaysian with only averaging between 20% and 25%.

**Forest**

Brunei’s Long Term development Plan - Vision 2035 has highlighted the continuing efforts to conserve the country’s remarkable biodiversity.

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20 Research of Australia, Papua New Guinea and the United States.

rain forests and natural habitat as an environmental strategy. Specifically, it stressed the development of forest resources, conservation and protection of natural forest and environment.

In managing our forests resources in a sustainable manner, there is a relevant policy which governs the social forestry aspect in this country which is the National Forestry policy, 1989. The Social Forestry Component of the National Forest Policy is reviewed and strengthened in order to develop and enhance the social and cultural contributions of the forestry sector to the country through active stakeholder participation in relation to forest management activities. Apart from this policy, there are also Forest Act (Cap.46), that protects Brunei’s reserved forest including prohibiting any operation in its boundaries. Forest Rules and the 20 Years Forestry Strategic Plan (2004-2023)\(^\text{22}\)

Brunei Darussalam efforts to prevent and combat forest fires have been undertaken that includes physical measures such as putting up fire breaks in forest reserves to prevent fire spreading, fences that prevent people from entering in some fire sensitive areas and etc. Brunei has also been working closely with its colleagues in Limbang, Miri and Lawas of Malaysia in combating forest fires in areas bordering the shared national boundaries.

However, recently forest fires in some parts of Brunei occurred more than usual. This has caused the country to be enveloped in haze the condition is expected to persist during the dry season. The Duty Forecaster from the Brunei Darussalam Meteorological Department reported that the current haze is locally sourced and not trans-boundary, making it difficult to predict the haze’s movements.\(^\text{23}\) It was reported that human action was partly responsible such as the frequent activity open burning and other actions that may exacerbate the haze conditions.

Moreover, easy access and presence of

\(^{22}\) Ibid.

forest fuel during dry conditions may also lead to frequent arson bushfires. Not only this will affect the rehabilitated logged but it also affects the natural forest and peat land of this country. Human action was reported to be responsible for sparking the fires such as by clearing the land for illegal farming. Thus, to protect the forests and preserve the rare and endangered biodiversity from being affected, section 32 of Brunei’s Land Code was made for those who are occupying and cultivating state land without permission.

Hence, it becomes imperative on the part of the environmental agencies, government and activist groups to seriously come to grips with the menace and discourage people from torching forests and is being controlled under the provision of Forest Act. This prohibits any person from kindling, keeping or carrying any fire or leaving any fire burning that may endanger the reserved forests.

Besides that, there are also relevant provisions for the implementation of social forestry programs in the country such as the Heart of Borneo (HoB) initiative. The Brunei government, with His Majesty’s support, committed 58% of Brunei’s total land area to be protected and sustainably managed within a delineated HoB landscape. In order to develop its commitments and actions on the HoB, Brunei pursued the development of a Project Implementation Framework (PIF). However, implementation of the PIF and a broader HOB initiative integrated into the Brunei National Development planning process will require additional focus and efforts on all part of stakeholders, especially the Brunei HoB National Council.

In this regard, Brunei still maintains its continuous effort in managing and developing its forest resources in a sustainable manner within the context of Sustainable Forest Management in support of the worldwide effort to lessen and avert climate change.

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24 Cap. 46. Law of Brunei

Marine Biodiversity

In an effort and to ensure the marine fisheries industry to be sustainable and preserved, including the various marine species in the country’s water, Brunei has designated 150,000 hectares of Marine Protected Area (MPA) under the Fisheries Act (1972). It aimed to protect and conserve the marine ecosystem within the coral reef because it has the ability to sequester the atmospheric carbon. Therefore this policy provides a co-benefit for climate change mitigation.26 This actually highlights that the government is not only concerned with today but also for the future and this small step is to certify a sustainable development.

Additionally, Brunei also introduced fundamental interventions that have been implemented to achieve sustainable marine environmental conservation and fisheries management, the construction and deployment of artificial reefs in specific areas to provide fish habitat and shelter.27 Despite of various government initiatives to conserve the marine environment, there are still a number of issues that concern Brunei in sustainably managing Brunei’s marine resources, mainly the issue of destructive fishing practices. The reason is that such practices can cause great harm and damage to the marine ecosystem and marine biodiversity which can be considered serious issue to the ‘rainforest of the ocean and seas’.

III. Legal Measures

Brunei’s government had also strengthened their measures with the implementation of laws. In achieving sustainable development, the protection of the environment in Brunei is governed by basic laws, rules and regulations. The following are other environment-related laws in Brunei Darussalam:

26 The 5th National Report to the Convention on Biological Diversity. The Forestry Department, Ministry of Industry and Primary Resources, Brunei Darussalam.
Land and soil

1) Protected Places Order, 2008. - This Order declares the place specified in the Schedule to be a protected place and it shall be prohibited to enter the place without the permission of the Director of Electrical Services.

2) Protected Areas and Protected Places Act (Chapter 147). - This Act prescribes steps necessary for the protection of any protected area or protected place. No person shall be in the premises of protected areas or places unless in possession of a permit issued by an authorized officer.

Flora and Fauna

1) Wild Fauna and Flora Order, 2007 - This Order provides for giving effect in Brunei Darussalam to the International Trade in Endangered Species of Wild Fauna and Flora and sets out procedures and requirements for obtaining permits and certificates to trade in, export or import any species listed in the Appendixes to the Convention.

Sea

1) Merchant Shipping (Civil Liability and Compensation for Oil Pollution) Order, 2008 - This Order to give effect to the International Convention on Civil Liability for Oil Pollution Damage 1992 and to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 and to make provisions generally for matters connected therewith.

2) Territorial Waters of Brunei Act, 1983 - This Law is composed of 4 articles. The breadth of the territorial sea of the State of Brunei shall be twelve nautical miles, measured in accordance with international law (art. 1). A large scale map of low water marks, baselines, and outer limits and territorial waters of Brunei shall be published on order of the Sultan and the Yang Di-Pertuan.

Forest

1) Forest Act 1934 - categorized country’s forest into five functional
classifications, as follows; protection, production, recreation, conservation and national parks. Protection in this act refers to forest areas which are designated to remain in a preserved condition. These forests are necessary to protect critical soil and water resource in order to minimize occurrence of flood, draughts, erosions and pollution.

2) Forest Rules - It provides for the protection of forests and their products, by mean of restrictions applied in terms of felling trees, harvest fruit or honey, gather firewood or samplings and etc.

Fisheries

1) Fisheries Act (Chapter 61) - An Act to consolidate and amend the law relating to fisheries and to make provision for matters incidental thereto.

2) Fisheries Order 2009 – consolidate the law on fisheries, fishing, fish processing, marketing, distribution and any related matters.

3) Brunei Darussalam Fishery Limits Act (Act No. 5 of 1983) – This Act declares Brunei Darussalam fishery limits.

4) 1972 Fisheries Enactment – designated area that may be closed to fishing and other forms of exploitation.

5) Fisheries Regulations - These Regulations implement provisions of the Fisheries Act. The Regulations provide for: restrictions on fishing; restrictions on the import or export of fish; restrictions on fishing gear; terms and conditions of fishing licences and licence fees; etc.

Water

1) Water Supply Act (Chapter 121) - An Act to provide for the control and regulation of the supply of water.

2) Ports Act (Chapter 144) - An Act to provide for the regulation and control of the ports and waters of Brunei, for the erection and maintenance of lighthouses and navigational aids and for purposes incidental thereto.
Wildlife

1) Wild Life Protection 1984 - The Act provides for the protection of Wild life, setting restrictions to hunting seasons, animal age ranges, hunting methods and establishes wild life sanctuaries even in a protected or reserved forest. The Game Officer shall be vested with the powers of control and supervise compliance to the present Act.

Other environment-related law

1) Proposed Environmental Protection and Conservation Order, 2010 (still under development and deliberation)– to protect and manage the environment and to integrate environmental concerns into private and public decision making;

2) Proposed National Biodiversity Order (waiting for implementation) – facilitate the implementation of biodiversity conservation and management in the country.

