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A PRELIMINARY COMPARATIVE ANALYSIS OF POLITICAL ACCOUNTABILITY IN THE PEOPLE'S REPUBLIC OF CHINA AND NEW ORDER INDONESIA

Dominic J. Nardi, Jr.[*]

ABSTRACT

Most authoritarian regimes establish mechanisms to ensure that judges remain responsive to elite preferences. This paper proposes a new framework for understanding these accountability mechanisms: institutionalized and patrimonial accountability. When the state can redesign the judiciary, it can institutionalize political control over judges, thus making judges directly accountable to elites. By contrast, if an authoritarian government inherits a liberal constitutional framework, political elites might instead attempt to influence judicial outcomes through the informal distribution of patronage to judges. This paper seeks to explain these different methods through case studies of the People's Republic of China and New Order in Indonesia. In assessing both, I suggest that institutionalized accountability may in fact be more likely to improve judicial performance than patrimonialism.

[*] Ph.D. Student, Political Science, University of Michigan, E-mail: dnardi@umich.edu, Website: http://rulebyhukum.blogspot.com/.

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I. INTRODUCTION

In the comparative judicial politics literature, it is generally accepted that judicial independence yields normative and empirical benefits. Under liberal democratic regimes, strong courts can protect fundamental rights and restrain executive power.[1] Some studies have suggested that judicial independence promotes economic growth by protecting private property and creditors' rights.[2] Yet, relatively less research has been done on political accountability of judges. Is more judicial independence always better? Are independence and accountability irreconcilable principles,[3] or is the appropriate balance between the two, dependent upon the particular context? As Randall Peerenboom, professor of Chinese at UCLA, argues, "Independence of the courts is no cure-all. Suddenly providing more authority and independence to incompetent and corrupt judges would result in more rather than fewer wrongly decided cases."[4] This paper is a preliminary attempt to explore these questions.

In this paper, I argue that how accountability mechanisms are used is a crucial factor in their impact on judicial performance. Institutionalized and patrimonial accountability mechanisms employ different strategies for controlling courts, which could have significant implications for the rule of law. I rely on case studies from the People's Republic of China and Indonesia under Suharto's New Order as archetypes of each accountability model.

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[1] *See, e.g.*, Gerald L. Blasi & David Louis Cingranelli, *Do Constitutions and Institutions Help Protect Human Rights?, in* HUMAN RIGHTS AND DEVELOPING COUNTRIES (Stuart S. Nagel & David Louis Cingranelli eds., 1996); Wayne Sandholtz, *Treaties, Constitutions, Courts, and Human Rights,* 11(1) J. HUM. RIGHTS 17 (2012). *Cf.* Douglas C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49(4) J. Econ. Hist. 803 (1989).

[2] *See, e.g.*, Daniel M. Klerman & Paul G. Mahoney, The Value of Judicial Independence: Evidence from Eighteenth Century England, 7 AM. L. & ECON. REV. 1 (Spring 2005); Thorsten Beck et al., *Legal Institutions and Financial Development* 2 (World Bank, Working Paper No. 3136, Sept. 2003); Rafael La Porta et al., *Law and Finance* 16-17 (NBER, Working Paper No. 5661, July 1996); *and* Rafael La Porta, et al., *Judicial Checks & Balances*, 112(2) J. POL. ECON. 1131 (2004).

[3] As suggested by John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002).

[4] Randall Peerenboom, *Judicial Independence and Judicial Accountability: An Empirical Study of Individual Case Supervision*, 55 THE CHINA J. 67, 84 (Jan. 2006).

Part II of this paper provides the theoretical framework for accountability and courts in authoritarian states. Part III discusses institutionalized judicial accountability in China's judicial system which, according to Communist legal theory, remains accountable to the People's Congress. Part IV analyzes the patrimonial model in Suharto's Indonesia, as well as the aftermath of *Reformasi*. Finally, in Part V, I draw comparisons between the accountability models and their longer-term impacts on the judicial performance.

