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Environmental Protection in China: The Role of Law

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"Faced with global warming, I am committed to a process of defense and protection against environmental issues."

Abstract
This article of environmental law in China has attracted the attention of scholars for several years. They produced a series of scientific works analyzing various aspects of this multi-component phenomenon. Our article is an attempt at a systematic classification and in-depth review of the literature on environmental law in China in the field of substantial developments in legislation and policy-making remain insufficient to address environmental degradation and the growing importance of environmental issues in Chinese politics, from pollution management to deepening academic research on environmental law in China. We used the Scopus database and a guided delineation approach to ensure the quality and relevance of selected articles. Based on the identified Chinese legislations, we propose promising avenues for future research in the field of pollution law research and management. Huge challenges remain in the areas of natural resource governance, environmental health, and transition pathways in agriculture and urban development. They must be addressed with an even stronger commitment from Chinese leaders, accompanied by meaningful reforms in the areas of environmental litigation, the transparency of local government decision-making, and the self-organizing capacity of Chinese citizens to mobilize on the environment problems.The modernity and thoroughness of the Chinese environmental legislation come as a surprise. The Constitution requires the State to protect and improve the environment, to prevent pollution, to ensure the rational use of natural resources. China is a party to the main international Treaties. Its major laws on air, water or waste, which have been revised several times are accompanied, already, by more transversal measures such as a broad satute on environmental protection in general and another one on the assessment of environmental incidenses, which covers plans and programs as well as individual projects. First elements of economic instruments are progressively joining civil and criminal liability, just as a few applications of the precautionary principle.
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Introduction

Ecological civilization is a comprehensive government strategy. Many observers both in China and outside the country are quick to see it as nothing more than propaganda. In reality, ecological civilization constitutes the only "innovation" brought by Chinese Marxism to the classic Marxist formulation of the stages of development through which societies pass: from agriculture to imperialism, from imperialism to capitalism, then to socialism and, finally, communism. Chinese state-sponsored Marxists essentially suggest that ecological civilization is the transitional stage between socialism and communism. In other words, they argue that China is living an experience of a Marxist nature but that Karl Marx himself did not experience. In this sense, ecological civilization constitutes a unique intellectual contribution.

China also claims that before the Opium Wars, around the middle of the 19th century, it was among the most advanced civilizations on the planet, but that it subsequently experienced a century of humiliation. The CCP sees itself as an organization that is dusting off the “Chinese nation” and restoring it to its past glory: it is not building just one type of civilization; it is building a unique type of civilization, an ecological civilization. This is, in a way, what is currently becoming the CCP's trademark in China. It is essential to recognize the centrality of ecological civilization in the way the Chinese state conceives itself. In the future, environmental protection will continue to occupy a very important place in Chinese state policies.

The study of the ecological environment has experienced considerable development in recent years in China. The results of ecological damage caused by the misdeeds of mass industrialization and environmental disasters have upset the balance of the earth and increasingly pose a threat to our planet. This deterioration of the

planetary state has had as a corollary awareness on the part of scientific and political circles as well as popular circles. This interest in ecology has been accompanied by rigorous Chinese legislative actions (nationally and internationally), the application by companies of ecological management systems such as ISO 14001, the emergence of pressure groups , increasingly abundant and targeted communication on environmental protection and an increasingly felt sensitivity on the part of all stakeholders, including consumers.

International admiration for China's ecology comes largely from the government's promotion of renewable energy. Rather, a certain amount of caution should be called for in this regard. If hydroelectricity is indeed renewable in energy terms, dams mainly have the effect of destroying river ecosystems and generating terrible long-term social and economic impacts on local communities.

The recycling policy of the city of Shanghai is a good example of inequality between cities and countryside. Recycling has existed in this city for decades and is a main source of income for many migrant workers. The government is now trying to establish a more formalized recycling system in the city by driving out migrants and replacing them with local workers. At the same time, this policy gentrifies the city and restricts the economic space of migrant workers, to the point that it is no longer possible for them to prosper in the large metropolitan centers of Shanghai and Beijing. We see this trend in other places as well.

Symbol of China's entry into a process of building an "ecological civilization", Premier Li Keqiang explicitly declared war on pollution at the National Assembly popular in March 2014. The force of the expression used could not deprive this announcement of a major reform. The right the Chinese environment would indeed know, a month after this declaration, one of its most emblematic reforms. A significant strengthening of the major environmental protection law of 1979 was adopted from April 2014 by the National People's Congress[1]. This reform then came to modify the legal framework for environmental protection through a set of fundamental revisions and, above all, by overhauling the means of implementing these provisions".[2] Such a legal upheaval now makes it possible to identify two stages in the construction of Chinese environmental law: a stage of creation of this law followed by a period of consolidation. The first of these phases represents the emergence of Chinese arrangements to preserve the country's natural resources. The environmental protection law, whose role must be compared to that of a genuine environmental constitution, (was adopted as early as 1979 but came into force ten years later, on December 26, 1989). This text includes the main principles of Chinese environmental law, such as those of including environmental concerns in economic measures, setting maximum standards for polluting discharges, pollution prevention or even the polluter pays rule. The progressive drafting of the environmental protection law was accompanied by the adoption of specific texts, corresponding to the measures for the protection of various components of the environment. (For example, the law relating to the preservation of air quality came into force on September 5, 1985, while the water pollution control law has been applicable since May 15, 1995).

The China is using the Belt and Road Initiative as a mechanism to absorb its economic surpluses. It exports high-speed rail technologies to its Silk Road partners while its domestic market is saturated. The New Silk Road is becoming a strategy for economic growth. It is quite astonishing to see how Chinese state actors continue, despite the environmental destruction caused by the New Silk Road, to describe it as “green, smart, win-win”.

There is ample evidence of the destruction of ecological habitats, the damage that deep-water ports inflict on marine systems, and the carbon emissions into the atmosphere caused by coal-fired power plants.

China has announced a plan to peak its carbon emissions no later than 2030, followed by carbon neutrality by 2060. The real question is: how will they achieve it? Various local experiences seek to account for carbon neutrality. In Beijing, for example, any organization or person wishing to organize a sporting event must do a “full carbon inventory” and calculate the quantities of energy, fuel, water, etc. required by the event. The total will then be compared to the carbon quota allocated by the government. Anyone who exceeds their quota must turn to Beijing's carbon cap-and-trade mechanism to buy more carbon credits. This experience seems very risky to me. It gives Chinese government actors considerable authority in determining how much carbon any event is allowed to emit. It’s not that far-fetched to imagine a scenario where events that are better aligned with state ambitions get more credit. If the commitment to carbon neutrality by 2060 were to be achieved in this way, it would be very worrying.

Within the framework of this general introduction, it will be a question of examining the object of environmental rights in China in the whole of our present article, the reduction of north-South distance; the new environmental concept; Internalize the cost of environmental protection; Strong pressure on polluting industries; Develop long-term industries. Our articles deal only with environmental law in China and pollution protection. We are going to ask a number of questions in this article.

1-What are the factors that contribute to awareness of environmental protection?

2-Is the new environmental concept in accordance with environmental protection law of the People's Republic of

[1] The term has been officially enshrined in the Chinese Constitution since March 2018.
[2] The term has been officially enshrined in the Chinese Constitution since March 2018.

China adapted on January 1, 2015?
3- How China's Environmental protection Law works and what is its insufficient performance?
4- How does China's environmental law influence economic activities?

China's environmental law has attracted academic attention for several years. He produced a series of scientific works analyzing various aspects of this multicomponent phenomenon. Our article is an attempt to systematically classify and comprehensively examine the awareness of environmental protection. Environmental law in the influential field of the Chinese economy in order to deepen academic research on the phenomenon of environmental law. We used the Scopus database and a guided scoping approach to ensure the quality and relevance of the selected articles. Based on the identified themes, we suggest promising avenues for future research in economics and management.

China has made continuous progress in environmental protection

In October 2005, I had the first opportunity to work in China as part of my participation in the wetland biodiversity conservation and sustainable utilization project in China. Many rare species have been observed in the Lurgai Wetland Nature Reserve in Sichuan Province, most of which live only in China: black-necked crane, Severzov grouse, Tibetan and antelope. For half a century, China has been actively promoting environmental protection. Since the United Nations Conference on the Human Environment in Stockholm in 1972, China has made firm efforts to strengthen environmental protection in the past 50 years.

While the Chinese economy has been booming in recent years, environmental problems are still serious. Its underdevelopment in the field of product certification due to incomplete environmental legislation has led to significant financial losses for China in international trade due to environmental barriers, Chinese products not meeting the standards of main countries to which they should be exported. The Environmental Protection Law of the People's Republic of China was enacted in 1989 and has gone through four revisions. The latest provisions adopted constitute an important development in Chinese environmental law: by setting more stringent standards for companies with a view to overcoming environmental barriers, they make it possible to reduce the North-South gap in the field of protection.

The difference in regulations aimed at environmental protection between developed and developing countries plays an important role in North-South trade. The revision of Chinese environmental law, begun at the beginning of 2011, resulted in the law of April 24th, 2014, passed unanimously; it entered into force on January 1st, 2015 after two sessions of the National People's Congress. This new legal framework means a fundamental change for China, because by enshrining environmental protection in law, it intends to approach the advanced environmental concept of developed countries. This change involves a new environmental concept and the realization of the internalization of the cost of environmental protection.

Does China intend to acquire global intellectual leadership on how states can reconcile economic development and ecological transition?

The Chinese diplomats are largely driven by the idea that the Chinese economic approach can be successfully replicated in other regions of the world such as Africa and South America. The Chinese state wants to be a world leader in environmental protection. Under Trump, the United States has dismantled much of its environmental apparatus. China seems very keen to fill this void. On the other hand, if it wants to live up to its potential as a world leader, China will have to learn to listen to non-state actors. It will need to learn to be sensitive to other conceptions of development and concerns that may or may not align with its urban-centered vision of development that seems to be so deeply embedded in the Chinese state.

One of the most important findings from environmental studies is the interconnectedness between everything that exists. We cannot isolate activities like corn or soy monocultures from the larger system that generates them, nor from the damage do they inflict on other parts of the ecosystem. Whether considering a forest, a marine ecosystem, or even an urban ecosystem, any project must be sensitive not only to long-term ecological impacts, but also to impacts that may not be immediately apparent. Take the case of the Three Gorges Dam: concerns had already been raised even before its construction, before many of the ecological consequences that had been predicted occurred. It is only after ten or twenty years that we begin to observe the disappearance of long-term sedimentation, with its consequences for communities living downstream. This phenomenon was previously unknown, simply because humans had never experienced a similar impact on such a scale. Now we know for a fact that because of the Three Gorges Dam the city of Shanghai does not receive enough sediment, so that it is gradually carried into the East China Sea because the ocean waters are salty and erosive. The ecological consequences will take a very long time to manifest themselves. If we are not careful now, the consequences can be very costly later.

This is a top priority. The city of Shanghai, a strategically important city for geopolitics, risks suffering serious climatic disruptions if sea levels continue to rise. Senior leaders are fully aware of this and are investing in a sea wall comparable to that of Venice. At the same time, Shanghai has invested in more than 600 pumps

installed on its waterways to pump water and limit impacts on human settlements in the event of storms. The city also invests in projects to strengthen its banks throughout the year. This struggle is permanent: Shanghai is the most important metropolitan center for the Chinese economy. The country simply cannot afford to lose it to climate change. However, it is striking to note that alongside these considerable efforts to make Shanghai climate resilient, the Chinese economy continues to emit carbon and all kinds of greenhouse gases which increasingly darken the long-term climate outlook.

The new environmental concept

The advanced environmental management that characterizes the China environmental policy results from a mature and progressive environmental concept. It develops from the first environmental plan, in 1973, to the fourth environmental plan, in 1992, which highlights the polluter-pays principle and the coordination of environmental policy with the economy.

Like the China pursued the principle of sustainable development, but never stated in explicit terms its position on the notion of environmental protection. As a fundamental and general right, the new environmental law ensures this time in its field of application the primacy of the environment over the economy. In its general provisions, the law specifies that “the protection of the environment is one of the fundamental policies of the Chinese government”[1], who participated in the drafting of the future text, the revision of the law "puts the environment before economic development" and "the fact of erecting the protection of the he environment as a fundamental principle is a considerable change which shows that the environment is a priority”. This change is a reform of the Chinese environmental concept.

Chinese policy also respects the principle of coordinating environmental policy with the economy and society. This principle evolves in the new law of the environment, which replaces the expression "the protection of the environment must be coordinated with the economic development», the expression "the development must be coordinated with the protection of the environment"[2] (art 4: The protection of environment is a basic national policy for China. The state shall adopt economic and technological policies and measures favorable for conservation and circulatory use of resources, protection and improvement of environment and harmony between human and nature, so as to coordinate economic and social development with the work of environmental protection.) This review is unmistakably a reflection of adherence to a mature sustainable development perspective. The core of the social strategy is the transfer of development from the simple economy to the most profound sustainable development, that according to which economic development cannot pass the limit of the adaptive capacity of the environment.

When deepening the concept of environmental development, the new law adds the need "to stimulate the construction of ecological civilization and to promote sustainable economic and social development" (art 1: This Law is formulated for the purpose of protecting and improving environment, preventing and controlling pollution and other public hazards, safeguarding public health, promoting ecological civilization improvement and facilitating sustainable economic and social sustainable development.) as one of the legislative objectives, emphasizing that “the State supports the research, exploitation and application of scientific technology for the protection of the environment. The State also encourages industry and promotes the construction of information on environmental protection, in order to increase the scientific level of environmental protection”(art 7: The state supports scientific and technological research, development and application of environmental protection, encourages the development of environmental protection industry, facilitates the environmental protection information technologies and improves the scientific and technological level of environmental protection science.) Article: 15 of the new law stipulates that “the State encourages research on environmental criteria” considering that the development of environmental standards must be foreseeable and advanced. The increase in environmental quality criteria is a process to be strengthened in order to act in the direction of pollution prevention; this requires the development of scientific environmental criteria.[3] Research on the environmental criteria stipulated by the new environmental law means that the state is trying to concretely raise the standards of environmental protection and the level of sustainable development.

Internalize the cost of environmental protection

Obstacles to Implementation

On the other side of the lake, in Baocun village [Yunnan province], Mr. Yang does not know what to do. “Look at my rice. You see, it is red.” He is standing in his rice paddy. Indeed about 60 % of his rice kernels are not yellow, but red. A giant phosphor chemical fertilizer plant emits a white smoke and acidic smells, not 500 meters from where we stand. Mr. Yang shrugs and points at the factory. “I know it is their fault, but what can I do? We all depend on them, in many ways.” What Yang means is that all income in Baocun is directly (jobs in the

[1] According to law professor Cao Mingde China University of political Science and Law
[2] Art 4: The protection of environment is a basic national policy for China
[3] Article 15 of the environmental law which entered into force on January 1, 2015.

factory) or indirectly (selling farm produce or renting houses to factory workers) related to the dirty giant in the middle of the village. The factory has paid for most infrastructure, has built a school and even pays compensation for pollution related damages, all be it [sic] much less than the actual losses. [1]

There are a number of factors that account for the implementation challenges that impede the creation of an effective environmental law system in China. Some of these factors relate to the tenuous status of law in general, and others are specific to the environmental context. The major factors are discussed below.

- Low Status of Law as a Means for Achieving Societal Goals

In the Confucian hierarchy of sources of authority for correct behavior, positive law ranked at the bottom.[2]

While law's status rose slightly in the later Imperial era and Republican eras, it returned to the bottom of the heap shortly after the founding of the People's Republic of China and did not get picked up and dusted off again until 1982 when Deng Xiaoping amended the Constitution and began his "opening up" reforms[3]. Given this history, Chinese culture has not traditionally looked to positive law as a model for public behavior.[4]

-Lack of Capacity within the Country's Bureaucracies and Legal Institutions

As a result of the low status historically accorded to the law in China and the nature of the Imperial administrative system, there were few institutions designed specifically to administer the law, and few people who functioned as judges or lawyers[5].The new legal institutions created during the Republican period did not develop strong foundations and found little support after the 1949 establishment of the People's Republic of China, even when they were redesigned to serve a "socialist legal system.[6]

The reestablishment of legal administrative capacity in the late 1970s had to start from scratch. Lacking strong advocates and still viewed with suspicion by many within China's leadership, law continued to be beholden to political and ideological.[7]

With a moribund university system, bureaucrats trained in specialized areas such as environmental law and science were not available in sufficient quantities until, at least, the late 1990s to staff China's bureaucracies and legal institutions. Problems with capacity continue to exist, but these now stem primarily from the administrative agencies' lack of financial resources.

- Delegation of Responsibility for Environmental Protection to Local Authorities

Primary responsibility for environmental protection in China has been delegated to local authorities[8]. The administrative model employed has been characterized as an "area-based, level-by-level" regulatory system.[9]The environmental protection bureau (EPB) of a given locality has two reporting lines. One line runs vertically, with each level of the environmental bureaucracy reporting to the next highest level, culminating in the provincial level EPB reporting to the national Ministry of Environmental Protection.**[10]**

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[1] (Benjamin van Rooij, Regulating Land and Pollution in China: Lawmaking Compliance and Enforcement; Theory and Cases 107 (Leiden University Press 2006).

[2] . (The "Chinese neither saw public, positive law as the defining focus of social order nor divided it into distinct categories of civil and criminal. Rather, traditional Chinese thought arrayed the various instruments through which the state might be administered and social harmony maintained into a hierarchy ranging downward from heavenly reason (tianli), the way (tao), morality (de), ritual propriety (li), custom (xixu), community compacts (xiang yue), and family rules (jia cheng) to the formal written law of the state." William Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization 10 (Stanford University Press 1995).

[3] Carlos Wing-hung Lo, China's Legal Awakening: Legal Theory and Criminal Justice in Deng's Era 38–41 (Hong Kong University Press 1995)

[4] There was a Legalist tradition in China which "emphasized the use of positive law as an instrument of governance, to insure social control and provide standards for the imposition of punishment," but it never gained much traction among those in power who found law an occasionally useful mechanism for control, but were wary of the potential for "rule of law" systems to circumscribe their own actions. Charles Baum, Trade Sanctions and the Rule of Law: Lessons from China, 1 Stanford Journal of East Asian Affairs 46, 48 (2001).

[5] (Id. page 40).

[6] (The Ministry of Justice was shut down in 1959 and did not reopen until September 1979. Shao-Chuan Leng & Hungdah Chiu, Criminal Justice in Post-Mao China: Analysis and Documents 72 (State University of New York Press 1985). The legal institutions that managed to survive into the 1960s were forcibly weeded out or left to wither during the Cultural Revolution. (At the height of the Cultural Revolution, the legal system as a distinct entity effectively ceased to exist in many parts of the country Charles Baum, supra, at 49.

[7] considerations (See, e.g., Randall P. Peerenboom , China's Long March Toward the Rule of Law (Cambridge University Press 2002); Stanley B. Lubman , Bird in a Cage: Legal Reform in China After Mao (Stanford University Press 1999).

[8] (China's Environmental Protection Law has established the principle that "[t]he local people's governments at various levels shall be responsible for the environmental quality of areas under their jurisdiction and take measures to improve the environmental quality. [Environmental Protection Law] (Promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), art. 16, available at http://www.law-lib.com/ law/law_view.asp?id=6229. Thus, responsibility for environmental protection is vested in over 3,000 local political entities).

[9] (Lu Hong, "A Study of the Environmental Regulatory System for China's Power Industry: The Case of Jiangsu Province" 16 (June 2005), available at http://www.efchina.org/csepupfiles/report/2007122111511823.1751987353824.pdf/A_Study_of_the_Environmental_Regulatory_System_for_China 's_Power_Industry.pdf).

[10] .(The national environmental ministry makes general policy decisions which should be implemented by local bureaus, but local party committees and governments allocate their personnel and administrative funds. When local authorities push for high economic growth and pursue administrative goals, local environmental protection bureaus are oft en unable to implement environmental protection policies. In certain cases, some even become accomplices of the polluters they are supposed to oversee. This system cannot ensure the effective implementation of the environmental policy)

The other line runs in a general horizontal fashion from the EPB to the local people's government (LPG) of its locale. The head of the EPB is appointed by the LPG, and the bureau receives most of its funding from this source. Given this employment and financial dependence, when conflicts arise between national environmental laws and the policies and goals of local governments, they are more likely to be resolved in favor of the local governments.[1]

- Developing the Economy Outranked Protecting the Natural Environment

Chinese government officials, including those within the national leadership, have for the past thirty years made economic growth the paramount goal. While environmental protection was occasionally acknowledged as important, when real or perceived conflicts between economic development and the enforcement of environmental laws and regulations arose, economic development won. The importance of environmental protection has recently been elevated at the national level and some localities have followed suit, but many LPGs still encourage unencumbered development and impress upon the local environmental regulators that certain projects that may be in clear violation of environmental laws need to be permitted nevertheless. [2]

- Horizontal Fragmentation of Environmental Compliance Responsibility Weakens Environmental Enforcement Efforts

Even when local authorities are inclined to enforce the environmental laws in their jurisdiction, the geographic fragmentation of the environmental responsibility system operates to restrain their zeal in deference to the local economy. They assume that other jurisdictions do not stringently enforce the environmental laws. Thus, they are hesitant to place a local industry at a competitive disadvantage by enforcing regulations they believe are not imposed upon the industry's competitors in other jurisdictions.

When enforcement occurs in one jurisdiction, its effect on motivating compliance in other jurisdictions is limited. Because enforcement decisions are primarily made at the county level where special local relationships may prevail, actions against a violator in one jurisdiction in China have much less of a general deterrent effect than similar actions would have in many Western countries where enforcement actions are oft en initiated by higher ranking officials within a larger geographic jurisdiction (national or state/provincial level).

- Public Oversight of the Implementation of Environmental Laws and Regulations Is Constrained

There is only sporadic and generally ineffective national oversight of environmental enforcement diligence. The attention paid by higher level local environmental authorities to subordinate ones varies. Oversight in both instances is hampered by a lack of personnel to devote to auditing.

In some countries where the designated authorities fail to diligently pursue their enforcement responsibility, the gap can be filled by concerned citizens and nongovernmental organizations (NGOs).

While China has a number of domestic environmental quasi NGOs, with a few notable exceptions, most are devoted to public education and environmental remediation tasks (e.g., planting trees, protecting endangered species habitat). They typically do not advocate for changes in environmental law or policy or become involved in litigation because such public advocacy could endanger their legal status.[3]

The Chinese populace is becoming more environmentally aware, and the avenues for public participation in environmental decision-making are increasing, but opportunities for the public and NGOs to ensure that environmental laws and regulations are effectively implemented remain limited.

-Strong Influence of Informal Networks on the Application and Administration of Laws and Regulations

These "informal networks" in China are usually referred to as guangxi. The effects of guangxi permeate all levels of Chinese society, and the concept is too complex to describe in any detail here. Basically it involves a system of hierarchical, horizontal (e.g., classmates), and "contracted" relationships.

These relationships establish a set of obligations that can, in certain situations, trump the authority inherent in relationships constructed by law such, as in the environmental context, that between environmental regulators and the regulated actors.

China has drafted its laws to operate at a level of generality that provides flexibility to those who are required to enforce them. They are oft en shorter and vaguer than their Western counterparts. This drafting style stems from a desire to provide those who administer the law with as much latitude as possible to reach a substantively correct result.

Unfortunately, this interpretive latitude gives the most pernicious forms of guanxi room to thrive

[1] Maohong Bao, The Evolution of Environmental Policy and Its Impact in the People's Republic of China , 4(1) Conservation and Society 36, 49 (2006). The minister of the Ministry of Environmental Protection has criticized the "the country's 'bumpkin policies' that [have] encouraged local officials to turn a blind eye to environmental hazards." New Rules to Curb Violations of Pollution Laws, Xinhua, Jul. 12, 2007, available at http://english.cri.cn/2946/2007/07/12/48@248937.htm.).

[2] (In some instances "local EPB employees have had to write anonymous letters to the MEP to report environmental violations because they were afraid of being fi red and punished by their local government leaders if identified as trying to enforce environmental laws which could be 'barriers for economic development.'" Id. (citing He Jianrong, Environmental Implementation Urged for Vertical Management , Legal Daily , Sept. 21, 2007).

[3] .(See Peter Ho, Greening Without Conflict? Environmentalism, NGOs and Civil Society in China, 32 Development and Change 893 (2002).).

unconstrained by a regulators need to justify actions against a definitive rule or detailed standard. As a result of these factors, "China's law enforcement institutions run a higher risk of capture-like and corruptive practices than similar Western institutions."[1]

-Environmental Policymaking and Implementation Is Characterized by Bureaucratic Fragmentation

There are a number of ministries and agencies that are delegated responsibility for formulating, implementing, and supervising aspects of environmental policy. In some instances the assigned functions are overlapping and there are unclear rights and responsibilities. This can result in bureaucratic wrangling and inconsistent regulatory approaches that can hamper compliance.[2]

- Structural Flaws in Existing Laws and Regulations

In a number of situations, even if vigorously enforced, China's environmental laws lack sufficient teeth to modify behavior. Penalties proscribed for violations of some laws and regulations are lower than the cost of compliance.

Thus, some entities may choose to run the risk of having penalties imposed (and paying those penalties if caught) rather than buying the equipment or making the process changes necessary to achieve compliance.[3]

The environment is considered as a component of production, and as such the market gives it a price. Production with weak environmental protection standards cannot properly assess and distribute an environmental resource, which leads to environmental dumping and increased environmental pollution.

In China, it was said that "breaking the law is more profitable than respecting the law" because the fixed fines for non-compliance with the legal provisions cost less than the establishment of measures aimed at compliance with standards or compensation for damages.[4] Today, the government applies the polluter-pays principle by following the concept of the internalization of environmental costs (art. Indeed, to fight effectively against this problem, the new environmental law reinforces the sanctions against polluting industries and the powers of the leaders.

First, the new law stipulates in Article: 59 to "fine per day", polluting industries will be fined according to the days of its illegal activities instead of a maximum fine. In addition, the new law establishes a "black list" of polluting industries by entering the figure of their pollutant emissions.[5] This data should be published and accessible to the public in real time. Secondly, under article: 60 of the new law, the competent environmental body above the district level has the competence to order polluting industries whose sum of polluting emissions exceeds the standard of control to stop their production and proceed with their closure.[6] Third, the new law stipulates the administrative and even penal sanction to polluting industries and their leaders. According to Article: 63 of this law, the construction of industries without the environmental assessment and which refuse to comply with the ordinance or alter the monitoring figures such as industries which refuse to operate the pollution prevention facility properly and elude pollution monitoring will be condemned by the administration or the courts. By applying these measures, the new law puts great pressure on the company through the implementation of more severe sanctions and, at the same time, brings new opportunities to transform and modernize companies.[7]

Strong pressure on polluting industries

The old environmental law did not sufficiently punish polluting industries, which allowed factories to continue to pollute by paying a sum much lower than the cost of bringing them up to standard: an industry could not be punished only once for a polluting case, and the maximum fine was 100,000 Yuan, or about $12,500, which is far from enough to stop industrial pollution. With the application of the new environmental law, the fine mode "per day without maximum ceiling" (art 59: Where an enterprise, public institution or other producer or business operator is fined due to illegal discharge of pollutants, and is ordered to make correction, if the said entity refuses to make correction, the administrative organ that makes the punishment decision pursuant to the law may impose the fine thereon consecutively on a daily basis according to the original amount of the fine, starting from the second day of the date of ordered correction. The fine prescribed in the preceding paragraph shall, pursuant to relevant laws and regulations, be enforced in accordance with considerations of operating cost of pollution prevention and control facilities, direct loss or illegal gains caused by such violations. Local regulations, based on actual demand of environmental protection, may extend the coverage of types of violation activities to be

[1] Benjamin van Rooij, supra, at 372. Cf. Pitman P. Potter, Guangxi and the PRC Legal System: From Contradiction to Complementarity, in Social Connections in China: Institutions, Culture, and the Changing Nature of Guangxi 179 (Thomas Gold, Doug Guthrie & David Wankeds., Cambridge University Press 2002).
[2] (See discussion of "Ministry of Water Resources," Chapter 6, III, B, 2. infra.)
[3] (This is not strictly an implementation issue, since the law may in fact be implemented (through the imposition of penalties), but it is an issue of effective implementation mechanisms because the law as designed and enforced is not producing compliant behavior).
[4] (Article 6 of the environmental law which entered into force on January 1, 2015).
[5] (Article 59 of the environmental law which entered into force on January 1, 2015).
[6] (Article 60 of the environmental law which entered into force on January 1, 2015).
[7] (Article 63 of the environmental law which entered into force on January 1, 2015).

subject to the daily-based fine as stipulated in the first paragraph) makes companies liable to pay a high price for polluting emissions. This text therefore indirectly forces companies to invest more in the fight against pollution by meeting environmental standards.

Industries that do not comply with environmental provisions can be transformed or eliminated. Moreover, the establishment of a "black list" (art 54: The competent department of environmental protection administration under the State Council shall release national environmental quality, monitoring data of key pollutant sources and other major environmental information. Competent environmental departments of governments at or above provincial levels shall regularly publish environmental status bulletins. The competent environmental protection administrative departments of the people's governments at or above the county level and other departments with environmental supervision responsibilities shall disclose information on environmental quality, environmental monitoring, environmental emergencies, environmental administrative permits, environmental administrative punishments, the collection and use of pollutant discharge fees, etc. in accordance with the law) greatly affects companies according to the new law: with regard to social credibility, they feel under pressure if their illegal polluting information is recorded. Thus, they will encounter difficulties in the following aspects: accessibility of credit, listing, cooperation with foreign countries and extension of production.

In the past, environmental administrations only had indirect coercive power, such as recommendations, but normally this type of recommendation is ineffective in the face of the inactivity of local governments. The new environmental law gives environmental administrations above the district level the power to seal polluting equipment, or even to seize it (art 25: Where enterprises, public institutions and other producers and business operators discharge pollutants in violation of laws and regulations, which may cause potential severe pollution, competent environmental protection administrations of the people's governments at or above the county level and other departments that are responsible for environmental supervision and administration may seal up and detain the facilities and equipment that discharge pollutants). In this case, the administrations can control illegal polluting production and emissions by exercising direct powers. But the process will be long.

Develop long-term industries

In China, the problems of unfair competition widely exist in the steel market. For industries that do not comply with established environmental criteria, continuing to pollute is more profitable than installing "environmental" equipment: by selling at low prices, these polluting industries hold an advantageous position in the market.

It is a "price war" that hinders the normal development of steel industries and seriously damages the Chinese environment. If the new environmental law has a negative effect on the steel industries for the time being, it will undoubtedly have a positive effect for them in the long term. According to Liu Haimin, economic expert in Chinese steel industry, to say that the strengthening of environmental protection lowers the profit of the steel companies is a false proposition, because "the increase in the cost of production leads to the lowering of the profit in appearance, but it drives out of the market, in the long term, industries whose protection of the environment is insufficient". These considerations on the steel industry restore order to the steel market and are likely to change the chaotic situation in this field.[1] After the price is restored, the regulation of the market economy begins to operate. The new environmental law is a surveyor's sight, with which industries taking into consideration the protection of the environment work better than before, relying on a fairer market. The new environmental law eliminates industries whose standards do not correspond to national environmental standards and makes industries that have a real concern for the protection of the environment more competitive.

Conclusion

In this context, and in conjunction with the preparations for the Paris Agreement, the Chinese Government proposed a text restructuring the methods of implementing environmental law, in order to increase its effectiveness. The new environmental protection law, in its amended version in force since January 1st, 2015, includes a reinforcement of the means of control of compliance with environmental standards. This strengthening is reflected in particular by an extension of the means of control (opening of the right of recourse to environmental protection associations, passage from a competence entrusted to the provinces to a national-level inspection, obligation to publish environmental information) and the establishment of more diverse and severe sanctions (multiplication by ten of fines on average, possibility of pronouncing penalty payments daily, to suspend the activity temporarily or to place the operator in administrative detention). The reinforcement of the means of constraint within the environmental protection law inevitably provoked the successive reform of the special environmental laws. For example, the law relating to the preservation of air quality[2], the water pollution controls law.[3]

The increase in environmental protection measures has also led to the adoption of regulations devoted to

[1] (Article 63 of the environmental law which entered into force on January 1, 2015).
[2] (August 29, 2015)
[3] (June 27, 2017) and the law for the prevention of pollution caused by solid waste (November 7, 2017).

new fields of law. Since January 1st, 2018, companies established in China have been subject to the environmental protection tax law[1], which creates a new tax burden proportional to the quantity of polluting discharges induced by an activity. Similarly, an important law aimed at defining an obligation to treat polluted sites and soils in the territory is expected for the end of 2018, which will oblige each industrial operator to worry about the environmental state of the land on which he operates his activity. As we can see, the current and future reforms demonstrate the liveliness of Chinese environmental law, which is evolving towards a more intense and broader framework for economic activities present in the territory.

I-References

1- Sources of law text

1- According to Liu Haimin, economic expert in Chinese steel industry
2-According to the polluter pays principle set out in Article L110-1 of the Environmental Code, the costs resulting from measures to prevent reduce and fight against pollution must be borne by the polluter.
3-The Polluter Pays Principle was adopted by the OECD in 1972 as an economic principle aimed at allocating the costs associated with pollution control.
4-The cross: China enshrines environmental protection in law
5- China's New Environmental Protection Law of the People's Republic of China 2015
6-The water pollution control law June 27, 2017 and the law for the prevention of pollution caused by solid waste November 7, 2017
7-The new environmental protection law, in its amended version in force since January 1st, 2015
8- The Chinese Constitution since March 2018
9- The Environmental Protection Law of the People's Republic of China was enacted in 1989 and has gone through four revisions
10- The law relating to the preservation of air quality came into force on September 5, 1985, while the water pollution control law has been applicable since May 15, 1995.
11- The environmental protection law, whose role must be compared to that of a genuine environmental constitution, (was adopted as early as 1979 but came into force ten years later, on December 26, 1989
12- The environmental protection law of 1979 was adopted from April 2014 by the National People's Congress; the term has been officially enshrined in the Chinese Constitution since March 2018.

II- Bibliography

1- Environment Court to Set Up in Kunming,China.org.cn,Sept.22,2008,http:// china.org.cn/government/local_governments/2008-09/22/content_16513887.htm.
2-Environment Official Investigated, China.org.cn, Oct. 31, 2008, http://china.org.cn/ environment/news/2008-10/31/content_16694070.htm.
3-Environmental Governance in China, Task Force on Environmental Governance, presented at the 5th Annual General Meeting of CCICED,Nov.12,2006,http:// www.epa.gov/ogc/china/governance.pdf.
4-Fackler, Martin, Chinese Villages Poisoned by American High-Tech, Associated Press, Feb. 28, 2002.
5-Fan, Cindy, China's Eleventh Five-Year Plan (2006–2010): From "Getting Rich First" to "Common Prosperity," 47 Eurasian Geography and Economics 708 (2006).
6-Fang Ming et al., Managing Air Quality in a Rapidly Developing Nation: China, 43 Atmospheric Environment 79 (2009).
7-Fang Yiping et al., Industrial Sustainability in China: Practice and Prospects for Eco-Industrial Development, 83 Journal of Environmental Management 315 (2007).
8-Fang Yiping & Yong Zeng, Balancing Energy and Environment: The Effect and Perspective of Management Instruments in China," 32 Energy 2247 (2007).
9-Feng Xianliang,[Environmental Change and Social Control in Ming-Qing Jiangnan] (Shanghai Remin Chubanshe 2002).
10-Ferris, Richard J. & Zhang Hongjun, China Environmental Law Deskbook (Environmental Law Institute 2009).
11- Ferris, Richard J. & Zhang Hongjun and Reaching Out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime, 11 William and Mary Bill of Rights Journal 569 (2003).
12- Frywell, Gerald E. & Carlos W. H. Lo, Organizational Membership and Environmental Ethics: A Comparison of Managers in State-owned Firms, Collectives, Private Firms and Joint Ventures in China , 29 World Development 1941 (November 2001).
13- Goelz, Darcey J., and China's Environmental Problems: Is a Specialized Court the Solution? , 18 Pacific Rim Law & Policy Journal 155 (2008).

[1] law (The "Environmental Protection Tax Law" was indeed enacted by Congress on December 25, 2016, to come into force January 1, 2018)

14- Gold, Thomas, After Comradeship: Personal Relations in China since the Cultural Revolution, 104 China Quarterly 657 (1985).
15- Goodman, Peter, China Serves as a Dump Site for Computers, Washington Post, and Feb. 24, 2003.
16- Guthrie, Douglas, The Declining Significance of Guanxi in China's Economic Transition, 154 China Quarterly 255 (1998).
17- Han S. & L. Zhang, China's Environmental Governance of Rapid industrialization, 15 Environmental Politics 271 (2006).
18- Hao Jiming, Air Pollution Control Strategy in China, Tsinghua University, September 2008, http://www.landecon.cam.ac.uk/research/eeprg/cleed/pdf/HAO % 20Jiming_Air.pdf.
19- Harris, P. G., Environmental Perspectives and Behavior in China, 38 Environmental Behavior 5 (2008).
20- Harrison, Emma Graham, China Mulling New Air Quality Regulations, Reuters, July 3, 2009, http://www.reuters.com/article/environmentNews/ idUSTRE5622GY20090703.
21- Hartwell, Robert M., "Fifteen Centuries of Chinese Environmental History: Creating a Retroactive Decision-Support System," China in Time and Space (CITAS) CSS94, University of Pennsylvania, June 2, 1994.
22- He Hongyan et al., Cleaner Production Programme in Taiyuan City, China, 2 International Journal of Technology Transfer and Commercialization 65 (2003).
23- He Jianrong, Environmental Implementation Urges for Vertical Management, Legal Daily, Sept. 21, 2007.
24- He Pengyu & Jillian S. Ashley, Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots: NGOs in China Today, 26 Boston University International Law Journal 29 (2008).
25- Hicks, C. R. Dietmar, Improving Cleaner Production through the Application of Environmental Management Tools in China, 15 Journal of Cleaner Production 395 (2007).
26- Hicks, C. R. Dietmar & M. Eugster, the Recycling and Disposal of Electrical and Electronic Waste in China — Legislative and Market Responses, 25 Environmental Impact Assessment Review 459 (2005).
27- Hicks, Robert et al., Greening Aid?: Understanding Environmental Assistance to Developing Countries (Oxford University Press 2008).
28- Hills, P. et al., Environmental Regulation and the Industrial Sector in China: The Role of Informal Relationships in Policy Implementation, 7 Business Strategy and the Environment 53 (1998).
29- Ho, Peter, Greening Without Conflict? Environmentalism, NGOs and Civil Society in China, 32 Development and Change 893 (2001).
30- Jiang, Zemin , [Important Points from General Secretary Jiang Zemin's Speech on the Work Conference of the Central Committee Birth Planning and Environmental Protection] Environmental Work News Report (Huanjing Gongzuo Tongxun), no. 6 (1997), at 2 – 3 .
31- Keller, Perry, Legislation in the People's Republic of China, 23 University of British Columbia Law Review 653 (1989).
32- Keller, Perry, The National People's Congress and the Making of National Law, in Law Making in the People's Republic of China (J. M. Otto et al. eds., Kluwer Law International 2000).
33- Khoday, Kishan Mobilizing Market Forces to Combat Global Environmental Change: Lessons from Private Sector Partnerships in China, 16 Reviews of European Community & International Environmental Law 173 (2007).
34- Lan Rongjie [Research on Localization of Litigation Rules] , 14 Law and Social Development 13 (2008).
35- Law Making in the People's Republic of China (J. M. Otto et al. eds., Kluwer Law International 2000).
36- Lee , Christine J. , "Pollute First, Control Later" No More: Combating Environmental Degradation in China Through an Approach Based in Public Interest Litigation and Public Participation, 17 Pacific Rim Law and Policy 795 (2008).
37- Lee Seungho, Environmental Movements and Social Organizations in Shanghai, 21 China Information 269 (2007).
38- Li Fugui et al, Improving public access to environmental information in Chin, 88 Journal of Environmental Management 1649 (2008).
39- Li Jin & Wang Dongdong, Existing Problems of Environment System — Three Meantimes — Executed in Construction Project and Corresponding Measures, 24 China Resources Comprehensive Utilization 35 (2006).
40- Li W. & Chan H., Pollution Discharge and Treatment in China: Implications for Environmental Governance (2008), http://mumford.albany.edu/chinanet/ events/ guangzhou09/ paper/Li_2008_IncomeCapacityEnvironment_draft % 206 % 20tables % 20included.pdf.
41- Li W. & E. Zusman, Translating Regulatory Promise into Environmental Promise: Institutional Capacity and Environmental Regulation in China, 36 Environmental Law Reporter 10616 (2006).
42- Li Zhiping, The Challenges of China's Discharge Permit System and Effective Solutions , 24 Temple Journal of Science, Technology & Environmental Law 375 (2005).