3) Proposed Environment Protection and Management Order 2012 (still in progress) - contains provisions that comprehensive pollution control including air pollution, water and land. It also provided for the preparation of the impact assessment report projects that have the potential to pollute the environment or better known as Environment Impact Assessment Report (EIA).

4) Disaster Management Order 2006 - called for a comprehensive disaster management structure, which has propelled the establishment of the Disaster Management Center.

5) Hazardous Waste (Control of Export, Import and Transit of Hazardous Waste) order 2013 - give effect to the implementation of the Basel Convention. It sets out on controlling the export and import, the transit of toxic and hazardous waste as stated on part III and IV of the order.

6) 1909 Land Code (amended in 1982) and 1949 Land Acquisition – governs the land allocation and management of all lands, including private use and tenure of land in the
country;

7) Town and Country Planning Act – provides for national development planning, particularly with respect to allocation of land;
I. Introduction

In Japan, summer in the 2015 was the hot season in disputing security bill. This law review tries to examine its content at first, and to consider the intentions of Prime Minister Shinzo Abe, from two viewpoints of ‘the Japan-U.S. Security Treaty’ and ‘Japanese Constitution’. On the introduction of his major policies called “Proactive Contribution to Peace,” we try to reveal the current government’s direction on the security policies.

II. Approval of the Security Bills

Japan’s parliament has voted to allow the military to fight overseas for the first time since the end of World War II 70 years ago. Despite polls showing vast public disapproval, ongoing protests against legislations of the security bills on a scale not seen in decades, and scores of scholars disputing its constitutionality, Prime Minister Shinzo Abe’s signature security legislation has passed both houses. A vote on the new law was delayed for several hours as the opposition tried to stop the measure coming into force. Outside, demonstrators rallied in a last-ditch show of protest. Finally, the bills were enforced on 29 March, 2016, and the State Department welcomed its establishment.

Clearly, this approval of the bills is historical changes for Japan. Three things were raised as the main changes to be paid attention.
the right of collective-self defense got to be recognized when these three conditions are met:

• when Japan is attacked, or when a close ally is attacked, and the result threatens Japan’s survival and poses a clear danger to people

• when there is no other appropriate means available to repel the attack and ensure Japan’s survival and protect its people

• use of force is restricted to a necessary minimum

• the government came to be able to use logistic support all over the world and established the lasting law for logistic support for international contribution.

In the Japan peacekeeping operations, Self-Defense Forces was allowed to use weapons to dispatch its members to rescue civilians in remote locations: by this bills are enacted, SDF were permitted to attend in the mission only to defend their own forces.

Mr. Abe’s government has pushed for security legislation that would allow Japan’s military to mobilize overseas: we usually hear the term kyokosaiketsu, meaning “forced passage,” applied to the ruling party’s passing the security bill through the strength of numbers.

So what made him rush in the approval of the bills?

III. The Japan-U.S. Security Treaty

The government says that the changes in defense policy are vital to meet new military challenges such as those posed from such nations as China. Against tremendous changing security situation around its nation, Japan had to adopt the limited policy for its security. To keep its security, Japan selected a reinforcement of relationship between Japan and the U.S. for getting the right of the collective self-defense. Japanese government tried to use the deterrent power of the Japan-US alliance as the important security measures. The main grounds for approving the security bills must be for the government to put its priority on the security of the national
policies.

The necessary of the Japan-U.S. alliance is explained on the home page of Ministry of Foreign Affairs: this is answer to the question’ Why the system of the Japan-U.S. alliance is necessary.

『我が国を取り巻く安全保障環境は、一層厳しさを増しています。このような安全保障環境の中、日本の平和と安全を確保するためには、我が国の防衛力を適切に整備するとともに、日米安保条約を引き続き堅持することにより、米軍の前方展開を維持し、その抑止力を確保することが必要です。

日米安保体制は、こうした日米協力関係の重要な側面となっています。』

‘The security environment surrounding our country is becoming still more serious. In such environment, for securing Japanese peace and security, it is needed not only to maintain defense capacity of our country appropriately, but also to maintain the deterrent by keeping U.S.-Japan Security Treaty and deploying the United States Armed Forces. The U.S.-Japan Security Treaty system is important for a collaborative relationship between Japan and the United States.’

In the Japan-U.S. Security Treaty, first signed in 1952 at San Francisco. Article III and Article V mention how each country should face each domestic constitution at that time.

ARTICLE III

The Parties, individually and in cooperation with each other, by means of continuous and effective self-help and mutual aid will maintain and develop, subject to their constitutional provisions, their capacities to resist armed attack.

1 Ministry of Foreign Affairs http://www.mofa.go.jp/mofaj/area/usa/hosho/qa/02.html
ARTICLE V

Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations in accordance with the provisions of Article 51 of the Charter. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

These parts proved that the Japan-U.S. Security Treaty was established with respectful on each country’s constitution at least on the paper.

IV. Japanese Constitution

Historically, the Japan-U.S. alliance has been globalized. And both countries have each domestic evaluation. In particular, in Japan, its globalization has been often criticized. One of the views of critics, the globalization of the Japan-U.S. alliance has some problems in that the U.S. tends not to paid attention to the discord of the alliance, or the Japanese domestic limitation: Constitution.

However, on the Japanese constitution, there are some different interpretations on the important parts like the arguments of the security bills. Let me introduce Article 9 ‘RENUNCIATION OF WAR’ as one of the examples.

http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html

‘Japan-U.S. Security Treaty,’ Ministry of foreign Affairs of Japan
Article 9
‘RENUNCIATION OF WAR’

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as sovereign right of the nation and the threat or use of the force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Generally speaking, the part of Article 9 has been interpreted in two ways. One is that the Constitution clearly restricts the government’s use of military force literally. The other is that the Constitution restricts the government’s use of military force, but permit the right of the self-defense.

Prime Minister Abe originally set out to revise Article 9 of the Constitution, which renounces war and, traditionally, military action outside self-defense. As Abe found revision of Article 9 too difficult, he then tried to the rewrite Article 96, which would make it easier to amends to the Constitution easier. Finding resistance too strong once again, he abandoned revising the Constitution and simply asserted the right to reinterpret it to allow for military action deemed “collective self-defense.”

In this time argument of the security bills, many Japanese attached to the Article 9 ‘RENUNCIATION OF WAR’ in the constitution which banned fighting overseas.

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4 http://www.akon.sakura.ne.jp/constitution/chapter2_f.html National Diet Library
V. The policy of “Proactive Contribution to Peace”

Then, on the other hand, how Mr. Abe reasoned the establishment of the security bills? His basic policies are explained at the website of the Foreign Affairs of Japan.

Basic Policies

While firmly following the path of a peace-loving nation, Japan, as a major player in the international community, will put the policy of “Proactive Contribution to Peace” into practice as well as work closely with the countries concerned including the United States.

Japan’s basic policy

Under the policy of “Proactive Contribution to Peace” based on the principle of international cooperation, Japan will contribute even more proactively in securing peace, stability and prosperity of the international community while achieving its own security as well as peace and stability in the region.

- Firmly follow the path of a peace-loving nation
- Continue to be a major player in the international politics and economy
- Coordinate closely with other countries including the United States

He tried to change the policies of the Japanese security into ‘Proactive Contribution to Peace.’

VI. Conclusion

Mr. Abe’s trial to change constitution is reflected on this time approval of the security bills. That approval of the security bills proved the presence of Japanese government’s request to reinforce the relationship of the Japan-U.S. alliance. This request is resulted from the Japanese governments’ concerns against changing security situation around its nation. For Japan,
there was dilemma that reinforcing power of the deterrent for the security is contradicted with the domestic constitution. Though respects of the each constitution are stated at the Japan-U.S. Security Treaty, alliance is seemed not to have enough attention to the some important parts of Japanese constitution. This is one of the causes making different interpretation of the constitution. Mr. Abe change the historical government’s constitutional interpretation and promote the polocies of the Proactive Contribution to Peace.
Japan: Japanese Nuclear Disarmament and Proliferation Strategy

Tomoki YAGASAKI, Chuo University
Kohei HAYAKAWA Chuo University

I. Introduction

Nowadays, East Asia, where Japan located in, has alongside Middle East as one of the most serious security issue\(^1\). Recent nuclear development by North Korea is arguably main contributor of this issue. In spite of persistent warnings and sanctions by international community, North Korea's provocation using nuclear weapon is escalating, especially in this Kim Jong- Un regime. On January 6th 2016, North Korea declares it has successfully carried out its first underground test of a hydrogen bomb - a more powerful weapon than an atomic bomb. On next month, North Korea carried out missile test which can be load nuclear warhead and its firing range includes not only Japan but also the continental United States.