II. JUDICIAL ACCOUNTABILITY AND CONSTITUTIONALISM IN AUTHORITARIAN STATES

Although most authoritarian states do limit judicial autonomy,[5] they nonetheless have almost universally found it beneficial to preserve formal judicial institutions, or even engage in judicial reform. Many authoritarian states do not enjoy a complete monopoly over domestic politics, but rather face competing pressure from internal activists, opposition parties, or local officials. Allowing a judiciary with even limited independence serves to legitimize the regime.[6] More importantly, courts channel disputes between different political elites or levels of government into state institutions, rather than public protests.[7] In today's globalized economy, multinational corporations and foreign governments increasingly demand independent adjudicators who can enforce contracts and intellectual property rights.[8] Finally, authoritarian governments often draft constitutions not to limit state power but rather to "make lines of authority

[5] There are exceptions. Franco's Spain and Mubarak's Egypt both had fairly independent courts. José J. Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9(3) LAW & SOC'Y REV. 475, 475-96 (1975); Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 883-930 (2003).

[6] Rolando V. del Carmen, *Philippine Judicial System under the New Constitution and Martial Law*, 9 TEX. INTL. L. J. 143 (1974).

[7] Andrew J. Nathan, *Authoritarian Resilience*, 14(1) J. OF DEMOCRACY 6, 6-17 (2003).

[8] For example, despite the Singapore Peoples Action Party's strict anti-defamation laws and political dominance, the government has allowed courts a certain measure of independence and compensate judges very well. LEE KUAN YEW, FROM THIRD WORLD TO FIRST: THE SINGAPORE STORY (1965-2000) (2000).

clear;" hence, a judicial system simply serves as the primary institution for dispute resolution.[9]

In assessing the institutional power of courts in China and Indonesia, I consider 1) independence from improper external *or* internal influences; 2) the ability to create politically significant outcomes or decisions; and, 3) the authority to compel other state actors to comply with those decisions.[10] The institutional power of courts is not necessarily correlated with an individual judge's competence or authority. While judges may accumulate influence among the country's ruling elite, this does not necessarily translate into institutionalized judicial power.[11]

It is important to distinguish between *judicial* accountability and *political* accountability in this context. Judicial accountability is a set of mechanisms that reduce judges' overall utility when they violate standards of conduct defined in the law.[12] All countries have some mechanisms for judicial accountability, often in the form of impeaching judges or independent disciplinary councils,[13] although the difficulty of utilizing such mechanisms varies significantly. There is some evidence that judicial accountability mechanisms decrease judicial corruption and increase economic growth,[14] suggesting that, while there exists some tension between independence and accountability, it is also possible to balance the two.

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[9] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES 11 (2003).

[10] *Id.* at 252.

[11] In fact, under some anti-communist governments, conservative judges actively and willingly cooperated in upholding the regime and attacking political enemies. For example, Supreme Court justices in Pinochet's Chile actively supported the military's anti-leftist ideology and furthered its goals in the courtroom. Anthony W. Pereira, *Of Judges and Generals: Security Courts under Authoritarian Regimes in Argentina, Brazil, and Chile*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 23-57 (Tom Ginsburg & Tamir Moustafa eds., 2008).

[12] Such standards might come from the 2002 Bangalore Principles or the Global Judicial Integrity Principles, which both call for judicial independence and impose ethical duties on judges. *See* Keith E. Henderson, *Halfway Home and a Long Way to Go, in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2009).

[13] Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (Winter 2009).

[14] Stefan Voigt, *The Economic Effects of Judicial Accountability: Cross-country Evidence*, 25 EUR. J. LAW ECON. 95 (2008); Tim Besley & Abigail Payne, *Judicial Accountability and Economic Policy Outcomes: Evidence from Employment Discrimination Charges*, INSTITUTE FOR FINANCIAL STUDIES WP03/11 (June 2003).

By contrast, political accountability mechanisms decrease judges' utility should they issue decisions that violate the policy preferences of political decision-makers or elites. In order to activate political accountability mechanisms, judges do not necessarily need to violate the letter of the law or even engage in ethically questionable conduct. Political accountability mechanisms can occur *a priori* or *a posterior*. In the former, the government exercises control over whom to appoint to the bench based on the candidate's policy preferences. In the latter, the government can sanction or remove a judge after he or she has made a decision.

While we often associate political accountability mechanisms with authoritarian states that lack the rule of law, in practice there is much more variation. Many democratic states appoint judges based on their policy preferences. Some systems impose term limits on judges and even allow reappointment after the term has expired, giving judges an incentive to conform to the preferences of political elites. In the United States, the birthplace of independent judicial review, most states hold judicial elections or allow the public recall of judges for controversial decisions. This is not to claim that democracies and authoritarian regimes are equivalent, but rather to point out that the difference in political accountability mechanisms between countries is a matter of degree, not absolutes.