43- Lieberthal, Kenneth, Governing China (2d ed. W.W. Norton 2004).
44- Lieberthal, Kenneth & M. Oksenberg, Policy Making in China, Leaders, Structures and Processes (Princeton University Press 1988).
45- Liebman, Benjamin China's Courts: Restricted Reform, 191 China Quarterly 620 (2008).
46- Liebman, Benjamin, Class Action Litigation in China, 111 Harvard Law Review 1523 (1998).
47- Lin Li-Wen, Corporate Social Responsibility in China: Window Dressing or Structural Change? , 28 Berkeley Journal of International Law 64 (2009).
48- Liu, Guojun, Huanjing Xingzheng Chufa zhong Cunzaide Wenti yu Duice [Problems and Solutions in Environmental Administrative Punishment], 4 Environmental Protection 17 (1999).
49- Liu J. & Vine, H, Environmental Issues in China, 16 European Business Journal 59 (2004).
50- Liu Nanpin, Opinions of the Supreme People's Court: Judicial Interpretations in China (Sweet & Maxwell Asia 1997).
51- Liu Silong [Obstacles of the Environmental Law Enforcement System and their Countermeasures], 1 Environmental Protection (2000).
52- Liu Yan et al., Policy and Research Efforts for Agricultural Non-point Source Pollution in Yunnan Dianchi Watershed, Enrich Conference 349–61, Qinghua University September 26 – 27, 2002.
53 -Liu Yong, Investigating External Environmental Pressure on Firms and Their Behavior in Yangtze River Delta of China, 17 Journal of Cleaner Production 1480 (2009).
54- Lo, Carlos W. H. et al., the Regulatory Style of Environmental Governance in China: The Case of EIA in Shanghai, 20 Public Administration and Development 305 (2000).
55- Lo, Carlos W. H. & Gerald E. Fryxell , Enforcement Styles Among Environmental Protection Officials in China, 23 Journal of Public Policy 81 (2003).
56- Lo, Carlos W. H. & Gerald Fryxel, Governmental and Societal Support for Environmental Enforcement in China: An Empirical Study of in Guangzhou, 41 Journal of Development Studies 558 (2005).
57- Lo, Carlos W. H., Gerald Fryxell & B. van Rooij, Changes in Regulatory Enforcement Styles Among Environmental Enforcement Officials in China, 41 Environment and Planning 2706 (2009).
58- Lo, Carlos W. H. & Sai Wing Leung, Environmental Agency and Public Opinion in Guangzhou: The Limits of a Popular Approach to Environmental Governance, 163 China Quarterly 677 (2000).
59- Lo, Carlos W. H. & Shui-Yan Tang, Institutional Reform, Economic Changes and Local Environmental Management, 15 Environmental Politics 109 (2006).
60- Lo, Carlos W. H. & Tang, S. Y., Institutional Context of Environmental Management: Water Pollution Control in Guangzhou, China, 14 Public Administration and Development 53 (1994).
61- Lu Hong, A Study of the Environmental Regulatory System for China's Power Industry: The Case of Jiangsu Province (June 2005), http://www.efchina.org/csepupfiles/report/2007122111511823.1751987353824.pdf/A_Study_of_the_Environmental_Regulatory_System_for_China 's_Power_Industry.pdf.
62- Lubman, Stanley B., Bird in a Cage: Legal Reforms in China after Mao (Stanford University Press 1999).
63- Lubman, Stanley B., Looking for Law in China, 20 Columbia Journal of Asian Law 1 (2006).
Ma Ji et al., On Sealing a Lakebed: Mass Media and Environmental Democratization in China, 12 Environmental Science & Policy 71 (2009).
64- Ma Yujia, China Intensifies Regional Environmental Supervision, China.org.cn, Dec. 19, 2008, http://china.org.cn/environment/news/2008-12/19/content_16977637.htm.
65- Ma Zhong, "Evaluation of the Implementation of Water Pollution Prevention and Control Plans in China: The Case of Huai River Basin," Background Paper, World Bank Policy Analytical and Advisory Assistance Program (2006),http:// siteresources.worldbank.org/INTEAPREGTOPENVIRONMENT/Resources/Huai_river_pollution_EN.doc .
65- MacBean, Alasdair, China's Environment: Problems and Policies, 30 World 292 (2007).
66- Magnier, Mark, As China Spews Pollution, Villagers Rise Up, Los Angeles Times, Sept. 3, 2006 , http://articles.latimes.com/2006/sep/03/world/fg-enviro3
67- Marks, Robert B., Tigers, Rice, Silk, and Silt: Environment and Economy in Late Imperial South China (Studies in Environment and History (Cambridge University Press 2006).
68- Marks, Robert B., Why China? , 10 Environmental History (January 2005).
69- McMahon , George F. , The Yellow River Law: A Framework for Integrated River Basin Management , in Proceedings of the 2005 Georgia Water Resources Conference 4 (Kathryn J. Hatcher ed., Institute of Ecology, The University of Georgia, Athens, Georgia 2005).
70- Mei, Chengrui & Harold E. Dregne, Silt and the Future Development of China's Yellow River, 167 The Geographical Journal 7 (2001).
71- Mei Hong, Legal Gateways for Environmental Protection in China, 4 Review of the European Community and International Environmental Law 22 (1995).

72- Menzel, Donald C., China, Acid Rain, and Hazardous Waste, 50 Public Administration Review 474 (1990).
73-Miller, James, and How Confucianism Could Curb Global Warming: China Openly Debates the Role of Eastern Thought in Sustainability, Christian Science Monitor, June 26, 2009, http://www.csmonitor.com/2009/0626/p09s01-coop.html.
74- Ministry Will Give More Weight to Green Issues, China Daily, and Mar. 13, 2008.
75- Mo Hongpin et al., China's Recyclable Resources Recycling System and Policy: A Case Study in Suzhou, 53 Resources, Conservation and Recycling 409 (2009).
76- Mol, Arthur P. J., Urban Environmental Governance Innovations in China, 1 Current Opinion in Environmental Sustainability 96 (2009).

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Fiki Nono Dhiri Lina Mata Kisa: Ngadhu-Bhaga Community Wisdom Towards Honest, Fair and Democratic Elections[1]

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Abstract
This paper is part of a seminar at Widya Karya Kupang Catholic University, repackaged as a journal article with some additional analysis. It aims to understand 'local wisdom as an instrument for the implementation of presidential, legislative and regional head elections' which are said to be experiencing quality degradation in the democratic process. Democracy in the context under discussion is Pancasila Democracy as an expression of Indonesian domestic politics. This study raises the question of whether local wisdom can fill the gap in the law for an honest, fair and democratic election process. It implements qualitative analysis with a cultural approach to law. Before the analysis is carried out, this paper proposes several main propositions that local wisdom is able to fill the gap of legislation, especially on the implementation of honest, fair and democratic elections. Thus, the goal of the Indonesian State based on Pancasila can be realized. The realization of this Goal is due to the fact that election is an instrument of national leadership relay which becomes the axis of state management and law enforcement. Thus the government is suggested to pay more attention to and provide opportunities for local wisdom to take part in the elections legislation.
Keywords: local wisdom, Pancasila democracy, and election
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I. Introduction

A state is built to provide protection and social justice to all its citizens as stated in its State Ideology. Similarly, the purpose of the Unitary State of the Republic of Indonesia as juridically-ideologically stated in the 5th Precept of Pancasila is Social Justice for All Indonesian People. Based on the Pancasila Ideology, the Unitary State of the Republic of Indonesia has laid its foundation and purpose. However, 'Social Justice for All Indonesian People' is never easy to achieve, since it is complex and abstract, as an ideology should be. Therefore, to realize such a goal, the Ideology is relegated to the Constitution, and the Constitution is relegated to various laws and regulations as the implementing regulations.[2]

The National Objective of the Unitary State of the Republic of Indonesia is stipulated in the constitution as 'Protecting the Entire Indonesian Nation and the Entire Indonesian Bloodline, Advancing the General Welfare, Educating the Nation's Life and Participating in the Implementation of World Order'. This goal is juridically-constitutionally aimed at all citizens, including the population of the State of Indonesia as stated in Paragraph IV of the Preamble of the 1945 Constitution. It is further derived into the Body of the 1945 Constitution of the Republic of Indonesia, namely in the articles and paragraphs. The Body of the 1945 Constitution is the General Principle of Law of the Indonesian National Legal System.[3]

The state is a political organization in which all its activities are always related to politics, namely the power to manage the state based on law.[4] Law is an expression of ideology agreed upon by all the Founders of the State representing all the people of the country. As an agreement, derived from the basic word '*akad* or *akat*' in Islamic law which means the deals, it is morally and legally binding by all components of the state to be impemented.[5]

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[1]. This article is the paper at the National Seminar which was held on May 30 2023 at the Faculty of Law, Widya Mandira University, Kupang.
[2]. Badan Pengkajian MPR, 2017, *Penataan Ulang Jenis dan Hierarki Peraturan Perundang-Undangan Indonesia*. Jakarta: BPMPR RI.
[3]. Compared with, Jimly Asshidique, 2006, Konstitusi daan Konstitusionalisme. Jakarta: Sekretaariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI.
[4]. See, Haposan Siallagan, "Penerapan Prinsip Negara Hukum di Indonesia." Dalam *Jurnal Sosio Humaniora, Jurnal Ilmu-Ilmu Sosial dan Humaniora, Vol. 18, No. 2* (2016), p-ISSN. 1411-0911, e-ISSN. 2443-2660.
[5]. Afdawaiza, "Terbentuknya Akad dalam Hukum Perjanjian Islam." Dalam *Al-Mawarid, Edisi XVIII* (2008), p. 181-202.

Any violation to the agreement is considered unethical. In the perspective of law, it is referred to as *onrechtmatige daad* or *wederrechterlijk* or a contrary actions to the law. In the perspective of civil law, if in an agreement has been made, then is being violated, it is considered a defaults (breaking promises). It is conflicting with the law because the action is contrary to the principle *of pacta sunt servanda*.[1]

Election is one of political instruments in relations with the 'baton relay' of the state leadership that must be implemented. It is the expression and the embodiment of a democratic state that has been chosen and stipulated in the Constitution. The Constitution is the implementation and embodiment of ideology. Due to the fact that ideology is abstract and is not directly implemented,then the Basic Law or Constitution is formed[2] which is illustrated as follows:

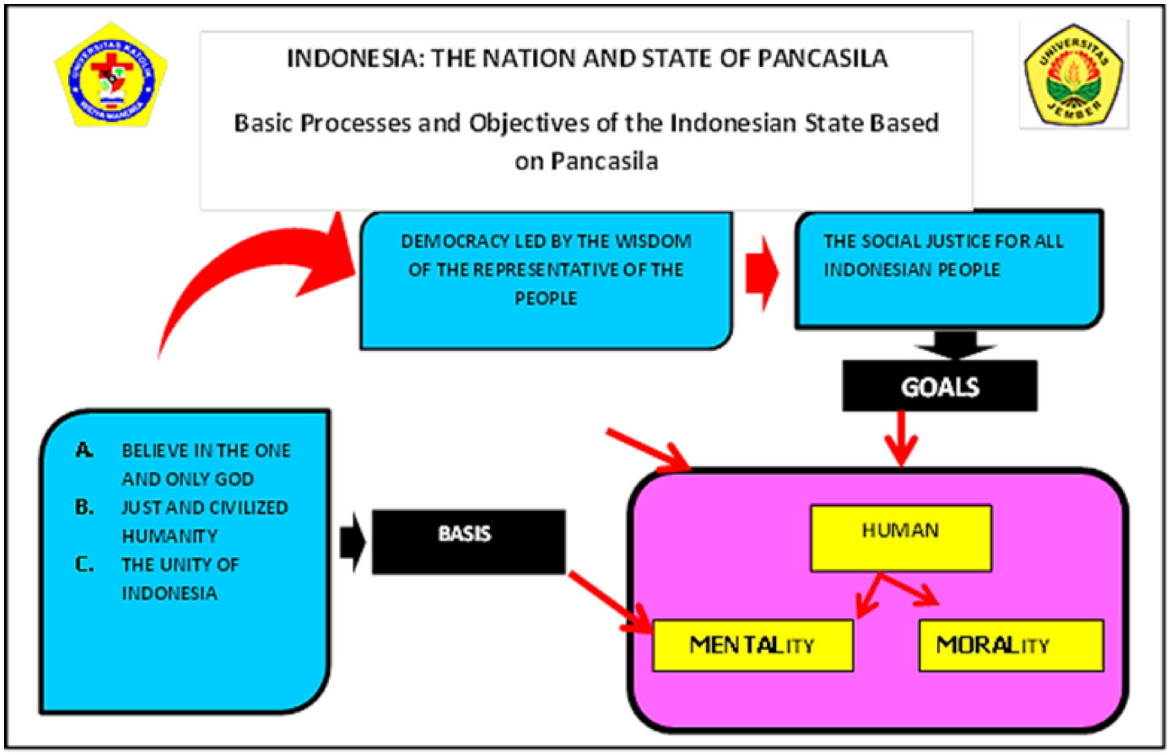

Figure 1: The Unitary State of the Republic of Indonesua is the State of Pancasila

The figure shows that there are 3 main points namely basis, instruments, and goals. The basis means that the values of Pancasila become the basis for every legal making, namely the values of Belief in One Almighty God, Just and Civilized Humanity, and the Unity of Indonesia. The means or instrument in the life of the nation and state is Pancasila Democracy. Pancasila Democracy is an expression of Domestic Politics of the Unitary State of the Republic of Indonesia. It is said to be 'democracy' because the Constitution has stipulated that sovereignty or supreme power is in the hands of the people and is carried out based on the Constitution.[3] Pancasila is the State Foundation as well as the State Philosophy, so it is appropriate to say that Pancasila Democracy. Thus, as a civilized nation, the implementation of popular sovereignty or democracy must be based on and guided by legal norms. The target or goal to be aimed at or achieved is social justice for all Indonesian people.

Pancasila is the foundation and provides the basis for all political, economic, social, and cultural activities. Defense-security and law are found in all these activities. All activities from all aspects of national and state life relating to citizens are holistically related to one another.[4] Pancasila is the heart of all activities of the nation and state. Thus, Pancasila both as the State Foundation (*Staatsfundamentalnorm*) and World View (*Weltanschauung*) cannot be separated from the life and activities of the Indonesian nation and state,[5] including the implementation of honest, fair and democratic elections. Only Pancasila Democracy is able to realize the will of the country.

Election as the state political activity takes place every 5 (five) years. In the political aspect of the state, elections function as an instrument for the relay of state power. Election is also a democratic party so that it is

[1]. Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda dalam Perjanjian Internasional." Dalam *Jurnal Mimbar Hukum, Vol. 21, No. 1* (2009). P-ISSN. 0852-100X, e-ISSN. 2443-0994. DOI: https://doi.org/10.22146/jmh.16252
[2]. Jamal Wiwoho dan Munawir Kholil, "Pembumian Pancasila sebagai Bintang Penuntun Hukum di Indonesia." Dalam *Jurnal Majelis. Media Aspirasi Konstitusi, Edisi 4* (2020). ISSN. 2085-4862. P. 163-188
[3]. Badan Pengkajian MPR, 2018, *Kajian Akademik Penegasan Demokrasi Pancasila.* Jakarta: Badan Pengkajian MPR RI.
[4]. Judi Latif, 2011, *Negara Paripurna: Historitas, Rasionalitas, dan Aktualitas Pancasila.* Jakarta: Gramedia Pustaka Utama. ISBN. 978-979-22-6947-5.
[5]. Judi Latif, 2014, *Mata Air Keteladanan: Pancasila dalam Perbuatan.* Bandung: Mizan.

the right of all Indonesian citizens to participate.[1] It is not only a right, but also an obligation for Indonesian citizens. As it is an obligation, this activity shall be carried out, obeyed adn respected by all the citizens, residents, and the government.

Several elections, especially in the post-reform period, has caused unrest, anxiety, or confusion for the people. It is due to the fact that there are several things that are contrary to the values of Pancasila, especially Democracy of Pancasila. The political actors participating in the election have committed some unlawful acts, such as spreading fake news, b;ack campaign, money politics,[2] and intimidation. The Democratic Party is unsettling, disturbing and creates tremendous uncertainty. Such dirty games cause unhealthyy life of the nation and state that is contrary to the principles of honesty and justice. The fighters and heroes have fought to build thenation and state, however their heirs and baton holders as the successors of this nation and state have misused their rights.

In regards to the above elaborations, this general question, i.e., Is local wisdom able to fill the gap in the legislation in an honest, fair and democratic election process?, is derived into the following several questions, namely:

1. Is local wisdom able to reduce black campaigns in honest, fair and democratic elections?
2. What is the role of local wisdom in realizing peace in society?
3. What is the urgency of local wisdom in realizing honest, fair and democratic elections*?*

If local wisdom is able to fill the gap in the legislation in an honest, fair and democratic election process, then the goal of the Indonesian State based on Pancasila can be achieved through honest, fair and democratic elections can be achieved. Is it correct? Hypothetically it can be stated that "The goals of the Indonesian State based on Pancasila can be achieved if the elections are carried out honestly, fairly and democratically. However, on the contrary, the goals of the Indonesian State will not be achieved, if elections are not held in an honest, fair and democratic way." The tentative answer is that 'democracy as an instrument for the relay of state power has been wrongly chosen and applied.'

Currently, the democracy being implemented is liberal democracy, which has even led to a selfish democracy. If it is wrong, is local wisdom able to provide an alternative? How does local wisdom play its role to fill the wrong value? Based on reflective thinking, these questions are analyzed and answered. Based on the results of the temporary analysis, this sudy entittled "*Fiki Nono Dhiri Lina Mata Kisa*: Ngadhu-Bhaga Community Wisdom towards Honest, Fair and Democratic Elections."

II. Discussion

2.1 Pancasila Democracy as the Right Instrument

This discussion begins with the process towards Indonesia with Social Justice for All Indonesian People, namely Democracy led by the wisdom of the representatives of the people. The discussion in this context begins with the illustration in Figure 1. The process and the goal are always based on Pancasila both as the State Foundation and as the View of Life of the Indonesian Nation. The discussion uses the concept of basis, instruments, and goals (see Figure 1).

Holistically, if the value of Pancasila namely Believe in the One and only God as mental and moral basis for govermental activities are carried out properly, it can avoid any confusion, unrest, doubt or indecision, because it lays down the values of spirituality. The first Percept contains moral values in order that all state activities are running under the God's blessing.[3] Without being imbued, energized, and guided by this spiritual value, human activities will lead them to the wrong way. Thus, as the people who have the belief that God is there in every action and inch of human life, they shall pay attention to this spiritual value.

Furthermore, the Precept of Just and Civilized Humanity is similar with the Precept of Belief in the one and only God. This Precept raises three basic values, namely Humanism, Justice, and Civilization.[4] The concept of Ngadhu-bhaga society says *'kita ata ata kita'* (*kita ata* = human, mankind; *ata kita* = togetherness) meaning that all humans are us (togetherness) or in other words that all humans are equal in dignity, since humans, even all living things are the creation of God Almighty. The value *'kita ata' is 'ata kita,'* requires human to love, respect, protect and serve one another. Difference is a gift. Evnthough with this diffferences human are united. Human are differ in their names, orgins, and beliefs making them uniqes, different from other creatures, and it is the valuae of humanity.

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[1]. Mashuri, *Partisipasi Masyarakat Sebagai Upaya pembangunan Demokrasi.* Dalam *Menara Riau: Jurnal Kewirausahaan,* Vol. 13, No. 2, Edition of July- December (2014).

[2]. Ibrahim Malik Tanjung, 2022, Peluang dan Tantangan Mewujudkan Pemilu Serentak 2024 Yang Berintegritas: Perspektif Pengawas Pemilu. *Makalah Studium General Fakultas Syariah 2021/2022*. In https:// puslitbangdiklat.bawaslu.go.id/wp-content/uploads/2022/06/Peluang-dan-Tantangan-Mewujudkan-Pemilu-Serentak-2024-yang-Berintegritas-Perspektif-Pengawas-Pemilu.pdf, accessed on April 17th, 2023.

[3]. Kirdi Dipoyudo, "Pancasila Moral Bangsa Indonesia: Arti Formal dan Materielnya." *Jurnal Analisa, CSIS 13-84-130* (1984). *http://library.stik-ptik.ac.id/file?file=digital/38479-Csis13-84-130.pdf*, accessed on June 18th, 2023.

[4]. See also, Ratna Sari, dkk., "Mehamai Nilai-Nilai Pancasila Sebagai Dasar Negara dalam Kehidupan Masyarakat." *Jurnal Hamony, Edisi 7, No. 1* (2022), p-ISSN. 2252-7133, e-ISSN. 2548-4648.

Human are unique. Thus the concept of 'just' or 'fair' shall be emphasized. Human must be treated fairly. Fair does not mean equal. Being fair means treating proportionally based on human dignity. Justice, as defined by Thomas Aquinas[1] refers to proportional treatment under certain condition and situation. He divides justice into 2 (two) categories namely general and specific justice. General Justice which is law-based is a formal justice built through the establishment of law. Meanwhile, the specific justice consists of a) distributive justice, a) commutative justice, and c) restitutive justice.[2]

Distributive justice or justice that divides is equal justice, i.e., distribute the people's right. Everyone is entitled to an equal share. For example, all children are legitimate heirs of their father's legitimate income. Both male and female children as the heirs have the same rights on the property obtained by their father. Sellers and buyers have the same rights, as between the owner of goods and the owner of money as a tenant, as well as between the owner of goods and the owner of other goods in exchange transactions. In such legal actions, everyone has the same rights and is treated equally.

Commutative justice is the justice of giving everyone they are entitled to proportionally. For example, a person with more responsibility is entitled to receive higher salary. A director is entitled to a higher salary than a manager. A full-time employee is entitled to earn more than a part-time worker. A head handyman has more rights than other workers, because he has more responsibility.[3]

Restitutive justice is justice to restore one's rights lost due to the negligence of others.[4] This justice is obtained through a judge's decision. Someone who is found guilty is obliged to pay compensation, someone who is found right, he is entitled to compensation. A person found guilty is obliged to be imprisoned based on the judge's decisions. A person declared a murderer, but no evidence is proven in the trial, he cannot be imprisoned and is entitled to obtain the freedom.

Human are different from animals, because human is given ratios, feeling, and will. In other words, culture and civilization make human special and different from animals. Human are able to arrange a law to regulate their behavior. One of the products of civilized society is the Customary Law.

The second concept is humanity. Humanity means that humans are brothers and sisters. Human are breathing the same air, so that none is more powerful, higher, more dignified, and more valuable before God. All humans are equal. In the Javanese concept, it is called *manungsa* (*manunggal ing rasa* = has single taste and feeling). When human consider themselves to be higher than others, it means something has gone wrong. If someone feels 'more' than others, then there is something 'wrong' with that human being. Since '*kita ata = our ata'* or 'human beings are single in feeling,' then every individual human being is obliged to love, serve and respect each other. Any bad thoughts, words and deeds must be eliminated in the local wisdom of the *Ngadhu-Bhaga* community.'

The third concept of the Second Precept of Pancasila is civilized. That humans who love, serve and respect each other are civilized humans. Civilized human beings have good and correct nature and behavior according to the teachings of God Almighty. In the local wisdom of the Nadhu-Bhaga community, is called '*lina mata kisa',* a human being who has a clear mind, good words and right actions. Thus, it can be seen and found that there is a correlation between local wisdom and the realization of Pancasila values in the real daily lives of community members.[5]

2.2 Local Wisdom as a Companion Value to Pancasila Democracy

The discussion in this session is based on the reflective thinking method. Thus, the subjectivity of the author cannot be separated from the content of this paper. This analysis begins with some definitions of *fiki nono dhiri, lina mata kisa. Fiki nono dhiri* consists of the word '*fiki*' which means something dirty, frozen, useless. If one cooks rice or corn rice using a clay pot, there should be more water. When the rice or corn rice is half cooked, the excess water in the pot must be removed. The amount of water in the pot is adjusted to the amount of rice or corn rice in it. The removed water then undergoes an air cooling process and then freezes. The rice or corn rice water that is removed and frozen is called *fiki*. The cooled water must be discarded or removed to make the rice cooked and tasty. If this extra water is not removed, the rice is cooked, but not tasty, because it will turn to porridges.

Fiki also means the dirt on top of the coconut shell where the syrup water is stored. The dirt that reduces the clarity of the *nira* (*tuak* or *wae tua*) water is called *fiki*. At the time of the '*fedhi tua*' or '*mau tua*' ritual, which is a way of making predictions of the future or future events, the *fiki* must be set aside, so that the clear nira water is

[1]. Rato, Dominikus, 2017, *Pengantar Filsafat Hukum (Mencari, Menemukan dan Memahami Hukum)*. Jogyakarta: LaksBang Group.
[2]. Rato, Dominikus, 2017, *ibid*.
[3]. Mashuril Anwar, Rini Fathonah, dan Niko Alexander, "Menelaah Keadilan dalam Kebijakan Penanggulangan Illegal Fishing di Indonesia: Perspektif Konsep Keadilan Thomas Aquinas." *Jurnal Sasi, Vol. 27, No. 2* (2021), p-ISSN. 1693-0061, e-ISSN. 2614-2961.
[4]. Goni, Kevinly, "Penerapan Prinsip Restorative Justice pada Terpidana Anak." *Jurnal Lex Lumen, Vol. VIII, No. 4, April Edition* (2019).
[5]. Hafidh Asrom, "Pancasila, Kearifan Lokal dan Pengembangan Daerah." *Jurnal Filsafat, Vol. 17, No. 2* (2017). ISSN. 0853-1870 (print), e-ISSN. 252806811, https://doi.org/10.22146/jf.23187

set in the center, and only then prediction can be made. It is by looking at the nira (tuak or moke) that the divination is done, by paying attention to the rotation of the water. Whether the nira (tuak or moke) is turning to the right or to the left and stops in the middle, slightly to the center, or slightly to the edge, the right edge or the left edge. It is at each of these places that the prediction is made. However, when the fiki covers the clarity of the nira (tuak or moke), the divination will be disturbed. If the clarity is covered, the symbols of evil are covered, so divination errors are possible, indicating that there will be danger. Therefore, fiki must be abolished (fiki nono dhiri = fiki or impurities must be abolished or removed).[1]

Lina mata kisa means that clarity must be emphasized. The clear nira water must be located in the center of the coconut shell that holds the nira water. When it is clear in the center, there is only goodness, luck, and safety. Therefore, when the divination is done, the dirty water (*fiki, Jw. butak*) is blown slowly to the edge. It is blown slowly so as not to disturb the clear ones from being carried away or contaminated. If the impurity (*fiki*) does not want to be removed, it indicates an imminent danger. If it covers the right side, then the danger comes from within (self, house, tribe, relatives, or village). If it covers the left side, then the danger may come from outside (self, house, tribe, relatives, or village)

Thus, *fiki nono dhiri*, *lina mata kisa* is the local wisdom of the *Ngadhu-bhaga* indigenous people which means that the dirty, evil, disturbing things must be abolished so that the good, clear (lina), which brings goodness, happiness, security and safety must be placed in the middle or centralized. *Lina mata kisa* means that social harmony must be maintained, preserved and fought for. The way to remove the fiki (dirty, evil, obstruction, obstacles, useless things) must be done carefully, wisely, or in the right and proper way so as to prevent the lina from being disturbed. Fiki is blown slowly and carefully so as not to damage or disturb the lina

Regarding the local wisdom, the Act Number 32 of 2009 on Environmental Protection and Management, in Article 1 point 30, states that: Local wisdom is the noble values that apply in the community life system to protect and manage the environment sustainably. Article 1 point 72 of Government Regulation Number 23 of 2021 on the Implementation of Forestry, states that: Local Wisdom is the noble values that apply in the way of life of local communities aimed to protect and manage the environment and natural resources sustainably. It means wisdom is the noble values that live in a local community for the sustainability of the local community's living habitat.[2]

Local wisdom is inherited by the ancestors from generation to generation. It is not static but dynamic, which is different from the philosophical values that form the basis of customary law norms, which are static. Local wisdom is always in accordance with place, time, customs and individuals.[3] . It is used based on the needs of its community members.[4] When local wisdom is accepted by the wider community and lasts for a long time, it turns into principles of living law and becomes the source of the birth of customary law norms (Figure 2).

[1]. Age, Maria Y.C., "Revitalization of Po Pado: Explaning the Meaning of Educational Value of Oral Tradition in the People of Rakalaba Village, West Golewa, Ngada Regency." *Advances in Social Sciense, Education and Humanities Research, IJCAH, Vol. 618; International Joint Conference on Arts and Humanities* (2021).
[2]. Betu, Silverius, "Upacara Adat Reba Sebagai Resolusi Konflik di Kabupaten Ngada, Provinsi Nusa Tenggara Timur." *Jurnal Al-Adyan Vol. 6 No. 2* (2016).
[3]. Daeng, Hans J., "Reba, Tahun Baru Orang Bajawa." *Jurnal Humaniora, Vol. IV* (1997).
[4]. Betu, Silverius, "*Pata Dela:* Identitas Budaya dalam Mendukung Toleransi dan Kerukunan Antar Umat Beragama." *JKPM: Jurnal Pendidikan dan Kebudayaan Missio, Vol. 15, No. 1,* e-ISSN. 2502-9576, p-ISSN. 1411-1696, January Edition (2023), p. 7-21

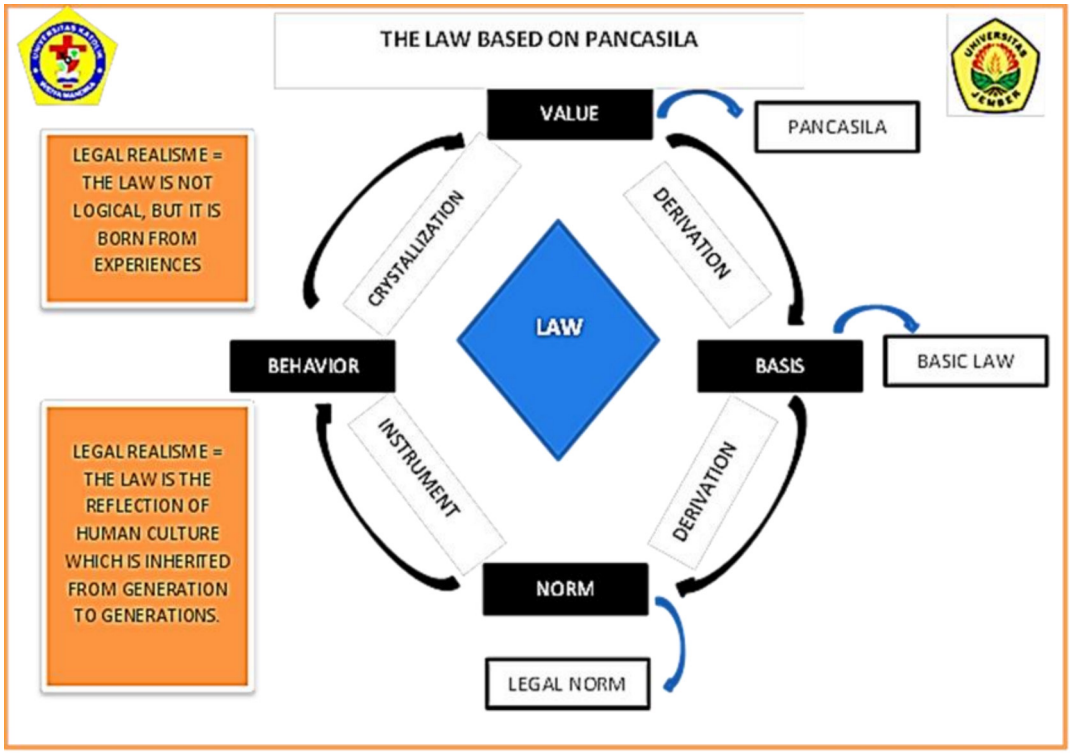

Figure 2. Customary Law derives from Pancasila

The above illustration presents that human experience is always a source of inspiration for the formation of values that become the philosophical basis of legal principles and norms. Laws are not born from the logic of lawmakers, or from the logic of legislators, but it is made from experiences. The experiences of good ancestors undergo crystallization to form the value of 'goodness'. Any bad experiences will be removed and discarded, this process is also often called *fiki* (*ba*) *nono dhiri lina (ba) mata kisa.* The word '*ba*' is an expression of hope and prayer for goodness.

What does the above analysis have to do with elections? As stated earlier, democracy as an instrument towards the national goal of social justice for all Indonesians is a wrong and inappropriate instrument. Why is it wrong? The democracy which is currently implementing is liberal democracy. This democracy is based on individual interests. More explicitly, this democracy is being camouflaged into a democracy based on egoism. Egoism-based democracy has ignored collectivism (kinship). How is it possible? What are the indicators?

The current democracy has deviated. This democracy is a Liberal Democracy which justifies all means and is contrary to Pancasila Democracy. This deviation is reflected in several indicators, namely: black campaigns, hoaxes (spreading false news), money politics (buying voters' votes), etc.[1] It shows that the democracy being implemented and applied in Indonesia to maintain the relay of national leadership has wrong instrument. Liberal democracy is like riding on a leaky boat, it is wiped out before it reaches the destination. In other word, a wrong instrument wont lead the right path.

Pancasila Democracy is the correct democratic system since it is based on the values of Pancasila namely "Democracy led by the wisdom of the representatives of the people". In this democracy, people's participations is necessery or it is not merely a mobilization. People's participation indicates that the sovereignity is in the hands of the people led by the wisdom of the representatives.[2]

The sovereignty is being imbued with the value of Believe in the one and only God, rejecting religious identity politics, avoiding religion as a political tool. Just and Civilized Humanity is characterized by fair and true laws. A civilized society upholds the law and respects the rights of others by ignoring hoaxes or fake news for personal and group interests, rejecting money politics and black campaign such as slandering, ridiculing, and attacking political opponents). The following is a description of Indonesia's current objective conditions, the *fiki nono dhiri*.

[1]. Doly, Denico, "Penegakam Hukum Kampanye Hitan (*Black Campaign*) di Media Sosial: Pembelajaran Pemilihan Umum Presiden Tahun 2019. *Jurnal Kajian, Vol. 25, No. 1* (2020), p-ISSN. 0853-9316, e.ISSN. 2614-3712.
[2]. Mushaddiq Amir, "Keserantakan Pemilu 2024 yang Paling Ideal Berdasarkan Putusan Mahkamah Konstitusi Indonesia." *Jurnal Al-Islah: Jurnal Ilmiah Hukum, Vol. 23, No. 2, November* (2020) 115 – 132. P-ISSN. 1410-9328, e-ISSN. 2614-0071.

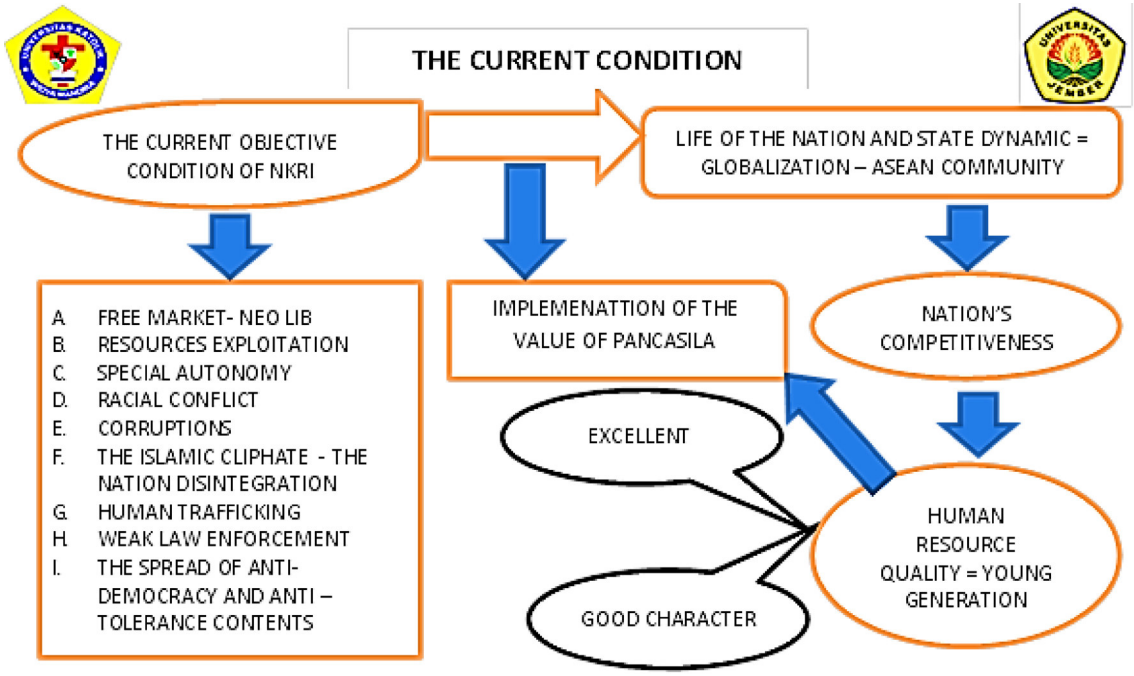

Figure 3. Indonesia's current condition

The Indonesian current objective condition is referred to as Fiki. It relates to a condition where there are evil acts in the life of the people, i.e., actions that are contradictory to the law, ethics, and religion. The alienation or elimination of this condition is called *dhiri* (the edge). *Fiki nono dhiri* (or *fiki wi nono dhiri*) indicates that the abolishment of the bad condition shall be carried out based on the value of humanity which is ethical and lawful.

Lina refers to any situation or condition that is conducive, honest and just. It shall be highlighted or put into the canter to attract people's attention to see, imitate, and implement the value. It needs to be preserved as a guideline for human life.

To maintain the lina condition, fiki needs to be abolished. It is carried out in the right way to keep a peaceful situation. It shall be adhered to the ethics and laws which is based on second principle of Pancasila, and is motivated by the value of the First principle of Pancasila to seek for God's blessings.

Appropriate, correct, honest and fair efforts will lead the Unitary State of the Republic of Indonesia to remain intact and powerful. Thus, the dream that our Founding Fathers made will come true. Furthermore, the aspects built should be holistic, and adhered to the values of Pancasila as the basis, instrument, and objectives. These aspects have legal binding with the integrated function of law, while the politic, economic and socio-cultural aspects are based on the ideology of Pancasila.[1]

Consistent law enforcement is significant for selecting any condition or situation that belongs to fiki or lina. It is prior to the discussion on the role of local wisdom as a companion of the Pancasila Democracy and an effort to create the social justice for all Indonesian people.

Prior to the discussion on law enforcement, the concept of KKM is mentioned initially. In Bahasa Indonesia, KKM refers to Komitmen (Commitment), Konsistensi (Consistency) Militansi (Militancy). Commitment is the seriousness and ability to bind oneself to carry out something that has been agreed upon consistently (obeying principles). If I have committed myself as an Indonesian citizen, then I am serious and willing to respect and realize Pancasila as the ideology of the state and nation of Indonesia. The actualization of the Pancasila ideology is manifested in the form of legislation in various fields, both political legislation, as well as economic, social and cultural fields. The correct legislation is legislation derived from the Pancasila Ideology as the State Foundation and Source of all Sources of Law.

Commitment is a personal expression of someone who has good mentality and morality.[2] It is a manifestation of seriousness and the ability to carry out something that has been agreed upon consistently (obeying principles). By having commitment, a person binds himself voluntarily to carry out something that has become a collective agreement. It can only be done by people who have good mentality and morality.

Consistency or adherence to principle is an action or deed that sticks to something that has been agreed upon constantly, continuing to behave as agreed until a new agreement made to change. It relates to the

[1]. Simarmata, Markus H., "Hambatan Transparansi Keuangan Partai Politik dan Kampanye Pemilihan Umum." *Jurnal Legislasi, Vol. 15, No. 1* (2015). DOI: https://doi.org/10.54629/jli.v15i1.13.
[2]. Sunarti Setyaningsih, "Pengaruh Orientasi Etika terhadap Komitmen Akuntan Publik pada Profesi dan Organisasi." *Jurnal Widya Manajemen & Akuntansi, Vol. 7 No. 1, April* (2007), p. 34-46.

realization of an agreed agreement clause that is continuously adhered to, implemented, done or avoided.

If Pancasila is the ideology of the Indonesia manifested in through law or legislation, then the legislation shall be able to face any risks that occur in the realization of the agreed matters. The law may be in the form of written law such as legislations, or unwritten law such as customary law, judicial decisions and international treaties.

Militancy is the basic attitude of a person who bravely defends his commitment consistently to be implemented or not. Risk is always an inseparable part of militancy when something that has been agreed upon must be done or avoided. A command must be done, and prohibition must be avoided.

Militancy needs to be everyone's behavior who believes in Pancasila as the right and correct Ideology. An Indonesian must have a commitment to defend, and implement the values of Pancasila consistently, and has the courage to face all risks. A patriot is willing with all his body and soul to defend the State of Indonesia, therefore he is certainly a militant.

2.3 A Few Things Need Fixing

The 'Social Justice for All Indonesian People' will be difficult to achieve when the democracy as an instrument to realize it is wrongly chosen and implemented. The Liberal Democracy which leads to Egoistic Democracy is adopted in Indonesia. It is a selfish democracy since it fights for the individual interests of each person as legislators, executives, and judicial. At election moments, many behaviors that are contrary to the collectivism values (kinship) of the Indonesian Nation carried out by Legislative and Executive Candidates.

The candidates, including their supporters or winning teams commit unlawful acts such as money politics to gain number of votes, making hate speech against their political opponents, spreading false news to outwit the votes of their opponents, physical and mental threats, even killing fellow legislative candidates even though they are from the same party. For legislative candidates, being elected and win the game is the main objectives, negating the ideology of the party they choose. Legislative candidates no longer question the ideology of the party they choose, the important thing is for them to pass as legislative candidates and be elected. A person justifies all means to become a legislative candidate by ignoring the consistency of the faith he adheres to. Ideology becomes less important or in other words, they belong to 'legislative candidates without commitment'.