It is impossible to talk about Japanese national security matters without situation of nuclear weapon over the world. As the only country to have suffered atomic bombings\(^2\), but also the country which relies security field on nuclear umbrella of United States, Japan has difficult and complicated but one step ahead strategy of disarmament and non-proliferation. In this paper, I will focus on the nuclear strategy of Japan which contributes to stabilizing and peacemaking on 21st century Asian region.

II. Decision making factors of Japanese Nuclear Strategy

Over the past 70 years since World War II, passion toward anti-nuclear weapon is relatively stronger than other developing countries from government to citizen level. Arguably, it comes

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from atomic bombings of Hiroshima and Nagasaki (1945), and incident of Daigo Fukuryū Maru (1954)\(^3\). Those tragic events result in strong public concern which become driving force for government to carry on disarmament and non-proliferation strategies.

Japanese government have been considering mainly three factors when to plan and proceed disarmament and non-proliferation policy. Balancing the factors of security, humanity, and diplomatic is the first priority in Japanese disarmament and non-proliferation policy procedure.

Firstly, security matter is indispensable factor to organize Japanese Disarmament and non-proliferation strategy. One of the basic and fundamental duty of Japanese government is to maintain and save life and property of the Japanese people, therefore it is impossible to disregard this factor. As it was previously mentioned, East Asia was an ever-presented and one of the most serious security danger in the world. Moreover, it is true that still tons of nuclear weapon exists in the world, and some inconsiderate, out of control nations such as North Korea are having it. These kind of severe situation is why Japan is declaring not to hold nuclear weapon by self and appealing to countries possessing nuclear weapons while in under the nuclear umbrella based on the U.S.-Japan Security Treaty.

Also, humanitarian factor is as important as security factor. Japan have been consistently asserting reduction as well as extinction of nuclear weapon since World War II. The root of this approach is comes from the argument that use of nuclear weapon does not match to the humanitarianism. This idea is supported on Advisory Opinion of 8 July 1996 by the International Court of Justice (ICJ), “Unanimously, a threat or use of nuclear weapons should be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.”\(^4\) Especially Japan had experienced Hiroshima and Nagasaki, in which creates strong national opinion to extinct nuclear

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\(^3\) On 1 March 1954 a Japanese fishing boat, the Daigo Fukuryu maru (Lucky Dragon V), while operating in the central Pacific, was sprayed by a cloud of radioactive ash. This accident was caused by a US thermonuclear weapon test on Bikini Island. One crew died and several crews were suffered aftereffect such as cancer.

As a democratic country, it stands to reason that Japan follow national opinion and carry on the policy to extinct nuclear weapon. Importance of humanitarianism during promotion of disarmament and non-proliferation can be matched not only nuclear weapon but also other weapons of mass destruction and conventional weapon.

Last but not least, for Japan, disarmament and non-proliferation policies are as part of diplomatic policy. It is important diplomatic activity to find out global issue’s countermeasure and lead global society to carry it on in the international field. In view of Japan’s historical experiences, disarmament and non-proliferation are the field which Japan can take initiative to lead the global society. The fact Japan had been consistently contributing to promote disarmament and non-proliferation since post World War II is precious asset for Japanese diplomacy which earns esteem and influence from over the world.

As it was previously mentioned, balancing these factors properly is important. The balance is not that easy, which depends on that present international affairs, characteristics of issue’s item, or idea of decision maker. This is how Japanese characteristics of nuclear strategy is created since post World War II.

III. Characteristics of Japanese Nuclear Strategy

According to last chapter, Japanese Nuclear Strategy stands on realism and slow, steady moderation principle. Situation of international affairs is changing rapidly, especially disarmament and non-proliferation is dramatically impressionable from current situation. The strategy has to be realizable in short term and acceptable to other countries especially to superpowers.

Japanese government have been always insisting to “make the world peace and free from nuclear weapon as soon as possible”. This short phrase shows all of the nuclear strategy of Japan which aims to promote disarmament with keeping security of domestic and international field. This approach to achieve eradication of nuclear weapon as soon as possible is accepted from many other countries.

Japan’s policy does not captured by disarmament or non-proliferation dualism. Both concepts can be coexist and those are inseparable. If we slack up

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non-proliferation effort, more countries and international terrorist group can hold nuclear weapon. Or, if we just focus on non-proliferation, quantity of nuclear weapon in the world would never decrease.

It is important for Japan to address and get the understanding of these policies at international field. There is two major ways to achieve it. First, multilateral treaty, such as Treaty on the Non-Proliferation of Nuclear Weapons (NPT). Japanese government is recognizing NPT as fundamental treaty of maintaining international security matters. However, multilateral treaty is not almighty especially for regional issues. Promotion of the Middle East nuclear weapon free zone (MENWFZ) and settlement of one nation's nuclear weapon issues such as Iran or North Korea had been supported by bilateral disarmament agreement or regional regime. Six-Party Talks for North Korea nuclear weapon development is one of the successful sample. In other words, on the disarmament and non-proliferation field, coexistence of multilateral treaty, regional and plural nations’ regime, cooperation of volunteer nation, and bilateral agreement is indispensable.

IV. Considering cases

Last but not least, let's look over how these mentioned above concepts of Japanese disarmament & non-proliferation policies have been affecting real world policy agreement. One example which describe Japanese measure toward nuclear disarmament clearly is the annual United Nations resolution for the abolition of nuclear weapon. Japanese government made a proposal of nuclear weapon abolition first at United Nations General Assembly First Committee in 1994. This proposal is considered by next year’s NPT committee, making abolition of nuclear weapon as the ultimate goal, urging promotion of disarmament, settling Comprehensive Test Ban Treaty (CTBT), beginning of Fissile Material Cut-off Treaty (FMCT) agreement negotiation, and enforcing non-proliferation effort. At the beginning, nuclear powers such as United States and Russia had rebelled severely on this proposal. It is partly up to the Japan's situation that ourselves are in under the umbrella of U.S nuclear weapon. However, this progressive idea got a support from non-nuclear powers and


also from the U.S academic world such as Henry A. Kissinger, U.S prominent diplomat and political scientist, has proclaimed.\(^8\)

This proposal had been submitted every year by trial and error. On 2000, the name of proposal changed to “The path to total abolishment of nuclear weapon”, and on 2005 it changed to “Brand new determination toward total abolishment of nuclear weapon”. Steadily Japan’s concept have been accepted by other countries. Nowadays, it became one of the good example of the field which Japan is taking initiative.

V. Conclusion

As it mentioned before, the new shift of Japan’s security policy receives the impression that Japan can play a role in the war. However, we have been consistently followed the path of a peace-loving nation since the end of World War II, which cannot be replaced so easily. By accumulated peace-loving passion and know-how, Japan have potential to take initiative and lead the international society to better, peaceful way. Because of Japan’s peculiar experience, which as the only country to have suffered atomic bombings, this nuclear disarmament and non-proliferation field is perfect point to make effort for Prime minister Abe’s foreign policy called ”Proactive Contributor to Peace”. Now is the time for Japan and international society to carry on the concrete and acceptable policy to create the world free from nuclear weapon.

Globalization has increased the potential for international spread of infectious diseases and has resulted in the need for adopting a multilateral approach to public health. Worldwide patterns and determinants of health and disease, and specifically infectious diseases, are changing dramatically due to globalization’s erosion of traditional geographical, temporal and cognitive boundaries.\(^1\) Take the example of one of the hottest topics in Chinese internet and the whole society these days, which is the spread of the deadly Middle East Respiratory Syndrome (MERS) from South Korea to Guangdong province. The carelessness among medical staff in S. Korea, as well as the bungling of initial response by the South Korean government has caused widespread indignation.