Legal scholars should instead focus on if and when political accountability mechanisms in authoritarian states have the potential to improve the quality of adjudication. An institutionalized political accountable system may be less injurious to the rule of law than *ad hoc*, extra-constitutional measures. For example, China's 1982 Constitution never promises that judges are independent from the political branches of government, but rather grants state officials the constitutional authority to review and supervise judges. If judges threaten the interests of the Communist Party, they will be punished. Ironically, by ensuring the judiciary is not a threat to Chinese political elites, these boundaries might have made judicial reform possible. Since the early 1980s, the judiciary has become more professional and can even review some government decisions.

Such institutionalized political accountability might not even violate constitutionalism in the strictest sense. In popular usage, constitutionalism and the rule of law have become virtually

synonymous with democracy and human rights. However, according to a more precise definition, constitutionalism is merely an equilibrium under which political elites adhere to the text of their constitutions and laws, whether progressive or illiberal.[15] This implies that institutionalized mechanisms are more predictable and that judges have some guidelines for how to behave. As such, while China's government might violate global norms of the rule of law by supervising its judges, this does not necessarily mean that it has violated the country's own legal principles.

By contrast, some countries rely upon patrimonial or extra-constitutional mechanisms for making judges accountable to political elites. Political elites can distribute patronage to complaint judges or use it as leverage to compel courts to overturn unfavorable verdicts. This model might be particularly attractive to authoritarian regimes that come to power in a country with a preexisting judicial framework. Rather than expend resources to change institutions, patrimonial mechanisms subvert them. For example, Indonesia's New Order regime used salaries and other government benefits to influence judges, in part because President Suharto was not in a position to engage in the revolutionary measures Communist China employed.

Even though judicial independence might be guaranteed by the text of the law, patrimonial mechanisms could have even more severe effects on judicial performance than institutionalized mechanisms. It often requires political elites to violate the text or spirit of the law. The lack of institutionalization also means the condition of the judiciary depends heavily upon the skills and networks of political elites. In Indonesia, using patronage as a means of political control encouraged widespread corruption amongst judges and reduced respect for legal institutions. Even today, fourteen years after the collapse of the New Order, overwhelming majorities of Indonesians still believe judges can be bribed.[16]

The manner in which authoritarian governments seek to establish political accountability over their courts has important

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[15] *See* NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD 8-10 (2002).

[16] Ina Parlina, *Survey Finds Judiciary Perceived as Most Corrupt*, JAKARTA POST, Apr. 11, 2013, *available at* http://www.thejakartapost.com/news/2013/04/11/survey-finds-judiciary-perceived-most-corrupt.html.

consequences for constitutionalism and the rule of law. Unfortunately, it is difficult to get reliable, quantifiable data about accountability mechanisms, making a cross-national test difficult. The next two sections of this paper use case studies from the People's Republic of China and New Order Indonesia. First, I discuss why China adopted institutionalized mechanisms while Indonesia used more patrimonial methods. Second, I demonstrate how each mechanism worked in practice and the extent to which they do work. Finally, I compare the consequences of the mechanisms for judicial performance.

III. INSTITUTIONALIZED ACCOUNTABILITY: CHINA'S PEOPLE'S COURTS

A. HISTORY OF THE CHINESE JUDICIARY

Upon seizing power in 1949, the Chinese Communist Party (CCP) emphasized that legality, equality before the law, and judicial independence were "bourgeois" concepts of no use to a proletarian nation.[17] Initially, Party Chairman Mao Zedong had accepted the Soviet argument that China should retain courts and KMT judges, and even recruit new judges, in preparation for a gradual transition toward the proletariat revolution. The courts were integrated into the government structure, often with the chairman of the county concurrently serving as the head of the court. This ensured that judges were directly accountable to political elites and made the courts useful tools for enforcing Party policy. In 1951, courts handled 800,000 cases against reactionaries.[18] The CCP also utilized courts to nationalize foreign assets.[19]

However, judges were not trusted with the most sensitive issues. The CCP authorized a*d hoc* people's tribunals, military judges, and security officials to handle political cases and

[17] Graig R. Avino, *Comment: China's Judiciary: An Instrument of Democratic Change?,* 22 PENN ST. INT'L L. REV. 369, 377 (Fall 2003).
[18] Jerome A. Cohen, *The Chinese Communist Party and "Judicial Independence:" 1949-1959*, 82(5) HARV. L. REV. 967, 977 (Mar. 1969).
[19] This is largely also because the *Marriage Law* of 1950 already existed by this time and allowed litigation in courts.