By this fact, it shows that the mentality and morality of human both as citizens, members of society, or member of political party shall be reformed. Mentality and morality ignore valuable things to obtain something less valuable. If a commitment is ignored, then the consistency and militancy are questioned as a citizen. Thus, when conflict rises, they tend to solve it emotionally rather than rationally.

Post truth has become a type of new ideology that is embraced and implemented. Post truth is a new perspective in social interaction that considers something to be true because it is made continuously even it is wrong. It means, even a mistake is right when it is made continuously or repeatedlyy.[1]

In 1992, Steve Tesich in his article entitled 'The Government of Lies' in Nation Magazine stated that 'we as free human beings, have the freedom to choose and want to live in a post truth world.' In 2004, Ralph Keyes in Post Truth Era Magazine together with a comedian, Stephen Colber mentioned about 'truthiness' (another term for post truth). Their statement was about the phenomenon of stating something as if it is true when it is completely false. An error that is stated continuously, for example a lie (hoax) that is stated continuously will be believed as a truth. This post truth reached its peak in 2016 with the UK's exit from the European Union (Brexit) and the election of Donald Trump as US President. So that in 2016 it became a trending topic or word of the year on the Oxford University Campus. Therefore, Oxford University defines post truth as 'a condition in which facts are less influential in shaping social opinion than emotions and personal beliefs'. In other words, 'lies can masquerade as truth'. How? It is by playing with human emotions and feelings. In such situation, people are unable to distinguish between true and false information.

Post truth characters are: a) stirring up social emotions, b) ignoring data and facts, c) combining popular movements with conspiracy theories, d) echoing artificial narratives of certain events, e) building opinions by ignoring the truth/facts to benefit a party. These post truth character are utilized by people who ignore criticism and rationality. For these people, the information benefits them both financially and emotionally.

III. Conclusion

The culture of customary law communities in Indonesia is generally a 'speech culture' which is different from Europe, Egypt, China and India which are based on a 'written culture.' The values as source of law are regulated through local wisdom or folklore such as proverbs, fables, myths, rituals and traditional ceremonies. Therefore, local wisdom and folklore are instruments for the socio-cultural values socialization that become the source of legal norms, especially customary law.

[1]. Compared with, Ulya, "Post Truth, Hoax, dan Religiusitas." *Fikrah: Jurnal Ilmu Aqidah dan Study Keagamaan, Vol. 6, No. 2* (2018), p-ISSN. 2354-6147, e-ISSN. 2476-9649. DOI: 10.21043/fikrah.v6i2.4070.

One of the instruments to socialize socio-cultural values as the socio-cultural context of customary law is the proverb. *Fiki ba (siba) nono dhiri, lina ba (siba) mata kisa* is one of those proverbs. This proverb is an ancestral heritage which means that 'the dirty and filthy should be set aside, marginalized to place the good and right value at the center. It is an advice to the future children and grandchildren to live a quiet and peaceful life.

At this time, as General Election is a political activity, to seek for proper leadership process, the above proverb shall be put forward to remind the generation of the nation to live in peace. By this proverb, we are reminded to prioritize safety, security, and peace rather than individual interest.

Recommendation

To the power holders, election organizers and the public who actively participate in the political process of general election shall always consider the local wisdom that has been passed down by our ancestors. It is the right and proper choice to make local wisdom as one of the guidelines or legal norms to regulate and protect the rights of Indonesian people to achieve the 'Social Justice for all Indonesian People."

References

Afdawaiza, "Terbentuknya Akad dalam Hukum Perjanjian Islam." *Al-Mawarid, Edisi XVIII* (2008), P. 181-202.

Age, Maria Y.C., "Revitalization of Po Pado: Explaning the Meaning of Educational Value of Oral Tradition in the People of Rakalaba Village, West Golewa, Ngada Regency." *Advances in Social Sciense, Education and Humanities Research, IJCAH, Vol. 618; International Joint Conference on Arts and Humanities* (2021).

Badan Pengkajian MR, 2017, *Penataan Ulang Jenis dan Hierarki Peraturan Perundang-Undangan Indonesia*. Jakarta: BPMPR RI.

Badan Pengkajian MPR, 2018, *Kajian Akademik Penegasan Demokrasi Pancasila.* Jakarta: Badan Pengkajian MPR RI.

Betu, Silverius, "Upacara Adat Reba Sebagai Resolusi Konflik di Kabupaten Ngada, Provinsi Nusa Tenggara Timur." *Jurnal Al-Adyan Vol. 6 No. 2* (2016).

Betu, Silverius, "*Pata Dela:* Identitas Budaya dalam Mendukung Toleransi dan Kerukunan Antar Umat Beragama." *JKPM: Jurnal Pendidikan dan Kebudayaan Missio, Vol. 15, No. 1,* e-ISSN. 2502-9576, p-ISSN. 1411-1696, January (2023), P. 7-21.

Daeng, Hans J., "Reba, Tahun Baru Orang Bajawa." *Jurnal Humaniora, Vol. IV* (1997).

Doly, Denico, "Penegakam Hukum Kampanye Hitan (*Black Campaign*) di Media Sosial: Pembelajaran Pemilihan Umum Presiden Tahun 2019. *Jurnal Kajian, Vol. 25, No. 1* (2020), p-ISSN. 0853-9316, e.ISSN. 2614-3712.

Eddy M. Sutanto dan Athalia Ratna, "Pengaruh Komitmen Organisasi terhadap Kinerja Karyawan Brrdasarkan Karakteristik Individu." *Bisma: Jurnal Bisnis dan Manajemen, Vol. 9, No. 1* (2015), P. 56-70.

Goni, Kevinly, "Penerapan Prinsip Restorative Justice pada Terpidana Anak." *Jurnal Lex Lumen, Vol. VIII, No. 4, April* (2019).

Hafidh Asrom, "Pancasila, Kearifan Lokal dan Pengembangan Daerah." *Jurnal Filsafat, Vol. 17, No. 2* (2017). ISSN. 0853-1870 (print), e-ISSN. 252806811, https://doi.org/10.22146/jf.23187

Haposan Siallagan, "Penerapan Prinsip Negara Hukum di Indonesia." *Jurnal Sosio Humaniora, Jurnal Ilmu-Ilmu Sosial dan Humaniora, Vol. 18, No. 2* (2016), p-ISSN. 1411-0911, e-ISSN. 2443-2660.

Harry Purwanto, "Keberadaan Asas Pacta Sunt Servanda dalam Perjanjian Internasional." *Jurnal Mimbar Hukum, Vol. 21, No. 1* (2009). P-ISSN. 0852-100X, e-ISSN. 2443-0994. DOI: https://doi.org/10.22146/jmh.16252.

Ibrahim Malik Tanjung, 2022, Peluang dan Tantangan Mewujudkan Pemilu Serentak 2024 Yang Berintegritas: Perspektif Pengawas Pemilu. *Makalah Studium General Fakultas Syariah 2021/2022*. https:// puslitbangdiklat.bawaslu.go.id/wp-content/ uploads/2022/06/Peluang-dan-Tantangan-Mewujudkan-Pemilu-Serentak-2024-yang-Berintegritas-Perspektif-Pengawas-Pemilu.pdf, accessed on April 17th, 2023.

Jamal Wiwoho dan Munawir Kholil, "Pembumian Pancasila sebagai Bintang Penuntun Hukum di Indonesia." *Jurnal Majelis. Media Aspirasi Konstitusi, Edisi 4* (2020). ISSN. 2085-4862. P. 163-188

Jimly Asshidique, 2006, *Konstitusi daan Konstitusionalisme*. Jakarta: Sekretaariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI.

Judi Latif, 2011, *Negara Paripurna: Historitas, Rasionalitas, dan Aktualitas Pancasila.* Jakarta: Gramedia Pustaka Utama. ISBN. 978-979-22-6947-5.

Judi Latif, 2014, *Mata Air Keteladanan: Pancasila dalam Perbuatan.* Bandung: Mizan.

Kirdi Dipoyudo, "Pancasila Moral Bangsa Indonesia: Arti Formal dan Materielnya." *Jurnal Analisa, CSIS 13-84-130* (1984). *http://library.stik-ptik.ac.id/file?file= digital/38479-Csis13-84-130.pdf,* Accessed ob June 18th, 2023.

Mashuri, *Partisipasi Masyarakat Sebagai Upaya pembangunan Demokrasi. Menara Riau: Jurnal*

Kewirausahaan, Vol. 13, No. 2, Edition of July - December (2014).

Mashuril Anwar, Rini Fathonah, dan Niko Alexander, "Menelaah Keadilan dalam Kebijakan Penanggulangan Illegal Fishing di Indonesia: Perspektif Konsep Keadilan Thomas Aquinas." *Jurnal Sasi, Vol. 27, No. 2* (2021), p-ISSN. 1693-0061, e-ISSN. 2614-2961.

Mushaddiq Amir, "Keserantakan Pemilu 2024 yang Paling Ideal Berdasarkan Putusan Mahkamah Konstitusi Indonesia." *Jurnal Al-Islah: Jurnal Ilmiah Hukum, Vol. 23, No. 2, Edisi November* (2020) 115 – 132. P-ISSN. 1410-9328, e-ISSN. 2614-0071.

Purwastuti, L. Andriani, "Membangun Karakter Toleransi – Militansi Melalui Pendidikan Inspiratif." *Jurnal Humanika: Kajian Mata Kuliah Umum, Vol. 11, No. 1* (2011), p-ISSN. 1412-1271, e-ISSN. 2579-4248, DOI: https://doi.org/10.21831/ hum.v11i1.20996.

Ratna Sari, dkk., "Mehamai Nilai-Nilai Pancasila Sebagai Dasar Negara dalam Kehidupan Masyarakat." *Jurnal Hamony, Edisi 7, No. 1* (2022), p-ISSN. 2252-7133, e-ISSN. 2548-4648.

Rato, Dominikus, 2017, *Pengantar Filsafat Hukum (Mencari, Menemukan dan Memahami Hukum)*. Jogyakarta: LaksBang Group.

Simarmata, Markus H., "Hambatan Transparansi Keuangan Partai Politik dan Kampanye Pemilihan Umum." *Jurnal Legislasi, Vol. 15, No. 1* (2015). DOI: https://doi.org/10.54629/jli.v15i1.13.

Sunarti Setyaningsih, "Pengaruh Orientasi Etika terhadap Komitmen Akuntan Publik pada Profesi dan Organisasi." *Jurnal Widya Manajemen & Akuntansi, Vol. 7 No. 1, Edisi April* (2007), P. 34-46.

Ulya, "Post Truth, Hoax, dan Religiusitas." *Fikrah: Jurnal Ilmu Aqidah dan Study Keagamaan, Vol. 6, No. 2* (2018), p-ISSN. 2354-6147, e-ISSN. 2476-9649. DOI: 10.21043/fikrah.v6i2.4070.

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Evaluation of Emerging Trends in Nigerian Criminal Law Jurisprudence

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Abstract
Nigeria's criminal law system has seen enormous change in recent years as a consequence of new trends that have had a significant influence on both societies and legal advancements. Nigeria is not immune to these global occurrences, since the digital era has opened up new criminal frontiers. The rise of cybercrime in the country is studied in this article, as are the challenges it poses to law enforcement and the legal frameworks put in place to combat it. It also considers how cybercrime impacts people, businesses, and national security.[1]Nigeria has been dealing with terrorism for some years, owing in large part to the operations of Boko Haram and other extremist organisations. This article examines how these organisations' methods have evolved over time, how the government has responded, and the legal defences put in place to combat terrorism. It underscores the delicate line that must be established between national security needs and human rights protection. Moreover, Nigeria has seen continuous changes aimed at resolving concerns including crowded prisons, protracted pretrial detentions, and access to legal counsel amid calls for a more equitable and effective criminal justice system. Lastly, International collaboration is more important than ever in a time of transnational crime.[2]
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Introduction

Nigerian criminal law is a key component of the country's legal system and is used to define and prosecute crimes. Its growth has been diverse, affected by colonial legacies, current legal changes, and indigenous customary rules.[3] Legal professionals, academics, and politicians must have a solid understanding of the fundamental ideas and doctrines underlying Nigerian criminal law in order to properly navigate this complex legal environment.[4] Maintaining up with new developments is crucial in the fast-paced field of Nigerian criminal law. These patterns not only show how criminal activity is changing, but they also have a big impact on the development of the law and society dynamics. Being ignorant of these changes might make it more difficult to uphold citizens' rights and apply the law fairly. As a result, this article is devoted to exploring the constantly changing patterns in Nigerian criminal law and illuminating their profound relevance and effects.[5]

Moreover, Indigenous legal customs, colonial legacies, and post-independence legal changes have all contributed to Nigeria's criminal law history. Its origins may be seen in pre-colonial customary rules, and it continues through the colonial era's influence on the legal system. Its current shape has been influenced by significant turning points in legal history and legislative initiatives, offering insightful perspectives on the path that led to the present day. There is collection of guiding ideas and theories that forms the basis of Nigerian criminal law. These include the burden of proof, the presumption of innocence, and the notion of guilty mentality. In addition, the Penal Code Act and the Criminal Code Act are important pillars in the codification of substantive criminal laws, establishing the foundation for defining and prosecuting criminal offences. It is important to note the Administration of Criminal Justice Act 2015 which is a significant milestone in the administration of criminal justice in Nigeria has been domesticated by a good number of states to redefine the landscape of the Nigerian criminal justice system.

New developments in Nigerian criminal law pose particular difficulties, frequently highlighting the precarious balance between security needs and the defence of human rights. Given the importance of safeguarding human rights in all facets of law enforcement and criminal justice, finding this balance is a crucial matter. Furthermore, International collaboration is essential in combating transnational crime and terrorism in a world that is becoming more linked.[3] A crucial aspect of Nigeria's strategy is its involvement in international treaties and accords. This article emphasizes on the importance of staying updated on emerging trends in Nigerian criminal law for legal practitioners, scholars, and policymakers.

[1] Akande, J. O. (2018). *Nigerian Criminal Law: A Comparative Approach. Oxford University Press*.
[2] Okonkwo, R. (2020). Emerging Trends in Nigerian Cybercrime Law. Journal of Nigerian Law.
[3] Odoemelam, C. (2019). *Counterterrorism Measures and Human Rights in Nigeria. International Journal of Human Rights.*
[4] Nigerian Institute of Advanced Legal Studies. (2021). *Annual Report on Criminal Justice Reforms in Nigeria*.
[5] United Nations Office on Drugs and Crime. (2017). *Handbook on International Cooperation in Criminal Matters.*

Cybercrime and Digital Law

In recent years, the increase in cybercrime in Nigeria has become a serious worry, echoing a global trend in the digital era. Increased internet usage, the spread of smartphones, and the explosive expansion of online financial transactions are some of the factors that have contributed to this uptick in cybercriminal activity. In response to this growing threat, Nigeria approved the Cybercrime (Prohibition, Prevention, Etc.) Act in 2015 as an essential regulatory framework for dealing with many areas of cybercriminal behaviour.[1]

The Nigerian Cybercrime Act, introduced in 2015, contains a slew of legislation designed to address various sorts of cybercrime. It criminalises a wide range of cybercrimes, including cyberstalking, unauthorised access to computer systems, data manipulation, identity theft, and online fraud.[2] These crimes have legal consequences that are specifically stated in the law. The Act specifies penalties for cybercrime, which vary based on the gravity of the violation. A conviction for a common cybercrime, such as unauthorised access to computer systems, might result in a fine and/or jail time. Another common cybercrime, identity theft, may result in harsher punishments including lengthier jail terms. The Act offers a framework for the courts to evaluate the seriousness of the offence and impose suitable punishments in accordance. The Act also specifies procedures for the storage of digital evidence. Law enforcement authorities have the authority to take and safeguard electronic evidence during investigations thanks to Section 15 of the Nigerian Cybercrime Act. The protection of digital evidence from manipulation or destruction is ensured by this clause, which is essential for a successful prosecution.[3] Finally, The Act recognises the value of enhancing cybersecurity measures in addition to combatting cybercrimes. In order to do this, it creates the National Cybersecurity Fund, which is intended to assist programmes that attempt to improve cybersecurity throughout the nation. The initiatives, studies, and training that strengthen Nigeria's overall cyber resilience can be funded with the help of this fund.

Even with these regulations, it is still very difficult to prosecute cybercrimes in Nigeria. It is impossible to overstate how technically complicated cybercrimes are. Criminals that operate online frequently use sophisticated techniques to hide their identities and actions, making it challenging for law enforcement to find and capture them. Due to budget limitations, these agencies' and the judiciary's ability to efficiently investigate and prosecute cybercrimes is regularly tested. In addition, resources and training tailored specifically to combating cybercrimes are required. Although the Nigerian Cybercrime Act provides the necessary legislative framework, its successful execution depends on the ability of the judiciary, law enforcement, and digital forensics professionals.[4] This emphasizes how crucial it is to continue making investments in technology advancements as well as training programmes in order to provide professionals the tools they need to effectively tackle cybercrime.

Given the transnational nature of cybercrime and the capacity of cybercriminals to operate from various jurisdictions, international collaboration is undoubtedly crucial in tackling the global difficulties it poses. For the purpose of facilitating such collaboration in successfully combating cybercrime, a number of international regulations and agreements have been formed. The Budapest Convention on Cybercrime, commonly known as the Council of Europe Convention on Cybercrime, is an important international law.[5] The first international agreement addressing cybercrime expressly was this 2001 pact. It offers a framework for the collecting of electronic evidence, the harmonisation of national legislation, and reciprocal legal aid between member nations. Nigeria is not a party to this convention, although it has previously expressed interest in joining, which would improve its capacity to work with other nations on international cybercrime issues. Through the United Nations Office on Drugs and Crime (UNODC), the UN has also contributed to the fight against cybercrime. In order to help nations improve their legal systems and law enforcement capacity to combat cybercrime, UNODC has created a number of tools and services. These resources offer direction and best practises to promote international collaboration.[6]

Another noteworthy instance of an international group devoted to fighting cybercrime is INTERPOL's Cybercrime Directorate.[11] A Global Complex for Innovation (IGCI) run by INTERPOL focuses on digital forensics and cybercrime. It acts as a focal point for global cooperation, intelligence exchange, and capacity development in the struggle against cyberthreats. The shutdown of the Gameover Zeus in 2014 botnet serves as a compelling example of worldwide collaboration in the fight against cybercrime.[7] The infamous Cryptolocker

[1] Adibe R, Ike CC, and Udeogu CU, *"Press freedom and Nigeria's Cybercrime Act of 2015: An assessment" (2017) 52(2) Africa Spectrum 117.*
[2] Eboibi FE, "*A review of the legal and regulatory frameworks of Nigerian Cybercrimes Act 2015" (2017) 33(5) Computer Law & Security Review 700.*
[3] Awhefeada UV and Bernice OO, *"Appraising the Laws Governing the Control of Cybercrime in Nigeria" (2020) 8(1) Journal of Law and Criminal Justice 30.*
[4] Ajayi EFG, *"Challenges to enforcement of cyber-crimes laws and policy" (2016) 6(1) Journal of Internet and Information Systems 1.*
[5] Menon S and Guan Siew T, "*Key challenges in tackling economic and cyber crimes: Creating a multilateral platform for international co-operation" (2012) 15(3) Journal of Money Laundering Control 243.*
[6] Vincent NA, *"Victims of cybercrime: Definitions and challenges" in Cybercrime and its victims (Routledge 2017) 27-42.*
[7] Cieśla R, "*International co-operation in combating cybercrime. Selected issues" (2018) 47 Nowa Kodyfikacja Prawa Karnego 91.*

ransomware, which extorted money from victims by encrypting their data, was disseminated by this botnet.[1] Law enforcement from the United States and more than ten other nations worked together to successfully dismantle the botnet and apprehend Evgeniy Bogachev, who was running it.[2] The success of coordinated multinational action against cybercriminal networks was proved by this operation. Additionally, the 2017 "WannaCry" ransomware outbreak, which impacted organisations all across the world, sparked collaboration amongst nations to find the offenders.[3] Following the assault, cybersecurity experts, law enforcement officials, and international organisations worked together to trace the malware's sources and prosecute those involved.

Terrorism and National Security

Nigeria's protracted conflict with terrorism, especially the insurgency headed by Boko Haram, is a complex and entrenched situation that needs serious analysis. While the government of Nigeria and its foreign allies have taken attempts to tackle this threat. The Nigerian government has frequently utilised a military-first strategy to combat terrorism while ignoring the socioeconomic and political underpinnings of extremism.[4] In the northeastern area, problems including poverty, unemployment, corruption, and poor governance have not been appropriately addressed. Extremist ideologies have been able to survive and spread because of this failure to address their underlying roots.

Allegations of security force violations of human rights have occasionally harmed counter-terrorism operations. Significant concerns have been raised by reports of extrajudicial executions, arbitrary arrests, and forced disappearances. Such misuse can unintentionally increase recruitment to terrorist organisations while also undermining faith in governmental institutions. The Nigerian security system has frequently battled with deficiencies in personnel, tools, and intelligence capabilities. The efficacy of counterterrorism operations has been hampered by these flaws. Security flaws have been taken advantage of by Boko Haram to launch attacks and increase its power.[5]

Beyond Nigeria's boundaries, Boko Haram's activity may be found in close-by nations including Chad, Niger, and Cameroon. Effectively addressing cross-border dangers necessitates a regional response that is coordinated. However, historical rivalries and varied interests among these nations have made regional collaboration difficult. The capacity of Boko Haram to radicalise and attract people, notably young people, continues to be a major source of worry. In order to expand, the gang has taken advantage of community complaints and weaknesses. Comprehensive efforts in education, community involvement, and deradicalization programmes are required to combat radicalization.[6]

The efficiency and openness of aid and assistance programmes have come under fire, despite Nigeria receiving foreign help in its war against terrorism. Concerns concerning accountability have been raised in relation to the distribution of resources and its practical effects. As a result of the factionalization of Boko Haram, other breakaway organisations have emerged. It is difficult to discuss or come to a complete peace deal because of its intricacy.[7] The group's lack of united leadership makes it more difficult to have a meaningful conversation. The protracted conflict with Boko Haram has resulted in a severe humanitarian crisis, with millions of internally displaced persons (IDPs) and refugees in need of assistance. The humanitarian response has struggled to keep up with rising requirements, resulting in deplorable living conditions and vulnerability among impacted communities.

The Terrorism (Prevention) Act, passed into law by Nigeria in 2011, establishes a legal framework for dealing with terrorism-related acts. This statute defines terrorism as assaults against the state, persons, or property with the intent of threatening or coercing the government. Individuals found guilty of terrorism-related offences face harsh penalties, including the possibility of life in prison. The Terrorism (Prevention) Act has been amended throughout time to better Nigeria's counterterrorism activities.[8] These modifications have widened the scope of the statute to cover activities such as money laundering and recruitment to help or support terrorists. They have also given law enforcement agencies increased authority to investigate and prosecute terrorism-related acts.[9]

Nigeria has prioritized counter-terrorism activities, both military and non-military. The Nigerian military has conducted enormous operations against Boko Haram in an effort to diminish its authority and territorial

[1] Tsybulenko E and Suarez S, *"INTERPOL" in International Conflict and Security Law: A Research Handbook (TMC Asser Press 2022) 673-691.*
[2] Kyurkchiev NIKOLAY, Iliev ANTON, Rahnev ASEN, and Terzieva TODORKA, *"A new analysis of cryptolocker ransomware and welchia worm propagation behavior. some applications. iii" (2019) 23(2) Communications in Applied Analysis 359.*
[3] Ibid, note 14
[4] Iyekekpolo W.O., "*Boko Haram: understanding the context" (2016) 37(12) Third World Quarterly 2211.*
[5] Ibid, note 16
[6] Smith M, Boko Haram: *inside Nigeria's unholy war (Bloomsbury Publishing 2015).*
[7] Forest JJ, *Confronting the terrorism of Boko Haram in Nigeria (JSOU Press 2012).*
[8] "*Terrorism (Prevention) Act, 2011" (2011) 5(1) International Journal of Peace and Conflict Studies 77.*
[9] Omolaye-Ajileye A, "*Legal framework for the prevention of terrorism in Nigeria" (2015) 11 National Judicial Institute Law Journal 19.*

control. The administration has also worked to address the underlying causes of extremism through programmes to fight radicalization and rehabilitate former troops.[1] Nigeria's counter-terrorism tactics have not gone ignored, particularly when it comes to human rights issues. Concerns regarding the preservation of human rights in counter-terrorism operations have been raised as a result of reports of extrajudicial executions, arbitrary arrests, and the eviction of people. It continues to be very difficult to strike a balance between the necessity of security and the requirement to uphold human rights.

In order to combat terrorism, international law is essential, and Nigeria has actively participated in these efforts on a global scale. Nigeria is a party to several international agreements and treaties pertaining to anti-terrorism, including resolutions adopted by the UN Security Council. [2]To successfully combat terrorism, these international agreements offer a framework for international collaboration, extradition, and information sharing. Additionally, regional organisations like the African Union and international organisations like INTERPOL have contributed to the success of Nigeria's counterterrorism activities. In order to combat the cross-border terrorist threats presented by Boko Haram, cooperation with neighbouring nations including Chad, Niger, and Cameroon has been crucial.

Threats from terrorism are dynamic and ever-changing. Eventually, Boko Haram has modified its methods, which now include suicide bombings, kidnappings of schoolgirls, and attacks on civilian targets. The danger environment has become more complicated as a result of the group's connections to other international terrorist groups like ISIS.[3] Nigeria's reaction must also change as a result of these shifting dangers. In addition to boosting security measures, this entails tackling socioeconomic issues, enhancing intelligence-sharing procedures, and guaranteeing that counterterrorism actions adhere to global human rights norms.

Criminal Justice Reforms

The criminal justice system in Nigeria has to deal with a number of difficult problems that combined undermine its efficiency and jeopardise the protection of human rights. Overcrowding in correction centres, where inmates endure appalling living circumstances, has emerged as one of these significant problems. The issue of overcrowding in correction centres is a result of a complex interplay of elements, including the large number of people being held without charge before trial, drawn-out legal processes, and inadequate correctional facilities.[4] Moreover, the incidence of protracted pretrial detention is one of the system's most obvious signs of failure. Interestingly, a sizable majority of those incarcerated in Nigeria are those who have been detained for a long time, frequently longer than the terms they would have received if found guilty. The excessively long trial processes highlight the court system's inadequacies and constitute a clear breach of the dictum that justice delayed is justice denied.

The persistent case backlog afflicting Nigeria's legal system aggravates these problems. The backlog prolongs the administration of justice, putting both victims and suspects in an uncertain situation. Under the weight of this bureaucratic lethargy, access to justice as a fundamental human right remains elusive. One more obstacle for Nigeria's criminal justice system is the lack of resources, both in terms of money and human capital. Law enforcement organisations struggle with ongoing underfunding, a lack of skilled workers, and a lack of the resources required for efficient investigation and prosecution.[5] This lack of resources exacerbates structural inefficiencies and jeopardises the impartiality and integrity of the criminal justice system. Lastly, the ongoing complaints of violations of human rights are a worrisome part of Nigeria's criminal justice system. The system's credibility and integrity are questioned by claims of torture, arbitrary arrests, and extrajudicial deaths. These severe transgressions not only undermine public confidence in the legal system but also amount to flagrant abuses of citizens' fundamental rights, which is of grave concern to the larger human rights community.[6]

In recent years, Nigeria has initiated various reforms and measures aimed at addressing the challenges within its criminal justice system. The Nigerian government has implemented decongestion programmes in prisons, which has resulted in the release of several prisoners. Non-custodial sentence implementation and parole systems are two of these approaches. There have been initiatives to provide access to legal counsel, particularly for the poor. Pro bono services and legal aid programmes work to guarantee that those accused have access to legal representation. Nigeria has adopted ADR processes like arbitration and mediation more and more as a substitute for protracted judicial trials. These procedures aid in expediting case resolutions and reducing case

[1] Fidler DP, *"Cyberspace, terrorism and international law" (2016) 21(3) Journal of Conflict and Security Law 475.*
[2] Schrijver N and Van Den Herik L, "*Leiden Policy Recommendations on Counter-terrorism and International Law" (2010) 57(3) Netherlands International Law Review 531.*
[3] N Schrijver and L Van Den Herik, *"Leiden Policy Recommendations on Counter-terrorism and International Law" (2010) 57(3) Netherlands International Law Review 531.*
[4] Nwosu K.N., *"Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials; Plea Bargains; Non-Custodial Options and Restorative Justice" (2018).*
[5] Nwosu KN, "*Criminal Justice Reforms in Nigeria: The Imperative of Fast Track Trials; Plea Bargains; Non-Custodial Options and Restorative Justice" (2018).*
[6] Ogunode S, "*Criminal justice system in Nigeria: For the rich or the poor" (2015) 4(1) Humanities and Social Sciences Review 27.*

backlogs.[1] Practises of restorative justice are becoming more popular in Nigeria. These initiatives emphasise reparation and reconciliation while incorporating both victims and offenders in the resolution procedure. They encourage civic engagement and criminal offender rehabilitation. Nigeria has also started extensive criminal justice reforms, including changes to pertinent laws and rules. These changes are intended to speed up court proceedings, safeguard human rights, and boost system effectiveness.

A crucial milestone in criminal justice reform came with the 2019 passage of the Nigerian Correctional Service Act. This Act established the novel idea of non-custodial penalties, providing an alternative to imprisonment for some types of criminals. People who are found guilty of minor offences may instead be sentenced to non-custodial punishments including community service, probation, parole, or fines.[2] With regard to those who commit non-violent or less serious offences, this progressive legislative measure strives to lessen the burden on prisons. Nigerian legislation has made tremendous progress in establishing diversion practises within the juvenile justice system, although not fully addressing diversion programmes for adults. These initiatives aim to keep juvenile offenders out of the traditional criminal justice system by offering them community-based treatments, counselling, and rehabilitation instead of imprisonment. Although the use of adult diversion may not be as formally established, some jurisdictions are investigating its potential advantages as a way to lessen the number of people kept in pretrial custody. Furthermore, Plea agreements are covered by the Administration of Criminal Justice Act (ACJA) of 2015. Plea bargaining has the ability to speed up case resolution even if it is not specifically intended to decrease pretrial detention or congestion.[3] In return for lighter penalties, defendants may choose to collaborate with police or admit guilt to less serious offences. This strategy helps to decrease the number of people imprisoned in pretrial custody by expediting case resolution.

Initiatives to overhaul the criminal justice system in Nigeria are starting to have a beneficial effect on access to justice and human rights. These changes assist in safeguarding the rights of those accused and improving their access to a just and prompt judicial process by addressing problems like protracted pretrial detention and overcrowded prisons. However, obstacles still exist, and consistent efforts are required to guarantee that all Nigerians' access to justice is enhanced and that all human rights are completely upheld within the criminal justice system.

Human Rights and Criminal Law

Significant obstacles exist at the point where criminal law and human rights collide in Nigeria, notably in relation to police brutality, torture, and extrajudicial murders. Both nationally and globally, these difficulties have sparked serious worries:

1. Nigeria has struggled with widespread instances of police brutality, which are frequently characterised by the use of excessive force, wrongful arrests, and torture. The rights to life, freedom from torture, and liberty have all frequently been violated.[4]
2. The use of torture by law enforcement and, in certain instances, criminal gangs is a problem that plagues Nigeria's criminal justice system. International human rights treaties routinely breach the right to be free from torture and cruel or degrading treatment.
3. Security forces' extrajudicial deaths have been a major source of worry. These murders frequently take place unlawfully and violate people's right to life. Such acts go against the basic justice values that criminal law is supposed to defend.[5]

The current legal regime in Nigeria has made efforts to remedy these abuses of human rights and encourage accountability. The Anti-Torture Act, which makes torture a crime and imposes harsh punishments on perpetrators, was approved by Nigeria in 2017.[6] This legal framework is an important step in tackling the problem of torture in the nation. Additionally, the Nigerian government promised to overhaul the police force in response to the #EndSARS demonstrations in 2020. While still in progress, these improvements show a dedication to stopping police violence and making officers responsible for their actions.[7]

The fact that Nigeria is a member to several of these agreements, international human rights treaties play a significant role in Nigerian law. The primacy of international human rights treaties and accords is acknowledged

[1] Ajah BO, Nnam MU, Ajah IA, Idemili-Aronu N, Chukwuemeka OD, and Agboti CI, *"Investigating the awareness of virtual and augmented realities as a criminal justice response to the plight of awaiting-trial inmates in Ebonyi State, Nigeria" (2022) 77(2) Crime, Law and Social Change 111.*

[2] Ladapo OA, "*Effective investigations, a pivot to efficient criminal justice administration: Challenges in Nigeria" (2011) 5 African Journal of Criminology & Justice Studies.*

[3] Ugbe RO, Agi AU, and Ugbe JB, *"A critique of the Nigerian Administration of Criminal Justice Act 2015 and challenges in the implementation of the Act" (2019) 4 AFJCLJ 69.*

[4] Madubuike-Ekwe NJ and Obayemi OK, "*Assessment of the role of the Nigerian Police Force in the promotion and protection of human rights in Nigeria" (2018) 23 Ann. Surv. Int'l & Comp. L. 19.*

[5] Nnadi I, "*An insight into violence against women as human rights violation in Nigeria: A critique" (2012) 5 J. Pol. & L. 48.*

[6] Uwazuruike AR, *"# EndSARS: the movement against police brutality in Nigeria" Harvard Human Rights Journal (2020).*

[7] Babatunde E, "*Torture by the Nigerian police force: International obligations, national responses and the way forward" (2017) 2 Strathmore L. Rev. 169.*

by the Nigerian Constitution. Important treaties have been domesticated and are upheld by Nigerian courts, including the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) and the International Covenant on Civil and Political Rights (ICCPR). [1]

Nigerian efforts to establish responsibility for violations of human rights entail a number of crucial steps. Civil society organisations and victims of human rights violations frequently seek redress in the courts. Holding offenders accountable requires legal actions, investigations, and trials. Advocates for human rights and those who demand accountability have benefited greatly from the work of civil society organisations and activists. Police violence and extrajudicial executions have received international attention because to campaigns like #EndSARS. Nigeria has come under pressure from the international community, especially foreign governments and human rights organisations, to address violations of human rights. The degree to which the government is prepared to solve these problems can be significantly impacted by this external criticism.

Nigeria presents major difficulties when it comes to balancing criminal justice with human rights, notably in regards to police brutality, torture, and extrajudicial murders. There is hope for correcting these serious crimes and advancing a judicial system that supports and respects human rights values thanks to recent legal advances, the influence of international human rights treaties, and continued efforts to establish accountability.

International Cooperation in Criminal Matters

In order to combat transnational crimes and preserve international security, international cooperation is of utmost importance. Criminal activity that crosses national borders frequently includes terrorism, cybercrime, drug trafficking, and human trafficking. Effective international collaboration is required to tackle these crimes. If international processes are not in place, criminals who abandon their home nations may be able to avoid prosecution.[2] Cooperation makes it possible to extradite perpetrators and bring them to justice, ensuring that they are held accountable for their deeds. For the purpose of preventing, identifying, and pursuing criminal activity, international information exchange is essential. Collaboration makes it possible to share information and proof. Cooperation might be advantageous for nations with different resources and experience. Sharing information and resources helps law enforcement organisations better battle complex crimes. International collaboration is essential to the success of multilateral accords and conventions, such as those addressing cybercrime and counterterrorism.[3]

To strengthen its attempts at international criminal law cooperation, Nigeria has entered into extradition treaties and accords governing mutual legal aid. Nigeria can ask for the return of fugitives who have committed crimes in the nation but escaped abroad according to extradition treaties. These accords outline the requirements and legal process for extradition.[4] Through agreements on mutual legal aid, Nigeria can work with other nations to exchange information about criminal cases, acquire evidence, and interview witnesses. Investigative work and legal actions are aided by this.

INTERPOL offers member nations a forum for exchanging vital information on criminal activity, offenders, and criminal trends. INTERPOL manages databases that help law enforcement authorities throughout the world track down criminals, recover stolen goods, and locate missing people. In order to combat many types of crime, such as terrorism, drug trafficking, and cybercrime, INTERPOL organises worldwide police operations. [5] Through agreements, initiatives, and cooperative efforts, other international organisations, like the United Nations and regional groups like the African Union, also contribute to developing international cooperation in criminal law.

Mutual legal aid and extradition procedures may become more challenging due to various national legal systems and norms. Moreover, political considerations may have an impact on extradition decisions, causing delays or refusals to extradite people. There are resources and skill gaps between nations can make collaboration difficult. It is difficult to strike a balance between the necessity for information exchange and worries about privacy and data protection.[6]

[1] Joshua IA, Dangata YY, Audu O, and Nmadu AG, "*Human rights and Nigerian prisoners-are prisoners not humans" (2014) 33 Med. & L. 11.*

[2] Vermeulen G and De Bondt W, "*Rethinking international cooperation in criminal matters in the EU: moving beyond actors, bringing logic back, footed in reality" (2012).*

[3] Babatunde EO and Adbulsalam MM, "*Towards Attaining Sustainable Development Goals in a 'Fantastically Corrupt' World: Issues in international Legal Framework on Mutual Legal Assistance for Recovery of Proceeds of Corruption and the Nigerian Act" (2021) 12 Beijing L. Rev. 691.*

[4] NGARA CO, *"Nigerian National Assembly and domestication of treaties in Nigeria's Fourth and fifth Assembly" (2017) 2(2) Socialscientia: Journal of Social Sciences and Humanities.*

[5] Cherniavskyi SS, Holovkin BM, Chornous YM, Bodnar VY, and Zhuk IV, "*International cooperation in the field of fighting crime: Directions, levels and forms of realization" (2019) 22 J. Legal Ethical & Regul. Isses 1.*

[6] Rahman MH, *"Practical Challenges in Cross-border Cybercrimes: Prosecutors and Investigators Perspectives" (2021) Bangladesh Journal of Legal Studies (BJLS), (ISSN: 2415-136X)(Online).*

Conclusion

In the end, Nigeria's criminal law system has undergone a substantial modification in reaction to recent developments. The Nigerian legal system has evolved to confront new and complicated dangers, from the advent of cybercrime to the ongoing difficulties posed by terrorism. Important legislative proposals and reforms have been put out, emphasizing how crucial it is to keep up with these changes. It is impossible to emphasize the value of the legal system's flexibility and constant change. The laws governing illegal behaviour must change as the nature of such behaviours does. Because to its flexibility, the law is able to protect citizens' rights, promote justice, and preserve social order.

In order to solve new difficulties, policymakers, lawyers, and civil society have a crucial role to play. Collaboration is essential, and this includes resource distribution, complete legislative changes, and the advancement of human rights. Together, these parties should strike a balance between security and civil freedoms, advancing a strong and fair judicial system. Subsequently, the dynamic character of Nigerian criminal law reflects the larger global setting, where developing criminal practises and technology breakthroughs continuously alter the legal environment. Nigeria may overcome these obstacles and create a criminal justice system that successfully serves its population in the future by embracing adaptation, pursuing legal changes, and placing a priority on the preservation of human rights.

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Enlightened Shareholder Value Principle in the UK Companies Act 2006: What Lesson for a Legal Approach to CSR in Nigerian?

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Abstract
The original emergence of corporate social responsibility (CSR) as a call to companies to consider the interests of their external stakeholders out of charity or philanthropy now reverberates in the context of legal duties of companies' directors. A foremost effort at achieving the objective of making CSR part of the legal duties of companies' directors is provided under section 172 of the United Kingdom Companies Act 2006, which provides for the ''enlightened shareholder value'' principle. This paper critically analyses the statutory enlightened shareholder value principle and determines the purpose, implication, and significance of the principle in relation to a legal approach to CSR in other common law jurisdictions such as Nigeria.
Keywords: Corporate social responsibility, Enlightened shareholder value, Companies Act 2006, duties of directors, Companies Act 2020,
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1. Introduction

Corporate social responsibility (CSR) has evolved significantly since the 1960s as a company's ethical acknowledgement and commitment to serve wider interests beyond those of its members or shareholders. A company's business operations impact the interests of people who are not its members or within the company, including the location and the environment where the company operates. These outside interests constitute the stakeholders of a company, as distinct from the company's shareholders. The original emergence of CSR as a call to companies to recognize and serve the interests of their stakeholders out of charity or philanthropy now reverberates in the context of the legal duties of company directors.

At common law, the idea that directors owed their duties only towards the maximization of profits for the company's shareholders expanded to include the recognition of the need to consider the interests of the company's other stakeholders. The common law position was succinctly captured by Bowen LJ in the case of *Hutton v West Cork Railway*[1] that the ''law does not say that there are to be no cakes and ale, but that there are to be no cakes and ale except such as are required for the benefit of the company''. This implied that directors' focus on profit maximization for shareholders as the only purpose of a company did not prohibit directors from considering the interests of other stakeholders.

Directors were not prohibited from taking into account the interests of other stakeholders as long as it was a means to the end of maximizing shareholders' gains in the long-term. The common law position therefore allowed directors to exercise the discretion to consider other stakeholders' interests as a means of promoting long-term shareholder value[2]. However, the focus on profit maximization for companies' shareholders, otherwise referred to as shareholders primacy, aligns more with the foundational purpose of a company than the stakeholder theory which seeks to project the interests of those who impact or are impacted by the business operations of the company.