In view of this, this article is to analyze the behavior of Korean government in the purpose of illustrating the reason why their act is in violation of International Covenant on Civil and Political Rights, and how can we strike a balance between the public health powers and human rights.

I. Brief introduction

MERS is a respiratory illness caused by a coronavirus, similar to SARS. The first human case emerged in Saudi Arabia in 2012. It has a fatality rate of about 40 percent.\(^2\) There is no effective antiviral treatment for MERS and medical care just focuses on alleviating the symptoms so far.

On May 26, a 44-year-old South Korean man left for China despite recommendations from a doctor of dropping his travel plan due to his fever symptom. The man flew from South

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2 See Xinhua net "MERS-infected S. Koreans rise to 30, tertiary infection added”. http://news.xinhuanet.com/english/2015-06/03/c_134292937.htm
Korea to Hong Kong on May 26 via an Asiana Airlines flight and entered the southern Huizhou city through Shenzhen by bus, and has driven hundreds of others into being isolated for observation during the incubation period of two weeks. Shortly after the isolation of the 44-year-old man, he was confirmed positive for the MERS.

It can be concluded from the above that lack of understanding among the individuals and medical staffs over the fatal contagion risk triggered the spread of MERS fears from South Korea to China. If not for the carelessness of the individuals and medical staff, the MERS fears would not have obsessed the Chinese people.

II. The obligations concerning the Public Health Power in MERS case

What shall Korean government do in face of MERS?

Since each and every human right requires three significant duty of government: the duty to respect, to protect, and to fulfill, the right of life and health are no exceptions. Accordingly, from my point of view, in preventing the spreading of infectious diseases like MERS, government shall: (1) Respect the right of the infector and ordinary people. For instance, no measures of discrimination against infectors can be adopted. (2) Protect the violation of these rights against third persons. For example, Chinese government ought to take measures when the Korean infectee slipped into China, in order to prevent further spreading of MERS. (3) Adopt positive measures to ensure the safety of citizens. For example, adopt compulsory isolation towards patients when necessary.

Has the S. Korean government fulfilled their duties?

The answer to this question is clear. Through the preceding reports, I took three of the most typical nonfeasance as examples. It’s worth noting that the responsibilities cannot be attributed entirely to the S. Korean authorities, due to the character of MERS that it does not appear to spread easily among people in public settings.

However, the S. Korean government has apparently in violation of Article 12 of ICCPR, “The state Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, especially the second paragraph, “The steps to be taken by the State Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:…(c) The prevention, treatment and control

3 Huizhou city is a part of Guangdong province.
of epidemic, endemic, occupational and other diseases.” The details are as follows:

Failed to set a reliable standard of watchful lists

According to the report, the Korea Centers for Disease Control and Prevention (CDC) didn’t conduct any test on the 68-year-old first patient who has recently been to Bahrain, even after his doctor’s report on the possibility of infection. It’s because Bahrain is not a country where MERS was identified before. As a matter of fact, the U.S. CDC has already classified Bahrain as MERS-dangerous-country long ago.

Setting the standards of watchful countries and patient can be regarded as a fundamental measurement in prevention of infectious disease, yet the S. Korean health authorities failed to fulfill that obligation.

Failed to ban the MERS suspects from leaving country

Though it might raise controversy, public health has been recognized as a solid reason to restrict or derogate freedom of movement, according to almost all the human rights conventions. It can be easily interpreted the patient’s personality and preceding behaviors as indicating that he would continue to act in such a way as to risk disease spread.4

S. Korean government wasn’t aware of a this significant point that a disease arising anywhere on the planet poses a threat to public health in every nation. The distinction between national and international health policy has become more than irrelevant.5

Failed to raise public attention on MERS prevention

Two South Korean women, who were on the same flight to Hong Kong and sat close to the MERS patient, at first refused to be isolated for test and treatment, reflecting how South Koreans lack understanding of the fatality of the viral disease. In the early stage of the analogous viruses, it’s of the government’s positive duty to ensure all sorts of preventive measures be fully understood by the public, which is exactly the opposite in the MERS case.

4 The patient refused to drop the trip plan, then violated the quarantine order and disembarked in Hong Kong.
III. What kind of human rights might be derogated in the exercise of public health power?

Governments commonly assert that there exists a right to derogate from human rights norms to safeguard the public interest during crises. Such assertions reflect an attempt to reconcile individual and aggregate interests. In the prevention of spreading infectious diseases, the above “crises” can be claimed, if the situations have reached certain standards. One referential standard was set out in Public Health Act 1997 in the Australian Capital Territory, for determination of whether conditions are liable to become a public health risk, including regard to the number of persons affected or potentially affected by the conditions; the degree or potential degree of public health risk, damage or offensiveness to community health standards; any reasonable precautions that the person creating the risk might have or have not taken to avoid or minimize the adverse consequences; and any reasonable precautions that the person at risk might take or might not have taken to avoid or minimize the effect of the risk.

The general criteria

Considering that S. Korean is a contracting party of the International Covenant on Civil and Political Rights, thus the criteria ought to be sought in the provisions. In accordance with Article 22 paragraph 2 of ICCPR, the restriction on the right to freedom of association may be placed within two criteria: prescribed by law and necessary in a democratic society. In implementing these two criteria, the government should take into account the general considerations of the limitation clause interpretation and the principle of proportionality and non-discrimination.

Obviously, the exercise of public health power in relevant to series of human rights, including the freedom of speech, freedom of association, and in some cases, right of fair trial, etc. The most controversial human rights derogated in the prevention of MERS are hereinafter.

The freedom of movement

According to Article 12 of ICCPR, everyone lawfully within the territory of a State shall, within that territory,
have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave any country, including his own. Especially, the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or moral, which justify the restriction of freedom of movement in the MERS prevention. Undoubtedly, these restrictions has to be proportional.

On June 1, South Korea planned to impose a ban on suspected infectees with MERS from leaving the country, which is exactly a perfect example. Unfortunately, damage has been caused due to the initial carelessness.

Personal Liberty?

In response of the netizen’s opinion that the patient shall be compulsorily detained, I would like to briefly analyze the feasibility of restraining personal liberty in this situation.

A Chamber of the European Court of Human Rights had the opportunity to interpret the extent of the power of States, under Article 5(1) of the European Convention on Human Rights to detain a person infected with the HIV virus in Enhorn v Sweden. The Court made clear that any such detention must be in compliance with both the principle of proportionality and the requirement that there be an ‘absence of arbitrariness’ such that other less severe measures have been considered and found to be insufficient to safeguard the individual and the public.

There’s likewise a strict limitation on the use of compulsory of detain in the MERS prevention. As mentioned above, MERS doesn’t appear to spread easily among people in public settings, which is exactly why WHO didn’t asked for particular isolation on patients. It can’t be concluded arbitrarily that S. Korean government has the obligations to isolate every MERS suspect, even if it’s been proved to be helpful afterwards.

IV. Public Health Interventions and the Balance between Public and Private

Recently in Weibo (Chinese version of twitter), tens of thousands of netizens are condemning Korean government, arguing the need of arresting the Korean patient and compulsory detention of suspected MERS infectees. Their outrage somehow sets me rethinking the exercise of public health power. It’s on one level surprising, given the vulnerability of many statutory public health powers to challenge on human rights grounds. It is, however, perhaps
less surprising when realizing that people have the trend to put more trust than doubts on government, especially in emergency situations like this.

The containment of infectious disease is a continuing public health priority, made more urgent by the threat of newly emerging diseases such as MERS. It is generally accepted that states and communities have the right, if not a moral mandate, to protect its citizens against disease harms, and that such protection may well require some intrusion into individual rights and individual interests. Determination of criteria for when such intrusion is appropriate is problematic, and is contingent on the identification and perception of risk.

The question of the balance in the context of infectious disease needs to be addressed and consideration given to incorporation of a precautionary approach into public health legislation. The emergence of a disease such as MERS serves to bring the debate to public attention, and at such times there is usually public and media support for strong public health powers to contain disease. It is arguable, however, that such a debate should not take place in the headlights of an oncoming threat, but rather we should be deciding now the balance we would wish to see between public benefit and private rights. The decision in Enhorn prioritized the private right of liberty over the public benefit of disease protection in a case of HIV/AIDS, despite that there was some risk to public health. The extent to which this decision can serve as a precedent where the risk is of large-scale, fast-spread disease of unknown virus is still questionable.