circumvent professional judges.[20] The Security Administration handled most criminal affairs, with the final judicial trial serving merely to "educate" the public. Meanwhile, judges received "leadership" from higher levels of the judiciary as well as local people's councils. By 1952, the CCP felt secure enough to remove 80% of KMT holdover judges in its "Judicial Reform Movement."[21] Six years later, the Anti-Rightist Movement revealed that Party officials were dissatisfied with judicial interference with their attempts to prosecute "enemies of the state." The CCP removed all non-Party judges and replaced them with loyal retired military and public security officials. Party clearance became required for major cases, but judges often sought advice even in small cases in order to avoid potential reprimands.[22]

During the Cultural Revolution, most traces of the formal legal system faded as Mao relied on mass campaigns targeting certain social ills to provide "justice." The campaigns began with policy directives from senior Party officials and required individuals to participate in "discussions" and criticize their previous errors. Those perceived to be resisting the campaign were publicly humiliated and denounced. Campaigns focused on group problems arising out of class struggle rather than individual disputes. In a sense, campaigns allowed political elites to administer justice directly without worrying about the accountability of judges. Campaigns supplanted courts as the "trial" mechanism of the proletariat, with stage-managed show trials focused on "self-criticisms."

After Mao's death in 1976, Deng Xiaoping began to rationalize and institutionalize the dispute resolution mechanisms, including the judiciary, mediation, and "letters and visits" petitions (*xinfang*).[23] In 1979, the National People's Congress (NPC) passed the *Organic Law of the People's Courts*, which detailed the structure of courts and appointment of judges. In 1982, the government adopted a new Constitution, Article 126 of which provides that judges shall "exercise judicial power independently and are not subject to interference by administrative organs, public organizations, or individuals." In 1995, the NPC passed the *Judges*

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[20] Cohen, *supra* note 18, at 977.
[21] *Id.* at 976.
[22] *Id.* at 990-99.
[23] Carl F. Minzner, *Xinfang: An Alternative to Chinese Formal Legal Institutions*, 42 STAN. J. INT'L L. 103 (Winter 2006).

Law, which details qualifications for judges, methods of appointment and removal, and an appraisal system. In 1996, Jiang Zemin adopted a new official policy formulation (*tifa*) with the goal of ruling the country in accordance with law and establishing a socialist rule of law state (*yifa zhiguo jianshe shuhui zhuyi fazhiguo*).

Courts have become a much more important venue for dispute resolution since the reforms, as witnessed by the increasing caseload of most courts. From 2003 to 2007, the SPC decided 20,451 cases and supervised lower courts adjudicating over 30 million cases.[24] According to the most recent SPC Work Report, in 2008 alone, the SPC adjudicated 10,553 cases, national courts handled 10,711,275, and people's tribunals handled 9,839,358 – a 10.91% rise over the previous year.[25] Courts are adjudicating more important and controversial cases.[26] The number of mass-plaintiff suits has also been rising; in 2004, there were 538,941 multi-party suits, up 9.5% from the previous year.[27] Some public interest lawyers and firms even specialize in "impact litigation."[28] Much of the SPC's workload – estimated at 90% of cases – consists of death penalty reviews. With the passage of the Administrative Litigation Act, plaintiffs have prevailed in approximately 40% of challenges against administrative decisions. The SPC even tried to assume constitutional review (discussed below).

The Party has also used the judiciary, especially Basic Courts, in order to extend the state's reach into the countryside. Judges have wide powers to handle disputes. In addition to hearing cases brought to the courts, judges may initiate investigations on their

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[24] Xinhua News, *Highlights of Work Report on China's Supreme People's Court*, CHINA COURT NEWS, Mar. 10, 2008, *available at* http://en.chinacourt.org/public/detail.php?id=4283&k_title=work.

[25] Wang Shengjun, *The Supreme People's Court 2009 Report on the Work of 3 Years on 10 at the Eleventh National People's Congress at its Second Meeting*, broadcast by Xinhua News Agency, Mar. 17, 2009, *available at* http://news.xinhuanet.com/newscenter/2009-03/17/content_11024682.htm.

[26] Randall Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization, and Dejudicialization in China*, in ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA 175-202, 182 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

[27] Id. at 193.