Consequently, the question as to whether directors should necessarily consider other stakeholders' interests in addition to shareholders interests remains unresolved since the notable Berle-Dodd debate in about the first quarter of the 20th century. The debate centred around the responsibility of companies towards its external stakeholders, especially in light of the foundational purpose of a company, which is only to make profits for its members or shareholders. While Berle argued in favour of the shareholder primacy theory – that the responsibility of companies' directors is only to maximize profits for shareholders[3], Dodd had countered with the stakeholder theory – that directors must also be responsible for other constituencies such as employees, customers, local communities, and the public[4].

A middle ground that seems to have emerged from the debate in this 21st century is that the realization of

[1] (1883) 23 Ch D 645, at p. 673
[2] Mihir Naniwadekar and Umakanth Varottil, (2016). The Stakeholder Approach Towards Directors' Duties Under Indian Company Law: A Comparative Analysis. NUS Working Paper 2016/006. NUS Centre for Law & Business Working Paper 16/03, p. 4. Electronic copy available at: https://ssrn.com/abstract=2822109
[3] AA Berle, (1931). Corporate Powers as Powers in Trust. 44 Harv L Rev 1049
[4] E Merrick Dodd, (1932). For Whom are Corporate Managers Trustees? 45 Harv L Rev 1145

short-term profit maximization for shareholders may narrow directors' focus on shareholders' interests, however, a long-term sustainable view of shareholder interests will inevitably require directors to consider the interests of other stakeholders[1]. This middle ground approach between the contending shareholder and stakeholder theories appears to provide an influential rationale for CSR in this contemporary time. CSR finds its roots in the stakeholder theory which is opposed by the foundational purpose of a company, and by implication, the shareholder primacy theory.

As a result of its stakeholder basis, CSR remains at the realm of voluntarism and moral suasion of companies rather than in the spheres of corporate legal obligations to stakeholders[2]. A foremost attempt at effectuating the middle ground approach and achieving the objective of making CSR part of the legal duties of companies' directors is provided under the United Kingdom Companies Act 2006, which extended the scope of directorial considerations for maximizing profits for shareholders. Section 172 of the UK Companies Act 2006 provides for the ''enlightened shareholder value'' principle[3]. This statutory principle requires company directors to have regard to the wider interests of various stakeholders when exercising their power on behalf of the company and its shareholders.

This provision of the Companies Act 2006 does not by any means constitute a direct statutory enactment of CSR in the UK. However, in the general absence of statutory CSR in most common law jurisdictions the provision on enlightened shareholder value principle under the Companies Act 2006 offers an exception worthy of consideration for its potential effect on instituting a legal regime for directorial practice of CSR. It is to that end that this paper critically examines the principle of enlightened shareholder value as provided in section 172 of the UK Companies Act 2006 to determine the purpose, implication, and significance of the principle in relation to a legal approach to CSR in other common law jurisdictions such as Nigeria.

2. Shareholder Value in the Context of CSR

It has been noted elsewhere that ''the conflicting proposition between shareholder primacy and the stakeholder theory gives CSR a dubious status under common law''[4]. Generally, under common law shareholders were considered as the primary beneficiaries of the company and therefore directors' fiduciary duties were to be performed in the shareholders' interest and for the maximization of shareholder value[5]. The common law contractarian theory of the company regarded directors as contractual agents of the shareholders, with fiduciary obligations to maximize returns on shareholders' investments[6].

The only exception, as indicated in the opinion of Bowen LJ in *Hutton v West Cork Ry. Co*[7], was that directors could consider the interests of other stakeholders to the extent that such consideration served the shareholders' interests in the long term. However, in the decade following the Berle-Dodd debate, Lord Greene had stated in the case of *Re Smith and Fawcett*[8] that directors must exercise their discretion *bona fide* ''in the interests of the company, and not for any collateral purpose''. Indeed, the legal implication of the *ultra vires* doctrine as established in the case of *Ashbury Railway Carriage & Iron Co. v Riche*[9] would invalidate directors' exercise of corporate powers for any purpose other than to achieve the business objects of the company.

In addition, despite the rule laid down in the case of *Foss v Harbottle*[10] which established the separate legal personality of a company, the power and influence of shareholders such as the power to appoint and remove directors allowed shareholders to appropriate the interest of the company as equivalent to their own interests. As financial contributors to the formation of the company and its capital, shareholders under common law were

[1] See generally, Clarke, C., & Friedman, H. H. (2016). Maximizing shareholder value: a theory run amok. Journal of Management, 10(4), 45–60; Stout, L. A. (2012). The shareholder value myth: how putting shareholders first harms investors, corporations, and the public. San Francisco: Berrett-Koehler Publishers; A Keay, (2010). Stakeholder theory in corporate law: Has it got what it takes? 3/9, Richmond Journal of Global Law and Business 249; Martin, J., Petty, W., & Wallace, J. (2009). Shareholder value maximization: is there a role for corporate social responsibility? Journal of Applied Corporate Finance, 21(2), 110–118.

[2] Babajide S. Shoroye, (2022). Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria. Journal of Poverty, Investment and Development. Vol. 61, p. 26

[3] Harper Ho, V. (2010). Enlightened shareholder value: Corporate governance beyond the shareholder-stakeholder divide. Journal of Corporation Law, 36(1), 59–112; J. Yap, (2010). Considering the Enlightened Shareholders Value Principle. 31 Company Lawyer 36; S. Kiarie, (2006). At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take? 17 I.C.C.L.R. 329; D. Fisher, (2009). The Enlightened Shareholder – Leaving Stakeholders in the Dark: Will Section 172(1) of the Companies Act 2006 Make Directors Consider the Impact of Their Decisions on Third Parties? 20 I.C.C.L.R. 10

[4] Babajide S. Shoroye, (2022). Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria. op.ct, , p. 28

[5] Lance Ang, (2019). Directors' Duties and Stakeholder Interests: A Convergence Towards a Common Law 'Enlightened Shareholder Value' Model? NUS Centre for Asian Legal Studies Working Paper 19/11, at p. 2

[6] Stephen M Bainbridge, "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Nw. U.L.Rev. 547

[7] [1883] 23 Ch. Div. 654, 673

[8] [1942] 1 Ch 304 (CA) 306

[9] 1875) L.R. 7 HL; The common law ultra vires doctrine applies to void any acts performed on behalf of a company if such acts were beyond the company's business or objects as set out in its charter or where the acts are prohibited by statute.

[10] (1843) 2 Hare 461, 67 ER 189

effectively treated as the ‘‘owners’’ of the company for whose ultimate benefit the company should be managed[1].

Consequently, within established rules and doctrines of common law, shareholder primacy prevailed, untrammelled by the stakeholder theory. Therefore, arguments between supporters of shareholder primacy and proponents of stakeholder theory make more meaning when examined in the context of CSR. The wide range of social, economic, ethical and environmental aspects of life and the society are implicated in the concept of CSR. Proponents of stakeholder theory argue that these different aspects of human and societal lives should conduce to a company’s sense of social responsibility towards its external stakeholders. And that this sense of CSR ought to be expressed through directors who manage the company.

It is in this context that Dodd originally noted that ‘‘there is reality and not simply legal fiction’’ in the proposition that directors of a company are ‘‘trustees’’ for the company and not merely for its shareholders, and as such they owe a social responsibility to the company’s stakeholders, in addition to its shareholders[2]. Dodd’s proposition laid the foundation for stakeholder theory which adherents of Berle’s school of thought attempted to destroy but upon which strong scholarship has been built since the 1970s when Friedman famously wrote in the New York Times an article titled; ‘‘The Social Responsibility of Business Is to Increase Its Profits’’[3].

Friedman argued that it undermined the foundation of a free society to accept that directors should owe a ‘‘social responsibility other than to make as much money for their stockholders as possible’’, and that ‘‘there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits’’[4]. But a contrary argument developed later by the stakeholder theorist, Freeman, was that if business organizations are to be successful in the current and future environment, their managers ‘‘must take multiple stakeholder groups into account’’[5].

Instructively, despite the Berle-Dodd debate and the Friedman-Freeman counter arguments, the defining question has remained as framed by Hayek that, for a company; ‘‘In whose interest ought it and will it be run?”[6]. And the answer has remained that the original purpose of a company would not be served if ‘‘social consideration’’ determines corporate expenditure, or if corporate funds were expended on ‘‘specific ends other than those of a long-term value maximization for the company and its shareholders’’[7]. Therefore, as it has been noted elsewhere[8], ‘‘there is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value’’.

The ‘‘enlightened shareholder value’’ approach focuses on long-term value maximization for shareholders while taking into consideration the interests of other stakeholders for the purpose of promoting the shareholder value[9]. But how coterminous is CSR with long-term shareholder value maximization? In order to determine the implication and significance of the principle of enlightened shareholder value for CSR, including its conceptual or functional relationship, it is apposite to understand the purpose of the principle as provided in section 172 of the UK Companies 2006.

2.1 Enlightened shareholder value principle

Essentially, enlightened shareholder value (ESV) principle is to improve directorial decision-making concerning the interests of stakeholders of a company, in addition to the interests of the company and its shareholders. ESV principle represents a statutory attempt to strike a middle ground or a balance between shareholder primacy and stakeholder theory. This is in recognition that effective CSR management is not incompatible with shareholder value, and having wider stakeholders’ interests can be the key to long-term financial performance of a company[10]. As Andreadakis pointed out, ESV approach does not prioritise the interests of other stakeholders at the expense of shareholders[11]. It is that all stakeholders benefit from a long-term view and hence the sustainability of the company.

Prior to the formal enactment of the UK Companies Act 2006 which provides for ESV principle in section 172, the Company Law Review Steering Group, the body which reviewed the UK company law leading to the

[1] Lance Ang, (2019). Directors’ Duties and Stakeholder Interests: A Convergence Towards a Common Law ‘Enlightened Shareholder Value’ Model? op.cit
[2] E. Merrick Dodd, Jr., “For Whom Are Corporate Managers Trustees?”, op.ct at p. 119
[3] Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES, Sept. 13, 1970
[4] Ibid, at p. 7
[5] R. Edward Freeman, et al., (2010). Stakeholder Theory: The State of the Art (Cambridge: Cambridge University Press) at p. 9
[6] F Hayek (1985). “The corporation in a democratic society: In whose interest ought it and will itbe run?” in M Anshen and G Bach (eds) Management and Corporations (1985, McGraw-Hill) 97 at 100
[7] ibid
[8] Henry Hansmann and Reinier Kraackman, (2004). “The End of History for Corporate Law” in Jeffrey N. Gordon and Mark J. Roe (eds), Convergence and Persistence in Corporate Governance (Cambridge: Cambridge University Press) at p. 33
[9] Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360
[10] Maeve O’Connell and Anne Marie Ward, (2020) Shareholder Theory/Shareholder Value. https://www.researchgate.net/publication/340620401
[11] Stelios Andreadakis, (2013). Enlightened Shareholder Value: Is It the New Modus Operandi for Modern Companies? https://www.researchgate.net/publication/286341508

Act, had made a persuasive case for a middle ground approach. The conclusions and recommendations of the Steering Group provide an illuminating contextual understanding of the rationale and purpose of the provisions on ESV principle in the Companies Act 2006. In its White Paper under the heading, ‘‘Enlightened Shareholder Value’’, the Steering Group noted that the ultimate objective of companies as currently enshrined in law was to generate maximum value for shareholders[1].

The Steering Group further noted that while supporters of shareholder primacy argued that maximum value for shareholders could not be achieved without companies building long-term relationships, ‘‘the law as currently expressed and understood fails to deliver the necessary inclusive approach’’[2]. Therefore, the Steering Group recommended the introduction of ESV principle for the purpose of retaining the fundamentals of directors’ duties and to correct the approach of some directors who only manage companies for the short term and narrow interests of members and at the expense of wider interests and longer-term approach[3].

According to the Steering Group, in many situations directors should adopt a broader, inclusive, and longer-term approach to their role as there was nothing compelling them to focus on only the short term. The Steering Group wanted to ensure that directors recognised the fact that they have, in appropriate cases, an obligation ‘‘to have regard to the need to build long-term and trusting relationships with employees, suppliers, customers and others in order to secure the success of the enterprise over time’’[4]. Notably, as Keay and Iqbal opined, the Steering Group did not envisage the ultimate objective of the company being changed from shareholder value, because ESV principle would simply ensure that stakeholder interests are to be considered in achieving the ultimate objective[5].

Thus, ESV principle while clearly based on shareholder value, is to eschew ‘‘exclusive focus on the short term financial bottom line of companies and seeks a more inclusive approach that values the building of long-term relationships’’[6]. The UK Government fully agreed with ESV principle as recommended by the Steering Group and embedded it in the Companies Act 2006. The purpose is to ensure that that directors must promote the success of the company for the benefit of its shareholders, and that this can only be achieved by taking due account of both the long-term and short-term interests, including wider stakeholders’ interests such as employees, customers, suppliers, community, and the environment.

The provisions on ESV principle contained specifically in section 172(1) of the Companies Act 2006 are reproduced below *in extenso* for easy reference. Captioned as the ‘‘Duty to promote the success of the company’’ the section provides that:

A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to;

a) the likely consequences of any decision in the long term
b) the interests of the company's employees
c) the need to foster the company's business relationships with suppliers, customers and others
d) the impact of the company's operations on the community and the environment
e) the desirability of the company maintaining a reputation for high standards of business conduct, and
f) *the need to act fairly as between members of the company.*

The above statutory provisions are clear enough to the extent that they require company directors to have regard to other stakeholders’ interests as a means of ensuring the company’s success and enhancing the shareholder value over the long term. The inclusion of all the interests identified in section 172(1) (a)-(d) is a formal recognition under the UK company law that both the shareholders and other stakeholders have residual risks, and their interests require recognition and consideration. As noted by Kabour, ESV principle as contained in the section has curated the path towards a more stakeholder-centric construct of UK company law[7]. While ESV principle does not add much to the general duties of directors, its significance is that it warranted a statutory footing for the consideration of different stakeholders’ interests in an explicit form for the first time in UK legal history.

Instructively, the interests which directors are obligated to consider as listed in section 172(1) (a)-(d) are the external stakeholders of a company and these stakeholders constitute the objects of CSR. Under the statutory provisions, directors are obliged to act in a way that benefits the company’s shareholders, however, in their decisions-making process they must take account of these external stakeholders which include employees,

[1] Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework, 1999, London, para 5.1.12
[2] ibid
[3] Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework. op.cit, para 5.1.17
[4] Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework. op.cit, para 5.1.12
[5] Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. Journal of Business Law, 2019 (4). pp. 304-327
[6] Company Law Review, Modern Company Law for a Competitive Economy: Developing the Framework, 2000, London, para. 2.21
[7] Reem Kabour, (2021). What effect does the enlightened shareholder value principle in the Companies Act 2006 have on the corporate objective of UK companies? IALS Student Law Review, Vol. 8, Issue 2, pp. 13-29

customers, suppliers, community, the environment, and others; an inclusive and long-term account of the implications of their decisions on these other stakeholders thereby establishing a reputation for high standards of business conduct.

The requirement for directors to ‘‘have regard’’ to these wider stakeholders’ interests leads to ESV because in the long-term it is believed that such directorial considerations would lead to more profitability of the company for its shareholders[1]. The requirement also clarifies any confusion between the interests of shareholders and those of stakeholders as not mutually exclusive but interdependent. Apparently, the provisions on ESV bring stakeholders’ interests within the context of obligatory CSR because directors have the statutory duty to consider the respective stakeholders’ interests. But in effect, how does the ESV principle relate to CRS in functional or conceptual respects.

2.2 Relationship between CSR and ESV Principle

The ESV principle has attracted criticisms from those who argued that it ‘‘brings little or nothing to the table’’[2]. Others have argued that the statutory ESV ‘‘merely constitutes a rebranding of shareholder primacy, which has often been seen as a harsh aspect of capitalism, devoid of any moral basis to make it more palatable to those who adhere to stakeholderism’’[3]. A substantive analysis of ESV principle in the context of the shareholder primacy/stakeholder theory debate and the procedural elements limiting its enforceability, which constitute the focus of much of the criticisms[4], are beyond the scope of this paper. The present focus is the potential impact of the principle on a comparative approach to CSR between two common law jurisdictions.

It is submitted that the argument for a deserving place for stakeholders’ interests in directorial management of the company in the long-term as conceptualized in ESV principle is related to the concept of CSR or can be used to ground it because such argument advocates for the interests of outsiders to the company; those considered as stakeholders because they are impacted or can impact the company. In fact, there is no significant distinction between arguments for ESV principle and for CSR under the stakeholder theory. As Martin et. al noted, CSR and stakeholders’ interests have the potential to be complementary undertakings that result in a virtuous circle in which doing good helps companies to do well, and doing well provides the wherewithal to do more good’’[5].

The ESV principle is effectively a ‘‘business case for CSR’’ in terms of the driving forces of CSR such as being a marketing strategy which benefits the company in the long term and creates profitable or respectful relationships with the company’s other stakeholders[6]. In this CSR sense, ESV principle may be considered as promoting a form of marketing strategy for companies’ directors to aim at competitive advantage and successful improvement of their bottom line, corporate reputation and public good-will, all to the benefits of the company and its shareholders.

It has been shown elsewhere how the CSR profile of a company enhances it corporate and brand image with positive effect on external stakeholders including higher patronage of the company’s products or services, increase in employees’ productivity, attraction of new customers, improvement in relations with investors and more access to capital, and a mutually beneficial relationship with host communities[7]. This paper’s argument that ESV principle approximates to the business case for CSR is justifiable because the requirement of ESV under section 172(1) of the Companies Act 2006 is considered as a ‘‘Duty to promote the success of the company’’.

Therefore, the purpose of ESV principle is to ensure the success of the company in the longer-term based on due consideration of the interests of its stakeholders besides those of its shareholders. This is not conceptually and functionally different from the business case for CSR where companies develop CSR agenda not because of an altruistic desire to only assist in improving the socio-economic welfare and conditions of external stakeholders but only to make more profit[8]. Given the conceptual and functional relationship between CSR and ESV principle, a pertinent question that emerges is: In whose interest did the UK Government enact ESV

[1] Company Law Review, Modern Company Law for a Competitive Economy: Strategic Framework. op.cit, para 5.1.17
[2] Elaine Lynch, (2012). Section 172: A ground-breaking reform of directors’ duties, or the emperor’s new clothes? Company Lawyer, (33(9), 196-203
[3] Andrew Keay, The Enlightened Shareholder Value Principle and Corporate Governance (Routledge 2013), p. 278
[4] See Maeve O’Connell and Anne Marie Ward, (2020) Shareholder Theory/Shareholder Value. https://www.researchgate.net/publication/340620401; Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. Journal of Business Law, 2019 (4). pp. 304-327; Stelios Andreadakis, (2013). Enlightened Shareholder Value: Is It the New Modus Operandi for Modern Companies? https://www.researchgate.net/publication/286341508; Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360
[5] Martin, J., Petty, W., and Wallace, J. (2009). Shareholder value maximization: is there a role for corporate social responsibility? Journal of Applied Corporate Finance, 21(2), 110–118
[6] Zhao, J (2017) Promoting More Socially Responsibly Corporations through a Corporate Law Regulatory Framework. Legal Studies, 37 (1). pp. 103-136
[7] See Babajide S. Shoroye, (2022). Charitable Donations and Corporate Philanthropy: Examining the Trend in the Law Relating to Corporate Social Responsibility in the UK and Nigeria. op.ct, , p. 26
[8] Geethamani, (2017). Advantages and disadvantages of corporate social responsibility, op.cit, at p. 374

principle, the company's, the shareholders', or the stakeholders'?

As a company's consideration of the interests of external stakeholders, CSR has originally and traditionally been voluntary, but ESV principle as provided in section 172(1) of the UK Companies Act 2006 imposes a legal obligation on companies' directors to practise CSR. Ostensibly, it follows that the statutory ESV principle is in the interest of stakeholders. But under the provisions of section 172(1), companies are obligated to pursue shareholders' interests with a long-term view that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholders' interests[1].

The obligation created in section 172(1) has been described as imposition of a duty ''to genuinely take the relevant matters into account'' in order to reconnect ''the corporate vehicle with the society in which it operates''[2]. Consequently, in line with the middle ground approach as recommended by the Steering Group, ESV principle is neither in the interest of shareholders nor stakeholders, but the company as a separate legal personality. Therefore, in concept and purpose, the UK statutory ESV principle has not meant any significant changes for both shareholders and stakeholders within their original context of CSR.

In the original context, companies practise CRS voluntarily but with underlying motive for business advantage. And under the statutory ESV principle, directors are obligated to perform the same duty irrespective of motive. In both cases the objective is the same – a consideration of the interests of other stakeholders of the company, whether implied as in voluntary CSR or express as in statutory ESV principle. It is therefore a consistent conceptual and functional relationship between CSR and statutory ESV principle.

3. CSR and ESV Principle under Nigerian Law

The most that may be gleaned from the relationship between CSR and ESV principle in the UK company law is that they are consistent, even complementary, in concept and purpose, and in social and legal contexts. For instance, in compliance with the provisions of section 172(1) (a)-(d) directors would effectively be practising CSR, and any directorial practices of CSR would fall squarely within the ambit of the statutory provisions. This is not the case in Nigeria where the ''shareholder primacy-centric common law position''[3] is retained in the latest Companies Act 2020 and CSR remains a voluntary practice at the discretion of directors.

There is no ESV principle in the Nigerian Companies Act 2020 and provisions that are relevant to CSR are only inferable to the extent that such provisions require companies to have regard for the interests of other stakeholders, in addition to the interests of shareholders of companies. Section 305(3) of the Companies Act 2020 provides that in acting in the best interests of the company, directors ''shall have regard to the impact of the company's operations on the environment in the community where it carries on business operations''.

In section 305(4), it is further provided that matters to which directors are to have regard in the performance of their duties ''include the interests of the company's employees in general, as well as the interests of its members''. Thus, besides a consideration of the impact of the company's operations on the environment and local community, directors are only required to consider the interest of the company's employees. This is a relatively small number of external stakeholders' interests to be considered by directors, when compared with section 172(1) of the UK Companies Act 2006 which identifies five different stakeholders' interests.

Significantly, reference to long-term view of the company in section 172(1)(a) is essential to the consideration of stakeholders' interests because that is when the impact of the company's business operations on external stakeholders is likely to be manifested. This defining element of statutory ESV principle is not reflected in section 305(3) and (4) of the Nigerian Companies Act 2020. The long-term success of a company, as envisaged under the statutory ESV principle, is invariably dependent on the well-being of all of its stakeholders. In the absence of a term of operation within which directors must consider the interests of stakeholders, the implication is that directors are not obligated to do so whether in the short or long term.

It is curious that Nigeria laid back instead of stepping forward in the direction of more effective practice of CSR with the UK statutory ESV principle, given that the Companies Act 2020 derived substantially from the UK Companies 2006[4]. The result of Nigeria's failure to adopt the statutory ESV principle is that directorial consideration of wider stakeholders' interest in corporate decision-making for the purpose of enhancing the practice of CSR in Nigeria has not moved from the realm of voluntariness to the sphere of legal duties of directors.

[1] D. Millon, (2012). 'Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose without Law', op.cit, at p. 58

[2] Rt. Hon. Lady Justice Mary Arden, (2007). "Companies Act 2006 (U.K.): a new approach to directors' duties" 81 Australian L.J. 162 at 168 and 173

[3] Nojeem Amodu, (2020). Stakeholder Protection and Corporate Social Responsibility from a Comparative Company Law Perspective: Nigeria and South Africa, Journal of African Law, 64, 3, 425–449, at p. 438

[4] Nigerian Companies Act 2020 is a wholesale adoption of the provisions of the UK Companies Act 2006, with minor omissions especially of provisions that reflect trend or modern corporate practices. For more on Nigeria's curious omissions of some key provisions of the UK Companies Act 2006, see Babajide S. Shoroye, (2023). Delimiting the duties and powers of company administrator under the companies and allied matters act 2020. International Journal of Law, Policy and Social Review, Volume 5, Issue 3, 2023, Page No. 137-143

Despite the generally acknowledged importance of CSR for all stakeholders – the company, shareholders, and wider interests – it remains at the whims and caprices of directors in Nigerian companies; practised selectively for business advantage rather than for its intrinsic social value. The Companies Act 2020 botched an opportunity to have strengthened the practice of CSR in Nigeria by ensuring its legal compellability. However, for the purpose of a legally compelling practice of CSR in Nigeria, does the UK statutory ESV principle offer any lesson?

3.1 Towards a Legal Approach to CSR in Nigeria

It is arguable whether the UK statutory ESV principle has much to recommend it to the practice of CSR in other common law jurisdictions such as Nigeria. Williams argued strenuously that the statutory ESV principle does not represent any substantive change in the approach of UK company law to stakeholders, and that as such ''it is of doubtful usefulness to other jurisdictions seeking to enhance social responsibility in their company law''[1]. The views of practitioners and experts concerning the impact of the statutory ESV principle are as varied as they are inconsistent. But it has been reiterated that the duty it imposes on directors has not led to a ''radical change''[2] in directorial responsibilities.

The legal duty, which is the notable feature of statutory ESV principle, has turned out to be a ''damp squib which did not introduce any new liabilities or responsibilities for directors''[3]. As provided in section 172(1) (a)-(f) of the Companies Act 2006, ESV principle is stated with a high degree of generality and as such read much like a list of exhortations to good conduct by directors rather than specific instructions to undertake, or refrain from undertaking, any particular actions[4]. More so, the principle does not provide any legal guidance relating to the imposed directorial duty and with specific reference to its enforceability.

Consequently, enforceability of the principle by stakeholders is not legally tenable; only shareholders may be able to enforce it through derivative proceedings because directors owe the duty to the company, and not to the stakeholders. This means that the range of people who are able to enforce the provision is narrow and excluding stakeholders. According to Keay and Iqbal, this is a major flaw of the statutory ESV principle which limits its impact; and that neither the Steering Group nor the Government intended stakeholders to have any power or rights to enforce it[5].

However, while the Companies Act 2006 failed to vest stakeholders with power of enforceability of ESV principle, the provisions of section 172 nonetheless endorse a multi-stakeholder decision-making duty which obligates directors to be accountable to stakeholders, and this has the effect of nudging companies in the direction of greater social responsibility[6]. Remarkably, the provisions have addressed the challenge of how best to balance the often-conflicting interests of a company's shareholders and stakeholders in order to keep the company on the pathway of profitability and sustainability.

Conflict typically arises between shareholders and other stakeholders interests due mainly to agency issues, wherein self-serving directors make decisions that focus on short-term gains with the effect that the long-term sustainability of the company is put at risk. This approach only benefits short-term transitional shareholders who trade for quick speculative gains; it does not serve the interests of long-term shareholders who are interested in the sustainability of the company[7]. Beyond its elemental deficiencies, therefore, statutory ESV principle has provided an enshrined normative function for directors towards the practice of CSR, the effect of which has been the beginning of the promotion of long-term view of companies over the short-term

From its intent and purpose, the statutory ESV principle requires more than mere consideration of stakeholders' interests because it goes as far as to support directorial accountability through the requirement of a statement of strategic report of how directors have complied with their duty to have regard to stakeholders' interests as listed in section 172(1) (a)-(d) of the Companies Act 2006[8]. Although, the statutory ESV principle

[1] Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360

[2] J. Gauntlett and R. Dattani (Norton Rose) Directors Duties Codified and referred to in J. Loughrey, A. Keay and L. Cerioni, "Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate 7] Governance" (2008) 8 Journal of Corporate Law Studies 79; In fact, findings from the study on the impact of statutory ESV principle conducted by Keay and Iqbal confirmed that the enactment of section 172 had not changed directorial regard for stakeholders' interests, with only 17 per cent of directors indicating that the provision had led to a change in their behaviour. See Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. Journal of Business Law, 2019 (4). pp. 304, at p. 327

[3] Bruce Hanton of Ashursts, quoted in Financial Director 26 November 2006 and referred to in J. Loughrey, A. Keay and L. Cerioni, "Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance" (2008) 8 Journal of Corporate Law Studies 79

[4] Richard Williams (2012). Enlightened Shareholder Value in the UK. UNSW Law Journal Volume 35(1). p. 360

[5] Keay, AR and Iqbal, T (2019). The Impact of Enlightened Shareholder Value. Journal of Business Law, 2019 (4). pp. 304, at p. 327

[6] Virginia Harper Ho, '"Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder-Stakeholder Divide' (2010) 36 Journal of Corporation Law 61

[7] Maeve O'Connell and Anne Marie Ward, (2020) Shareholder Theory/Shareholder Value. op.ct

[8] Reem Kabour, (2021). What effect does the enlightened shareholder value principle in the Companies Act 2006 have on the corporate objective of UK companies? IALS Student Law Review, Vol. 8, Issue 2, pp. 13-29; See also the UK Companies (Miscellaneous Reporting) Regulations 2018

was not included in the Companies Act 2006 with any specific reference to CSR, its intent and purpose point to a viable approach to an effective legal regime for the practice of CSR in common law jurisdictions such as Nigeria without ESV principle.

As ready noted in the preceding section of this paper, ESV principle effectively constitutes CSR in practice. Therefore, the implication of section 172(1) is that it removed CSR from the realm of corporate voluntarism and directorial discretion to the sphere of legal duties of directors. This has set a trend for other common law countries such as India to enact ESV principle in their company laws. Indeed, India has taken the statutory ESV principle further than the UK in terms of using it to enforce the practice of CSR at the level of board of directors.

In section 166(2) of the Indian Companies Act 2013 a director of a company is required to ''act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment''. These expressly stated stakeholders under the section are less than those mentioned in section 172(1) of the UK Companies Act 2006, and more like the provisions of section 305(3) and (4) of the Nigerian Companies Act 2020.

However, under the provisions of section 135 of its Companies Act 2013 Indian became the first common law jurisdiction to provide for mandatory CSR policy for companies. According to the section, every company that satisfies the prescribed threshold of annual turnover is required to spend at least 2% of its net profits as CSR expenditure on a list of activities provided in Schedule VII of the Act. Under the section, Indian companies are required to set up a Board Committee with responsibilities for formulating CSR policy, recommending the amount of expenditure to be incurred on CSR activities and monitoring the CSR policy implementation.

Majumdar has pointed out that under the provisions of section 135 of the Companies Act 2013 CSR activities in India do ''appear to further social good, beyond the interests of the firm''[1]. Majumdar's point is more so because under the Companies (Corporate Social Responsibility) Rules 2014, which provide for the details of the legal obligations for CSR under section 135, CSR programmes and activities that solely benefit companies' employees and their families would not be considered as CSR activities within the meaning of the section. This to ensure that CSR obligations are more widely focused on external stakeholders.

Consequently, the emerging concept of CSR in India under the Companies Act 2013 goes beyond charity or philanthropy and requires companies' directors to undertake CSR programs and activities as legal obligations, integrating social, environmental, and ethical concerns into their business processes[2]. This is the intent and purpose of the UK statutory ESV principle despite its inherent limitations or weaknesses. Arguably, the influence of the principle on the current legal regime on CRS in India is more than apparent. And for Nigeria, it offers a lesson on a legal approach to CSR and the lesson can be applied to reflect Nigerian local context and peculiarities, like the case of India.

4. Summary and Conclusion

At common law, the idea that directors owed their duties only towards the maximization of profits for the company's shareholders expanded to include the recognition of the need to consider the interests of the company's other stakeholders. However, the focus on profit maximization for companies' shareholders, otherwise referred to as shareholder primacy, aligns more with the foundational purpose of a company than the stakeholder theory which seeks to project the interests of those who impact or are impacted by the business operations of the company.

Consequently, the question as to whether directors should necessarily consider other stakeholders' interests in addition to shareholders' interests remains unresolved since the notable Berle-Dodd debate, including Friedman-Freeman counter arguments. A middle ground approach that seems to have emerged in this 21st century is that the realization of short-term profit maximization for shareholders may narrow directors' focus on shareholders' interests, but a long-term sustainable view of shareholders' interests will inevitably require directors to consider the interests of other stakeholders.

This middle ground approach is referred to as ''enlightened shareholder value'' principle which constitutes the provisions of section 172(1) of the UK Companies Act 2006. Although, the statutory ESV principle does not make any specific reference to CSR, this paper however shows that its intent and purpose offer a lesson on legal approach to effective practice of CSR in other common law jurisdictions such as Nigeria.

[1] A.B. Majumdar, (2015). 'India's journey with Corporate Social Responsibility – What Next', 33 Journal of Law and Commerce 165 at 204
[2] A. Singh and P. Verma, (2014). 'From Philanthropy to Mandatory CSR: A Journey towards Mandatory Corporate Social Responsibility in India', 6 European Journal of Business and Management 146 at 147

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The Law on Child Labor: A Correlational Study in Vietnam

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Abstracts
According to the International Labsour Organization (ILO), Vietnam is the first country in Asia and the second country in the world to ratify the United Nations Convention on the Rights of the Child. Among them, are conventions related to child labor such as Convention 138, on a minimum age for employment in 1973 (Convention 138); Convention 182, which prohibits and urgently acts to eliminate the worst forms of child labor in 1999 (Convention 182). During the process of joining conventions on child labor, Vietnam's legal system has been issued, amended, and adjusted to enforce international commitments. However, from the perspective of the conventions on labor children that Vietnam has joined, the national legal system still has shortcomings from the age of labor, occupations that are allowed to use child labor to forms of labor… The article uses the correlational research method, comparing the regulations of the ILO convention with the law regulating child labor in Vietnam and then proposing solutions to improve the Vietnam national law.
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1. Introduction

Child labor or the use of children as workers, in agriculture, fishing, apprenticeships, and factory workers, has been practiced throughout human history but reached its peak during the Industrial Revolution. Poor working conditions included overcrowded and polluted factories, lack of safety regulations, and long working hours became the norm. Child laborers were often deprived of education, perpetuating a cycle of poverty that was difficult to break. 19th-century reformers and labor organizations sought to limit child labor and improve working conditions to uplift the morale of the masses, but it was not until the Great Depression, a time when Americans desperately sought employment, that the long-standing practice of child labor in the United States began to shake (EDITORS, 2009).

The issue of child labor is not only prevalent in underdeveloped countries but also in developed ones. Throughout history, Vietnam has always prioritized children's issues in its policies. The Vietnamese legal system is constantly improving and adapting to the realities of each period, as well as aligning with international standards and conventions on children and child labor. Vietnam is committed to protecting children and creating an environment for their comprehensive development, as demonstrated by its participation in various conventions.

2. Material and Methods

The article examines the regulations on children and child labor according to the ILO Convention that Vietnam has joined, and its correlation with the legal framework in Vietnam. It analyzes, evaluates, and proposes solutions to improve the regulations of Vietnamese laws.

The research is conducted through qualitative research methods, examining the correlation between the ILO Convention's regulations on children and child labor and the regulations within the legal framework of Vietnam. Statistical analysis, expert consultations, and management officials are employed to collect information, including legal documents, research works by relevant authors, and statistical data from relevant sources. These data are systematized, analyzed, synthesized, and evaluated appropriately to provide a basis for solutions to eradicate child labor issues in Vietnam.

3. The theoretical basis of children and child labor

Since its establishment in 1919, the International Labour Organization (ILO) has adopted several conventions addressing the prevention and reduction of child labor. Two of the most important and currently effective conventions are Convention No. 138, concerning the minimum age for employment, 1973 (Convention No. 138), accompanied by Recommendation No. 146; and Convention No. 182, concerning the worst forms of child labor, 1999 (Convention No. 182), accompanied by Recommendation No. 190. Both of these conventions are included in the list of ILO's fundamental conventions. (Organization, n.d.).

3.1 The concept of children and child labor

In international law, children are defined as individuals under the age of 18, unless the applicable national law sets an earlier age of adulthood (Child, n.d.). It can be observed that the regulations regarding the age of children depend on the national laws of the Convention's members, which may set a lower age than 18. For example, in the United Kingdom and Northern Ireland (UK), the Children Act of 1989 is a significant law that provides a legal framework for protecting children and young people who are experiencing or at risk of serious harm to their basic rights. The Act also delineates the responsibilities of local authorities, courts, parents, and the community in ensuring the protection and promotion of children's rights and interests. In UK law, children are defined as individuals under the age of 18 (Legislation, n.d.). Similarly to the UK, according to Article 4 of the Japanese Child Welfare Law, children are defined as anyone under the age of 18 (Translation, n.d.). In contrast, Chinese law strictly prohibits state agencies, social organizations, enterprises, institutions, non-profit non-governmental organizations, and private enterprises from employing child labor, which refers to labor performed by individuals under the age of 16 (Natlex, n.d.). In Vietnam, children are defined as individuals under the age of 16 (Quốc hội Việt Nam, n.d.).

Generally, regulations regarding the age of children among countries that are members of the ILO Convention may vary depending on the laws of each country. However, from the ILO Convention's perspective, age is essential in determining whether a person is a child or an adult. This is because physical development enables a worker to perform strenuous tasks, and the level of physical development differs in each country due to various factors. Therefore, the criteria for age depend on each country and may have different regulations.

Within the framework of its regulations, the ILO also introduces the concept of child labor. According to this concept, child labor is generally understood as work that deprives children of their childhood, potential, and dignity, while also being harmful to their physical and mental well-being (Organization, n.d.). The legal regulations in Vietnam do not explicitly define what constitutes child labor. However, based on the understanding derived from the ILO conventions and referencing the provisions of the Law on Children in 2016, child labor can be understood as work performed by individuals under the age of 16 that involves dangerous tasks harmful to their physical and mental well-being, work that undermines their morals and deprives them of opportunities for social interaction. This includes work that prevents them from attending school by taking away their chances for education, forcing them to drop out early, or requiring them to combine excessive work with their studies.

The mentioned tasks include those that subject children to physical, psychological, or sexual abuse; working underground, underwater, at dangerous heights, or in restricted spaces; operating dangerous machinery, equipment, and tools or involving manual handling and heavy lifting; working in unhealthy environments, such as exposure to hazardous substances, agents, or processes, or harmful levels of temperature, noise, or vibration; working under particularly difficult conditions, such as long hours or night shifts, or work in which children are unlawfully confined on the employer's premises.

3.2 Identifying criteria for determining child labor

Based on the content of the concept of children and child labor from the perspective of international law (including Convention No. 138 and Convention No. 182) and national laws such as the Law on Children in 2016 and the Labor Code in 2019, as well as related documents, child labor can be identified through the following criteria:

Firstly, the worst forms of child labor, as defined by Convention No. 182, include all forms of slavery or similar practices such as the sale and trafficking of children, debt bondage, and forced labor, including the forced recruitment of children into armed conflicts; using, procuring, or offering children for prostitution, pornography production, or pornographic performances; using, procuring, or offering children for illegal activities, particularly for the production and trafficking of drugs as outlined in international agreements; and any work that is likely to harm the health, safety, or morals of children. According to the provisions of the Labor Code in 2019, the worst forms of child labor can be understood as prohibited labor practices such as discrimination in employment, labor exploitation, forced labor, sexual harassment at the workplace, and the exploitation of apprenticeship or vocational training for profiteering, labor exploitation, or the coercion, enticement, or forceful induction of learners or trainees into illegal activities. Additionally, children have the right to be protected in all forms and not to be subjected to labor exploitation; they should not engage in work before the designated age or beyond the regulated working hours, or perform hazardous, harmful, or dangerous tasks as determined by the law; they should not be assigned to work or be in environments that negatively affect their personality and comprehensive development.

Secondly, types of work and working hours are categorized by age groups: According to Article 2, Paragraph 3 of Convention No. 138, the minimum age for employment of children is not less than 15 years or the age at which compulsory education ends. Comparing this with the provisions of Article 3, Paragraph 1 of the Labor Code in 2019, the minimum age for employment is also 15 years, except for cases of child labor, which

are further classified into age groups (those aged 15 to under 18; those aged 13 to under 15; those under 13). Additionally, according to Civil Law, an adult is defined as a person who is 18 years of age or older, while a minor is someone who has not reached the age of 18 (Nam, n.d.). From the aforementioned regulations, it is possible to classify the age groups of child labor.

Children under 13 years old, who have not reached the age of 13, are only allowed to engage in artistic, physical, and sports-related activities that do not harm their physical, intellectual, and personal development. Even child labor performing these activities is still prohibited if there is no consent from the specialized labor agency under the provincial People's Committee and if the working hours exceed 20 hours per week.

The age group from 13 to under 15 years old is only allowed to engage in specific types of work (69 types of work) as stipulated in Appendix II of Circular No. 09/2020/TT-BLĐTBXH dated November 12, 2020, issued by the Ministry of Labor - Invalids and Social Affairs, which provides detailed regulations and guidelines for the implementation of certain provisions of the Labor Code regarding child labor (Circular 09/2020). According to this, the list of permissible light work for this age group includes artistic performances, sports activities, software programming, traditional crafts such as pottery glazing, shell cutting, paper making, making palm leaf hats, hat decoration, weaving mats, etc., as well as handicrafts such as embroidery, wood carving, making horn combs, making folk paintings, etc. Additionally, within this age group, compliance with working hours is also required.

In the age group from 15 to under 18 years old (adolescent labor), regarding work, adolescent workers will be considered child laborers if they engage in arduous, hazardous, and dangerous tasks that are prohibited for this age group. Such tasks include carrying, lifting, or transporting heavy objects beyond the physical capacity of the adolescent; the production, sale, and business of alcohol, beer, tobacco, drugs affecting the mind, or other addictive substances; the production, use, or transportation of chemicals, gases, explosives; equipment maintenance and repair; demolition of construction works; metal forging, casting, rolling, pounding, welding; diving, offshore fishing, marine products; and other work that can harm the physical, intellectual, and personal development of adolescents (Nam, 2019). Regarding working hours, even when performing the aforementioned tasks, the age group from 15 to under 18 years old will still be considered child labor if the working hours exceed 8 hours in one day and 40 hours in one week.