V. Conclusion

In the above paragraphs, I analyze the behavior of S. Korean government and health authorities in the prevention of MERS, then come to the discussion of striking a balance between human rights and public health power. It’s somehow thought-provoking, that while people protested vehemently against S. Korean government on the so called “violation of human rights”, their opinions show unconcern on the MERS suspects as well. In order to achieve effective protection on the right of life and health, balanced measurement shall be taken in to consideration. After all, every approach adopted by government shall comply with principles of proportionality and freedom from arbitrariness. Based on the above-mentioned fact, there’s still a long way to go.
ELSA is the sister organization of ALSA, has contributed an Article for us. The Editor-in-Chief is grateful of such arrangement, and hope that it will be a great start for our many contribution and cooperation in the future.
Dear reader,

Before you proceed with the articles of this journal, we would like to highlight that this edition has a special aim to be addressed to as many European and Asian law students as possible among all the potential audience that will be reached. The reasons of this wish are briefly presented at our short article which you can find below as it was published at the 59th edition of the members’ magazine of ELSA, Synergy. It should be our responsibility to get closer to each other and bridge our legal education now, in order to face collectively every future challenge.

We hope that you enjoy this edition.

Antonia Markoviti, Vice President for Academic Activities of ELSA
Minami Tsuruta, Vice President for Academic Activities of ALSA
‘Bridging law students in Asia & Europe: The importance of global legal cooperation

The long distance between Tokyo and Brussels and the time difference could not be perceived as obstacles and, in the end, they have been annihilated, when it came to identify that ALSA and ELSA have something more in common: two leading legal publications. Founded in 2007, the ALSA Law Review is a student-run journal published annually by Asian Law Students’ Association (ALSA) International. Focused on diversity in a shifting legal landscape of Asian countries, the ALSA Law Review has grown significantly over years and seeks to publish timely and important legal articles. The ELSA Law Review - founded in early 80s and re-established in 2015 - is a student-edited and peer-reviewed law journal published by the European Law Students’ Association (ELSA). The ELSA Law Review strives to create an open forum for legal analysis and discussion and it serves as an international platform through which engaged law students, graduates and young legal professionals can showcase their legal research.

As the premier regional law students’ organizations, ALSA and ELSA realize the challenges that arise from the varied legal systems and educational approaches of different countries and regions. It is beyond question that understanding social, economic, and educational factors that have shaped the legal views, principles, and systems of different jurisdictions benefits anyone who studies law. Striving for excellence, our Law Reviews provide a platform for law students with diverse backgrounds to engage in dialogue on current legal issues of global interest, as well as motivate them to enhance their research and writing skills. Additionally, these publications aim to provide an enthusiastic international readership with access to scholarly discussion of contemporary legal issues, exposure to which they may otherwise not have. The core of importance of this project is the free provision of a comprehensible source of legal knowledge tailored to young students’ demands.
As the world is becoming smaller by globalization, Asia and Europe foresee greater legal cooperation. The initiation of this goal is clearly based on a big vision: by publishing simultaneously our work and exchanging legal opinions by our members, we do not only expand the reach of our reading audience, but we set the basis for the establishment of a frequent communication which is aspireing to bring concrete outcomes in the future and unite the populations when it comes to resolution of legal matters - and potentially issues of other fields as well. We believe that our new initiative will be a stepping-stone to bridging law students in the world’s two most diverse regions, as the enhancement of legal capabilities of students cannot be achieved without the exchange of knowledge with one another.”
Comparing The Role of the Courts In English and German Arbitration Law: Should Party Autonomy or Certainty Preferred?

Satya Talwar Mouland

Satya Talwar Mouland is the recipient of a full scholarship to study an LLM in Commercial Law at Edinburgh University 2015-16. She graduated in 2015 with a First in LLB Law with German Law with Honours from the University of Birmingham. She is a native English and fluent German speaker and as part of her degree spent a year abroad studying German Law at the Free University of Berlin 2013-14. This essay is a translated and shortened version of her First class German undergraduate dissertation. She is a former participant of the Willem C Vis International Commercial Arbitration Moot for the Free University of Berlin and recently participated at Edinburgh. Her research interests lie primarily in Private and Public International Law and in promoting the internationalisation of legal systems. She has received a place for a PhD in Private International Law at the University of Edinburgh but is awaiting an answer regarding funding.

‘At the heart of these different approaches … lies a contradiction. Arbitration law must constantly grapple with the disharmonious relationship between party autonomy and legal certainty. It is within the discretion of the legislator to decide where to draw the line.’ [Section C III, final paragraph].

This essay seeks to draw on the often complementary, but contrasting principles of party autonomy and legal certainty to distinguish the English and German legislators’ approach to the drafting of their respective national arbitration laws. Emphasis is placed on how they have differently defined the boundaries of the relationship between the courts and arbitral tribunals.

Despite attempts by a 1985 the United Nations Commission on International Trade Law (UNCITRAL) to harmonise the widely differing arbitration laws in Europe through the UNCITRAL¹ Model Law, national systems maintain certain features of their own arbitration rules in order to attract international parties to arbitrate in their countries. This author concludes that whilst English arbitration law provides more legal

I. INTRODUCTION

Arbitration is an alternative form of dispute resolution,¹ which is often preferred by parties for its private and (potentially) less costly nature when compared with the public forum of the courts. In light of the UNCITRAL Model Law (Model Law), it is particularly interesting to compare the English and German arbitration rules. The Model Law, written by UNCTRAL in 1985, aimed to harmonise the widely differing arbitration rules in Europe.²

Model Law: harmonisation or divergence

If the Model Law aimed to harmonise differing national rules, why do differences still exist? Another aim of the Model Law was to create rules which satisfy the needs of international arbitration.³ Even though the German rules in principle apply when Germany is chosen as the forum for arbitration (§1025 of the German Code of Civil Procedure⁴), and the English rules when England is chosen (s. 2 of the English Arbitration Act⁵), the aim of both systems was to promote its arbitration rules to attract international parties⁶ to arbitrate in those countries. These are the default procedural rules that apply when parties select either England or Germany as the place of their ad hoc arbitration if they have not explicitly agreed otherwise. The possibility of choice is designed to protect the parties’

3 Siegfried Georg Häberle, Handbuch für Kaufrecht, Rechtsdurchsetzung und Zahlungssicherung im Außenhandel (De Gruyter, 2002), 344.
4 Hereinafter, all articles named ‘§’ are paragraphs of the German Code Civil Procedure.
5 Hereinafter, all articles named ‘s.’ are sections of the English Arbitration Act 1996.
interests. The national systems have therefore preserved some peculiarities of their own to set them apart as unique sites for international arbitration. The longer history and acceptance of arbitration might explain why English arbitration law is so comprehensive when compared to its German equivalent. Whilst arbitration was already recognised in the 14th century in England, it took many centuries for it to be accepted as an alternative form of dispute resolution in Germany. Numerous commercial disputes had already been decided by arbitration in England by the 17th century, whereas Germany only reformed its rules in 1990 after the unpopularity of Germany as a forum for arbitration was mooted. A virtually verbatim adoption of the Model Law was proposed and accepted in Germany.

Role of the courts

The relationship between arbitration and the courts has created tension. Some authors speak of a forced cohabitation, whilst others describe it as a real partnership. It is therefore necessary that this relationship is governed and defined, to a certain extent, by the law.

According to Art. 5 of the Model Law, no court shall intervene except where so provided in this Law. Similar rules can be found in §1026 of the German Civil Code and s. 1c of the English Arbitration Act. They do not completely exclude the role of the courts from arbitration, but rather allude to the policy of the Model Law; namely that the role of the courts must be limited because arbitration is a private form of dispute resolution, independent (to an extent) from the courts. If courts were always able to interfere with arbitral proceedings, then the purpose of arbitration as an alternative form of dispute resolution would be compromised.