Third, regarding the workplace. Article 147 of the 2019 Civil Law Code of Vietnam stipulates that all age groups of minors will be considered child laborers if they work in places where the use of minors is prohibited, such as underwater, underground, in caves, in tunnels; construction sites; slaughterhouses; casinos, bars, nightclubs, karaoke rooms, hotels, guesthouses, steam rooms, massage parlors; lottery businesses, electronic gaming services; other workplaces that can harm the physical, intellectual, and personal development of minors. Additionally, Circular 09/2020, provides detailed regulations on workplaces that can harm the intellectual and personal development of minors, and workplaces that involve exposure to hazardous and harmful factors outside the permitted limits according to national standards and technical regulations on occupational hygiene. These factors include electromagnetic fields, vibration, noise, temperature, silica dust, non-silica dust, cotton dust, asbestos dust, coal dust, talc dust; various types of substances, radiation; X-ray radiation, harmful substances, and other harmful radiation; exposure to disease-causing microorganisms; working for more than 4 hours per day in confined, cramped workspaces, tasks that require kneeling, lying down, or bending over; working at heights or hanging more than 2m above the working surface; steep terrain over 300; work in holes deeper than 5m; work in prisons or mental hospitals.

In general, from the perspective of the ILO Convention, the criteria for child labor primarily rely on criteria such as the worst forms of labor, age, working hours, and workplace. However, in Vietnam, there are currently no specific criteria for child labor. The delineation between child labor and child participation in labor is challenging but needs to be clearly defined in legal regulations and have clear criteria (phủ, 2018). A positive signal is that the International Labour Organization (ILO), in collaboration with the Ministry of Labour - Invalids and Social Affairs and with the support of the US Government, has developed training materials on the prevention and reduction of child labor in Vietnam. These materials also identify criteria similar to Convention 182. This is a positive indication for the issuance of regulations that are in line with international standards and norms.

4. Causes and Consequences of Child Labor

4.1 Causes of Child Labor

There are numerous factors leading to the issue of child labor worldwide, with some less developed and developing countries having a high prevalence of child labor (Organization, n.d.). Arising from a combination of internal and external factors:

The internal causes stem from within the family, such as poverty, unemployment, parental divorce, illness, and more. The external causes are related to societal factors, including a deficient education system, difficult access to schools, and economic crises that prevent a significant portion of children from attending school. This situation is not confined to underdeveloped countries; it occurs worldwide. Children are engaged in weaving,

cutting, and polishing stones, assembling shoes, cutting and sewing clothes, mining for precious metals like diamonds, gold, and silver, working in sugarcane fields, harvesting fruits, and coffee, livestock farming, drug trafficking, and engaging in prostitution (Silk & Meron Makonnen, 2013).

Vietnam-based on the results of a survey conducted by the Ministry of Labor, War Invalids and Social Affairs (MOLISA) in collaboration with the General Statistics Office of Vietnam (GSO), with technical and financial support from the International Labour Organization (ILO), carried out a national investigation on child labor. The results have revealed several factors contributing to the issue of child labor: Parental perception that practical work is essential for a child's development, leading parents to be willing to allow their children to work. However, the nature of these jobs often exceeds a child's capabilities; Many parents find satisfaction in the income earned by their children through child labor; Family crises, such as divorce, force some children to drop out of school and engage in work to support their families; Rapid urbanization has led to strong migration waves, especially in major cities like Hanoi and Ho Chi Minh City. This has resulted in children from impoverished families having to work; Gender inequality and the persistence of the "male superiority" mindset in society lead to some girls leaving school early to work. Furthermore, the policies and regulations aimed at preventing and reducing child labor still have shortcomings. Their implementation in practice is less effective, focusing mainly on formal sectors while child labor remains more prevalent in informal sectors (Ministry Of Labour, 2018).

Many countries around the world also conduct investigations into child labor, and the results often point to poverty as the primary reason that compels children to work. Faced with the pressure to provide food, shelter, and repay their parents' debts, some children have no choice but to engage in labor to support their families. However, some children are forced into labor against their will and subjected to slavery. Other factors influencing whether children have to work or not include barriers to education and inadequate enforcement of laws protecting children (Legislation, n.d.). When parents' incomes are insufficient to support their families, children are compelled to work to ensure food and contribute to the family's upkeep.

4.2 Consequences of Child Labor

Child labor despite some benefits such as skill development, financial support for families, and reduced labor costs, has significant and long-term consequences. It directly harms the well-being of children and has negative impacts on families and nations.

Regarding education and physical well-being, children being forced to leave school to work or combine work with education can affect their right to education and reduce their capacity to learn. Physically, the consequences of early labor make many children more vulnerable to physical injuries compared to adults. Tasks like carrying heavy loads or working at heights and underwater increase the risk of workplace accidents for children, as they lack the necessary knowledge and skills for these jobs.

In terms of psychology and cognition, according to some studies in the Journal of Nursing Research in the United States, child labor hurts the ability to attend school and the physical, emotional, and cognitive development of children (Mohammed, 2019). The lack of experience and emotional immaturity in children leads to a reduced ability to recognize and evaluate potential risks and make appropriate decisions related to the type of work and associated hazards. Depression, despair, shame, guilt, low self-esteem, and anxiety are some of the horrifying psychological effects of child labor, increasing the risk of developing mental illnesses and engaging in antisocial behaviors, especially when children are exposed to exploitative labor situations such as slavery, prostitution, drug trafficking, or other illegal activities.

Furthermore, child labor imposes negative effects on national competitiveness, adversely impacting the quality of the labor force. It hinders poverty reduction and national development processes. It creates a labor force with limited education, and low skills, and becomes a burden on society as a whole.

5. The current situation and some solutions to improve child labor laws in Vietnam

To provide an updated overview of the child labor situation in Vietnam and establish a strong evidence base for policy development and the design of appropriate and effective intervention measures to prevent and reduce child labor, Vietnam conducted two National Child Labor Surveys (the first in 2012 and the second in 2018). These surveys were carried out through the collaboration of the Ministry of Labor, War Invalids and Social Affairs (MOLISA) and the General Statistics Office (GSO) of Vietnam, with technical and financial support from the International Labor Organization (ILO).

5.1 The current legal framework regulating child labor in Vietnam

The survey results reveal that more than 1 million children in the age group of 5-17 are engaged in child labor, accounting for 5.4% of the child population in this age group. Among these child laborers, over half are involved in hazardous work, and half of them do not attend school, with 1.4% having never been to school.

The International Labor Organization (ILO) has introduced numerous action programs aimed at eradicating child labor issues that have occurred and are ongoing worldwide. The flagship action program in 2021 is the

International Year for the Elimination of Child Labor (ILO, n.d.). As an active member of the ILO, Vietnam has taken, is taking, and will continue to implement strong and practical actions to fulfill international commitments. One of the pressing issues is the need to review and revise the regulations governing child labor and child labor in the national legal framework. Overall, Vietnam has made efforts to establish and gradually improve the system of regulations related to children and child labor. However, from the perspective of ILO Conventions and accompanying recommendations, there are still some shortcomings in Vietnam's regulations concerning children and child labor, such as the following:

First, concerning the minimum age of children engaged in labor: According to Article 2 of Convention 138, the minimum age for admission to employment should not be less than the age at which compulsory schooling ends and, in any case, not less than 15 years of age. However, the Convention allows for exceptions in the case of member countries with less developed economies and educational conditions. After consulting with relevant parties regarding the use of child labor, these countries may determine the minimum age for labor to be 14 years during the initial phase. When compared to Regulation 09/2020, Vietnam stipulates that adolescents aged from 13 to less than 15 can engage in light work (Appendix II, Category 12). Vietnam's regulation of the minimum age for labor does not align with the provisions of Convention 138. Even though it involves light work, jobs such as gardening, shellfish shucking, rice vermicelli making, painting handicrafts, and livestock herding are tasks with high labor intensity, and unfavorable weather conditions, and can significantly impact the health, education, and leisure time of children.

Second, concerning the principle of equal pay for equal work: The principle of equal pay for equal work is addressed in Recommendation 146, which specifies equal pay for work of equal value without discrimination based on location or gender. This principle is also acknowledged in the legal system of Vietnam. Specifically, employers must ensure equal pay without gender discrimination for workers performing work of equal value (Nam, n.d.), which aligns with ILO Conventions and Recommendation 146. However, current legal provisions related to wages are outlined in the Labor Code of 2019 and Decree 38/2022/NĐ-CP, dated June 12, 2022, which stipulate the minimum wage for workers under labor contracts. According to these regulations, the minimum wage varies by region, ranging from VND 3,250,000 (Region IV) to VND 4,680,000 (Region I) (phủ, 2022). Nevertheless, child labor contracts are a special type of labor contract, and the specific regulations regarding their wages have not been defined. Employers typically negotiate wages with the child's parents, legal guardians, or the child directly. This leads to inequalities in labor relationships, and the protection mechanism lacks specifics regarding wage rates for different age groups and specific job types, especially for child labor in non-formal sectors.

Third, regulations regarding the industries employing child labor and the prohibition of child labor are also defined in related documents such as the Child Law of 2016, the Labor Code of 2019, and Circular 09/2020. In general, there have been breakthroughs in legislating for the care and protection of children and child labor, meeting the need to enhance laws for child protection in line with international commitments. However, when compared to ILO Conventions and accompanying recommendations on child labor, there are some shortcomings in Vietnam's regulations concerning industries employing child labor and prohibiting child labor. According to Appendix III of Circular 09/2020, the list of work that may harm the physical and mental development of minors includes 69 jobs primarily related to chemical industries and heavy industries. However, it does not cover the agricultural sector, aquaculture, or areas near rivers and coastal regions, which are also hazardous due to the use and operation of dangerous equipment like plows, combines, feed mills, etc. Furthermore, Section IV of Circular 09/2020 specifies a list of workplaces that may harm the physical and mental development of minors. It includes places with dangerous environmental factors, exposure to disease-causing organisms, heights, deep pits, etc. However, it does not address places such as nightclubs, karaoke bars, and massage parlors, despite the substantial employment of child labor in these areas, often working hourly. These are also environments where many social issues occur, and child labor is exposed to various risks by working daily in complex and sensitive environments.

Fourth, regarding monitoring, inspection, and addressing violations: According to ILO Convention 138, together with Recommendation 146, member countries are required to establish mechanisms and measures for protecting and monitoring the working conditions of children, as well as to have sanctions for violations. In the current Vietnamese context, the inspection, monitoring, and handling of child labor violations fall under the jurisdiction and responsibilities of the Labor Inspectorate of the Ministry of Labor, War Invalids, and Social Affairs. Vietnam does not have an independent agency for monitoring and supporting child labor, and addressing issues where children are subjected to exploitation and labor in poor conditions in various sectors, including nightclubs, massage parlors, beer bars, labor on fishing vessels, and household chores, presents significant challenges in terms of inspection and enforcement.

5.2 Some solutions to improve child labor policies in Vietnam

As an active member of international relations, Vietnam has made adjustments to its legal system in recent years

to adapt to changes in international relations. The overall labor situation and child labor, in particular, have seen legislative advancements. However, through the examination of provisions in line with ILO Conventions, it is possible to identify some policies aimed at eliminating child labor. Specifically, these policies include:

First, regarding the minimum working age, it is necessary to specify that in no case should the minimum working age be less than 14 years old to align with Convention 138 and Recommendation 146. Amendments should be made to the age provisions set out in Article 145(3) of the 2019 Labor Code. These adjustments should ensure that employers do not recruit or use individuals under 14 years old for work, except for artistic, physical, and sports-related activities that do not harm physical, intellectual, or personal development. When employing individuals under 14 years old, the consent of the specialized labor agency under the provincial People's Committee should be obtained. Raising the minimum working age as described above is in line with Convention 138 and Recommendation 146, which aim for member states to gradually increase the minimum working age to 16 years old.

Second, the equal pay principle and the list of industries: In labor relations between children and employers, wages are often determined through agreements between the employer and the child, their parents, guardian, or the child directly. The principle of equal pay is reflected in the 2019 Labor Code and related documents, adjusting various aspects of these relationships. The core relationship exists between the employer and the child worker. The term "child worker," as stated in the 2019 Labor Code, encompasses all categories of workers in society. However, as mentioned earlier, child labor relationships have specific characteristics related to job types, working hours, and rest periods. As a result, there is a need for regulations specifying minimum wages based on the industry and the age of child labor to ensure fairness. This would serve as a tool for regulating wage issues, preventing discrimination against child labor, and reducing inequality in labor relations. Furthermore, there is a need to supplement regulations related to industries that prohibit the use of child labor. This means that regarding Sections III and IV of Circular 09/2020, the list of industries and workplaces that need adjustment and additional information should include tasks related to the agricultural sector. Vietnam, as an agricultural-based economy, is increasingly focusing on agricultural development. Modern agricultural production is increasingly replacing traditional labor with machinery and equipment. Consequently, agriculture often involves regular contact with machinery, which is hard to avoid. Thus, the agricultural and aquaculture sectors should be added to the list of prohibited child labor industries in Circular 09/2020. Additionally, areas that prohibit child labor, such as nightclubs, karaoke bars, and massage parlors, should also be added to Section IV of Circular 09/2020 as workplaces that harm the physical, intellectual, and personal development of minors.

Third, the mechanism for monitoring, inspecting, and handling child labor violations: As an active and responsible member in international relations, Vietnam should consider and adopt ILO recommendations regarding child labor. It is essential to establish a comprehensive monitoring and inspection mechanism that operates consistently from central to local levels, forming a unified network. At the grassroots level, the creation of offices for disseminating information and providing legal advice on child labor, at the community level (communes, wards, and townships), serves as the most effective means of monitoring child labor issues in various regions across the country. At the district and provincial levels, specialized labor inspection teams for child labor, under the authority of the Ministry of Labor, War Invalids and Social Affairs, should be established. With this monitoring and inspection mechanism, there is a unified approach from the central government down to the local level to promptly detect, provide assistance, and penalize child labor issues in line with ILO recommendations and international commitments on child labor that Vietnam has adhered to.

6. Conclusion

Throughout its historical journey, the issue of children has been of particular concern in Vietnam and is enshrined in the country's Constitution, the supreme law of the land, stating that "children are protected, cared for, and educated by the State, family, and society; they are entitled to participate in child-related matters. It is strictly forbidden to infringe upon, abuse, maltreat, abandon, exploit child labor, and engage in other acts that violate children's rights." Indeed, the process of improving national legal regulations concerning minimum working age, equitable remuneration, and mechanisms for monitoring and supervising child labor helps to enhance Vietnam's legal framework and align it with international standards, all in line with Vietnam's objectives for protecting and nurturing children and creating a conducive environment for comprehensive physical and mental development.

REFERENCES

Child, A. 1. -. C. o. t. R. o. t., n.d. *www.ohchr.org.* [Online] Available at: https://www.ohchr.org/sites/default/files/crc.pdf

EDITORS, H., 2009. *Child Labor.* [Online] Available at: https://www.history.com/topics/industrial-revolution/child-labor

ILO, 2018. *Viet Nam National Child Labour Survey,* s.l.: s.n.

ILO, 2021. *2021: International Year for the Elimination of Child Labour.* [Online] Available at: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_766351/lang--en/index.htm

ILO, n.d. *2021 International Year for the Elimination of Child Labour.* [Online] Available at: https://www.ilo.org/global/topics/child-labour/int-year/lang--en/index.htm?mc_cid=09fcbcbd1b&mc_eid=%5bUNIQID%5d

Legislation, n.d. *Children Act 1989.* [Online] Available at: https://www.legislation.gov.uk/ukpga/1989/41/contents

Luật, T. V. P., 2022. *Nghị định 38/2022/NĐ-CP về lương tối thiểu vùng từ 01/7/2022.* [Online] Available at: https://thuvienphapluat.vn/chinh-sach-phap-luat-moi/vn/thoi-su-phap-luat/chinh-sach-moi/41009/da-co-nghi-dinh-38-2022-nd-cp-ve-luong-toi-thieu-vung-tu-01-7-2022#:~:text=2.-,M%E1%BB%A9c%20l%C6%B0%C6%A1ng%20t%E1%BB%91i%20thi%E1%BB%83u%20gi%E1%BB%9D,ng%C6%B0

Ministry Of Labour, I. S. A., 2018. Việt Nam National Child Labour Survey 2018. In: Hà Nội: s.n.

Mohammed, F. M., 2019. Effect of Child Labor on Physical and Psychological Health among Technical Secondary Schools Students at Assiut City. *American Journal of Nursing Research,* p. http://pubs.sciepub.com/.

Nam, Q. h. V., 2019. *Khoản 1 Điều 147 Bộ luật lao động năm 2019.* s.l.:s.n.

Nam, Q. h. V., n.d. *Bộ Luật Lao động năm 2019.* s.l.:Nxb Chính trị quốc gia Sự Thật.

Nam, Q. h. V., n.d. *Điều 20, 21 Bộ luật dân sự năm 2015.* Hà Nội: Nxb Chính trị quốc gia Sự Thật.

Nam, Q. h. V., n.d. *Khoản 3 Điều 90 Bộ luật lao động 2019.* Hà Nội: Nxb Chính trị Quốc gia Sự Thật.

Natlex, n.d. *https://www.ilo.org/.* [Online] Available at: https://www.ilo.org/dyn/natlex/docs/WEBTEXT/63806/65269/E02CHN01.htm

Organization, I. L., n.d. *Causes of child labor.* [Online] Available at: https://www.ilo.org/yangon/areas/childlabour/WCMS_374210/lang--en/index.htm

Organization, I. l., n.d. *Conventions and Recommendations.* [Online] Available at: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

Organization, I. L., n.d. *R138 - Seafarers' Welfare Recommendation, 1970 (No. 138).* [Online] Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:9315181966418::NO::P12100_SHOW_TEXT:Y:

Organization, I. L., n.d. *Statistics on child labor.* [Online] Available at: https://ilostat.ilo.org/topics/child-labour/

Organization, I. L., n.d. *What is child labor.* [Online] Available at: https://www.ilo.org/ipec/facts/lang--en/index.htm

Organization, I. L., n.d. *What is child labor.* [Online] Available at: https://www.ilo.org/ipec/facts/lang--en/index.htm

phủ, B. Đ. t. C., 2018. *Cần tiêu chí rõ ràng về lao động trẻ em.* [Online] Available at: https://baochinhphu.vn/print/can-tieu-chi-ro-rang-ve-lao-dong-tre-em-102236210.htm

phủ, C., 2022. *NĐ 38/2022/NĐ-CP.* s.l.:s.n.

Project, T. B., 2020. *https://borgenproject.org/.* [Online] Available at: https://borgenproject.org/10-facts-child-labor/

Quốc hội Việt Nam, 2018. *Bộ luật dân sự năm 2015.* Hà nội: NXB Chính trị quốc gia Sự Thật.

Quốc hội Việt Nam, n.d. Luật Trẻ em Năm 2016. In: s.l.:s.n.

Silk, J. J. & Meron Makonnen, 2013. Ending Child Labor: A Role for International Human Rights Law?. *Saint Louis University Public Law Review,* p. 1.

Translation, J. L., n.d. *Child Welfare Act.* [Online] Available at: https://www.japaneselawtranslation.go.jp/en/laws/view/11/en

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The Challenges of Personalised Pricing, and Self-Preferencing of Online Platform to Thailand Competition Law

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Abstract
The digitalisation and algorithm-based machine enable online businesses to collect a vast amount of data related to consumers' online activity, which can be used for personalised pricing and self-preferencing. Personalised pricing, which involves charging different customers with different prices for the same product or service based on their personal behaviour, could be a form of abuse of dominance. However, there is ambiguity in some jurisdictions regarding whether discriminatory treatment against consumers can be considered an abuse of dominance. Also, the potential anticompetitive effects of self-preferencing, where dominant online marketplaces prioritize their own products or services over those of competitors. It raises questions about whether using data to favour oneself constitutes an abuse of a dominant position or is it necessary for the dominant position leverages its market power and the effects of the abuse to be in the same market, and whether competition law should regulate these practices. Indeed, when assessing the anticompetitive effect of these practices, it was found that they have adverse effects on competition. Therefore, it needs careful implementation of competition law to address these challenges effectively, and competition law regime of Thailand is inadequate to address personalised pricing and self-preferencing practices in digital economy.
Keywords: Personalised Pricing, Self-Preferencing, Unfair Trade Practice
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1. Introduction

An unfair trade practice is the unfair contractual terms and conditions that the firm places on their counterparty. By the market dominant power enables firms to impose unfair trading conditions on its parties, that typically is abuse of dominance. The unfair trade practice in digital markets may be committed to both business users and consumer users. Price discrimination regarding personalised pricing is one of the unfair trade practices to consumers. The advances in data-analytics enable online platforms to gain increasing access to consumers' personal data. Such an extensive value of consumer data can be used for adjusting price to fluctuations in demand or willingness to pay. However, personalised pricing is differentiated treatment resulting unfair to some consumers since it is a different price charges different consumers for a same or similar product or service, and the price difference does not reflect cost difference (Bourreau *et al* 2017). However, there are ambiguity in some jurisdictions that whether discriminatory treatment against consumers can be an abuse of dominance, also it considerably debates in the context of competition law whether it should be regulated due to personalised pricing has the potential to benefit some consumers.

As well as where the firm enjoys a position of superior bargaining power, and other parties are economically dependent on the online market platform provided by the firm. To take the opportunity that trove of data is in its control, a dominant platform imposes contractual terms and conditions with trading parties to allow the online platform's operator uses data from sellers or retailers who sell goods on its online platform or demotes ranking of competing products to favours its own ones. This self-preferencing practice enabling online marketplace's providers prioritises their own products or services over those of competitors that raises concerns of competition due to is detrimental to both trading parties and consumers. However, it is questionable that whether using data which are generated through the provision of those platforms to favour itself is abuse of a dominant position or is it necessary for the dominant position leverages its market power and the effects of the abuse to be in the same market. Since a dominant undertaking abuses its market power in one market, and accords favourable treatment to itself, resulting in harm to competition in another market.

These behaviours might not be familiar with competition authorities since they are new forms of abuse of dominance in data-driven online market. Thus, conventional approach of competition law may not cover these behaviours because competition law itself is ambiguous that whether such these unfair trade practices should fall under its control. These challenges require a careful implementation of law to determine if those distinct anticompetitive behaviours exist, how competition law can effectively address and regulate it. Therefore, this article examines the potential anticompetitive effects of these unfair trade practices and scrutinises the provisions of Trade Competition Act 2017 of Thailand to capture such these practices.

2. Personalised Pricing Practice

It is undeniable that nowadays the advancement of technology and data analytics has allowed online companies to have greater access to consumers' personal data. Not only they can collect traditional information such as gender, age, or education level, but they can also gather data about consumers' online activities, including the websites they visit, search queries, and online purchases. This extensive collection of personal data opens up various possibilities for businesses, including real-time price adjustments based on demand fluctuations, and personalised pricing. Including the emergence of big data in the last decade, the cost of collecting data at the individual customer level has significantly decreased. This has made it easier for firms to implement personalised pricing strategies and target customers with customised pricing plans (The White House 2015).

Personalised pricing refers to the practice of charging different customers different prices for the same product or service based on their personal behaviour. In other words, personalised pricing is a category of price discrimination which has become a highly debated topic in the context of the rapid growth of the digital economy. As well as it considerably debates in the context of competition law whether it should be regulated. This is because on the one hand price discrimination has the potential to benefit both sellers and low-end consumers by improving welfare, on the other hand, many members of the public view price discrimination as unfair and a potential threat to trust in digital markets (Bourreau *et al* 2017). On the side of low-end consumers opine that this is not necessarily harmful to welfare and consumer surplus, as it has the potential to make products more affordable for many consumers and improve sales for businesses, also society today is more accepting of wealthier individuals paying higher prices (Bourreau *et al* 2017). However, there are others who argue that price discrimination has been criticised as unethical (Bourreau *et al* 2017). A survey conducted among 1,500 U.S. households revealed that 91 per cent of respondents objected to retailers charging different prices for the same product using personal information (Bourreau *et al* 2017).

Additionally, the report of French and German competition authorities addressed that, from the negative side, price discrimination is often viewed as an unfair breach of consumer equality due to some consumers have to pay higher prices for their purchases than in the absence of discrimination (Autorité de la Concurrence and Bundeskartellamt 2016). As this grey area of it brings about a challenge in implementation of competition law that whether price discrimination is within the scope of competition law. One may argue that price discrimination is within the scope of competition law due to it is unfair to the public and it usually committed by companies with powerful market dominance. As the joint report of French and German competition authorities mentioned that a significant condition necessary for companies to implement an effective price discrimination strategy is market power, without any market power the company is not able to charge prices higher than the cost of producing and to set its prices in reference to the willingness to pay of consumers (Autorité de la Concurrence and Bundeskartellamt 2016). Further, it is arguable that every single consumer has equality in purchasing no matter what he or she is in prosperous area or the poorer area. If a consumer pays different price for the same source of a homogenous product, the firm' s conduct in charging different price seems to be arbitrary and infringes to consumer equality. One goal of competition law is to protect consumer welfare does not mean that the law discriminates by protecting someone and leaving others. Hence, there is no reason why competition should ignore the personalised pricing and do not protect consumer welfare as a whole. This subsequently would lead to the questionable problem that how does competition law regulate such this practice, and how to classify this practice in the category of anticompetitive behaviour provided by law. To find the answer it should determine whether price discrimination affects consumers, and what type of misconduct of this practice should be classified in the context of competition law.

2.1 The multi-dimensional effects of personalised pricing

Some scholars note that there is economic benefit of personalised pricing as it can increase allocative efficiency by serving low-end consumers who would otherwise be underserved (Hutchinson & Treščáková 2022). To illustrate this positive effect, taking into consideration on the example of a one-litre bottle of milk with a market price of USD 3. If we have two consumers, A and B, A is willing to pay up to USD 5 for the milk, while B is only willing to spend USD 2. With a uniform pricing system, only A would purchase the milk, resulting in a revenue of USD 3 for the supplier. However, if the company is allowed to personalise prices, both A and B can purchase the milk at their personal reservation prices. This means that A will pay an amount between USD 3 and USD 5, while B will pay an amount between USD 1 and USD 2. As a result, company's revenue increases to USD 5 instead of USD 3 under a uniform pricing system. This demonstrates that personalised pricing allows for a more efficient allocation of resources. Low-end consumers like B are better served, and sellers significantly increase their sales (Hutchinson & Treščáková 2022). Based on this example, it can be inferred that there is no economic rationale for banning personalised pricing outright (Hutchinson & Treščáková 2022). It has the potential to benefit both consumers and sellers by increasing sales (Bourreau *et al* 2017). However, personalised pricing is still met with scepticism by a majority of the public.

A survey conducted in the United States revealed that American adults overwhelmingly consider all forms

of price discrimination to be "ethically wrong" (Turow 2005). Similarly, in Europe, a survey published by the European Commission found that 20 per cent of respondents had reported negative experiences related to personalised pricing (European Commission 2018). These findings indicate that there is a general mistrust and disapproval of personalised pricing practices among consumers.

When taking a closer look in the negative side, price discrimination can be source of harm to consumer welfare. Firstly, while it may lead to welfare improvement for low-end consumers and sellers, but it can result in a loss of welfare for some consumers, particularly high-end consumers (Hutchinson & Treščáková 2022). This is because it charges wealthier consumers more than the uniform pricing system. To mention the upper area group, it does not mean that they are rich because personalised pricing relies on the behavioural activities via online, so no one should pay high price under regulating of competition law. Also, consumer surplus from the low-end group does not transfer to the high-end ones but transfer to the company only and at the same time company can take profit surplus from high-end group. This is apparent that the company takes advantage of all groups of consumers. Secondly, personalised pricing makes it challenging for consumers to discover a general market price and assess their options (Hutchinson & Treščáková 2022). For example, if a customer notices price discrimination on Amazon marketplace, they may choose to switch to a competitor's platform. However, if many retailers engage in personalised pricing, it becomes increasingly difficult for consumers to find a competitive benchmark or determine the fair market price. That means they would be trapped with the high prices while they did not aware. Thirdly, personalised pricing effectively transfers all the surplus that high-end consumers would have gained to sellers and producers. This raises concerns for competition authorities who prioritise the protection of consumer welfare. By shifting the surplus to sellers, personalised pricing may create an imbalance in the market and potentially harm consumer interests (Hutchinson & Treščáková 2022).

2.2 Competition approach to personalised pricing

As mentioned above that the condition reinforces the achievement of personalised pricing is market power of firms, that means whether they are abusing their dominances. Subsequently, the focal point of the challenge posed by price discrimination depends on which antitrust approach of abuse of dominance in each jurisdiction based on: -exclusionary abuse or exploitative abuse. It has been found that in countries that investigate exclusionary abuses and apply a total welfare standard, the likelihood of personalised pricing being considered a competition risk is low, but when taking consideration on the other hand the risk of price discrimination is high in jurisdictions that prosecute exploitative abuses and prioritise consumer welfare (Hutchinson & Treščáková 2022).

Under the scope of competition law, it has to assess personalised pricing that whether such this practice is to be considered as an abuse of dominance when carried out by a firm with a dominant position. In most jurisdictions, there are three basic conditions to be met in order to qualify the anticompetitive behaviour as an abuse of dominance (Hutchinson & Treščáková 2022).

1. Dominant position: In order to consider such behaviour as an abuse of dominance, the company involved must be in a dominant position on the relevant market and have market power that can unilaterally harm the competitive process.

2. Categories of abuse: The conduct under consideration should fall into a category of abuse provided for by law. There are two main categories of abuse: exclusionary and exploitative. Exclusionary abuses refer to behaviours by dominant firms that are likely to have a foreclosure effect on the market, denying access or expansion to potential competitors (Hutchinson & Treščáková 2022). Exploitative abuses involve attempts by a dominant undertaking to use its market strength to harm consumers, such as through unfair commercial terms, excessive pricing, or price discrimination (Hutchinson & Treščáková 2022). It is worth noting that exclusionary abuses, such as predatory pricing or refusal to supply, are typically enforced in competition law, while exploitative abuses are not prosecuted in most countries (Hutchinson & Treščáková 2022). For example, in the United States, exploitative abuses are not contemplated by antitrust law, while in the European Union, abuses of exploitation are investigated (Hutchinson & Treščáková 2022).

3. The behaviour must not lead to efficiency gains that offset any anticompetitive effects. This evaluation is done by using an "effects-based approach," which means that if a behaviour does not by itself constitute an infringement, it must be assessed on a case-by-case basis by using the "rule of reason" (Hutchinson & Treščáková 2022). This assessment involves assessing both the potential anticompetitive effects and the efficiency gains resulting from the behaviour. If the potential anticompetitive effects outweigh the efficiency gains, then the behaviour will be considered an abuse of a dominant position and an infringement of competition law.

In economic point of view when consumers pay less price than they are willing to pay, it brings about consumer surplus which conflicts to benefit of sellers or manufacturers (Pettinger 2018). Firms thus take this surplus from consumers to maximise their profits, and one way to reduce or eliminate consumer surplus is to engage in price discrimination (Pettinger 2018). It means sellers or manufacturers will charge the consumers

with the highest price they are willing to pay for a product or service. This way will transfer consumer surplus to sellers or manufacturers. Consumer surplus is an important indicator of whether there is a competitive market or not because in competitive market companies have to keep price relatively low for allowing consumers to gain consumer surplus (Pettinger 2018). Indeed, when consumers pay less price than they are willing to pay, it enables consumers to purchase a wider choice of products. On the other hand, if the market were not competitive, the consumer surplus would be less and there would be greater inequality (Pettinger 2018). It could state in another way that personalised pricing decreases total welfare through consumers' benefit. When assessing effect based on economic point of view personalised pricing may be more likely to have detrimental effects on consumer welfare and could be considered a violation of competition law (Pettinger 2018).

2.3 Implementation of Trade Competition Act 2017 of Thailand

When taking into consideration provisions of unfair trade practice and abuse of dominance under Trade Competition Act 2017, personalised pricing practice is not fall under the scope of both provisions. This is because the unfair trade practice' s provision of Section 57 cannot be applied to anticompetitive practice regarding personalised pricing. Due to Article 57 stipulates that:

"A business operator shall not carry out any act which prejudices **other business operators** in any of the following manner.

(2) unfairly exploiting superior market power or bargaining power." (emphasis added).

It means unfair trade practices of undertaking under the provision of Section 57 applies to business-to-business relations, whereas personalised pricing is the unfair practice conducted against consumers. Also, this practice cannot be regulated by the provision of abuse of dominance. According to Section 50(1) the abusive manner of unreasonably fixing purchasing or selling prices of goods or fees for services includes price discrimination (The Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position 2018). According to Article 5 paragraph 3(a) of Guidelines for the Assessment of Practices by an Undertaking with Dominant Position stipulates that "Price Discrimination in which buying or selling prices of a product or service are determined or maintained differently for trading parties, as either one of the following: (a) Setting buying or selling prices of an identical product or service differently to different trading partners…". It means that price discrimination is a form of charging purchasing or selling prices of a homogeneous product or service differently to different trading partners. Therefore, Section 50(1) of Trade Competition Act 2017 of Thailand also cannot be applied for regulating personalised pricing which charges different price to different consumers, unless it could be interpreted the definition of trading partners would include final user as the consumers.

However, when comparing the context of provision of abuse of dominance between Trade Competition Act of Thailand and TFEU of the European Union, they are different since the provision of Article 102 TFEU is more flexible. It is worth studying to have a closer look at Article 102(c) of the Treaty of the Functioning of the European Union (TFEU 2012), which can be used to determine whether personalised pricing can be considered an abuse of a dominant position. This provision states that a firm in a dominant position engages in an abuse when it applies "dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage." In the context of price discrimination, it means that if a company with market dominance offers different prices or conditions to different customers for the same product or service, the practice is considered as a violation of Article 102(c) (Hutchinson & Treščáková 2017). Even the provision of Article 102(c) uses the word 'trading parties', but it is important to bear in mind that the provisions of Article 102 are not exhaustive, and it does not impose a general prohibition on personalised pricing that means it is not unlawful per se, it can be considered abuse of dominance subjected to an effect test. In the EU, personalised pricing could potentially be assessed as an exploitative abuse if it can be proven that higher prices are charged to some consumers without any justified cost reasons (Hutchinson & Treščáková 2017). Further, the protection of consumer welfare is prioritised by the EU Commission, thereby personalised pricing may be more likely to have detrimental effects on consumer welfare and could be considered a violation of competition law (Hutchinson & Treščáková 2017). In addition, some scholar addresses that personalised pricing could imply a discrimination between high-end and low-end consumers willing to purchase the same product or service, such this practice could potentially fall under the qualification of "dissimilar conditions to equivalent transactions" mentioned in Article 102 (c). Though, since those dissimilar conditions apply to "business partners", but it has a possibility that courts would interpret this part of Article 102 (c) as applying to business-to-consumer relationships (Hutchinson & Treščáková 2017).

3. Self-Preferencing Practices

Self-preferencing is the practice that a dominant platform gives preferential treatment to its own products or services when competing with other offerings on the same platform in particular the dominant firm is the online platform's operator. Firms serving as an intermediary platform, which gather sellers or retailers to connect with

consumers for having transactions in their online marketplaces, may engage in a various tactics for making sellers or retailers to be in line with the terms and condition they set. For instance, the firm may threaten sellers to remove a company from the product detail page of its website or to list the company as out-of-stock (Lancieri *et al* 2021). By the superior bargaining position in the framework of the big marketplace's provider, the sellers or retailers who wish to reach network effects of the online marketplace will accept such unfair terms and conditions. Some intermediary platform provider has two roles in the platform; one is an online marketplace's operator another is a role of a seller or a retailer. A firm can use its dominant position in one market to favour its products in a related market. According to the role of online market platform's provider which can control all information that be collected through its platform putting itself in advantageous competition by the imposition of unfair trading conditions with its customers. Firms that control data may use accessing to third-party data to favour its own business in the marketplace such as the search engine platform operator may put its own one on the best ranking or top of page result which increases its traffic and decreases competitors' traffic. Sometimes, a marketplace platform operator may use non-public data derived from sellers that sell products on its marketplace to promote its own offers or even demote competitors' products. This behaviour amounts to self-preferencing which is the ability of a company to give preferential treatment to its own products or services when they are in competition with products and services provided by other sellers or retailers (Hutchinson 2022). The practice affects not only to exclude potential competitors from the relevant market, but also can be highly damaging for consumers who have been prevented from making free choices between a platform's service and competitors' services

3.1 The multi-dimensional effects of self-preferencing

When taking into consideration the impact of self-preferencing in particular on consumers' side is ambiguous because it may result in both positive and negative welfare effects depending on factors such as quality competition versus price competition (Sariçiçek 2020). As positive effects can give consumers purchase on low prices sometimes, but it is observed that consumers have negatively affected because of not seeing the most relevant results for their queries and innovation is negatively affected since the rivals are disincentivised from innovation, as they did not expect to attract a sufficient volume of user traffic to compete with the dominant platform (*Google Search (Shopping)* case 2017). Hence, the precise effects and implications of self-preferencing are complex and can vary depending on the specific context.

Subsequently, theories of harm would fit into this framework as provided illustration in the investigation of EU Commission to determine the conduct in *Google Shopping* case. The theories of harm in cases concerning self-preferencing or leveraging have two central elements: foreclosure and consumer or user harm (Hunt *et al* 2022). Foreclosure refers to the exclusion of current and potential rivals in the market where the ancillary service is provided, which can occur through reduced access, increased costs, or diminished incentive to innovate (Hunt *et al* 2022). This can distort competition in the downstream market to the benefit of the platform operator's vertical affiliate (Hunt *et al* 2022). Further, when a company engages in self-preferencing, it can create an uneven playing field and disadvantage its rivals that can lead to a distortion of competition in upstream market where it is a direct competitor, and in downstream markets where the company may have an indispensable input (*Microsoft Corp. v Commission* 2007; *Amazon Marketplace* case 2020). In the case of Google Search, it acts as an upstream supplier of "traffic" which is an important input for comparison-shopping services including Google Shopping. Google's practice of demoting the organic ranking of rival comparison-shopping services and only allowing Google Shopping to have a prominent position on the search engine results page could be seen as a form of input foreclosure *(Google Search (Shopping)* case 2017). This conduct foreclosed rivals by reducing their supply of free clicks from the search engine results page and increasing the supply of free clicks to Google Shopping. It also increased costs for non-affiliated comparison-shopping services as they had to rely more on paid clicks through purchasing search advertisings *(Google Search (Shopping)* case 2017). The self-preferencing theory of harm focuses on how it harms to consumers materialises, in the case of Google Shopping, the EU Commission found that Google's conduct could lead to higher fees for merchants and higher consumer prices if merchants reflected the higher fees in their own prices *(Google Search (Shopping)* case 2017). Additionally, the Commission found that the conduct negatively affected consumers due to it could diminish consumers' ability to access the most relevant comparison-shopping service, as Google's comparison-shopping services did not always show the most relevant results and some consumers may not have been aware of this *(Google Search (Shopping)* case 2017). The EU Commission also stated that innovation was negatively affected as rivals were disincentivised from innovation due to not expecting to attract sufficient user traffic to compete with Google (*Google Search (Shopping)* case 2017). Also, Google did not have the motivation to improve its own service or innovate due to not competing on merits, this indirectly harming consumers through reduced quality or relevance (*Google Search (Shopping)* case 2017). It is important to note that European Commission tends to focus more on the evidence of foreclosure rather than actual consumer harm (Hunt *et al* 2022). This may be because it can be challenging to demonstrate harm to consumers in the context of digital platforms, especially when many

platforms offer their services for free or when the harm is indirect and dynamic in nature (Hunt *et al* 2022).
The European Commission opened the proceeding in 2010 and finally adopted a prohibition for decision in 2017 (*Google Search (Shopping)* case 2017). This decision resulted in a significant challenge for proving that Google's biased algorithm favoured its own products, as it required a substantial number of resources to be invested in order to successfully build a case (Sariçiçek 2020). This case demonstrates the potential harm of self-preferencing practices and the need for regulatory intervention to protect competition and consumer choice (Signoret 2020). In short. even self-preferencing can be abusive conduct under the EU competition law, but it is challenging for the competition authority to find negative effects on competition for outweighing the prohibition of such practice.

3.2 Competition approach to self-preferencing practices

Self-preferencing can be seen as a form of leveraging, where a dominant firm leverages its market power to gain an advantage in a separate market (Cremer *et al* 2019). In the context of the digital market like cases of *Amazon Marketplace* and *Google Shopping*, self-preferencing occurs when Amazon promotes its own products over those of third-party sellers on its online marketplace, or Google demotes the ranking of rival comparison-shopping services. This can create an unfair advantage for the dominant platforms and disadvantage others. The concern is that self-preferencing can be used as a tool to extend market power and restrict competition, which can have negative effects on innovation and customer choice. However, there are problems when handle with this practice; one is an exhaustive list of exclusionary behaviour, in some jurisdictions, that does not cover self-preferencing practice, another is that, in some jurisdictions, self-preferencing is found to be abusive, but it is subjected to an effect test.

In the case that self-preferencing does not fall within the exhaustive list of exclusionary behaviour. The competition law of many countries, including Thailand, specifies the behaviour's list of abuse of a dominant position. This means that if new forms of exclusionary abuse arise, the law cannot extend its regulation beyond the exhaustive list provided by law. Even though self-preferencing is a common practice occurring not only in the digital economy, but also it occurs in the brick-and-mortar business. However, the self-preferencing practice in the digital market by using acquired third-party sellers' data to manipulate the ranking in favour of its own products in the relevant market. By this way dominant platforms take advantage from data they hold to give preferencing to their own products that can be seen as the new form of abuse due to it is not competition on the merit. Especially, in the era that technology and algorithm is advanced including online platforms are in the data-driven market, it is easy for the dominant firms to have self-preferencing practices. Furthermore, digital platforms, like Amazon or Google that one of its roles acts as an intermediary in a market that has the authority to regulate the rules governing interactions on their platforms – as it can regulate the access to and exclusion from the platform; how to offer products, access to data generated on the platform (Cremer *et al* 2019). When these platforms have a dual role, it means they both facilitate transactions and display product rankings, thereby it is a possibility for abusive self-preferencing (Cremer *et al* 2019). Therefore, when the conventional approach of competition law does not give significance to the benefits that data can generate, it thus may not be aware of this type of practice.

In the better case, competition law of some jurisdictions provides the flexible provision to cope with all types of exclusionary behaviour. TFEU Article 102, for instance, according to Article 102(c), if a company applies different conditions to equivalent transactions with other trading parties, which places them at a competitive disadvantage, it may be considered an abuse (Cremer *et al* 2019). However, it is important to note that Art. 102 does not impose a general prohibition on self-preferencing that means it is not abusive per se, but if self-preferencing is found to be abusive and without any pro-competitive rationale, it can be considered a violation subjected to an effect-based approach (Cremer *et al* 2019). This means that the competition authority has to assess both the potential anticompetitive effects and the efficiency gains resulting from the behaviour. If the potential anticompetitive effects outweigh the efficiency gains, then the behaviour will be considered an abuse of a dominant position and an infringement of competition law.

Certainly, if taking into consideration of an effect test it is likely to result in a leveraging of market power to restrict competition so self-preferencing could be abusive (Hutchinson 2022). Some EU cases noted that self-preferencing can be held as abuse of a dominance if dominant firms leveraged their position to a separate market instead of competing on merits (*Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission* 1974;. *Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB*) 1985). *Google Shopping*, for example, the EU Commission investigated practices on Google that involve unlawful self-preferencing. On a matter of fact shown that Google had a market dominant position because Google's search engine held market share exceeding 90 per cent, also because its network effects gave rise high barrier to entry in comparison shopping markets. Thus, the EU Commission observed that the company exploited its powerful market position to promote its own comparison-shopping service in search results, while demoted those of competitors (European Commission 2015). This practice is a

form of an abuse of a dominant position by restricting competition (European Commission 2015). The EU Commission further observed that the Google's conduct had the potential of impeding competition in the comparison-shopping search because its services were an irreplaceable source of traffic which is essential ability for competing in the comparison-shopping search market (Google Search (Shopping) case 2017). This Google' practice increased the traffic of its products as Google Shopping as well as its revenues had been increased, while the traffic and revenue of its competitors decreased. After taking into account the effect test for finding the impacts of its practice the European Commission concluded that the Google's practice had deterred competition on the merits for comparison shopping markets and unlawfully protected its dominant position in general search (*Google Search (Shopping)* case 2017).

3.3 Implementation of Trade Competition Act 2017 of Thailand

In the context of Trade Competition Act 2017 of Thailand self-preferencing could be regulated under provisions of abuse of dominance if a firm is dominant, or provisions of unfair trade practice. However, when taking into consideration of Section 50 abuse of dominance which governs four types of abusive manners. First, the conduct of unreasonably fixing purchasing or selling prices of goods or services which are (1) predatory pricing; (2) price below cost; price discrimination; (3) margin squeeze; and (4) excessive pricing. Second, the conduct of fixing conditions in an unfair manner requiring its trade partners to restrict services, production, purchase or distribution of goods which are (1) exclusive dealing; (2) resale price maintenance; (3) tying; and (4) refusal to supply. Third, the conduct of suspending, reducing or restricting services, production with an object to reducing the quantity lower than the market demand. Fourth, the abusive conduct of intervening in the operation of business of other persons without justifiable reasons (The Trade Competition Commission Notice on Guidelines for the Assessment of Practices by an Undertaking with Dominant Position 2018). However, self-preferencing is not fall under scope of these four types of prohibited conduct. According to an exhaustive list of exclusionary abuse that is in Guidelines for the Assessment of Practices by an Undertaking with Dominant Position does not cover self-preferencing practice. It means that competition law regime of Thailand cannot be extended its regulation to apply for this such new form of exclusionary abuse.

Unfair trade practice' s provision of Section 57 governs four types of prohibited unfair practices which are:

(1) unfairly restricting other trade partners' businesses such as price discrimination or restricting rights of other trade partners in a mandatory manner without due cause.

(2) unfairly exercising market power or superior bargaining power over trade partners.

(3) unfairly imposing restrictive or obstructive trading conditions on other trade partners' business such as discriminatory trading conditions for different undertakings.

(4) carrying out any other action prescribed by the Notification of the Commission which are unfair practice in franchise business, fruit trading, and unfair trade practice in particular between retailers and distributors or producers.

When taking into account the above four types of unfair practice, self-preferencing could fall under a scope of type (2) of Section 57. Trade Competition Commission of Thailand's Guideline for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertakings (the Guideline) gives a list of aspects of unfairly exercising market power or superior bargaining power which includes the conduct of requirement for trading partners to offer trading or other benefits to the firm in question without due cause. In other words, a firm that has market power or superior bargaining power imposes contract terms or conditions to require its trading partners to allow the firm taking some benefits over them is prohibited under Section 57(2). For example, a case study of *Amazon Marketplace* (Case AT.40462 2022), Amazon makes agreement with sellers, that rely on its online marketplace for their selling, allowing its retail business to analyse and use third party sellers' data to promote its own products with better prices and offering consumers. It could state that where a large online platform' s firm enjoys a position of superior bargaining power, and other parties are economically dependent on the online market platform of the firm. The counterparties have to accept such unfair terms and conditions which make the firm has competitive advantage over its competitors.

However, such practice infringes Section 57(2) only when the firm, which commits specified unfair practice, must have 'market power or superior bargaining power' over another firm. Assessment of the position of being market power or superior bargaining power is crucial for determining the unfair practice under Section 57(2). When taking a closer look at a scope of which firms have 'superior bargaining power', it needs to consider the given definition by the Guideline. According to the Guideline firms with 'superior bargaining power' is assessed by the value of transaction which is buying or selling of goods or service between trading partners and the firm which is alleged having superior bargaining power. The firm would have superior bargaining power (i) where the revenue of the one with lesser bargaining power at least 30 per cent comes from the transaction with the firm with superior power, or (ii) 10 per cent or higher but less than 30 per cent of the revenue of the one with lesser bargaining power comes from the transaction with the firm with superior power, and the trading partners is implicitly acquiescent because no alternative suppliers, or dealing with an alternative one may incur significant

operating expenses exceeding benefits from dealing with an existing supplier (The Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertaking 2021). In other words, to assess the position of superior bargaining power it based on how significance of the trading partners rely on doing business with the firm with superior bargaining power which assessed by the value of transaction between them. If the value of transaction is high it is likely that the trading partners have to unavoidably accept unfair practice of the firm with superior bargaining power. As for the market power, according to the guideline it shall be assessed from an ability of a firm to determine price, quantity, or trading terms and conditions in a market, it shall be presumed that a firm with a market share of 10 per cent or higher is deemed to have market power (The Trade Competition Commission Notice on Guidelines for the Assessment of Unfair Trade Practices Resulting in Damage to Other Undertaking 2021). Thus, the infringement of Section 57(2) depends on the position of online platform's operator in question. If it is a large online platform' s operator like Amazon or Google which one of its roles acts as an intermediary in a market that have the authority to regulate the rules governing interactions on their platforms – as it can regulate the access to and exclusion from the platform, it can address that it has market power, but if the platform's operator is not large enough, it needs to assess whether the firm has superior bargaining power which may bring about a concern that if the value of transaction between them is lesser than the criterion set forth in the guideline, consequently, Section 57(2) cannot be applied. Furthermore, as the example of Amazon case, Amazon does not deal any transaction of selling or buying of goods with the retailers in its marketplace. Hence, when applying Section 57(2) to self-preferencing practice of online platform' s operator, only the market power shall be assessed. It can conclude that it cannot precisely address that Section 57(2) of Trade Competition Act can effectively apply to regulate unfair trade practice regarding self-preferencing because it may face an obstacle to meet with the criterion of assessment of superior bargaining power' s position.

4. Conclusion

If unfair trade manners such the self-preferencing which favours a dominant firm more than rivals, and personalised pricing practice, which have adverse effects to consumers, are not perceived and unchecked, it may have a greater adverse effect on the competitive market. The long-run consequence of these anticompetitive behaviours may not simply be higher price, but foregone innovation, and potential competitors. It is the responsibility of competition law to ensure that dominant firms do not directly and indirectly harm both counterparties and consumers with unfair practices, which they can simply impose due to their market power. Competition law, when sufficiently adjusted its content and approach can deter anticompetitive behaviours of online firms and keep competitive portal open. Indeed, the prohibition of all these behaviours increases fair competition in the market resulting in fair prices and practices, and thereby benefits the consumers. When the competitive portal opens and expands during the competitive environment can foster significant innovation, as well as maintain economic and consumer welfare. Therefore, it is a big challenging task for Thailand's legal providing to address and deal with those new forms of abuse of a dominance that happen in the digital economy.

References

Bourreau, M., Streel, A. & Graef, I. (2017), "Big Data and Competition Policy: Market Power, Personalised Pricing and Advertising", Project report of Centre on Regulation in Europe improving network industries regulation, <https://papers.ssrn. com / sol3/papers.cfm?abstract_id=2920301>, accessed January 30, 2023.

Concurrence, Autorité de la and Bundeskartellamt. (2016), "Competition Law and Data.", Available https://Bundeskartellamt - Homepage - French and German competition authorities publish joint paper on data and their impact on competition law, Accessed June 30, 2023.

Cremer, J., Montjoye, A. & Heike, S. (2019), "Competition Policy for the Digital Era. Final Report, Ec", <https://ec.europa.eu/ competition/publications/reports/kd0419345enn.pdf.>, Accessed January 30, 2023.

European Commission. (2018), "Consumer Market Study on Online Market Segmentation through Personalized Pricing/offers in the European Union". <https://data.europa.eu/doi/10.2818/990439.>, Accessed March 20, 2023.

European Commission. (2015), 'Fact Sheet: Commission sends statement of objections to Google on comparison shopping service'. <https://europa.eu/rapid/ press-release_MEMO-15-4781_en.htm.>, Accessed 15 March 2023.

Hunt, M., Safter, D. & Robert, S. 2022. '"Self-Preferencing in Digital Market", *Global Competition Review*, <https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/self-preferencing-in-digital-markets#footnote-086.>

Hutchinson, S. & Treščáková, D. (2022). "The Challenges of Personalized Pricing to Competition and Personal Data Protection Law", *European Competition Journal* 18(1), 105-128.

Hutchinson, S. (2022). "Curbing big tech's IoT dominance." *European Competition Journal* 18(2), 265-286.

Lancieri, S. & Patricia, M. (2021). "Competition in Digital Market: A Review of Expert Reports", *Stanford*

Journal of Law, Business and Finance 26(1), 65-170.

Pettinger, T. (2018). "Definition of consumer surplus." *Economic Help*, <https://www.economicshelp.org /blog/188/concepts/definition-of-consumer-surplus/.>, Accessed May 5, 2023.

Sariçiçek, C. (2020). "Me, Myself and Amazon: The Challenges Digital Marketplaces Pose to Eu Competition Law", *Competition Journal* 21(1), 122-199.

Signoret, L. (2020). "Code of Competitive Conduct: A New Way to Supplement Eu Competition Law in Addressing Abuses of Market Power by Digital Giants", *European Competition Journal* 16(2-3), 221-263.

The White House. (2015). "Council of Economic Advisers. Big Data and Differential Pricing", <https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/docs /Big_Data_Report_ Nonembargo_v2.pdf.>, Accessed June 28, 2023.

Turow, J., Feldman, L. & Meltzer, K. (2005). "Open to exploitation: America's Shoppers Online and Offline" (Working Paper). *Philadelphia, PA: Annenberg Public Policy Center, University of Pennsylvania*, <https://repository.upenn.edu/handle/ 20.500.14332/2000. >, Accessed June 23, 2023.

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Understanding Islamic Sharia and the KSA Legal System

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Abstract
Individuals who lack knowledge about the legal system in the Kingdom of Saudi Arabia (KSA) and Islamic Sharia may encounter challenges in comprehending the functioning of the legal system that is grounded in Islamic Sharia. This article offers a concise explanation of how the legal system in the Kingdom of Saudi Arabia is derived from Islamic Sharia law.
Keywords: the KSA legal system; Islamic Sharia; Royal Decree; statutory law.
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1. Introduction

In 610 CE, the Prophet Mohammed (PBUH) received the revelation of Islam in Makkah. Having had the same message conveyed to Abraham, Moses, and Jesus, this teaching was a moral and theological continuation of the earlier monotheistic faiths.[1] According to this doctrine, there is only one God, who has neither father nor son, and steadfastly rejects the idol venerated by the Arabian tribes.[2] As a religion, Islam aimed to change the harsh practices of the Arabian Peninsula and establish a set of standards of behaviour for everyone.[3] In the Qurʾān, it is stated, 'Indeed We sent Our Messengers with clear signs, and sent down with them the book and the balance that people may uphold justice'. This passage could be interpreted as suggesting that God sent the Islamic message to promote human welfare and foster peace.[4]

As outlined by the Qurʾān, Islam aims to protect people from injustice by advising them to do what is right and prohibiting them from doing what is wrong. Furthermore, the gospel empowers them to overcome burdens and yokes that have been placed upon them.[5] The KSA recognises Islam as the exclusive religious and legal foundation.

2. The Concept of Islamic Sharīʿa

The word Sharīʿa refers to Islamic Sharīʿa. It is derived from the Arabic phrase that means 'taking the right path'[6], in which God's rule is referred to.[7] The concept of Islamic Sharīʿa can be understood both as a legal system and as a set of guidelines that encompass the entirety of a Muslim's daily life.[8] Hence, Islamic Sharīʿa is considered to be both a religion and secular.[9] Islamic legal scholars agree that the four main sources for establishing Islamic Sharīʿa are the Holy Book (The Qurʾān), The Sunna (the traditions or known practices of the Prophet Muhammad), Ijmāʿ (Consensus), and Qiyas (Legal Analogy). The Qurʾān and the Sunna are the two primary sources of Islamic Sharīʿa, which are the foundations of the Saudi Legal system.[10] Ijmāʿ is an Arabic term referring to the consensus or agreement of the Islamic community on a point of Islamic Sharīʿa based on legal analogy (Qiyas). These latter sources are collectively referred to as "the striving of a legitimate scholar to reach a religious verdict" (Ijtihad).[11]

2.1. Primary sources

2.1.1. The Qurʾān

The Holy Qurʾān is regarded as the most important scripture in the Islamic religion. A majority of scholars agree that the Qurʾān is considered to be the utterance of God, sent to the prophet Muhammad in order to guide his

[1] Qurʾān, 14:1, 'Alif. Lam. Ra. (This is) a Scripture which We have revealed unto thee (Muhammad) that thereby thou mayst bring forth mankind from darkness unto light, by the permission of their Lord, unto the path of the Mighty, the Owner of Praise'.
[2] Qurʾān, 30:1, 'Say (O Muhammad (Peace be upon him)): 'He is Allah, (the) One'
[3] Wael Hallaq, 'A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-fiqh' (1999) Cambridge University Press 31.
[4] Qurʾān, 57:25.
[5] Qurʾān, 7:157.
[6] Cherif Bassiouni and Gamal Badr 'The Shariah: Sources, Interpretation and Rule-Making' (2002) 1 UCLA Journal of Islamic & Near Eastern Law 135.
[7] Majid Khadduri and Herbert Liebesny, *Origin and Development of Islamic Sharia: Law in the Middle East* (Lawbook Exchange 1955) 105.
[8] SS Ali, 'Teaching and Learning Islamic Sharīʿa in a Globalized World: Some Reflections and Perspectives' (2011) 61(2) Journal of Legal Education 207.
[9] David Weissbrodt and others, 'International Human Rights: Law, Policy and Process' (2009) LexisNexis 239.
[10] See the important research by Emilia "Using Islam to Protect the Rights of Migrant Workers: Bringing Kafala into Sharīʿa Compliance in Saudi Arabia" UCLA Journal of Islamic and Near Eastern Law, 20(1) 2023 < https://escholarship.org/uc/item/1ht6n3qz>.
[11] Muhammad Ata Alsid Sidahmad, The Hudūd 432 (1995).

followers in virtuous behaviour and interpersonal relationships. Consequently, the laws included in the Qurʾān regulate civil contracts and alliances, as well as religious obligations. Islam maintains a clear distinction between acts of worship, which encompass devotional obligations, and transactions, which are legal transactions governed by Islamic Sharīʿa. It is widely believed that Islamic Sharīʿa is a comprehensive legal framework that includes religious duties (referred to as the five pillars) and regulations governing other aspects of transactions, including contracts, torts, property, crimes, punishments, and war and peace laws. Also included are issues pertaining to family law, such as marriage, divorce, child custody, inheritance, and wills. The Qurʾān consists of a grand total of 6,239 verses, out of which 500 verses are dedicated to the discussion of criminal law, contracts, duties, and other facets of the legal framework. Furthermore, the Holy Qurʾān uses the phrase 'dignity' or a related form, a total of 49 times. According to a certain scripture, the Almighty proclaims: 'We have granted dignity to the offspring of Adam'.

2.1.2 The Sunna

According to Islamic Sharīʿa, the Qurʾān is the primary source of guidance, with the Sunna providing additional guidance. The Hadith, is often referred to as the Sunna of the Prophet which is a compilation of the teachings and actions of the Prophet Muhammad and therefore they have significant authority in Islam. The verses of Surah An-Nisa explain the authority of the prophet Muhammad and instructs believers to adhere to the Messenger who has been assigned to them by God.[1] Thereunder, the Sunna explicates and clarifies the Qurʾān ic's general regulations, prohibitions, and commands. Furthermore, the results are corroborated by the Prophet's personal observations and accounts of scientific explanations and oral teachings that he shared with his disciples throughout his lifetime. Consequently, it may be said that there are two categories of Sunna: the Sunna pertaining to verbal expressions and the Sunna pertaining to physical deeds.

The Qurʾān is ultimately the most authoritative source, but both sources are essential to a great understanding of Islamic Sharīʿa. Nevertheless, each of them may require some interpretation where supplementary legal sources are used when the primary sources or secondary sources of law are inadequate or uncertain for addressing specific issues.

2.2 Secondary sources

2.2.1 Ijmāʿ(Consensus among legal scholars)

According to Islamic jurisprudence, consensus is considered the third most important authority source. In the present context, consensus 'Ijmāʿ' refers to the shared viewpoint of Islamic jurisprudence, the consensus of a group of Muslim jurists regarding a particular ruling or decision. The Prophet stated in a hadith that has been transmitted, 'Indeed, Allah will not permit Muhammad's community to concur on an error'.[2] In addition, obedience to God and the Messenger, in addition to those in positions of authority within the Muslim community, is obligatory according to the Qurʾān.

2.2.2 Qiyas (legal analogy)

The analogy is the fourth source of Islamic Sharīʿa. It is a method of utilising rational thinking concerning the application of verdicts derived from the holy texts to various emerging issues that arise in our day. Four essential components are required for analogous reasoning: the origin, which describes the original subject; the branch, which represents the new subject; the explanation, which is a statement of the shared cause between the two; and the ruling, a statement that refers to the inferred rule derived from the analogy.[3]

Based on the sources of Islamic Sharīʿa, it can be said that rules are derived from the Qurʾān and Hadith, as well as consensus and a process of interpretation known as Qiyas. A certain process needs to be followed when these sources are in conflict. It is believed that the Qurʾān and the Prophet's Sunnah are the primary texts or fundamental sources in this approach. There are many circumstances in which logic and reason may be applied, provided that they do not contradict the teachings of the Qurʾān and Sunnah.[4] According to Baderin, the concepts of IIjmāʿ and Qurʾān assist individuals in interpreting and implementing the teachings of the Qurʾān and Sunnah with intricate and constantly evolving situations.[5]

2.3 The concept of Ijtihad and the Islamic schools of thought

Islamic jurisprudence, according to Islamic Sharīʿa, refers to the cognitive process of uncovering and deducing

[1] As for the obligation of following the prophet and complying with his Sunnah, the Qurʾān states in Surah An-Nisa - 59: 'O you who have believed, obey Allah and obey his Messenger and those over you'.
[2] Muhammad Al-Uthaymeen, Al-Sharh Al-Mumti' 'In Zad Al-Mustaqni' Vol 7(Dār Ibn Al-Jawzi 1428)
[3] An analogy may be illustrated by dispossessing a murderer of his inheritance. As per the Sunnah of the Prophet, it is prohibited for a murderer to receive inheritance. Analogically, this norm encompasses testamentary law as well.
[4] An illustration of this may be seen in the narrative of Muadh bin Jabal, who was designated by the Messenger to oversee the virtuous adjudicators in Yamen. Prior to assuming the position of judge, Muadh was inquired by the prophet whether there are any Qurʾān ic passages or Prophetic sayings that might serve as guidance in the judiciary. Muadh replied, "I will exert my utmost effort in rendering judgements." The Messenger consented to this. Thus, this practice reinforces the previously stated organisation of Sharia's sources.
[5] Mashood Baderin, *International Human Rights and Islamic Sharīʿa* (Oxford University Press 2003)

principles pertaining to God's legal rules (Sharīʿa). In Islamic jurisprudence, Ijtihad is the process of deriving legal views by analysing and interpreting writings from the law. It is crucial to comprehend that Sunni and Shiite legal philosophy include many distinct schools of thought. Sunni legal interpretation is grounded on four prominent schools of jurisprudence: Hanbalia , Malikia , Shafi'ia , and Hanafia. As a group of Shiites, there are several different branches, such as Twelver, Imami, Ismaili, Alawite, Druze, and Zaidi.

Islamic Sharīʿa is fundamentally 'An exhaustive body of regulations' which can be implemented anywhere and at any time due to its mechanical structure. Islamic Sharīʿa holds that only God has complete knowledge and understanding of all matters. Consequently, a significant proportion of Muslims maintain the notion that Islamic Sharīʿa is fair and regard it to be a natural principle which the rational mind should strive to understand, since it represents the ultimate truth. As part of the Islamic Sharīʿa, one must not only consider the rationality of their outcomes, but also their favourable outcomes. Due to the divine and inviolable character of Islamic Sharīʿa, these concepts are certain and not subject to speculation. Consequently, Islamic Sharīʿa is different from other legal systems. While followers of Islam contend that secular law is unsubstantiated, Islamic Sharīʿa maintains that the law as elucidated in the Qurʾān offers a clear and unequivocal basis for legal concepts. As for the Qurʾān, 'This is the Book; in it is guidance sure, without doubt, to those who fear Allah'. That is a statement expressing agreement or confirmation.

Due to its immutable nature, Islamic Sharīʿa is inalterable by removal, or substitution, thus constituting an eternal source. However, it is feasible to differentiate between the unchanging principles of Islamic Sharīʿa and the adaptable regulations that may be periodically reinterpreted by careful examination.

Ijtihad may be described as a process used to read texts with the purpose of extracting standards from them. Muslims who engage in legal reasoning are obligated to adhere to the subsequent principles, as stipulated in the Qurʾān and the Sunnah of the Prophet: Islamic scholars adhere to the principles of Islamic Sharīʿa and refrain from violating them. They focus their analysis on contemporary issues based on the Qurʾān and Sunnah. In addition, it is not acceptable to rely solely on justice or common sense when making decisions. Accordingly, Islamic Sharīʿa provides an objective interpretation rather than one that is subjective. It is an unauthorised inference made without the approval of a governing authority. In addition, if the interpretation is speculative in nature and hypothetical, it therefore cannot be conclusive.

In summary, Ijtihad plays a vital role in the application of Islamic law in modern life, particularly in cases when there are no established sources for specific situations. It has a crucial function in contexts where criminal law is lacking, and Muslim scholars need to depict Islamic principles accurately. Therefore, it is incumbent upon individuals to assiduously seek divine guidance and adhere to the textual foundations of Islamic Sharīʿa, specifically the Qurʾān and the traditions bequeathed by the Prophet, in order to discover principles and resolutions pertaining to social issues such as human trafficking.

The corpus of Islamic law can be broadly classified into three categories:

i. Rituals and worship (ibadat);
ii. Civil and other legal duties that include administrative, commercial, constitutional, labour, employment, family, and civil laws (mu'amalāt) in the modern sense; and,
iii. Sanctions (uqūbat).[1]

3.The Foundation of the Saudi Legal system

The official language of Saudi Arabia is Arabic, which is the language used in all of its official legal documents. Although legal materials come in of various forms, they can be broadly categorised into three sources: Royal Orders, statutory law, and Islamic law. The KSA acknowledges Islamic Shari'a as the only basis for its legal system. Sharīʿa refers to the body of Islamic law as it serves as a guideline for all legal matters in Saudi Arabia. In the Sharīʿa, and therefore in Saudi Arabia, there is no difference between the sacred and the secular aspects of society. In fact, Saudi Arabia has no formal constitution; however, by Royal Decree in 1992, the King implemented the Basic Law of Governance. To the extent that the Basic Law can be considered an 'informal' constitution, Article I establishes the Qurʾān and the Sunnah of the Prophet Mohammed as the 'formal' constitution. In light of this, there should be no inconsistencies between the laws of the State and the principal sources of Islamic Sharīʿa.[2] A notable characteristic of the KSA is that it does not have many secular laws. Nonetheless, this may also increase the difficulty of determining the true meaning of the law, particularly in a system that lacks judicial precedent. Traditional laws can be interpreted more flexibly in this manner.[3]

The Basic Law has a total of 83 articles distributed throughout nine chapters.[4] Article 7 of the Saudi

[1] ibid. 424 – 433.
[2] Saudi Basic Law of Governance (1 March 1992) art 8.
[3] Lisa Wynn, 'Marriage Contracts and Women's Rights in Saudi Arabia; Mahr, Shurūt, and knowledge distribution (2008) Islamic Legal Studies Program, Harvard Law School 200.
[4] The Saudi Basic Law of Governance was adopted on 1 March 1992.

constitution establishes that the Saudi government has authority derived from the Holy Qurʾān.[1] Under Article 44, the King is exempted from the separation of powers, which applies to the legislative, executive, and judicial branches. The monarch is their ‘'ultimate authority’." As per Article 67 of the Constitution, if Islamic Sharīʿa does not directly address a legal issue, but a regulatory action is still needed, then a king may enact regulations (nizams) to address that issue in accordance with Islamic Sharīʿa. Furthermore, Article 68 of the Constitution provides for consultation and advice between the Council of Ministers and the 1992-reestablished Consultative Council (Majlis Al-Shura).[2]

Its duties include policy advice and the creation of rules and bylaws that are consistent with Islamic Sharīʿa principles and serve the public interest.[3] It was given the authority to create policies related to all public affairs, including economic, financial, and international affairs. As per the rule, an ordinance (nizam) could only be issued by royal order and would not come into effect until it was published in the official gazette.[4] According to Article 48, courts (including labour courts) must ‘"apply Islamic Sharīʿa to cases before them in strict conformity with the Qurʾān, and Sunnah as well as other regulations issued by the Head of State’".[5] The Council of Senior Eulama was founded in 1971 to make sure governmental regulations follow Islamic law. An important function of this institution is to advise the king and the administration on matters of state. Over the years, the council has played an integral role in the development of government policy.[6]

Council of Senior Eulama viewpoints regarding specific criminal law issues are considered authoritative by the legal profession. With the assistance of intellectuals and jurists, the State has been able to maintain Islamic Sharīʿa despite the KSA's incredibly rapid development.[7] During the past few decades, the KSA has frequently interpreted and applied Islamic Sharīʿa in a more traditional and conservative manner, which may explain why many observers perceive it as inflexible.[8]

Considering its prominent role in the Muslim world as the location of two of the most significant Islamic holy mosques, the KSA has an obligation to safeguard its Islamic identity. Accordingly, it declares itself to be an Islamic State throughout, binding itself to Islamic values and customs.[9] Additionally, the KSA is considered one of the nations most likely to maintain a strict Islamic legal system.[10] In this regard, the KSA has a distinct legal system compared with both the western and the Islamic systems that are practiced elsewhere.[11]

In general, Saudi law is mistakenly thought to be solely Islamic Sharīʿa. However due to the presence of regulations issued by the government, the law in reality is more comprehensive than it first appears. Consequently, the KSA has adopted a completely new interpretation of Islamic Sharīʿa relating to the legislative authority of the government following the passage of these laws. This new methodology appears to acknowledge that it is possible to enact laws under Islamic Sharīʿa ‘without in any way infringing on the function reserved exclusively for God’".[12]

In addition, tribal values, traditions, and customs make an important contribution to Saudi culture and their legal system, as in most of the Middle Eastern. Esmaeili concludes that tribal law, tradition, or custom have a significant influence on the political and governmental structures of the KSA, as well as the laws pertaining to private and individual matters.[13] It is, however, safe to say that Islamic Sharīʿa is without a doubt the cornerstone of the Saudi legal system, as well as in the Islamic world. However, there is one critical point to note here, that no law shall conflict with Islamic Sharīʿa, as the Qurʾān and the Sunnah constitute the primary sources of legal norms in the KSA.

The first place to look for information on Saudi Arabian law is the ‘fiqh,’ or Islamic law. Fiqh is an Arabic

[1] ibid arts 1, 7 and 48; Additionally, Rashid Aba-Namay's article ‘The Recent Constitutional Reforms in Saudi Arabia’ appeared in 42 International and Comparative Law Quarterly 295.
[2] Its responsibility is to establish rules and regulations that serve the public interest while also adhering to Islamic Sharia.
[3] Saudi Basic Law of Governance (1 March 1992) arts 67
[4] Many Saudi Eulama view the word 'nizam' (ordinance or regulation) as a Western concept that is not permitted under Islamic Sharia. This word distinguishes itself from the word 'law' and is commonly used to refer to codified laws. It is also avoided to use the term "legislative authority" in preference to "regulatory authority," as a phrase that can only be applied to God as the only legislator. In 2004, AM Al-Jarbou published a case study on the independence of the judiciary in Saudi Arabia in 19 Arab Law Quarterly 5, 31.
[5] Saudi Basic Law of Governance (1 March 1992) arts 1, 7 and 48
[6] Anders Jerichow, *The Saudi File – People, Power, Politics* (St Martin‟s Press 1998) 68.
[7] KSA History, Ministry of Foreign Affairs of the Kingdom of Saudi Arabia's website https://www.google.co.uk/search? accessed 01 December 2023.
[8] Hossien Esmaeili, ‘On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System’ (2009) 26 Arizona Journal of International and Comparative Law 1.
[9] The Kingdom of Saudi Arabia, as protector of Islam's holy sites, holds a special place in Muslims' hearts. This is stated in paragraph 2 of part 1 of the KSA's Initial Report to the CRC (n 15).
[10] Cf Enid Hill, ‘Comparative and Historical Study of Modern Middle Eastern Law’ (1978) 26 The American Journal of Comparative Law 295.
[11] Jan Michiel Otto, *Sharia Incorporated; A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press 2010) 172.
[12] KA Faruki, *Evolution of Islamic Constitutional Theory and Practice* (1971) 4.
[13] Hossien Esmaeili, „On a Slow Boat Towards the Rule of Law: The Nature of Law in the Saudi Arabian Legal System‟ (2009) 26(1) *Arizona Journal of International and Comparative Law* 1.

Islamic jurisprudence term derived from the root word faqiha, meaning ‘deep and comprehensive understanding’. The Arabic literature has used the word ‘fiqh’ and its subtracts in the quest of knowledge, wisdom, and in-depth understanding of Islamic laws. One looks to the ‘fiqh’, or "ijtihad," of religious-legal scholars from the past and present who, through their knowledge and devotion, have become qualified in interpreting Islamic Law and deduce laws rather than from State legislation or court decisions. The majority of the recognised Islamic legal schools' body of knowledge, or ‘fiqh,’ is found in works authored by Muslim scholars (Ulama) throughout a nearly fourteen-century span.[1] Saudi Arabian judges base their decisions on these texts, particularly those that are regarded as canonical sources in every Islamic legal school.[2] According to Professor Frank Vogel, who examined the Saudi legal system:

> Every source of Saudi law, with the exception of the Qurʾān, was written or assembled by academics known as Ulama. This includes the compilation of the Prophet's customs. Ulama's ability to produce these texts is based on their standing as scholars, not on any formal or official roles they may have, like judge or professor in an academic institution. Based on these sources, other Ulama, like Saudi Arabia's judges and Mufti, produce fiqh to provide guidance to others or settle disputes. Usually, a scholar is required to assess these materials and render a decision. A non-scholar has a moral duty to contact someone who is more knowledgeable than them when it comes to interpretation; they can do this by getting their fatwa or by reading a book where the expert has expressed their ideas.[3]

The Hanbali school, the fourth orthodox school of law within Sunni Islam, interprets Islamic Sharīʿa, which forms the basis for the implementation of Islamic law in Saudi Arabian courts. Even with the Kingdom's single school of Islamic law, there were still disparities in decisions and practices, which made it more challenging to get a reliable legal opinion. The scholars of the Hanabli school of Islamic law held differing views and philosophies, which contributed to the multiplicity of interpretations.

In June 1928, the Judicial Board of Saudi Arabia adopted a resolution, which was subsequently confirmed by the King, aiming to address the inconsistencies. The resolution declared that rulings would follow the established decisions found in Imam Ahmed ibn Hanbal's school of Islamic law due to its books' clarity and simplicity, the consensus of this school's adherents, and the presentation of evidence addressing any issues that may be at hand.[4]

Specific Hanbali school books were named by the Judicial Board as the official and primary sources for the Shari'a courts under its purview. Judges were instructed to refer to the two late Hanbali authoritative works written by renowned Hanbali jurist Mansur ibn Yunus al-Bahutī al-Hanbali (1052 A.H./1642) as per the resolution's paragraph (c):

Sharh Muntaha al-Iradat (Manual's Explanation); further

Sharh al-lqna' (Manual for Explaining Al-Lqna').

When attempting to solve a particular issue, judges must abide by the solution offered by one of the books and not the other, or by the answer that both agree upon. If there is a disagreement, nevertheless, Sharh al-Muntaha takes precedence. If neither of the two volumes is accessible or does not address a certain issue, judges should revert to an abridgment or synopsis of it:

A Synopsis of Al-Iqna', written by Sharaf al-Din Abu al-Naja al-Hajjawi (968 A.H./1560), is known as Zad al-Mustaqni' fi Ikhtisar al-Muqni'.

Mar'i ibn Yusuf al-Karmi's work Dalil al-Talib li Nayl al-Matalib, or A Synopsis of Muntaka al-Iradat (961 A.H./1554).

Other Hanbali law books may be studied and conclusions made in line with the prevalent opinion they contain if a solution is still not discovered.[5]As a result of this decision, a royal decree was issued in 1349 A.H. (1930) said that "a judgement not based on those texts shall require an obligatory meeting, while it shall be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which may be applied without a meeting of court members."[6]

Furthermore, there are situations where judges on hearing such cases should or should not follow the instruction of other Sunni schools, depending on the specifics. The aforementioned resolution contained a significant exception in paragraph (b) that allowed the courts to adopt the views of other schools of Islamic law if they thought in doing so would help them reach a decision that would best serve the public interest.[7]

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[1] Frank E. Vogel. Islamic Law and Legal System: Studies of Saudi Arabia at 22, 142 – 143 & 370 – 373 (2000).
[2] *ibid.*16.
[3] *ibid.*145-146.
[4] Abd al-Fattah M. Sayfi, al-Ahkam al-ammah Lil-Nizam al-Jinai fi al-Sharīʿa al-Islamiyah Wa-Al-Qanun [The General Rules of the Shari’ah Criminal Justice System] 9 (1997).
[5] Al-Hay’a al-Qadaiyyah [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by Royal Decree of 24/3/1347/ Sept. 8, 1928. *See also* Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 Int’l & Comp. L. Q. 764 – 765, 761 - 787 (1989).
[6] Fuaad Hamza, Al -Bilad al-Arabia al-Saudiah [Kingdom of Saudi Arabia] 175-76 (1988).
[7] Al-Hay’a al-Qadaiyyah [Judicial Board] Decision No.3 (17/1/1347/ June 25, 1928), approved by Royal Decree of 24/3/1347/ Sept. 8,

The Council of Ministers, the Shura Council, or the King codify family law, criminal law, legacy or inheritance, or many facets of Islamic contract law. The 'codification of Islamic law' debate is worth mentioning. Traditionalists, who favour applying Islamic law as it is understood by the Prophet's noble companions and as set forth in the Qurʾān and Sunnah, with the assistance of explanations found in traditional jurisprudential sources, have strongly opposed this.[1] While that is outside the purview of this thesis, scholastically speaking, limiting the number of jurisprudential sources of the divine law (fiqh), which caused ambiguity and differing opinions when applied in court rulings, was a significant first step towards codification and a crucial way to standardise the Saudi Arabian judicial system.[2]

The 1958 establishment of the Saudi Council of Ministers as a formal decision-making body with legislative, executive, and administrative functions brought modern laws and regulations spanning a wide range of public and private law domains into the Saudi legal system in addition to Islamic law.[3] The Saudi Corporation Law, which was enacted in 1385 A.H./1965, is a clear example of French influence in the field of private law. It was introduced into the Saudi legal system through 'the Egyptian code which was directly patterned on French company law before the amendments of 24 July 1966'.[4] The Saudi Law of Criminal Procedure also contains several provisions that were borrowed from Egyptian and French law.[5] Many other legal systems, particularly the Egyptian and French systems, had an influence numerous codes that regulate public finance, customs, ports, mines, and other areas have been enacted in the field of public law.[6]

As long as contemporary statute provisions do not violate divine law, they are generally valid and enforceable. As indicated, the objectives of Islamic Sharīʿa (Maqāsid al-Shari'a) are the only foundation upon which contemporary statutory legislation and regulations can be established and enacted. This power is only used when Islamic law lacks a clear provision addressing a particular matter.[7]According to Article 67 of the Basic Law, 'the regulatory authority shall lay down regulations and proposals to further the interests of the State, or remove what might be prejudicial thereto, in conformity with the Islamic Sharīʿa'.[8] Saudi Arabia refers to statutory laws that are autonomous, although not entirely independent, of Islamic Sharīʿa rules because, in accordance with the Islamic Sharīʿa God is sovereign and has the final say over matters of law. 'The Arabic word 'qanun,' meaning 'law,' is not used in Saudi Arabia because Sharīʿa forbids it as it symbolises secular or temporal law'.[9]

The official sources of Saudi Arabian law are established by the government and include Royal Decrees, executive regulations, schedules, laws, rules, procedures, international treaties and agreements, ministerial resolutions, ministerial decisions, circular memorandums, explanatory memorandums, documents, and ministerial decisions and resolutions. As previously stated, unless authorised by Royal Decrees following its study—typically by both the Council of Ministers and the Shura Council—no statutory laws or regulations, treaties, international agreements, or concessions may be adopted, negotiated, or changed.[10]

By issuing Royal Orders, the King can also independently create laws or policies. The head of an Islamic State, according to Islamic jurists, has the authority to enact laws, either directly or through interpretation, in order to meet growing social needs, address developmental concerns, and protect the public interest.[11] The King used his legislative authority to promulgate the following constitutional instruments between 1992 and 1994.[12]

i. The Fundamental Law;
ii. The Shura Council's Law;
iii. The Council of Ministers Law (as revised in 1993); and
iv. The Provincial Law.

Furthermore, in order to guarantee that judges have access to the most recent working knowledge and to prevent inconsistencies in their rulings, the Law of the Judiciary established a research department. This department is housed within the Ministry of Justice and is composed of several experts with a minimum of a

1928. *See also* Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 Int'l & Comp. L. Q. 764 – 765, 761 - 787 (1989).
[1] Bakr Abu Zayd, al-Taqneen Wa al-Ilzam [Rationalization and Necessity] (1982); Wahbah al-Zihily, Johoud taqneen al-fiqh al-lslamī, [The Efforts to Codify the Islamic *Fiqh*] (1987).
[2] Abd al-Fattah M. Sayfi, al-Ahkam al-ammah Lil-Nizam al-Jinai fi al-Sharia'h al-Islamiyah Wa-Al-Qanun [The General Rules of the Sharīʿa Criminal Justice System] 12-13 (1997).
[3] Roger Perrot, Institutions Judiciaires 88 (1983).
[4] *ibid.* 290.
[5] *See* Abdullah Mari Qahtani. 2 Tatawwur al-Ijraat al-Jinaiyah Fi al-Mamlakah al-Arabiyah al-Saudiyah [The Development of the Law of Criminal Procedure in Saudi Arabia] 528, & 363 (1998).
[6] Roger Perrot, Institutions Judiciaires 290 (1983).
[7] Royal Decree No. 19746 (22/9/1379H, Mar. 20, 1960).
[8] The Basic Law of Governance, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992) art. 67.
[9] Roger Perrot, Institutions Judiciaires 290 (1983).
[10] the Council of Ministers Law, Royal Order, art. 7 (12/7/1373H, Mar. 17, 1954).
[11] The Basic Law of Governance, Royal Order No. A/90, (27/8/1412H, Mar. 1, 1992) arts. 1 & 55.
[12] Sobhi Mahmansani, Falsafat al-Tashri fi al-Islam [The Philosophy of Jurisprudence in Islam] 127 – 130. (Farhat J. Ziadeh trans., by, Beirut; 1952).

bachelor's degree. Its duties include indexing, abstracting, and classifying the principles established by higher courts, gathering collections of specific judgements, general rules, and precedents for publication, conducting research projects, and responding to judges' inquiries.[1]The 2007 Law of the Judiciary's implementing rules also established the High Court's Research and Studies Department, which is made up of researchers who draft studies that the High Court's specialised circuits request.[2]

Currently, the Ministry of Justice has released a third edition of its Code of Judicial Rulings, which is a compilation of court decisions from 2008.