The role of the courts in English and German arbitration will be examined and compared following the three phases of arbitration: before, during and after the arbitral proceeding. Whether

8 Manuela Schäfer, 'Die Verträge zur Durchführung des Schiedsverfahrens' (2010), Saarbrücker Studien zum Privat- und Wirtschaftsrecht (Volume 64, 2010), 44.
10 N Blackaby, C Partasides, A Redfern, M Hunter, Redfern and Hunter on International Arbitration (Oxford University Press, 5th ed., 2009), Rn. 7-01.
party autonomy or legal certainty is preferred will be highlighted at each stage for each jurisdiction.

**B. Before the Arbitration Examining the Jurisdiction of the Arbitral Tribunal**

Prima facie, the arbitral tribunal decides on its own jurisdiction. Nevertheless, it is the duty of the courts in both English and German arbitration to recognise an arbitration clause provided it is not ‘null and void, inoperable or incapable of being performed’. According to Steinbrück, it makes sense in certain situations for the courts ‘to decide on the admissibility or inadmissibility of an arbitration agreement before the arbitral tribunal is constituted in order to achieve certainty at an early stage for the parties’ [translation by this author].

11 §1032 and §1040 of Code of Civil Procedure (Germany)

In German arbitration law, the court has three routes to establish or reject the jurisdiction of the arbitral tribunal. The three options for parties are: to object to the court hearing a claim which should be the subject matter of an arbitration ($§1032(1)$); to file a petition to the court to determine the admissibility of an arbitration clause before the tribunal is formed ($§1032(2)$); or to object to the competence of the arbitral tribunal after the request for arbitration is made ($§1040$).

**Parallel proceedings**

$§1040(2)$ provides that ‘the objection as to a lack of competence of the arbitral tribunal is to be submitted no later than the time at which the reply to the request for arbitration is made’. Moreover, $§1040(3)$ states:

Where the arbitral tribunal believes it has competence, it shall rule on an objection raised pursuant to subsection (2)…in such event, each of the parties may apply for a court decision to be taken, doing so within (1) month…for the period during which such a petition is pending, the arbitral tribunal may continue the arbitration proceedings and may deliver an arbitration award [emphasis added].

This wording is problematic because an objection to the competence of the arbitral tribunal in the court, whilst the arbitral proceeding is taking place,

12 OLG München, 22.06.2011 – Az 34 SchH 3/11, Rn. 38.
14 Ibid.
could lead to parallel proceedings. There is no rule as to which should prevail in the matter of conflict – the court judgment or the arbitral award.

The wording also does not exclude the possibility that the court could deliver a decision as to admissibility of the arbitral proceedings after the arbitral award is rendered, although the Bundesgerichtshof (Federal Court of Justice of Germany, hereinafter ‘BGH’) excluded this possibility in its decision of 30 April 2014. However, arbitral decisions are not binding on other tribunals. This demonstrates that the broad wording of the German statute does not resolve all issues which can arise in practice.

**Sections 32 and 9 English Arbitration Act (England)**

In English arbitration law, the court can decide on the admissibility of the arbitration either by determining a preliminary point of jurisdiction according to s. 32 or through a stay of legal proceedings pursuant to s. 9.

**More conditions**

Section 32(1) differs from the equivalent provision in the German procedural rules (§1032 (2)) since a request for determination is possible not only before the arbitral tribunal is formed, but also at any point during the proceedings until the award is rendered: ‘the court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal’.

On the one hand, this could lead to the same problem as in the German rules and provoke parallel proceedings. On the other hand, many conditions are attached to this possibility in s. 32(2):

An application under this section shall not be considered unless—

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied—

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and
(iii) that there is good reason why the matter should be decided by the court.

This demonstrates a tendency of the English arbitration rules, as will later be developed, to firstly give the parties more freedom to decide on whether the court should be able to decide the issue of jurisdiction, and then limit this using specific conditions in the codified arbitration law so that the arbitral proceeding is not abused. It is a welcome balancing act between party autonomy and legal certainty.

A ‘stay’ of legal proceedings

Section 9 provides that court proceedings can be ‘stayed’\(^\text{16}\) when they are brought against a party to an arbitration agreement unless the court is satisfied that the arbitration agreement is ‘null or void, inoperative or incapable of being performed’.\(^\text{17}\) A ‘stay’ pursuant to s. 9 differs from the German equivalent; court proceedings contrary to the arbitration agreement are not deemed inadmissible but are rather temporarily halted. The effect of a ‘stay’ in comparison to a petition for an order for lack of admissibility per §1032(2) is of importance. According to Steinbrück, filing a petition to the court to determine the admissibility of arbitral proceedings ‘does not remove the competence of the courts to rule on the merits’ [translation by author].\(^\text{18}\) Since the courts are stayed, they remain competent on the basis of inherent jurisdiction. This means they can support the arbitral tribunal later on in the proceeding (for example, by ordering interim measures) or can step in automatically should the proceeding fail. The effect of a stay might be to improve the expediency of proceedings, but could also paradoxically grant the courts more authority should the arbitration later collapse.

\(\textit{Comparison}\)

Whilst the rules on jurisdiction in both English and German arbitration law open up the possibility of parallel proceedings in the courts and arbitral tribunals, England offers more clear-cut rules about when the competence of the court should be exercised. For example, in determining a preliminary point of jurisdiction, there must be ‘good reason why the matter should be decided by the court’ (s. 32(2)(iii)). This may be

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\(^{16}\) Defined as ‘the act of temporarily stopping a judicial proceeding through the order of a court’ <http://legal-dictionary.thefreedictionary.com/stay>

\(^{17}\) s. 9(4).

\(^{18}\) Steinbrück (n 13) 113.
a result of the history of arbitration in England where the ‘interventionist-friendly approach’ of the courts was heavily criticised.\(^{19}\) The possibility for the courts to intervene was already limited by the 1979 Arbitration Act in England. Nevertheless, the courts had a role of oversight in arbitration proceedings until the 19th century.\(^{20}\) It was important for the English legislator to maintain this well-functioning system, ensuring that the courts had a limited role of overseeing the arbitration. The Mustill Committee, which rejected a verbatim adoption of the Model Law in England\(^ {21}\), favoured an approach which changed the wording of the Model Law\(^ {22}\) to achieve more clarity in the context of the English legal system.

A ‘stay’ means that English courts remain competent on an ‘inherent jurisdiction’.\(^ {23}\) Paradoxically, this could lead to a stronger role of the courts in arbitration than envisioned. In the event that the arbitration fails, a court action which has been stayed resumes automatically without having to re-establish jurisdiction. In German law, a court that hears a matter which should be the subject of arbitration, the court proceeding is deemed inadmissible. The German court must then establish its jurisdiction from different legal sources.

C. During the Procedure Interim Measures

Schlosser considers that in almost all legal systems, state interim measures are permissible ‘despite the existence of an arbitration agreement’.\(^ {25}\) Interim measures preserve the subjective rights of parties before the main arbitration has commenced and can be ordered by both the arbitral tribunal and the court. In English arbitration law, a unique subsidiarity principle provides that the arbitral tribunal has priority to order interim measures over the courts. In comparison, the German legislator decided against implementing such a rule in order to protect the free choice of the parties.

\(^{19}\) Julian Lew, Loukas Mistellis, Stefan Kröll, Comparative International Commercial Arbitration (Kluwer Law International 2003), 149 ff.
\(^{20}\) Professor David AR Williams QC, Defining The Role of The Court in Modern International Commercial Arbitration (Herbert Smith Freehills – SMU Asian Arbitration Lecture, Singapore, 2012).
\(^{22}\) Ibid, Rn. 1.14.
\(^{23}\) Steinbrück (n 13) 113 translation by the author.
\(^{25}\) B Schlosser, Kommentar zur Zivilprozessordnung (Stein/Jonas, 22nd Ed. 2013), §1033 Rn.1.
§1041 in conjunction with §1033
Civil Procedure Rules (Germany)

German arbitration law, with regards to interim measures, favours party autonomy. The state court has the same power as the arbitral tribunal to order interim measures. According to §1033, the state court may order an interim measure at the request of one of the parties ‘an arbitration agreement does not rule out that a court may order… that a provisional measure..be taken with regard to the subject matter of the dispute being dealt with in the arbitration proceedings’.

The arbitral tribunal has the same power to order interim measures according to §1041(1).