These decisions seem to set legally binding precedents for situations that are comparable in the future. It is beneficial in that it reduces the quantity of occasionally seemingly arbitrary rulings from certain courts. Similar departments with a director, several judges, specialists, and researchers were established as a result of the 2007 Law of the Board of Grievances. These divisions offer advice, carry out studies, categorise Board rulings, standard operating procedures, and precedents, and prepare them for publishing.[3] The Law of the Board of Grievances' implementing regulations also established the High Administrative Court's Research and Studies Department, which employs researchers whose job it is to prepare studies that the court's specialised circuits require.[4] A fourth edition of the Board of Grievances' Code of Rulings and Principles, which documents court rulings made in 2008 within its purview, has been released.

To further address the demands of the judiciary, King Abdullah issued a Royal Order on December 10, 2014, creating a committee to propose a project for the compilation of a Code of Judicial Rulings on legal situations and issues, categorised by Islamic jurisprudential category.[5] The committee, housed under the Ministry of Justice, has the authority to ask for research works and studies on Islamic jurisprudence and judicial precedents from specialists, researchers, and members of the court. The committee must weigh the views of the Islamic schools of law using a scientific method and in accordance with the guidelines of the Islamic Shari'a.

The 'Ijtihad' of religious-legal scholars and proof from Sharīʿa scriptures must bolster all of the codified content.[6] The committee was given 180 days to complete its work after the Royal Order affirmed its independence. The committee divided the work among three subcommittees, each of which was made up of eminent judges with expertise in criminal, personal status, and private law. Because the work was so complex, the committee asked the Royal Court to extend the deadline for completion. The Royal Decree is seen by many academics as a significant step towards the final codification of laws and punishments under the Islamic Sharīʿa, and the project is considered as a component of the extensive reform of the nation's legal system.

The Official Gazette (Umm al-Qura) is the publication where all Saudi statutory legislation and regulations are published.[7] The majority of Saudi statutory laws and regulations, as well as all the fundamental sources from the Sunni schools of jurisprudence, have been published in multi-volume works by private entities. The printed resources should be a researcher's initial choice.

It is noteworthy, nevertheless, that a sizable body of primary sources of Islamic Sharīʿa and its related sciences, including all the primary sources of the Hanbali school of jurisprudence, are now digitally accessible. The full texts of all the major sources of the Sunni schools of jurisprudence are available to attorneys, judges, scholars, and researchers through a number of independent internet services. Thanks to the advancements in search engine technology, interested parties can easily search through hundreds of volumes for a certain topic using the electronic copies of these primary sources. This allows users to compare and contrast different viewpoints from various Islamic schools of law.

Furthermore, all of the KSA's statutory laws and regulations are gathered, arranged, preserved, and made accessible by the Saudi National Centre for Documents and Archives. The Arabic full texts of multilateral, regional, and international conventions and treaties, as well as Saudi statutory laws and regulations, are comprehensively covered on the Center's website.

The Compendium of Saudi Laws has also been updated by the Bureau of Experts, which has added modifications and removed laws that have been repealed. Its English online database is an officially recognised government website providing a trustworthy English translation of Saudi Arabian statutory laws and regulations. It has translated a number of significant Saudi statutory legislation.

Saudi Arabia is an Islamic state, and as such, both criminal and civil proceedings in its court system are handled under Islamic law, or Sharīʿa. The King, who serves as both a source of pardon and the ultimate court of appeal, is at the head of the legal system. There are three primary components to the Saudi judicial system. The majority of matters in the Saudi legal system are heard by the largest, the Sharīʿa Courts. The Supreme Judicial

[1] The Law of the Judiciary, Royal Decree No. M/64, art. 89 (14/7/1395H,/Jul. 23, 1975).
[2] The Law of the Judiciary, Royal Decree No. M/64, art. 89 (14/7/1395H,/Jul. 23, 1975).
[3] ib*id*. art. 6(a), *amended by* Royal Decree No. M/4 (1/3/1401H, Jan. 7, 1981).
[4] ib*id*. art. 6(b), *amended by* Royal Decree No. M/76 (14/10/1395H, Sep. 20, 1975).
[5] Mahir 'Abdul-Majeed 'Abbood, Some Guarantees of Justice in the Islamic Judiciary, (Jan. 4, 2005).
[6] Royal Order No. A/20, (Dec. 10, 2014).
[7] Al-Shamil fi Anzimat Al-Mamlakah al-Arabiyah al-Sa'udiyah [Comprehensive Collection of Saudi Arabian Regulations] 10 Volumes (Muhammad Rustom & Muhammad Al-Fuzanī eds.) (Beirut: El-Halabi, 2005).

Council, Courts of Cassation, and Courts of First Instance (Summary and General Courts) comprise the hierarchy of Sharīʿa courts.

The Board of Grievances is an additional judicial system that hears cases involving the government in addition to the Shari'a courts. A number of special committees housed within government ministries handle certain disputes with limited adjudicatory or quasi adjudicatory jurisdiction, making up the third segment of the Saudi judicial system. The Committee for Negotiable Instruments (a), The Commercial Agency Commission (b), The Committee for Combating Commercial Fraud (c), The Committee for Combating Cover-Up Activities (d), The Committee for Combating Cover-Up Activities (e), The Customs Committee (f), The Committee for the Resolution of Securities Disputes (CRSD) (g), The Committee for the Settlement of Banking Disputes (the "SAMA Committee"), and (h) The Labour Disputes Committees are the most significant. The SAMA body established in 1987 by the Saudi Arabian Monetary Agency, is a special body tasked with investigating banking disputes between banks and their clients and mediating a resolution between the parties. Claims made by or against banks are outside the jurisdiction of the Board of Grievances and Shari'a courts, according to the Royal Order that established the Saudi Central Bank Committee. Hence, the Committee has the authority to render binding decisions even though it is not a recognised court.[1]

[1] See further at <https://www.acc.com/sites/default/files/resources/vl/membersonly/Article/1384896_1.pdf>.

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Towards Fair and Reasonable Wages for RMG Workers in Bangladesh: An Analysis of Minimum Wage Regulations and Implementation

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Abstract
The apparel manufacturing industry, also known as the Ready-Made Garment Industry (RMG), is a complex global supply chain with a significant presence in many South Asian and Eastern European countries. The RMG industry is characterised as being one of the most labour-intensive industries with a heavy reliance on low wages. This has led to the industry relocating to least-developed countries (LDCs) like Bangladesh, where labour costs are cheaper. Despite being the second largest exporter of garments, workers at the bottom of the supply chain in Bangladesh earn a minimum wage that is insufficient to cover their basic living expenses. This is a significant violation of labour and human rights, as workers have the right to earn a living wage that provides a certain standard of living for themselves and their families. This article will explore the wage scenarios of RMG workers in the last two declarations and discrimination between non-EPZ and EPZ workers. Further evaluating the minimum wage regulations in Bangladesh, specifically analysing the differences and gaps in the minimum wage fixing mechanism in the Bangladesh Labour Act 2006 and the Bangladesh Export Processing Zone Act 2019. It will also highlight the discrepancies between national legislation and international standards for protecting the labour and human rights of RMG workers to earn decent wages.
Keywords: RMG workers, Bangladesh, Minimum wage, Living wage
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1. Introduction.

The global apparel manufacturing industry, also known as the Ready-Made Garment Industry (RMG), is a complex supply chain industry. Garment manufacturing is widespread in many South Asian and Eastern European countries. The RMG industry is one of the most labour-intensive industries. Low wages are the key to production and industry relocation to least-developed countries (LDCs) such as Bangladesh[1]. The history of the RMG industry dates back to the early 1970s when the first ready-made garments (RMG) company, Reaz Garments, was established in Dhaka as a small tailoring shop called Reaz Store. For the initial 15 years, the company only operated within the domestic market. However, in 1973, it changed its name to M/s Reaz Garments Ltd. and started exporting to foreign countries[2].

Later, in partnership with *Daewoo*, a South Korean company, *Desh* Garments established Bangladesh's first joint venture garment factory in 1977 and began production in the early 1980s. During the 1980s, a local enterprise named *Trexim Ltd* partnered with *Youngone Bangladesh* and established the first garment factory in the country. Over the next decade, the 1980s to the 1990s, the RMG industry in Bangladesh experienced significant growth[3]. When the Bangladesh government authorised the duty-free import of clothing machinery, it boosted the country's garment manufacturing industry and exports. Afterwards, the number of factories increased significantly over time. The number of factories rose from 134 in 1983-84 to 632 in 1984-85; by 1999, it had reached 2900[4]. Bangladesh's RMG industry has been the country's primary export business for 30 years, contributing to 80% of export earnings. In the fiscal year 2022 to 2023, Bangladesh earned $55.55 billion from exports backed by the export of RMG products. The RMG industry is the highest contributor to total export earnings, $46.99 billion, or 84.58% of total exports[5].

Along with being a significant contributor to export earnings, the RMG sector also provided jobs to 4.1 million people in 4,600 plus factories, according to the Bangladesh Garment Manufacturers and Exporters

[1]Afroz, N.A.H.I.D.A., Moloy, D.J. and Hossain, Z.A.K.I.R., 2018. Socio-Economic status and influencing factors of wage discrepancy among ready-made garment workers in Bangladesh: Evidence from Dhaka City. *Journal of Science and Technology*, 8(1), pp.22
[2]Hossen, M.M. and Miazee, M.H., 2016. Industrial Disputes at Ready Made Garments in Bangladesh: An Analysis. *Journal of Business and Economics Research, 5(6), pp.210-216.*
[3] Rahman, M.H., Muzib, S. and Chaity, R.A., 2018. Ready-made garments of Bangladesh: an overview. *Barishal University Journal,* 1(5), pp.59-122.
[4]Islam, M. (2021) "Bangladesh RMG Industry's Robust Growth and Challenges," Business Inspection BD, 24 November. Available at: https://businessinspection.com.bd/rmg-industry-of-bangladesh/. (Accessed: October 19, 2023).
[5] The Financial Express (2023). "Exports from vast sectors save RMG stagnate" 3 June. Available at: https://thefinancialexpress.com.bd/economy/bangladesh/exports-from-vast-sectors-save-rmg-stagnate. (Accessed: November 4, 2023).

Association (BGMEA). Women make up 80% of the workforce in this industry, and the United States (US), United Kingdom (UK), and European Union (EU) are the major importers of RMG products. Bangladesh is the second-largest exporter of garments in the world after China. Although it lost its top position to Vietnam in 2020, it regained it by exporting $35.81 billion, while Vietnam exported $32.75 billion in 2021[1]. Bangladesh's Ready-Made Garments (RMG) industry has a competitive advantage due to its low labour costs and high returns on foreign investment in the Export Processing Zones (EPZ)[2].

Although the RMG industry employs poor rural women workers and helps them enter the formal sector, it exploits these underprivileged female workers. It violates their labour and human rights through the gender pay gap[3]. However, earning an adequate wage to satisfy workers' basic needs is a fundamental human and labour right. It is important to note that RMG workers in Bangladesh earn below a living wage, and their minimum wage is the lowest among its competitors. This consistent poor wage in the industry leads to frequent labour unrest and highlights the violation of the labour rights of RMG workers. The inadequate minimum wage (MW) regulations in national labour laws, non-compliance with the International Labour Organization (ILO) Convention, and the Rana Plaza incident put this industry under criticism[4]. However, at the end of 2023, the Bangladesh RMG workers' minimum wage will be revised, and a new pay structure will be declared. I hope the new wage will uphold the living standard of the RMG workers.

The first objective of this article is to analyse the impact of the last two wage declarations on the living conditions and expectations of RMG workers in Bangladesh. The second is identifying the differences and gaps in national labour acts concerning minimum wage fixing for RMG workers inside and outside the Export Processing Zones. Bangladesh has two sets of labour laws; first, the Bangladesh Labour Act (BLA) 2006(amended in 2013 and 2018), supported by Bangladesh Labour Rules 2015(BLR), applies to all sector workers and employees all over Bangladesh. Another law is the Bangladesh Export Processing Zones Labour (EPZ Labour Act) 2019, supported by Bangladesh Export Processing Zone Labour Rules2022 (EPZ labour rules), which applies only to the workers and employees inside the Export Processing Zones.

Moreover, establishing a minimum wage (MW) is a crucial tool for the global labour market, recognised by the International Labour Organization (ILO). As per the ILO's report for 2020-21, 90% of the 187 member states have established a MW through government statutes, tri-party agreements, or collective bargaining[5].This incorporation of the MW system highlights the significance of MW in the labour market worldwide. Finally, the article will analyse the compatibility of the Bangladesh National Labour Act minimum wage fixing mechanisms with ILO conventions and recommendations.

2. Exploring the Minimum Wage Scenario in Bangladesh

The minimum wage (MW) for unskilled workers in Bangladesh's Ready-Made Garments (RMG) industry has been subjected to much debate and criticism as the current wage level is not sufficient to cover the basic needs of the workers and their families. The current MW of RMG workers at lower grade is 8,000 Tk, approximately $74, declared in November 2018 and has not been raised in the past five years. Even at the time of its declaration, the MW was insufficient to provide workers with a decent standard of living. Despite no salary increases, workers struggle financially due to the Covid-19 epidemic and high inflation[6]. As a result, there have been calls for a review of the minimum wage policy to ensure that RMG workers can earn a living wage. On 6 February 2023, IndustriALL's affiliates in Bangladesh called for a raise in the MW for garment workers due to the impact of high inflation on workers' ability to cover their expenses. They suggested increasing wages from 8,000Tk ($75) to 23,000Tk ($215)[7]. In response to workers demands, the government has declared a new wage board composed of six members to recommend the MW for RMG workers[8]. In 2023, the Bangladesh RMG workers' MW will be

[1] Textile Today Report (2022). "Bangladesh RMG export exceeds Vietnam again" December 12. Available at: https://www.textiletoday.com.bd/bangladesh-rmg-export-exceeds-vietnam. (Accessed: June 4, 2023).
[2] Ashik-Uz-Zaman, S. and Khan, A.M., 2021. Minimum wage impact on RMG sector of Bangladesh: prospects, opportunities and challenges of new payout structure. *International Journal of Business and Economics Research.* Volume 10, Issue 1, February 2021, pp. 8-20. doi: 10.11648/j.ijber.20211001.12
[3] Haque, M.F., Sarker, M., Rahman, A., Rahman, M. and Rakibuddin, M., 2020. Discrimination of women at RMG sector in Bangladesh. *Journal of Social and Political Sciences*, 3(1).
[4] Syed, R., 2020. Mechanisms implementing minimum wage policies and compliance with the ILO's provisions: the case of Bangladesh's Garment Global Supply Chain. *E-Journal of International and Comparative Labour Studies.*
[5] Internationa Labour Organisation (ILO) (2020) Global Wage Report 2020-21: Wages and minimum wages in the time of COVID-19. Available at: https://www.ilo.org/global/research/global-reports/global-wage-report/2020/WCMS_762302/lang--en/index.htm. (Accessed: September 4, 2023).
[6]Clean Clothes Campaign (CCC) (2023) "Clean Clothes Campaign supports Bangladeshi unions in their 23,000Tk minimum wage hike demand," cleanclothes.org, 17 August. Available at: https://cleanclothes.org/clean-clothes-campaign-supports-bangladeshi-unions-in-their-23000tk-minimum-wage-hike-demand (Accessed: October 18, 2023).
[7]IndustriALL's Global Union (2023) "Bangladeshi unions demand increased minimum wage for garment workers," 3 February. Available at: https://www.industriall-union.org/bangladeshi-unions-demand-increased-minimum-wage-for-garment-workers (Accessed: October 18, 2023).
[8] The Business Standard (2023) "Wage board formed to review RMG workers' pay" 10 April. Available at: https://www.tbsnews.net/economy/rmg/govt-forms-new-wage-board-rmg-workers-614406 (Accessed: October 18, 2023).

announced at the year's end[1].

Since the beginning of Bangladesh's RMG industry in 1970, there has been no minimum wage for workers. When the industry started booming between 1980 to 1985, the government declared the minimum wage scale as the Minimum Wages Board recommended under section 6(1)(a) of the Minimum Wages Ordinance 1961[2]. The Ministry of Labour and Manpower (now Ministry of Labour and Employment) published Minimum Wage Gazette 1984 notification No SRO 583-L/84/S-X/3(3)/84[3] on 26 December 1984. Consequently, on 16 June 1985, Bangladesh's RMG industry's minimum salary rates were determined based on grade[4].

The government first implemented a minimum wage of 627tk for entry-level workers in RMG in 1985 under the "Minimum Wages Ordinance" 1961. Between 1985 and 2018, the minimum wage increased six times. After implementing BLA 2006, it was revised three times, in 2010, 2013, and 2018, and set MW 3000Tk[5], 5300Tk[6] and 8000Tk[7], respectively.

Table 1 Minimum wage in RMG Bangladesh Entry Level

Years	Minimum wage in (Taka)
1985	627
1994	930
2006	1662
2010	3000
2013	5300
2018	8000
2023	8000

Source: Dhaka Tribune[8]

Despite recent wage increases, living costs have risen dramatically, making it more difficult for workers in this industry to make ends meet. In 2020, workers in this field earn significantly less than workers in other exporting countries such as China ($217), Vietnam ($151), and Cambodia ($176). Furthermore, COVID-19 has had a devastating impact on the world, and the current crisis between Russia and Ukraine has made matters worse. As a result, food prices have increased, making it impossible for everyone, regardless of income level, to afford necessities. Because of the poor wages obtained by workers in this industry, it is difficult for them to provide for their families and satisfy their daily needs.

3. The Issue of Wage Discrimination: Equal Pay for Equal Work inside and outs EPZ

In Bangladesh, considerable wage discrepancy is observed between RMG workers within and outside EPZs because of different calculation methods. The payout structure for workers outside of the EPZs is calculated based on a combination of basic pay, house rent (40% of basic in 2013 and 50% in 2018), medical allowance, transport allowance, and food allowance[9]. Meanwhile, for EPZ workers, the payout structure is based on basic pay, house rent (40% of basic in 2013 and 50% in 2018), and medical allowance. This difference in payout structure between the two groups of workers highlights the need for a more equitable wage system.[10]

[1] The Business Standard (2023). "New wage for RMG workers likely by November" 10 August. Available at: https://www.tbsnews.net/economy/rmg/further-consultation-needed-fixing-wage-garment-workers-owners-wage-board-meeting-680266 (Accessed: August 16, 2023).

[2] Minimum Wage Ordinance 1961; section 6(1a) [Available athttps://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96234/113670/F-1598347207/PAK96234.pdf]

[3] Minimum Wage Gazette 1984[Available at https://www.dpp.gov.bd/upload_file/gazettes/268-269-Law-1985.pdf

[4] Hasan, M.A., 2019. Minimum Wage in Readymade Garments Industry in Bangladesh. American Journal of Trade and Policy, 6(2), pp.57-66.

[5] Salam, M.A. and McLean, G.N., 2014. Minimum wage in Bangladesh's ready-made garment sector: Impact of imbalanced rates on employee and organization development. HRD: Reflecting upon the Past Shaping the Future. Edinburgh Scotland: UFHRD http://www. ufhrd. co. uk/wordpress/wp-content/uploads/2014/11/Abdus-Salam. pdf .

[6] Minimum Wage Gazette 2013. Available at https://betterwork.org/wp-content/uploads/7.-Minimum-Wages_RMG_-Gazette_2013_English-Version.pdf.

[7] Minimum Wage Gazette 2018, ammendee in 24 january 2019.[Available at https://www.dpp.gov.bd/upload_file/gazettes/29984_73163.pdf](Bangla version)

[8] Dhaka Tribune (2019) "A brief history of the minimum wage in garment sector," www.dhakatribune.com, 11 January. Available at: https://www.dhakatribune.com/bangladesh/nation/165760/a-brief-history-of-the-minimum-wage-in-garment (Accessed: March 21, 2023).

[9] Uz-Zaman, A. and Khan, A.M., 2021. Minimum wage impact on RMG sector of Bangladesh: Prospects, opportunities and challenges of new payout structure. *International Journal of Business and Economics Research,* 10(1), pp.8-20.

[10] Hasan, M.A., 2019. Minimum Wage in Readymade Garments Industry in Bangladesh. *American Journal of Trade and Policy,* 6(2), pp.57-66.

Table 2 Minimum wage for RMG workers outside and inside EPZs in 2013 and 2018.

	Minimum wage (amount in TAKA)						
Non-EPZ 2013 Grade 7	Basic wage	House rent 40% of basic.	Medical allowance	Transport allowance	Food allowance	Increment on basic	Gross monthly wage
	3000	1200	250	200	650	5%	5300
EPZ 2013 Helper	3600	1440	560			10%	5600
Difference	600	240	310				300
Non EPZ 2018 Grade 7	4,100	2,050 50%	600	350	900	5%	8000
EPZ 2018 Helper	4500	2250 50%	1450			10%	8200
Difference	400	200	850				200

Source: Ministry of Labour and Employment (MoLE) gazette 2013[1] and 2018[2]. BEPZA wage circular 2013[3] and 2018[4].

Based on the data in Table 2, there is only a slight difference in the gross monthly wage between non-EPZ workers and EPZ workers. Non-EPZ workers receive a gross amount, which includes transport and food allowances for all grades. On the other hand, EPZ workers receive gross wages without additional transport and food allowances. However, enterprises inside EPZs are already paying transport and food allowances and will continue to do so without any changes due to the minimum wage refixing. Adding these two allowances can increase the gross wage for EPZ workers[5].

The comparison of the last two MW declarations for non-EPZ and EPZ workers in 2013 and 2018 reveals some interesting facts. In 2018, the house rent for both non-EPZ and EPZ workers increased by 10% compared to 2013, going from 40% to 50%[6]. However, the annual increments of 5% for non-EPZ and 10% for EPZ have remained the same (Table 2).

EPZ workers receive additional benefits such as festival bonuses, earn leave encashment, production and attendance bonuses, and 24/7 medical treatment and medicine at EPZ medical centres or hospitals. They also get subsidised education facilities for their children in BEPZA-run schools and colleges[7]. It is unfair that workers performing the same job with the same skills are subject to wage discrimination due to geographic differences, which is one of the key causes of labour dissatisfaction in the RMG industry.

Furthermore, the grading system introduced by the gazette in 2013 has caused confusion in wage distribution. According to the schedule (kha), grade 7 includes 14 positions, whereas grades 6, 5, 4, 3, 2, and 1 have 10, 14, 10, 13, 2, and 4 positions respectively.

[1] Minimum Wage Gazette 2013. (5 December 2013). Available at https://betterwork.org/wp-content/uploads/7.-Minimum-Wages_RMG_-Gazette_2013_English-Version.pdf] English version.
[2] Minimum Wage Gazette 2013 (24 January 2018),
Available at https://www.dpp.gov.bd/upload_file/gazettes/29984_73163.pdf.
[3] BEPZA Wage circular, (3 December 2013), Available at: https://bepza.portal.gov.bd/sites/default/files/files/bepza.portal.gov.bd/page/9ed10969_c352_45ed_a796_08ea29f549ae/Minimum%20Wages-2013.pdf.
[4] BEPZA Wage circular, (14 November 2018), Available at https://www.bepza.gov.bd/public/ckfinder/userfiles/files/Wage%20Circular%202018(1).pdf.
[5] Ibid
[6] Uz-Zaman, A. and Khan, A.M., 2021. Minimum wage impact on RMG sector of Bangladesh: Prospects, opportunities and challenges of new payout structure. International Journal of *Business and Economics Research*, 10(1), pp.8-20.
[7] BEPZA | Bangladesh Export Processing Zones Authority.[Available at: https://www.bepza.gov.bd/content/faq.]

Table 3 Grading of RMG worker's positions in 2013

Grade 1	Pattern Master, Chief Quality Controller, Chief Cutting Master/Cutting Chief, and Chief Mechanic
Grade 2	Mechanic/electrician, Cutting master
Grade 3	Sample machinist, Mechanic, Senior Sewing Machine, Senior Winding Machine, Senior knitting machine, Senior knitting machine operator, Senior Cutter, Senior quality inspector, Senior Marker/Senior, Drawing Man/Senior Drawing Woman, Senior Line Liver, Senior Overlock Machine, Senior Button Machine Operator and Senior Kanchai Machine operator.
Grade 4	Sewing Machine, Winding Machine, Knitting Machine, Linking Machine Operator, Marker/ Drawing Man/Drawing Woman, Cutter, Melding Operator, Pressing Man/women, Iron Man/women, Folder (finishing section) Packer.
Grade 5	Junior Sewing Machine, Junior Winding Machine, Junior knitting machine, Junior Linking machine Operator, Junior Marker/ Drawing Man/ Woman, Junior Cutter, Junior Melding Operator, Junior Pressing man/women, finishing, iron man, Junior Folder (concluding section), Junior Electrician, Junior Packer, Junior Overlock Machine Operator, Junior Button Machine and Junior Kanchai Machine Operator.
Grade 6	General Sewing Machine, General Winding Machine, General knitting machine, General Linking machine Operator, General Melding Operator, General Fusing Machine, General Color Turning, General Over Lock, General Button Machine and General Kanchai Operator
Grade 7	Assistant Sewing Machine, Assistant Winding Machine, Assistant knitting machine, Assistant Linking machine, Assistant Melding Operator, Assistant cutter, Assistant Marker/Assistant Drawing man/Women Assistant pocket creasing machine operator men/women

Source: MoLE Gazette 2013[1]

After a thorough evaluation of the grading system, it has been found that it is not an accurate reflection of the required skills and qualifications for certain positions. For example, jobs like sewing machine assistant and overlock machine helper should be graded separately due to their unique tasks. Similarly, the position of pocket creasing machine operator requires advanced skills and experience and thus should be graded higher. Currently, the grading for this position is inconsistent between 6 and 4, which makes it difficult to distinguish between general operator and operator roles and those that require higher levels of skill and experience. A more effective grading system should include junior operator, operator, and senior operator roles. Additionally, to become a senior quality inspector in grade 3, a combination of education and specific skills is required. According to experts, an electrician's job is routine, while a mechanic's duty is more intricate and challenging. Along with the complex grading positions in 2013[2], new positions were added to the grades in 2018(MoLE Gazette 2018)[3].

The grading system for RMG workers in EPZ factories is relatively simple. The workers are divided into five grades: Helper, Junior Operator, Operator, Senior Operator, and Highly Skilled. According to the 2013 and 2018 wage declarations, all workers will be promoted based on their performance, as outlined in 'Instructions 1 and 2 of 1989' in the BEPZA Gazette. As per BEPZA Instruction 2 Part 4, a Helper becomes a Junior Operator when they are allowed to operate a machine. For other positions, workers will be promoted after two years in the same post, considering their skills[4].

During the period from 2013 to 2018, it was observed that the increase in MW had a more significant impact on the gross compensation of grade 7 employees compared to other non-EPZ workers. This has disadvantaged employees in higher grades, creating an unfair situation. However, a study conducted by the Centre for Policy Dialogue (CPD), an independent think tank in Bangladesh, revealed that over the years, the percentage of basic wage in the total gross wage for all grades, including grade 7 workers, has decreased. The new wage structure implemented in 2018 continued this trend, with the basic wage for grade 7 workers accounting for only 51.25% of the total gross wage in 2018, as compared to 56.6% in 2013. This percentage was much higher in 2010 at 66.7%. Although the basic wage for grade 7 workers increased by 36.7%[5], the actual increase was only 1100tk (see Table 3).

[1] Minimum Wage Gazette 2013 (5 December 2013), Available at https://betterwork.org/wp-content/uploads/7.-Minimum-Wages_RMG_-Gazette_2013_English-Version.pdf] English version.
[2] Hasan, M.A., 2019. Minimum Wage in Readymade Garments Industry in Bangladesh. *American Journal of Trade and Policy*, 6(2), pp.62-63
[3]Minimum Wage Gazette 2013 (24 January 2018), Available at: https://www.dpp.gov.bd/upload_file/gazettes/29984_73163.pdf
[4] The Bangladesh Export Processing Zone Authority (BEPZA) Instructions 1 and 2 (14 June and 23 August 1989) https://www.bbalectures.com/ahad/wp-content/uploads/2018/10/BEPZA-Instruction_1_2.pdf
[5] Moazzam, K. G. (2019). New Minimum Wage of the RMG Sector: Addressing the Issues of Non-Compliance in Implementation. CPD Working Paper 129. Dhaka: *Centre for Policy Dialogue* (CPD), p8

Table 3: Comparing basic payout in grades (1-7) between 2013 and 2018 for Non EPZ. Workers.

Grades	Basic wage 2013	Basic wage 2018	Difference
Garde 1	8500	10440	1940
Grade 2	7000	8520	1520
Grade 3	4075	5160	1085
Grade 4	3800	4930	1130
Grade 5	3500	4670	1170
Grade 6	3270	4370	1100
Grade 7	3000	4100	1100

Source: MoLE Gazette 2013 and 2018.

In 2018, basic wage increases ranged from 22.8% to 33.6% across different grades. The gross wage increased between grades 1 to 7 by 34.7%, 34.2%, 40.9%, 44.0%, 46.6%, 48.0%, and 50.0%, respectively (Table 5 CPD report)[1]

In 2018, there was an error in the MWB's calculation of MW rates. As a result, workers in grades 1,2 and 3 receiving basic wages with a 5% yearly increment since 2013 were 10848Tk, 8934Tk, and 5201Tk. The announced payout caused a reduction in their basic wage by 408Tk, 414Tk, and 41Tk, respectively (table 4CPD report). The alterations in gross wages between the amount received in 2018 and the amount announced in 2018 for grades 1, 2, and 3 increased by 7.5%, 7.4%, and 14.4%, respectively, while grade 7 saw a larger increase of 23.8%, according to table 3 of CPD report[2]. Increments in other allowances could not impact higher grades workers as allowances are the same for all grades.

It was observed that the wage hikes implemented did not meet the demands of the worker's representatives. In 2013, the representatives had suggested a minimum pay of 6,000 Tk, which included a basic salary of 4,000 Tk, 1,600 Tk for housing, and 400 Tk for medical benefits. The suggested payment did not include a food allowance[3]. In 2018, the workers demanded a minimum pay of 12,000 Tk, with a basic salary of 7,050 Tk, 2,820 Tk forhousing costs, 1,000 Tk for medical allowance and 650 Tk for food and 500 Tk transport allowance for grade 7 workers[4].

On the other hand, for the EPZ workers, wage hike in 2013, the basic wage of a helper was 3600 Tk, and the gross monthly wage was 5600 Tk. This means the basic wage represented approximately 64% of the gross monthly wage. In 2018, the basic wage of a helper was 4500 Tk, and the gross monthly wage was 8200 Tk. This means the basic wage represented approximately 54.9% of the gross monthly wage. So, in 2013, the basic wage represented a higher percentage of the gross monthly wage for EPZ workers compared to 2018(table 2)

4. The Global Concept of Minimum Wage and Development:

The concept of "minimum wage" (MW) has been universally recognised by international, regional, and national organisations. This idea acknowledges that workers deserve a fair and reasonable wage. This wage should be enough to cover their basic needs, including food, housing, healthcare, and education. The primary objective of this principle is to prevent worker exploitation and underpayment, ensuring that every worker can afford their necessities without facing financial hardship.

Being part of the Treaty of Versailles, the Labour Charter established the International Labour Organization (ILO) in 1919. The ILO brings together representatives from governments, employers, and workers in its executive bodies. The organisation's constitution prioritises the right to a living wage that guarantees a reasonable standard of living and recognises the principle of equal pay for work of equal value. The ILO's Constitution consists of a Preamble emphasising the significance of labour conditions, stressing that labour should not be treated as a commodity and that industrialised countries should not exploit workers. The ILO recognises the right to a living wage sufficient for a reasonable standard of living and the principle of equal compensation for work of equal value[5].

As a sufficient wage mandated in the ILO constitution, over a decade ago, in 1928, it approved the first conventions and recommendations, the Minimum Wage-Fixing Machinery Convention (No. 26) and Recommendation (No. 30). Eventually, the role of the minimum wage has progressed from being an instrument of protection for a partial group of workers exposed to exploitation, become an instrument for the economic development of a broader segment of workers. Later, the Minimum Wage-Fixing Machinery Convention (No. 131) and Recommendation (No. 135) for Developing Countries were adopted in 1970. Additionally, the

[1] Ibid. p9.
[2] Ibid p9
[3] Hasan, M.A., 2019. Minimum Wage in Readymade Garments Industry in Bangladesh. American Journal of Trade and Policy, 6(2), pp.61
[4]Uz-Zaman, A. and Khan, A.M., 2021. Minimum wage impact on RMG sector of Bangladesh: Prospects, opportunities and challenges of new payout structure. *International Journal of Business and Economics Research*, 10(1), pp.8-20.
[5] Marinakis, A., 2009. The role of ILO in the development of minimum wages, ILO Century Project. International Labour Organization, Santiago. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_180793.pdf

Minimum Wage-Fixing Machinery (Agriculture) Convention (No. 99) was established in 1971. These conventions and recommendations signify the importance of the minimum wage as a fundamental labour right[1].

Furthermore, the MW concept was also recognised and defined by other international bodies such as the United Nations; the Universal Declaration of Human Rights (1948) Article 23 and 25 stated: "Everyone who works has the right to receive fair and favourable compensation, which ensures a life of dignity for themselves and their families" [2]. The International Covenant on Economic, Social, and Cultural Rights, Article 7, acknowledges "the right of individuals to enjoy just and favourable working conditions, adequate wages, and remuneration sufficient to provide a decent standard of living for themselves and their families".[3]

Other than this, regional organisations like the European Social Charter1996 Article 4[4] also considered "the right of workers to fair wage which will give them and their families a decent standard of living[5]. Meanwhile, the Council of Europe, the Community Charter of the Fundamental Social Rights of Workers, 1989 Articles 4 and 5 stated, "Every person has the freedom to pursue any career of their choice. However, equitable remuneration is necessary to guarantee a good standard of living for employees and their families, following the applicable agreements in each country"[6].

Furthermore, the American Declaration of the Rights and Duties of Man 1948, Article XIV states: "Each worker has a right to wages that ensure a decent standard of living for themselves and their family, in proportion to their abilities and skills"[7]. In the African Charter on Human and Peoples' Rights 1986, Article 15 "ensures that every individual has the right to work under equitable and adequate conditions and to be paid equally for equal labour"[8].

Minimum wage (MW) regulation, dating back to the Hammurabi Code, was initially developed in New Zealand and Australia to reduce industrial conflicts and remove inadequate wage levels. By 1911, all states in Australia had wage boards, and minimum wages were set for various categories of workers. The practice eventually extended to other countries, including the United Kingdom, the United States, Canada, and developing nations. The UK Parliament passed minimum wage legislation in 1909 to eliminate "sweating" and initially covered only four industries. By the end of 1926, minimum wages were in effect for around 40 trades, employing approximately 15 million people. At that time, in European countries, minimum wage regulation was first limited to homeworkers. However, legislation of this type was subsequently implemented for other worker categories in France, Norway, Austria, Czechoslovakia, Germany, Spain, Hungary, and Belgium. The USA enacted its first minimum wage rule in 1912, initially applying to women and children in Massachusetts.

Latin America implemented minimum wage legislation in the mid-1930s and 1950s, closely linked to comprehensive labour codes. Process initiated before the Second World War. Further minimum wage regulation and other protective legislation gained grip in British colonies like Africa between the 1940s and 1950s and in the Caribbean countries. Developing Asian countries, including India and Pakistan, have developed minimum wage rules over time. India enacted the Minimum Wages Act of 1948, which aimed to provide fair remuneration to workers, while Pakistan passed the Minimum Wages Ordinance in 1969 for unskilled workers[9].

5. Minimum Wage Regulations in Bangladesh:

The minimum wage system is a vital economic instrument that immensely affects worker welfare and the economy's expansion. The minimum wage rate varies across different countries and regions, depending on factors such as the cost of living, economic conditions, and industry standards. Some countries have a statutory minimum wage set by the government, while others have industry-specific minimum wage rates[10].

Bangladesh has statutory minimum wage rates that vary depending on industries. The Minimum Wage

[1] Bangladesh Institute of Labour Studies-BILS (2015). National Minimum Wage for Bangladesh's Workers: Rational Standard and Rationality of National Minimum, https://bilsbd.org/research-report/. Available at: https://bilsbd.org/wp-content/uploads/2016/03/NMW_MJF.pdf (Accessed: August 24, 2023).

[2] Universal Declaration of Human Rights 1984, Article 23. Available at https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2023,equal%20pay%20for%20equal%20work.

[3]International Covenant on Economic, Social and Cultural Rights (ICESCR), Article7, Available at:https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights.

[4] European Social Charter (1996) Article 4. Available at https://rm.coe.int/168007cf93.

[5]Syed, R., 2020. Mechanisms implementing minimum wage policies and compliance with the ILO's provisions: the case of Bangladesh's Garment Global Supply Chain. E-Journal of International and Comparative Labour Studies. Pp58

[6]Community Charter of the Fundamental Social Rights of Workers (1989) Article 4 and 5. https://op.europa.eu/en/publication-detail/-/publication/51be16f6-e91d-439d-b4d9-6be041c28122

[7] American Declaration of the Rights and Duties of Man 1948, Article XIV. [Available at https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf]

[8]African Charter on Human and Peoples' Rights (1986), Article15. Available at:https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf .

[9] Starr, G. Frank. (1980) Minimum wage fixing: an international review of practices and problems. Geneva: ILO. https://www.ilo.org/public/libdoc/ilo/1981/81B09_266_engl.pdf

[10] Saget, C. and Eyraud, F. (2006) The Fundamentals of Minimum Wage Fixing. Geneva: International Labour Office. Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_164972.pdf.

Board (MWB) is the primary wage-setting authority in Bangladesh. It was established by the Pakistani government in 1959. The concept of minimum wage was introduced during the 1928 ILO General Conference through Convention No. 26 and Recommendation No. 30. Convention No. 26 agreed to establish or maintain machinery that determines minimum wage rates for workers in trades or industries[1]. During that time, Bangladesh was a part of Pakistan; as a member of the ILO, Pakistan incorporated a mechanism for fixing the MW. In Pakistan, the MW was set by two laws: the Minimum Wage Ordinance of 1961[2] and the West Pakistan Minimum Wages Rules of 1962[3]. Following the independence of Bangladesh in 1971, the government chose to maintain the existing laws through the Bangladesh Laws Order (President's Order No. 48). Additionally, new rules were introduced in response to the evolving needs of the working class and the country as a whole.

The MWB is a department under the Ministry of Labor and Employment (MoLE)[4], which fixes the MW for 42 different industries in Bangladesh. MW was set according to the industry's economy and job types; the MW rate also varies per urban or rural area or export zone[5]. Previously, payment of "wage" or "minimum wage" and other matters were regulated by the "Payment of Wages Act" 1936[6], which covered a wide range of sectors and workers. Later, a new Bangladesh Labour Act (BLA 2006) was introduced, which unified the 1936 act into the BLA 2006 with some changes[7]. Along with Bangladesh Labour Rule 2015(BLR 2015) to supplement the BLA 2006.

Now, the payment of minimum wages and wage fixing machinery is regulated by the BLA 2006. Chapter 10 of the BLA 2006 describes the "wages" and other related payments to the workers. Section 120 of BLA 2006 considers the definition of "wages" as stated in section 2(45), "Wages" include all remuneration that can be stated in monetary terms. It is paid to a worker if the employment contract terms are met[8]. The term "wages" includes other additional remuneration such as holiday, overtime, retrenchment, discharge, removal, resignation, retirement, and layoff payment[9]. Furthermore, employers are obliged to pay wages to workers as per section 121 and section 122 of BLA 2006, and employers should fix the wage period not exceeding one month. Wages must be paid by employers or a responsible person within seven working days following the last day of the wage period for which they are due, section 123 of BLA 2006[10].

However, Bangladesh's Minimum Wage Board (MWB) is the only MW fixing body. The BLA 2006 chapter 11 describes the formation of MWB. Under section 138, the Bangladesh government is required to establish MWB. The MWB should composed of four permanent members. One chairman and one independent member were both selected by the government[11]. One representative of employers and workers is nominated by the employers and workers organisation, and one representative of the employers and workers industry is concerned. If the organisation fails to nominate a member, the government will appoint a representative at its discretion, section 138 (2 and 3) BLA 2006[12]. To implement section 138(6) of BLA 2006, the government should follow section 121(1-3) of BLR 2015. The government shall nominate owner and worker representatives from the maximum representative federations of the owners and workers. Without federation, the government shall select from the height owner associations and tread unions. In both circumstances, the Director of Labour must seek the nomination.[13]

The government, upon request from the employers or workers or both parties of a specific industry, to consider the fixing of minimum rates of wages. Instruct the MWB to recommend new minimum rates of wages after all necessary queries for that particular industry worker or class of workers within six months, section 139(1-2)[14]. However, no recommendation shall be discarded only for delay as per section 122(5) of BLR 2015[15].

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[1] Minimum Wage Board. https://mwb.portal.gov.bd/site/page/b40a20c0-8e5e-4183-92f0-017b0baca9b4/%E0%A6%85%E0%A6%AB%E0%A6%BF%E0%A6%B8-%E0%A6%AA%E0%A6%B0%E0%A6%BF%E0%A6%9A%E0%A6%BF%E0%A6%A4%E0%A6%BF

[2] Minimum Wage Ordinance 1961; section 6(1a) [Available athttps://www.ilo.org/dyn/natlex/docs/ELECTRONIC/96234/113670/F-1598347207/PAK96234.pdf]

[3] West Pakistan Minimum Wages Rules of 1962. Available at. https://www.ilo.org/dyn/travail/docs/970/West%20Pakistan%20Minimum%20Wages%20Rules%201962.pdf.

[4] Hasan, M.A., 2019. Minimum Wage in Readymade Garments Industry in Bangladesh. *American Journal of Trade and Policy*, 6(2), pp.59

[5] Grimshaw, D. and Muñoz de Bustillo, R., 2016. Global comparative study on wage fixing institutions and their impacts in major garment producing countries. *International Labour Organization (*ILO).

[6] Payment of Wages Act 1936. Available at: https://www.ma law.org.pk/pdflaw/PAYMENT%20OF%20WAGES%20ACT.pdf

[7] Chowdhury, M.S., 2006. Minimum wages in Bangladesh–Issues and challenges. The Chittagong University Journal of Law, 11(2006), pp.1-32.

[8] The Bangladesh Labour Act (BLA 2006), Section 2(45). Available at: https://compliancebangladesh.com/wp-content/uploads/2022/08/bangladesh-labour-act-2006-english.pdf

[9] The Bangladesh Labour Act (BLA 2006), section 120(a-e).

[10] The Bangladesh Labour Act (BLA 2006) section 123.

[11] The Bangladesh Labour Act (BLA 2006) section 138.

[12] The Bangladesh Labour Act (BLA 2006) section 138(2-6).

[13] The Bangladesh Labour Rule (BLR 2015) section 121(1-3)

[14] The Bangladesh Labour Act (BLA 2006) section 139(1-2)

[15] The Bangladesh Labour Rule (BLR 2015) section122(5)

The MWB can recommend minimum rates of wages for time work or piece work. Also, it can specify minimum time rates for piece work and set time rates on an hourly, daily, weekly and monthly basis, section 139(3 and 4) BLA 2006[1].

Furthermore, the MWB can recommend whether the new minimum wage rates shall apply to the workers in a specific industry uniformly all over the country or differ in regions. MW rates shall be refixed every five years for all workers in any industry, section 139 (5-6) BLA 2006[2]. Under section 141of BLA 2006, the MWB shall consider the following factors: the socio-economic conditions, cost of living, standard of life, cost of production, productivity, price of goods, inflation, nature of job, risk level, and business ability, the country and the locality concerned and other relevant factors while deciding the MW rates[3].

Before forwarding the minimum wage rates to the government, the MWB shall publish the recommendations in the official gazette so that the owners and workers representatives can place their objections and recommendations within 14 days of publishing the notice. Upon receiving objections or recommendations, the MWB can accept or keep the original proposal and forward it to the government, section 128(1-3) BLR 2015[4]. The MWB shall decide with the consent of the majority of members present in the meeting, with an open hand-raising voting system. In case of equal voting, the chairman can vote and take the final decision, section 129 BLR 2015[5].

After receiving the recommendations from the MWB, the government may declare the minimum wage rates by official gazette notification. If the government thinks the recommendations are unsuitable for workers or employers, they can be referred back to the MWB within forty-five days. Upon receiving recommendations referred from the government, the MWB will reconsider it. If necessary, the MWB will change the minimum rates of wages or may keep it unchanged. Later, after receipt of revised recommendations with modification or without modification, the government will announce the MW in the official gazette notification. In the official gazette, if any date is not specified, the declaration will take effect on the date of its publication. Once the government declares that minimum wage rates are fixed, any individual or authority cannot change the decision in any Court, section 140(1-7) BLA 2006[6]. After the amendment of BLA2006 in 2013, under section 140a, in exceptional circumstances, the government may declare the minimum wage structure for the industrial sector at any implementation stage, subject to the reconstitution of the Minimum Wages Board and compliance with necessary formalities[7].

The owners are obliged to pay the minimum wage rate declared by the law to workers or employees. In case of less payment, the authorities must pay the concerned worker or employee an additional 50% of the outstanding debt. Further, the government shall take all the necessary steps to inform the owners and workers about the MW rates, and owners shall hang a notice in the factory in the local language declaring the MW rate, section 133(1-4) BLR 2015[8].

The Export Processing Zones Authority supervises the RMG factories inside Bangladesh's Export Processing Zones (EPZ) following the Export Processing Zones “Authority” (BEPZA) Act of 1980. The BEPZA Act 1980 includes regulations on minimum wage rates and workers' rights. Later, in 2019, the government passed the Bangladesh Export Processing Zones Labour Act (EPZ Labour Act) 2019, focusing on labour practices, wage-related matters, and industry working conditions. It is important to note that the EPZ Authority, not the government, is directly responsible for setting[9]. Further, to supplement the EPZ Labour Act 2019, the government introduced the Bangladesh EPZ Labour Rule 2022(EPZ Rule 2022).

Moreover, the MW rates for the RMG workers in the EPZ were last revised in 2018. It was declared under the Bangladesh Export Processing Zones Authority Act 1980 (BEPZA Act 1980) by the PriMinister office on 14 November 2018. Since 2018, the RMG workers in EPZ’s minimum wage at apprentice or entry-level is 6250tk ($76)[10]. As the 2019 act came into force, the next MW will be declared under the EPZ Labour Act 2019 provisions. The 2019 Act is a comparable version of the BLA 2006. The formation of MWB and fixing of MW rates in the 2019 Act vary slightly.

As per the EPZ Labour Act 2019 chapter 7, section 65(1), the government shall establish the MWB to fix EPZ workers’ minimum wage rates. The MWB shall be composed of a total of 11 members: a Chairman

[1] The Bangladesh Labour Act (BLA 2006) section 139(3-4)
[2] The Bangladesh Labour Act (BLA 2006) section 139(5-6)
[3] The Bangladesh Labour Act (BLA 2006) section141
[4] The Bangladesh Labour Rule (BLR 2015) section128(1-3), Available at: https://decentwork.bilsbd.org/wp-content/uploads/2018/11/bangladesh_labor_rules_2015_english_version_15-09-2015-1.pdf
[5] The Bangladesh Labour Rule (BLR 2015) section 129.
[6] The Bangladesh Labour Act (BLA 2006) section140(1-7).
[7] The Bangladesh Labour Act (BLA 2006) section140a (Amended 2013)
[8] The Bangladesh Labour Rule (BLR 2015) section133(1-4)
[9] The Bangladesh Export Processing Zones Labour Act 2019(EPZ 2019) https://www.bepza.gov.bd/public/storage/upload/content-file/210731064604-32765_6059605792686867415.pdf
[10] Wage Circular BEPZA 2018[Available at https://www.bepza.gov.bd/public/ckfinder/userfiles/files/Wage%20Circular%202018(1).pdf]

appointed by the government, a member of the "Authority"[1], a representative from the Prime Minister's Office, Finance and Labour and Employment Ministry, two representatives from the Authority, employers and workers, section 65(1a-h)[2]. The authority will nominate representatives from employers and workers based on nominations from both parties. If both parties fail to give a nomination, the authority will select section 65(2)at its discretion. The authority will prioritise the most representative federations of owners' and workers' welfare associations or federations, section 129(1)EPZ Rule 2022[3]. The MWB can add members to the board upon request of other members, and regardless of other provisions, the government has the power to re-establish the Wages Board, section 65(3,4) EPZ Labour Act 2019[4]. Under section 66(EPZ Labour Act 2019), the government shall direct the MWB to recommend MW rates for workers within a reasonable time[5]. When the government accepts the Wages Board's recommendation pursuant to section 66, the "Authority" may, by official gazette notification, declare that the minimum rates of wages recommended by the Wages Board for the various categories of workers shall be the minimum rates of wages. Unless otherwise indicated in the notice under subsection (1), the declaration shall take effect on the date of its publication, and the minimum rates of wage announced according to this section will be conclusive. No question or objection shall be raised about the decision in any court or to the Authority, section 67(1-3) EPZ Labour Act 2019[6]. While making the recommendation, the MWB shall consider the wage or salary scale of similar industries outside zones and other factors. In case of any changes in the factors, the government can ask the MWB to reconsider the recommendation or amend the MW rates, sections 68 and 69 of EPZ Labour Act 2019[7].

Once the MW rates are declared under the act, the employers are obliged to pay minimum wage to workers, and workers have the right to receive wages at a higher rate than minimum rates, provided they are entitled to such facilities under agreements, awards, or customs. This ensures they continue to receive fair wages and benefits. The authority may take appropriate action against an employer or the person responsible for paying wages if they fail to pay the declared minimum wage. Further, for the purpose of this act, the authority has the authority to determine the method of fixing workers' wages and other benefits, sections (70 -73), EPZ Act 2019[8]. Further, the MWB in EPZs should follow the rules under Export Processing Zones Rule 2022(EPZ Rule 2022), which came into action on 21 September 2022 and contains provisions almost similar to those of BLR 2015. The objection period, decision-making process, employers' obligation to pay and notification of the MW rates by the government and employers are similar as mentioned above procedures are described under sections 136, 137 and 141 of EPZ Rule 2022[9].

6. Labour Law Discrepancies: A Comparison with International Standards

The current scenario regarding minimum wage (MW) declarations for non-EPZ and EPZ workers is challenging. The MW declared by the MWB was often criticised due to a lack of definition and calculation methods in the BLA 2006 and Bangladesh EPZ Labour Act 2019. Additionally, complications arise when considering the factors determining the minimum wage, and implementation and enforcement are also problematic. To establish an appropriate minimum wage standard at the national level. The Bangladesh national minimum wage fixing machinery should be compiled with the "Minimum Wage Fixing Convention" 1970 (No.131). It requires meaningful communication among stakeholders and careful consideration of workers' and their families' needs alongside economic conditions. It also entails periodic revisions and effective enforcement mechanisms.

6.1 The Living Wage Concept for Minimum Wages:

Regarding the concept of "minimum wage" at the national level, there is often a lack of clarity and inconsistency in how it is defined. This can make it challenging to determine what exactly counts as a minimum wage since no universal definition applies across the board. The International Labour Organization (ILO) does not offer a specific definition for the term "minimum wage." However, it states that the minimum amount of payment an employer must pay to employees for work done during a specific period cannot be lowered, either by a collective agreement or individually[10].

The International Labour Organization (ILO) has used different phrases to refer to minimum wage despite

[1] Here, "Authority" means the Bangladesh Export Processing Zones Authority established under the Bangladesh Export Processing Zones Authority Act, 1980 (Act No. XXXVI of 1980) section 2(7), (EPZ Labour Act 2019)
[2] The Bangladesh Export Processing Zones Labour Act 2019(EPZ Labour Act 2019), section 65(1a-h).
[3] The Bangladesh EPZ Labour Rule 2022(EPZ Rule 2022), section129(1)
[4] The Bangladesh EPZ Labour Act 2019, (EPZ 2019) section 65(3,4).
[5] The Bangladesh EPZ Labour Act 2019 (EPZ 2019) section 66
[6] The Bangladesh EPZ Labour Act 2019, (EPZ 2019) section 67(1-3)
[7] The Bangladesh EPZ Labour Act 2019 (EPZ 2019) section 68,69
[8] The Bangladesh EPZ Labour Act 2019, (EPZ 2019) section70-73
[9] The Bangladesh EPZ Labour Rule 2022(EPZ Rule 2022) sections 136, 137 141
[10]"Minimum Wage Policy Guide". International Labour Organisation (ILO). Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_508566.pdf (Accessed: October 24, 2023).

being the first to introduce minimum wage regulations. However, its conventions and recommendations have used different terminologies to describe minimum wage. For instance, the "Wage-Fixing Machinery Convention" (No.26) in 1928 referred to "minimum rates of wages" in Articles 1, 3, and 4[1]. Convention (No.99) used three different phrases: "minimum rates of wages", "minimum wage,'' and "minimum rates"[2]. In recommendations (No. 30[3] and No. 89[4]), the ILO used "minimum rates" and "minimum wage rates". In 1970, Convention No.131[5] and Recommendation No.135[6] exclusively used the term "minimum wages". The ILO's underlying principle is that the minimum wage should be adequate to meet the basic needs of workers and their families and provide some discretionary income[7].

This lack of definition has resulted in confusion among the MWB in recommending MW in 2010. In 2013, the CPD proposed that the MWB may consider the concept of a "living wage" when recommending minimum wage rates without a clear definition. Because the idea of a living wage is closely associated with the several concepts of minimum wage. A "living wage" aims to safeguard that workers and their families can afford a decent standard of living that is deemed acceptable by society based on the current level of economic change. The goal is to enable workers to live above the poverty line and actively participate in social and cultural activities[8]. Moreover, the ILO Constitution of 1919 and the United Nations Universal Declaration of Human Rights in 1948, Section 2, indicated that at least five international declarations on human rights have affirmed that a living wage is a fundamental human right. The national constitutions of Brazil, India, Mexico, and Namibia also recognise the concept of a living wage and its significance in promoting fair wages and social justice[9].

Further, the ILO Convention 1970 (No. 131) Article 3 supports the concept of a living wage, which emphasises considering the necessity of workers and their families, and economic factors should be taken into account when setting minimum wage rates, either through collective bargaining or by law. Additionally, ILO Recommendation (No. 135) on minimum wage fixing prescribes that minimum wages should be a part of a policy to overcome poverty and meet the needs of all workers and their families[10].

Moreover, RMG workers rights protection organisations like the Fare Wear Foundation (FWF) Code of Labour Practices, the Apparel Industry Labour Rights Movement (ALaRM), the Asia Floor Wage campaign (Decent Income for garment workers in Asia) and the Global Living Wage Coalition (GLWC) defined living wage similar to ILO. The living wage concept emphasises the idea that workers should be able to make enough money to fulfil their basic needs, such as food, housing, clothes, education, healthcare, and other required costs. It also allows for some savings and discretionary expenditure of workers and their families, giving them some additional income. The acceptance of the living wage concept is essential in the context of minimum wage negotiation of RMG workers in Bangladesh because, as per the ILO Committee of Experts declared in 1992, "the ultimate goal of the ILO Minimum Wage Convention ensures workers receive a minimum wage that provides a reasonable standard of living for themselves and their families''[11].

6.2 Minimum Wage Calculation Method:

If the MWB considers the concept of a living wage. Then, the determination of the calculation method could become another complicated matter. As the acts do not contain any provision describing the calculation procedure. To address the uncertainty in MW fixing regulation, the BLA 2006 was amended in 2013 and

[1] Minimum Wage-Fixing Machinery Convention, 1928 (No. 26). Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C026]

[2] Minimum Wage-Fixing Machinery (Agriculture) Convention, 1951 (No. 99). Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312244:NO.

[3] Minimum Wage-Fixing Machinery Recommendation, 1928 (No. 30) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312368

[4] Minimum Wage-Fixing Machinery (Agriculture) Recommendation, 1951 (No. 89) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R089

[5] Minimum Wage-Fixing Convention, 1970 (No. 131). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C131

[6] Minimum Wage Fixing Recommendation, 1970 (No. 135). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312473

[7] Bangladesh Institute of Labour Studies-BILS. (2015). National Minimum Wage for Bangladesh's Workers: Rational Standard and Rationality of National Minimum. In https://bilsbd.org/research-report/. Retrieved October 24, 2023, from https://bilsbd.org/wp-content/uploads/2016/03/NMW_MJF.pdf

[8] Moazzem, K.G. and Raz, S., 2014. Minimum wage in the RMG sector of Bangladesh: Definition, determination method and levels (No. 106). *Centre for Policy Dialogue* (CPD).

[9] Anker, R., 2011. Estimating a living wage: A methodological review. Geneva: ILO.p15 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_162117.pdf

[10] Ibid. p16.

[11] Bangladesh Institute of Labour Studies-BILS. (2015). National Minimum Wage for Bangladesh's Workers: Rational Standard and Rationality of National Minimum. In https://bilsbd.org/research-report/. Retrieved October 24, 2023, from https://bilsbd.org/wp-content/uploads/2016/03/NMW_MJF.pdf

incorporated some factors under section 141[1], which the wage fixing body should consider while setting MW. The factors mentioned in the act can be categorised into threefold. Firstly, the MWB should consider workers' and their families' living costs and standards. Calculating the cost of living should include a family's food (caloric intake) and non-food costs (house rent, transport, child's education). In August 2013, CPD conducted research on Focus Group Discussions (FGDs) to estimate the MW in the RMG sector of Bangladesh based on three different methodologies.

- Using the upper poverty line values drawn from national statistical data on family and dependent size.
- Using up-to-date data from workers' focus groups to determine existing expenditures and purchasing power.
- Incorporating nutritional values of dietary intake into a model diet instead of energy values alone.

Finally, CPD advised the MWB to consider Anker's formula to calculate the living wage for RMG workers.

[(Cost of Model Diet per Person / Food Share of Household Expenditure) x Household Size] / No. of Fulltime Workers per Couple + 10% for Emergencies]

Source: CPD report 2013[2]

One of the main advantages of this method is that it takes into account both the family as the unit of consumption and the number of income earners as the unit of earning. This means that the expenses related to the family's needs are not solely dependent on the income of RMG workers but will also be shared by another earner in the family[3]. When it comes to calculating a living wage, different organisations have their own approaches. The Global Living Wage Coalition (GLWC) has embraced the methodology developed by Richard and Martha Anker. At the same time, the Asia Floor Wage Alliance (AFWA) uses a method based on purchasing power parity (PPP). Further, the income of the RMG workers should compared with the household income and expenditure, as they are living below the poverty line. The calculation benchmark should be "upper poverty line"[4].

Various organisations' calculations for a living wage between 2013 and 2022 have shown significant differences. In 2013, the CPD determined the cost of living for RMG in and around Dhaka city. According to the poverty line method, a married worker needed a monthly income of Tk. 6,919, but the actual expenditure cost was Tk. 8,349. The calculation considered married workers with a household size of 3.25 and 1.61 earners[5]. On the other hand, AFWA in 2013 calculated the living cost of 25687 Tk[6], but MW declared at that time was 5300 Tk for non-EPZ workers in grade 7, and for EPZ, 5600Tk MW was declared by the BEPZA.

Later, in 2018, CPD conducted a survey that found the living conditions of RMG workers in Dhaka and nearby cities to be suboptimal. The survey analysed workers' household expenses, including food and non-food costs. The total cost of living for RMG workers was calculated at 22,435 Tk (USD 267), with 8,125 Tk allocated for food expenses and 11,142 Tk spent on non-food expenses[7].

Further, according to the GLWC report 2016, the living wage for RMG workers in Dhaka was estimated at 16450 TK and 13620 Tk in Dhaka satellite cities[8]. The report was later updated in 2022 and 2023, where the living wage for Dhaka city was calculated 23254 TK and 25497 Tk, respectively, and 19255 Tk and 21091 Tk, respectively, for satellite cities[9].

Based on the AFWA data available, it appears that the estimated living wage increased over the years. In 2017, the living wage was 37661Tk, which rose to 48280Tk in 2020 and is now estimated at 53105Tk in 2022. In 2017 and 2022, food bucket was not counted in the estimation[10]. In the context of Bangladesh, the Household Income and Expenditure Survey (HIES) by the Bangladesh Bureau of Statistics (BBS) is an important benchmark to consider. The HIES 2022 report estimates Bangladesh's total monthly household expenditure is

[1] Factors to consider under section 141BLA2006: the cost of living, the standard of living, cost of production, productivity, price of products, inflation, nature of work, risk and standard, business capability, and socio-economic factors.
[2] Khondaker Golam Moazzem & SaifaRaz,2014."Minimum Wage in the RMG Sector of Bangladesh: Definition, Determination Method and Levels, "CPD Working Paper106, *Centre for Policy Dialogue* (CPD).
[3] ibid
[4]Islam, Md.M. (2019) BEHIND THE PRICE: A STUDY ON GARMENTS INDUSTRY IN BANGLADESH. Oxfam in Bangladesh and BILS. Available at: https://bilsbd.org/research-report/ (Accessed: July 5, 2023).
[5] Khondaker Golam Moazzem & SaifaRaz,2014."Minimum Wage in the RMG Sector of Bangladesh: Definition, Determination Method and Levels, "CPD Working Paper106, Centre for Policy Dialogue (CPD) p10,11.
[6]Calculating a living wage (2013), Asia Floor Wage Alliance. Available at: https://asia.floorwage.org/living-wage/calculating-a-living-wage/ (Accessed: 21 August 2023).
[7] Moazzem, K.G. and Arfanuzzaman, M., 2018. Livelihood Challenges of RMG Workers: Exploring Scopes within the Structure of Minimum Wages and Beyond.p4
[8] Khan, M.E., Anker, R., Anker, M. and Barge, S., 2016. Living Wage Report for Dhaka, Bangladesh and satellite cities. The Global Living Wage Coalition. Available at: https://bit.ly/3y5LpIA.
[9] Andersen, L.E., Gonzales, A., Medinaceli, A., Anker, R. and Anker, M., 2022. Living Wage Update Report: Dhaka and Satellite Cities, Bangladesh, 2022 (No. 22-04-28). Available at: https://www.globallivingwage.org/wp-content/uploads/2018/06/Updatereport_-Bangladeshand-Satellite-Cities_-2022_30042022.pdf
[10]Calculating a living wage (2017,2020 and 2022), Asia Floor Wage Alliance(AFWA). Available at: https://asia.floorwage.org/living-wage/calculating-a-living-wage/ (Accessed: 21 August 2023).

31,500 Tk nationally. This value is comparatively higher in urban areas at Tk. 41,424, while it is lower in rural areas at Tk. 26,842.

In contrast to these values, the HIES 2016 report estimated a lower total monthly expenditure at Tk. 15,715 on a national level. This value was also lower in rural and urban areas, with Tk. 14,156 and Tk. 19,697, respectively.

Similar to the HIES 2022 report, Bangladesh's average monthly household income stands at 32,422 Tk nationally. However, this value is lower in rural areas at 26,163 Tk and higher in urban areas at 45,757 Tk. Comparing these values to those reported in HIES 2016, we can observe a significant increase in the national income average from 15,988 Tk to 32,422 Tk. This increase is also evident in urban areas, where the income average rose from 22,600 Tk to 45,757 Tk. However, in rural areas, the increase was not as significant, with the income average increasing from 13,998 Tk to 26,163 Tk[1]. Although MW declared in 2018 was 8000Tk for non-EPZ grade 7 workers and 8200Tk for EPZ workers by the BEPZA. It is clear from the analysis of living wage amounts of different organisations that there is a significant difference between the minimum wage and living wage in the Bangladesh RMG sector. The minimum wage announced by MWB has consistently been below the calculated living wage, which considers the needs and expenses of the worker's family.

6.3 Factors to consider in minimum wage fixing.

The MWB, after considering the living cost of the workers, should consider the second major factor, which is the economic factor in MW fixing. These include various variants: cost of production, productivity, price of products, nature of work and business capability. Unfortunately, there is no publicly available data to analyse these indicators[2]. For instance, there is no proper standard to evaluate the productivity of labourers. Productivity is not just limited to workers' physical and mental labour. However, it also depends on the administration of an organisation, raw materials, energy (such as electricity and gas), and equipment. Therefore, it is not wise to overlook these aspects when considering productivity[3]. Productivity is often seen to accumulate capital. However, it is also important to evaluate business capacity, which depends on the size and frequency of orders.

Thirdly, the MWB must consider socio-economic conditions, such as inflation, while determining the MW. Also, the current and probable future prices of essential goods and services should be taken into account. In addition, salaries should be increased to cope with the rising costs of essential commodities in the face of growing inflation[4]. A yearly 5% increment is insufficient to cover the hike in commodity prices. In September 2023, Bangladesh's annual inflation rate was 9.63%, and prices for food and non-alcoholic beverages increased by 12.4%, while the routine maintenance of the house increased by 13.5%, which was a slight increase from the previous month. Evidently, this inflation rate negatively impacts the lives of RMG workers, particularly those in lower positions.[5]

In 2013, the MWB faced a challenge: they lacked the experience and data to determine the factors that should be considered when setting up the MW in Bangladesh. To address this challenge, the MWB decided to go on a study tour to Cambodia and Vietnam. During the tour, they explored the MW setting approach in these countries to gain insights and determine best practices. Upon comparison, it was evident that the wage fixing system in Cambodia and Vietnam was far different from that of Bangladesh, providing the MWB with valuable knowledge to improve their own approach[6]. In Cambodia, MW was fixed by the Labour Advisory Council only for the garments and footwear industry, with wages adjusted annually. In Vietnam, the National Wages Council set MW for all sectors with four different wage rates for four separate regions and revised MW annually.

On the contrary, the Bangladesh MWB set MW for 42 separate sectors and revised the MW rate at five-year intervals[7]. Although the MWB in 2013 added a new allowance (food and transport) to increase the gross wage for workers, in 2018, all allowances were set much higher, fixed for all grades. The factors incorporated in section 141 of BLA 2006 are similar to factors stated in Recommendation (No.135) para 2 except for the social security issues.

On the other hand, the EPZ Labour Act 2019 only requires the MWB to consider the minimum wage or

[1] Bangladesh Bureau of Statistics (2023), "Household Income and Expenditure Survey (HIES) report 2022". (2023) bbs.portal.gov.bd. Available at: https://bbs.portal.gov.bd/sites/default/files/files/bbs.portal.gov.bd/page/57def76a_aa3c_46e3_9f80_53732eb94a83/2023-04-13-09-35-ee41d2a35dcc47a94a595c88328458f4.pdf

[2] Khondaker Golam Moazzem & SaifaRaz,2014."Minimum Wage in the RMG Sector of Bangladesh: Definition, Determination Method and Levels, "CPD Working Paper106, *Centre for Policy Dialogue* (CPD). p11

[3] Chowdhury, M.S. (2009) State of Minimum Wages in Bangladesh –Problems and Perspectives. *Rajshahi University Law Journal, Bangladesh*, Vol-05, pp. 167-194, 2008

[4] bid

[5] Bangladesh Inflation Rate (2023). tradingeconomics.com. Available at: https://tradingeconomics.com/bangladesh/inflation-cpi (Accessed: October 8, 2023).

[6] Bangladesh Minimum Wages Board returns from a study tour to Cambodia and Vietnam (2013) ILO Press release: Available at: https://www.ilo.org/asia/WCMS_223142/lang--en/index.htm (Accessed: 22 September 2023).

[7] Minimum wage chart: Bangladesh, Cambodia & Vietnam (2013) ILO. Available at: https://www.ilo.org/asia/WCMS_223988/lang--en/index.htm (Accessed: 22 September 2023).

salary of workers in similar industries outside the zone, along with other relevant factors. However, as the 2019 act is relatively new, it falls short of providing proper guidelines to the MWB in wage fixing. It is expected that the MW rates for EPZ workers will be fixed in 2023 under this act, and the MWB formed under the 2019 act will depend on the MW declaration outside the EPZ. It can be stated that the absence of clear guidelines on which factors to consider in fixing MW rates in export processing zones under the 2019 act contradicts the objectives of the ILO Convention (No.132). Both the acts mentioned other factors to consider without clarification. Remarkably, the 2019 act gives power to the BEPZ Authority to decide the method of age fixation of workers wages and other benefits.

7. Importance of Effective Implementation and Enforcement of Minimum Wage

Ensuring workers' rights through implementing a minimum wage (MW) is a crucial international system. However, merely setting a MW is not enough. The effectiveness of MW depends on the wage-fixing authority. International regulations mandate a well-balanced formation of the wage board to ensure proper enforcement. Additionally, adequate notification of the MW and regular inspection of factories or establishments is necessary for continual enforcement. Incorporating punishment provisions for non-compliance with the MW into national legislation would be a strong and beneficial approach.

7.1 Minimum Wage Board: Ensuring Fair Wage

The Minimum Wage Board (MWB) is the sole entity in Bangladesh responsible for setting minimum wage rates. It is important to have a well-structured and impartial board composition to ensure fair and just wages for workers in the RMG industry. Moreover, the composition of the MWB differs between the BLA 2006 and the EPZ Labour Act 2019. In the 2006 act, the board was composed of six members; however, under the 2019 Act, it has been expanded to eleven members, including representatives from the government, employers, and workers.

According to the ILO Convention (No.131), Article 4[1] guides each member in establishing or maintaining machinery for setting and adjusting minimum wage for groups of workers under Article 1, considering national conditions and requirements. The machinery should involve consultation with representative employers and workers organisations, ensuring that all stakeholders have a say in the process and that their voices are heard. To ensure the machinery functions effectively and in the country's best interests, a competent individuals may also be appointed after consultation with relevant employers and workers organisations in accordance with national law or practice. Further, ILO Recommendation (No.135) para 8[2], countries that have established bodies to advise the competent authority on minimum wage matters or to which the government has delegated the responsibility of minimum wage decisions should involve representative organisations of employers and workers in the operation of minimum wage fixing machinery as stated in paragraph 3 of Article 4. In addition, Recommendation (No.135) para 9[3], qualified independent individuals, such as public officials in industrial relations, economic and social planning or policy-making, should represent the country's general interests in minimum wage determination.

Representatives for employers, workers, and individual members in the MWB are ensured by both legislation in Bangladesh. However, both acts fail to mention the selection criteria and qualifications for workers and employers' representatives. The workers representative plays a vital role in wage fixing, as one member represents 4 million workers of the RMG industries. Therefore, the workers representative must have proper qualifications to argue and uphold the workers demands during critical bargaining. In some cases, the selection process is disregarded due to differences in opinion among trade unions and federations. As a result, when selection power is transferred to the government or authority, dishonest workers' leaders often become chosen. This is because union leaders sometimes prioritise their relationships with employers to benefit themselves, even if it goes against the interests of the workers who elected them. This can lead to weak bargaining in favour of workers and empowers employers to take unethical and illegal actions that might harm workers' welfare, which is unacceptable[4].So, the legislation requires the incorporation of new provisions clarifying the workers and employers' selection process.

The 2019 act has improved the composition of the MWB by adding representatives from the Prime Minister's office, Finance, and Labor Ministry, which is an improvement from the MWB formed under the 2006 act. However, whether the ministers' representatives will support the minimum wage recommendations and workers' rights is uncertain. It is important to note that most RMG workers are women, but unfortunately, they often do not receive maternity benefits in other facilities. To guarantee that female workers' rights are protected, having a female representative on the MWB would be helpful. Therefore, both acts should include a provision to

[1]Minimum Wage-Fixing Machinery Convention, 1970 (No.131). Article 4.
[2]Minimum Wage Fixing Recommendation, 1970 (No. 135). Para 8.
[3]Ibid, papa 9
[4]Syed, R., 2020. Mechanisms implementing minimum wage policies and compliance with the ILO's provisions: the case of Bangladesh's Garment Global Supply *Chain. E-Journal of International and Comparative Labour Studies*.

add a female representative to the board[1]. However, both acts comply with the representative requirement of the ILO Convention.

7.2 Notification of Minimum Wage:

The notification of Minimum wage (MW) rates to the RMG employers and workers is an important implementation issue. Workers must be aware of their entitled minimum wage before joining the industry. This knowledge can help them make informed decisions and understand their rights. According to ILO Convention (No.131) Article 5 and Recommendation (No.135) para (14a), MW rates should be communicated in a language that workers can understand. Which will help illiterate workers understand the law's provisions and policies initiated by the government[2].

A major issue in Bangladesh is that there is no consistent publicity policy for the minimum wage rates, resulting in a significant number of workers being unaware of them. These rates are only published in the official gazette by the government, under BLA 2006, which is not easily accessible for many workers, especially those who are illiterate. Further, the BLR 2015 added that the government is required to inform owners and workers about the MW rate. Owners must display the MW rate in Bengali in a visible location in the factory but can also display it in English if necessary. A notice of the determined wage rate and publication date in the gazette must be given to all factories or industry units where the MW rate is applicable and where workers are employed, sections 3-6 BLR 2015[3]. Similar approaches are also incorporated in the EPZ Labour Act 2019 and Rules in 2022, where the BEPZA declares the MW rate for RMG workers inside the EPZ in the official gazette.

However, in Bangladesh, the government should take more steps to ensure that the information about MW rates reaches the workers at the grassroots level rather than only limiting notification to the official gazette. Employers hanging notices about the MW rate in the factory was insufficient to inform uneducated workers. Without understanding the complex grading system, workers in grades 5 to 7 could be misled. According to a survey, exploited garment workers in Bangladesh are mostly uneducated rural women. These women are often exploited due to their lack of training, technical knowledge, and skills[4]. It is difficult for them to understand the difference between basic and gross wages, which impacts their earnings in terms of increments, overtime, festival bonuses, and maternity payments, as all of these depend on basic wages. For better publicity of the MW rates, factory owners and the government should provide workers with information in simple languages. Especially for those unable to read, other communication methods, such as arranging community meetings and creating TV commercials, would be a better way to convey the message to workers. Further, the government could conduct awareness campaigns to educate workers about their minimum wage rights through training sessions, workshops, and informational materials that are accessible and easy to understand. Additionally, encouraging dialogue between workers, employers, and government officials could help identify potential barriers and effective strategies for communicating minimum wage rates.

7.3 Importance of Inspection:

To ensure MW enforcement in any establishment, the ILO Recommendation (No 135) para 14 requires the Inspectorate to be accountable for enforcing the legal provisions related to wages as well as conditions of work[5]. The BLA 2006 and EPZ Labour 2019 do not have any specific provision for supervising MW implementation in the establishments. Instead, both acts contain provisions where the government can appoint a chief inspector or other inspectors who ascertain the power of inspection under the Acts to conduct investigations or examinations to ensure proper compliance with any provisions of the acts, rules, regulations, or schemes in respect of any establishment or worker employed therein[6]. In the case of establishments inside EPZ, the inspection should be carried out with the permission of the Executive Chairman[7]. In Bangladesh, the Department of Inspection for Factories and Establishments (DIFE) is the primary government agency for ensuring the proper application of labour laws and labour rules. The main role of DIFE is to ensure a safe and congenial work environment between workers and employers, implementation of minimum wage, Working hours, regular inspection of factories and establishments, and awareness-building programs in all sectors of Bangladesh[8]. DIFE is responsible for overseeing over 2 million shops, hotels, construction companies, and commercial health service centres, in

[1]Ibid.
[2]Minimum Wage-Fixing Machinery Convention, 1970 (No.131). Article 5 and Minimum Wage Fixing Recommendation, 1970 (No.135). Para 14a.
[3] Bangladesh Labour Rule (BLR) 2015, Section 3-6.
[4] Kabeer, N. and Mahmud, S., 2004. Globalization, gender and poverty: Bangladeshi women workers in export and local markets. *Journal of International Development*, 16(1), pp.93-109.
[5]Minimum Wage Fixing Recommendation, 1970 (No.135). Para 14.
[6]Bangladesh Labour Act2006(BLA2006) section 318,319.
[7]Bangladesh Export Processing Zone Act 2019 (EPZAct2019) Sections 168 and 169.
[8] Moazzem, K.G. and Khondker, A. (2021) EU's EBA & Prospect of GSP+ for bangladesh - centre for Policy (CPD). Available at: https://cpd.org.bd/resources/2021/07/EBA-and-Prospect-of-GSP-for-Bangladesh.pdf (Accessed: 24 August 2023). p28

addition to 242,000 manufacturing units[1]. The department is led by the Inspector General (IG), and in non-compliance with labour laws, they can file a case to the labour court. As per the DIFE report 2021 – 2022, they inspected 3560 RMG factories[2]. The DIFE can notify the factory and establishment if the minimum wage implementation is violated. The EPZ Labour Rules 2022 now incorporate DIFE inspections and a checklist prepared through consultations between DIFE and BEPZA. The DIFE has inspected 36 factories within EPZs as of December 2022[3].

With the responsibility of overseeing many workplaces, DIFE has a staff of 993 spread across 23 district offices to carry out its work. However, it is broadly recognised that the department is under equipped to fulfil its duties effectively and adequately. Still, 340 vacant posts need to be fulfilled. Additionally, the exclusive decision-making power of the IG is another working obstacle to this department's ability to perform its responsibilities effectively[4].

7.4 Punishment.

An effective method for ensuring compliance with MW at the national level is to include provisions for sanctions or penalties in the country's labour laws. ILO Recommends No 135 requires adequate penalties for infringement of the provisions relating to minimum wage and legal requirements or procedures for recovery of their underpaid wage[5]. In Bangladesh, both labour rules obligate employers or authorised persons not to pay less than the legal minimum wage. In case of underpayment, the worker or employee can claim 50% of the arrear money as extra compensation from the authority[6]. RMG workers outside EPZ can file complaints to DIFE. Upon receiving a complaint, they will inquire and notify employers to comply with the MW rates and 50% compensation. If the employer does not respond to the notification, the DIFE can file a case against the employer in the labour court. Moreover, under section 289 of BLA 2006, any employer who fails to comply with this law and pays a worker less than the MW rate may face punishment. The punishment can be imprisonment for up to one year or a fine of up to 5,000 taka or both[7]. RMG workers inside EPZ can complain to the BEPZ Authority and reserve the right to take necessary action against the employer through a written order or direction.

8. Conclusion and Recommendation:

Bangladesh's RMG industry has significantly contributed to the country's economic growth and employment generation. However, the industry's low wages and poor working conditions have been significant concerns for the industry's reputation and sustainability. The protection of the RMG workers from poverty is also a key concern. After analysing the full article, it is clear that the minimum wage (MW) system in Bangladesh's Ready-Made Garment (RMG) industry needs substantial improvement. Although Bangladesh has its own MW regulations and laws to ensure workers are paid fairly, the current minimum wage regulations in national labour laws are inadequate and do not fully comply with international standards. The current MW system is discriminatory, with two different legislations to regulate RMG worker labour rights, and the minimum wage fixing system is completed, with continued gaps between the minimum wage and living costs. Bangladesh has been a member of the ILO since 1972 and has ratified eight fundamental conventions. Still, it did not ratify the Minimum Wage Fixing Convention (No.131) and Minimum Wage Fixing recommendation (No.135).

Moreover, Bangladesh included a minimum wage fixing system in the national acts. Compared with the ILO Convention (No.135), the BLA 2006 and EPZ Labour Act 2019 established a MW fixing body. Both acts ensure the participation and representation of employers and workers in the MWB. The BLA 2006 incorporated similar factors to consider in fixing MW as ILO Recommendation (NO.135), but EPZ Labour Act 2019 does not compile in this matter.

Therefore, the government of Bangladesh should take the following steps to improve the minimum wage system in the RMG industry:

1. Ratify the ILO Minimum Wage Fixing Convention (No. 131) and Minimum Wage Fixing Recommendation (No. 135) and ensure full compliance with international standards.
2. Include the concept of a living wage in the national legislation, which should be sufficient to provide a rational

[1] To create a better everyday life for some people (2020) Worker Rights Consortium. Available at: https://www.workersrights.org/research-report/to-create-a-better-everyday-life-for-some-people/ (Accessed: 25 August 2023).
[129] Department of Inspection for Factories & Establishments (2022) Labour Inspection Report 2021-2022. Bangladesh. p28. Available at: http://www.dife.gov.bd/site/publications/ae252acb-8a05-4d74-bd11-d15f8e01bafa/- (Accessed: October 13, 2023).
[3]International Labour Organisation (ILO) (2023), Report by the Government of Bangladesh on progress made on the implementation of the road map taken to address all outstanding issues mentioned in the article 26 complaint concerning alleged non-observance of Conventions 81, 87 and 98. Available at: https://www.ilo.org/gb/GBSessions/GB347/ins/WCMS_869201/lang--en/index.htm (Accessed: October 14, 2023).
[4] Moazzem, K.G. and Khondker, A. (2021) EU's EBA & Prospect of GSP+ for bangladesh - centre for policy. Available at: https://cpd.org.bd/resources/2021/07/EBA-and-Prospect-of-GSP-for-Bangladesh.pdf (Accessed: 24 August 2023).
[5]Minimum Wage Fixing Recommendation, 1970 (No.135). para 14c.
[6]Bangladesh Labour Rule (BLR) 2015 section 133(12), and Bangladesh Export Processing Zone Rule 2022 (EPZ Rule) section 141 (1-2).
[7] Bangladesh Labour Act (BLA) 2006 Section 289.

quality of life for workers and their families.
3. Incorporate calculation methods like the Anker formula for living cost calculation for RMG workers in the national laws, which might vary depending on the area, number of family members, and food and non-food costs.
4. Guarantee that future minimum wages are at least close to the cost of living in the country to bridge the gap between the minimum wage and living costs.
5. Increase the figures of inspectors and provide more punitive power to the inspectors to monitor and enforce the minimum wage.
6. Impose penalties and sanctions on non-compliant factories and increase fines for the acts. If a factory fails to pay the minimum wage, that factory operation should be ceased, and a long imprisonment sanction would be an effective way.
7. Work to ensure that enterprises can absorb the cost increases related to regular adjustments to the minimum wage by providing tax incentives or other forms of support.
8. Address concerns about competitiveness in the global market by implementing policies that support sustainable and fair-trade practices.