Supporting free choice: no restriction on court-ordered interim measures

In principle, there is no restriction on court-ordered interim measures. Parties do not require the permission of the arbitral tribunal to seek them. This rule could be viewed in two different ways. On the one hand, it follows from the German arbitration rules that parties could only order interim measures in the state courts rather than the arbitral tribunal. On the other hand, the rule corresponds to the Model Law, which supports the free choice of parties.

Preservation of historical power of courts

The wording of the German statute sheds light on the decision of German legislators to preserve the historical power of the courts. The state court has an obligation to provide the possibility of interim measures when certain conditions are fulfilled, whereas the arbitral tribunal has a choice, according to the wording of §1041(1):

Unless the parties to the dispute have agreed otherwise...the arbitral tribunal may order interim measures by the order of one of the parties’ [emphasis added].

This difference can lead to tactical decisions being taken by parties, whereby they choose to apply for interim measures in state courts.

28 J. Schäfer (n 11), Rn. 4.2.2.1.
because judges have less ‘elbow room’ to grant these than arbitrators. According to Schaefer\(^{31}\), this demonstrates that free choice of the parties is actually being supported. Nonetheless, it could be problematic that §1033 does not provide which court, and under which circumstances, is authorised to order interim measures. The German legislator saw such a rule as superfluous and arbitrary because the arbitral tribunal is not limited in its competencies to order interim measures.\(^{32}\)

**Adoption of Model Law provision**

The rule in §1033 is similar to that of Art. 9 of the Model Law, which also protects party autonomy. According to Voigt\(^{33}\), the use of this principle in this context is appropriate. Parties, pursuant to their private autonomy, should be able to request what they desire from an arbitral proceeding (within the limits defined by law) because it is the parties who decided to go to arbitration in the first place.

German arbitration law is heavily influenced by the Model Law. This is because reform of arbitration law in Germany first took place in 1991, after the Model Law had been concluded.\(^{34}\)

A commission of arbitration experts recommended modernising the Model Law in 1994 with a few caveats. The only difference is that the German rule limits the interim relief recoverable to that directly related to the subject matter in dispute.

**Section 44 of the English Arbitration Act (England)**

With regards to interim measures, English arbitration law is based on a unique subsidiarity principle. It is unique because, in contrast with other arbitration rules, parties should treat the state courts as the subsidiary organ to the arbitral tribunal when considering a request for interim measures. In comparison, many international treaties, such as the European Convention on International Commercial Arbitration 1961 as well as the Model Law, only provide that an arbitration agreement does not exclude the state courts from ordering interim measures. The comprehensive nature of the English arbitration law is a result of the long history of development of arbitration in the common law. It achieves clarity and supports the principle of a non-interfering court.

\(^{31}\) J. Schäfer (n 11), Rn. 4.2.2.2.

\(^{32}\) Steinbrück (n 13) 427.

\(^{33}\) Oliver Voigt, Einstweiliger Rechtsschutz im Schiedsverfahren gemäß §1041, (GRIN 1st ed. 2009), 4.

\(^{34}\) Schäfer (n 11), 4.2.1.
Preservation of the historical relevance of restricting court intervention

The principle of subsidiarity is defined in English legal jurisprudence. In comparison to Germany, there had been three Acts of Parliament and extensive case law that influenced the drafting of the English Arbitration Act. In Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd, it was important that the court first examined the implications of taking away the power of ordering interim measures from the arbitral tribunal in light of the parties’ agreement to arbitrate. The case led to the adoption of s. 2(3) of English Arbitration Act.

Independence of arbitral tribunal

Furthermore, English arbitration law governs the issue of when, and under which conditions, the state court has competence to order interim measures. The rule aims to not overcomplicate the arbitral proceeding through unnecessary court intervention. This is beneficial because it supports the independence of the arbitral tribunal. Section 44(1) states that the court exercises its powers in support of arbitral proceedings ‘unless otherwise agreed by parties’.

Pursuant to s. 44(3), the court can only make orders it deems ‘necessary’ for the purpose of preserving evidence or assets ‘if the case is one of urgency’. Absent a case of urgency, the court can only act upon an application upon notice to the other parties and the tribunal, made with the permission of the tribunal or the agreement in writing of the other parties (s. 44(4)). In both cases, the state court only exercises its power when the arbitral tribunal is not able to.

The subsidiarity principle in English arbitration law is welcome. Section 44 supports not only the private autonomy philosophy behind arbitration, but also provides conditions according to which the state court can intervene and limits these accordingly.

Comparison

According to Redfern and Hunter, the position in English law is clearer as to the conditions to invoke state court interim measures over those available in the arbitral tribunal. Section 44(5)
of the English Arbitration Act provides that the arbitral tribunal has priority over the state courts to order interim measures should the parties not have agreed otherwise. This sensible handling of the problem of conflict between the state court and the arbitral tribunal derives from the history of the development of the English Arbitration Act.

One aim of the Act was to ensure the articles contained therein were sensibly ordered, thereby reducing the problems of the Model Law highlighted in the 1989 Mustill Report. According to Shackleton, England had a reputation of freeing itself from ‘international problems’ using local solutions. That explains why the Model Law was seen merely as a travail prépatoire in England. Since arbitration has its roots in freedom of contract, the English legislator decided to protect this in respect of interim measures by providing for the subsidiarity of courts.

The general formulation of the German rule offers flexibility. In §1033, it is provided that the arbitration agreement does not exclude the possibility of state-ordered interim measures, but not that the parties could agree to such. The idea is taken from the Model Law, where it is simply provided that the state court and the arbitral tribunal have the same competence to order interim measures. Therefore the German rule, just like the English rule, does not solve the issue of conflict between court-ordered and arbitral interim measures. The German legislator wanted there to be no limits to the courts’ competence to order interim measures pursuant to §1041. The relationship between the state court and the arbitral tribunal is not defined precisely, leaving the choice up to the parties.

At the heart of these different approaches to interim measures lies a contradiction. Arbitration must constantly grapple with the disharmonious relationship between party autonomy and legal certainty. It is within the discretion of the legislator to decide where to draw the line. Whilst the German legislator in this instance decided in favour of party autonomy, the English legislator preferred legal certainty. The English subsidiarity principle resolves the problem of conflict between the state court and the arbitral tribunal best, thus promoting the use of arbitration as a private form of dispute resolution.

43 Ibid.
44 Steinbrück (n 13) 429.
Nevertheless, the German rule might be preferred by the parties since it does not restrict their choice of where to request interim measures.

IV. After the Proceedings: Appeal

In principle, the arbitral award is final and binding on both parties. Nevertheless, parties can go to the state courts in certain circumstances to appeal or review the award according to §1059 and s. 69. However, the scope of these circumstances are quite distinct in English and German arbitration law.

§1059 of the Civil Procedure Rules (Germany)

Appeal and review rules in German arbitration law are similar to those found in the Model Law. §1059 lists the grounds upon which parties can appeal or review the award in the state courts. These grounds are exhaustively listed and exclusively procedural, which means that the arbitration award can only be appealed on the procedural grounds listed in §1059 paragraphs (2) and (3). This exclusivity is clear from the wording of §1059(1):

Only a petition for reversal of the arbitration award by a court pursuant to subsections (2) and (3) may be filed against an arbitration award [emphasis added].

Promoting finality of award

At first blush, these limitations on the scope of review seem to go hand in hand with the principle of finality of the award. The state court can only appeal the award on one of the few exhaustively listed grounds in the article. A révision au fond (review on the merits) is excluded. Nonetheless, it will be asserted that the principle of finality is not necessarily supported in practice. The limitations in §1059 have driven parties to think up creative solutions to limit the effect of the restriction.

No substantive review on ‘public policy’ grounds

An arbitral award can be appealed if the court finds that its recognition or enforcement would be contrary to public policy of the state in which enforcement is sought. It has been the subject of debate whether, for the court to be able to determine this, it

45 Vorwerk, Wolf, Beck’scher Online Kommentar zur Zivilprozessordnung (Beck, 14th ed. 2014).
47 Rauscher, Krüger (n 26) §1059, Rn. 7.
48 BGH SchiedsVZ 2008, 40 (42).
49 BGH Fall vom 1.3.2007 – III ZB 7/06.
must intervene to some extent in the substance of the dispute.\textsuperscript{50} According to the BGH decision of 28 January 2014,\textsuperscript{51} public policy in Germany only includes fundamental principles of the legal order and flagrant violations. A violation of one of these principles would therefore be so obvious in most cases that it would be unnecessary to examine the substantive elements of the arbitral award.

BGH Case: 1 March 2007

Despite the apparent exclusion of a révision au fond, the BGH case of 1 March 2007\textsuperscript{52} has questionably limited this. The parties agreed to the following clause: ‘should one of the Parties be dissatisfied with the arbitral award, it can take this matter to the state courts within one month following the rendering of the award’ [translation by author].\textsuperscript{53} The parties thus were able to attach certain conditions to the finality of the award.

On the one hand, this decision runs contrary to §1055, according to which the arbitral award has the same effect as a court judgement. The parties can then always attach certain conditions to the finality of the arbitral award, which diminishes the significance of the arbitral proceeding. According to Wolff\textsuperscript{54}, the arbitral proceeding loses some of its importance if the parties can ‘say no’ to finality. Such an agreement seems more like mediation where the parties do not bind themselves to any certain rules.

On the other hand, the arbitration agreement derives from the parties’ autonomy. The BGH decided on this basis that the more fundamental reason for the final and binding nature of the arbitral award derives from the parties’ own choice to make it so.\textsuperscript{55} This analysis brings the decision in line with the nature of arbitration as a creature of contract. Since the binding nature of the arbitral award (§1055) derives from the consensus of the parties, the parties should be able to attach conditions to this finality.

This case demonstrates that restrictive

\textsuperscript{50} Rymanlova, ‘Le contrôle de la sentence arbitrale au regard du droit communautaire de la concurrence: application de l’arrêt Eco Swiss de la CJCE en France et en Allemagne’, Arbitrage et ADR <http://m2bdc.u-paris10.fr/content/le-contr%C3%A9le-de-la-sentence-arbitrale-au-regard-du-droit-communautaire-de-la-concurrence-appl> accessed 2 February 2014.

\textsuperscript{51} BGH vom 1.1.2014 - III ZB 40/13 - OLG Celle.

\textsuperscript{52} BGH Fall vom 1.3.2007– III ZB 7/06.

\textsuperscript{53} Ibid., Rn. 1.


\textsuperscript{55} 1.3. 2007 (n 64), Rn. 18.
grounds for review do not always have a positive knock-on-effect for the final and binding nature of arbitration awards. Rather the parties begin to choose their own rules by concluding creative arbitration agreements.

**Section 69 of the English Arbitration Act 1996 (England)**

In contrast with German arbitration law, the state court may review a question of law (but not a question of fact). Section 69 codified the general wording of s.1 of the English Arbitration Act with regard to the developing case law, in particular The Nema and The Antaos, providing in s. 69(1):

Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

In both cases mentioned above, the House of Lords found that review on a question of law should only be possible if the arbitrators made an obviously wrong decision, which hinders the rights of one or both of the parties substantially. Upon a first reading, the statement seems to run contrary to the principle of excluding the courts from interfering with arbitration. Conversely, it limits the parties’ ability to agree to a contrary (and perhaps more expansive) form of judicial review.

The elusive review on a ‘question of law’ – against finality?

It might be argued that a substantive examination of the award hinders the finality of it. According to Wolff, the principles of private autonomy and finality come in to conflict when it comes to appeal and review. If the court can review questions of law, it has the capability of changing the material decision of the arbitrator. Arbitration is thereby reduced to a mere ‘first step’ before the parties finally go to court. The arbitral proceeding, as well as the arbitration agreement itself, lose their meaning and effect. Nevertheless, it remains open to the parties to exclude an appeal on a point of law by agreement. Section 69 is thus not a binding rule if the parties do not want it to be.

57 Pioneer Shipping Ltd. v. BTP Tioxide Ltd. (The Nema) [1982] AC 724.
59 Wolff (n 56) Rn. 3.
Limited by conditions

In any case, s. 69 is seldom utilised by parties since certain conditions must be fulfilled for it to apply. Statistically, the reviews of a question of law pursuant to s. 69 only occurred 151 times between 2004 and 2006. Only 14 of these attempts actually led to an appeal of the award.\(^{61}\)

The first condition is that the applicant must receive the consent of all parties of the arbitration agreement as well as the court to be able to review a question of law. The court can only agree in the explicitly listed cases in s. 69(2), including:

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(c) that, on the basis of the findings of fact in the award

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

An expansive list of grounds for review, limited by conditions, could therefore be seen as positive for arbitration. Even though they appear, at first glance, to give the state courts too much power to review arbitral awards, the grounds are sensibly limited in the arbitration law.

Comparison

When compared with German arbitration law, the possibility of an appeal on a question of law is a unique and welcome feature of English arbitration law. Section 69 sets precise conditions upon which a material review by the state courts can be granted, whereas German arbitration law permits review only on express procedural grounds.

The English legislator opened up these grounds and then attached conditions to such a review.\(^{62}\) The BGH case of 1 March 2007\(^{63}\) demonstrates that

\(^{61}\) Ibid.


\(^{63}\) 1.3. 2007 (n 64).
the uncertainty created in German law by the absence of such provisions can lead to contradictory results, whereby the parties can determine the scope and possibility of review by the courts themselves. The possibility of expanded review by state courts paradoxically promotes finality more than the uncertain German rules. Before the earlier version of the English Arbitration Act of 1979, there was significant mistrust towards the state courts. The review mechanism which existed at that time was considered to be a back door to give the state courts more power in arbitral proceedings.64

Following the conclusion of the Model Law in 1985, an English Committee presented a report called the DAC Report65 which can be used as an instrument of interpretation for today’s law. The English legislator felt that the parties are entitled to expect that the selected legal mechanism (i.e. courts or arbitral tribuneals) is correctly applied as they have placed their trust in the English legal system. A further justification given was that a court is more likely to correctly apply the law since arbitrators are not always necessarily lawyers. The DAC Report therefore favoured a possible review on a question of law but made sure that certain conditions were attached so that it could not be abused.

V. Conclusion

As a result of this analysis, which compares the role of the courts in English and German arbitration, it has been established that English arbitration law treats the uneasy relationship between the arbitral tribunal and the court in a more sensible and definite way then German arbitration law. This is partly due to the longer history of arbitration in resolving international commercial disputes in England, and the English legislator’s preference for the principle of legal certainty over party autonomy when defining the outer limits of court assistance and intervention. Whilst party autonomy could be seen as beneficial to parties, too much freedom runs contrary to the principle of legal certainty, thereby hindering the meaning of arbitration for the international community.

A ‘real partnership’ between the court and the arbitral tribunal - deemed by some commentators as necessary for a well-functioning arbitration66 - is not easy to achieve. It demands recognition by the state court that the arbitral tribunal is in principle independent, whilst having the capacity to support the arbitral tribunal in any of the

64 Dedezade (n 64) 57.
66 Blackaby, Partasides, Redfern, Hunter (n 12) 7.01.
ways prescribed (where necessary for a well-functioning arbitral proceeding). Therefore, it is important that the state court finds the right balance between these two duties.

It has been explained that the German rules, which permit arbitral tribunals and courts to concurrently order interim measures, may promote party autonomy at the expense of legal certainty. Similarly, the limited form of review offered in German arbitration law may lead to parties agreeing to expanded forms of review in their arbitration agreements, which have not been found to run contrary to the aims of arbitration. This suggests that the expanded form of review on a question of law, permitted in English arbitration law, may in fact strike the correct balance between promoting party autonomy and legal certainty since a certain higher level of review is permitted but limited by the statute itself.

Arbitration laws are thus a question of give and take. Whilst parties cannot be deprived of the exercise of their own autonomy, this cannot be permitted to the extent that it hinders the meaning of arbitration itself as a private form of dispute resolution. Perhaps the answer lies in not viewing party autonomy and legal certainty as mutually exclusive, but complementary and mutually beneficial. However, this article has shown that a balance must be struck between the two in order to preserve arbitration as a freestanding form of dispute resolution, independent (at least, to an extent) from the public sphere of the courts.
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