[28] Hualing Fu & Richard Cullen, *Weiquan (Rights Protection) Lawyer in an Authoritarian State: Building a Culture of Public-Interest Lawyering*, 59 THE CHINA J. 111 (Jan. 2008).

own and negotiate with defendants to reach settlements.[29] Zhu Suli, dean of the Peking University Law Department, claims Basic Courts often decide cases on the basis of equity rather than law, and minimize formal legal fact-finding and procedures.[30] If a decision is appealed, the judge may simply balance the appellate decision with the equity concerns of the parties. Basic Courts also have smaller branch courts for minor cases, called People's Tribunals (*renmin fating*), to extend even deeper into the countryside.

The CCP realized the need to strengthen the accountability of judges to the Party and improve judicial quality. In 1999, the NPC passed the first Five-Year Reform Plan (FYRP 1999) to improve professionalism and management, combat local protectionism, and address the lack of resources among the courts. The FYRP 1999 called for more independent panels; reducing the powers of adjudicative committees; appointing authoritative and qualified presiding judges; and separating adjudication personnel from other staff. While judges have become more professional, the FYRP 1999 could not realize some of its goals, particularly combating local protectionism. The Second Five-Year Reform Plan (FYRP 2005) focused on regularizing the use of lay assessors; strengthening enforcement measures; reestablishing SPC review over death penalty sentences; making the appellate process more transparent; securing funding for courts;[31] and centralizing court appointments regionally.[32] The most recent plan (FYRP 2012) emphasizes efficiency in processing cases.[33]

The Communist Party was able to implement such wide-ranging institutionalized accountability because since 1949 it had achieved a monopoly over political power. Moreover, the CCP retains much of its political legitimacy. Thus, institutional change

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[29] *E.g.*, Frank K. Upham, *Book Review: Who Will Find the Defendant If He Stays with His Sheep? Justice in Rural China (Song fa xiaxiang: Zhongguo jiceng sifazhidu yanjiu) [Sending Law to the Countryside: Research on China's Basic-Level Judicial System] by Zhu Suli*, 114 YALE L. J. 1675, 1679-80 (May 2005).

[30] *Id.* at 1696-97.

[31] Jonas Grimheden, *Chinese Law in the Global Context: Essay: The Reform Path of the Chinese Judiciary: Progress or Stand-Still?,* 30 FORDHAM INT'L L. J. 1000, 1009-10 (Apr. 2007).

[32] Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 625 (Sept. 2007).

[33] Staff Reporter, *Judicial Reform Plan Fails to Impress Critics*, S. CHINA MORNING POST, July 19, 2012, *available at* http://www.scmp.com/article/674757/judicial-reform-plan-fails-impress-critics.

was relatively easy. The Party could amend the constitution quickly and with little public debate. Moreover, during the Maoist period the government had very clear political and social goals and sought to use state institutions to advance them. Unlike Indonesia, the government was not content simply to survive but also needed courts as an agent in advancing the Communist revolution. Even as Maoism ebbed, the Party has used its institutionalized control over courts in order to encourage judges to support the Party's economic goals.[34]

B. MECHANISMS OF INSTITUTIONALIZED ACCOUNTABILITY

The Chinese state has institutionalized executive and legislative supervision over the judiciary. Both the Constitution and laws explicitly provide people's congresses the power to appoint judges, fix their salaries, and assess their competence. Within the judiciary itself, adjudicative committees and appellate judges supervise the discretion of lower court judges. Other party-state organs, such as the Procuracy and Communist Party Political-Legal Committees, can supervise cases and even appeal adverse decisions. Popular pressure also influences judges, as courts become an acceptable venue for popular grievances. Balanced against these factors is the judiciary's increasing autonomy and tentative steps towards judicial review.

1. LEGISLATIVE/PEOPLE'S CONGRESS

Judges in the people's courts do not have life tenure but rather have terms similar to those of other bureaucrats in the career civil service judiciary. The NPC and people's congresses have almost complete control over the appointment and removal of judges. The SPC president is elected by the NPC, while other members are nominated by him and appointed by the NPC Standing Committee. According to the *Judges Law*, lower courts judges are appointed and removed by people's congress at their corresponding level, with heavy pressure from the Party.

Chinese law also defines qualifications for judges in a way that guarantees that all candidates will conform to CCP ideals.

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[34] Yuhua Wang, *When Do Autocrats Build Clean Courts? Sub-National Evidence from China*, 2013 AM. POL. SCI. ASSOC. CONFERENCE (Sept. 2010).

According to Chapter VI of the *Judges Law* of 1995, judges must be Chinese nationals of more than 23 years old in good health, of "fine political and professional quality," endorse the 1982 Constitution, and possess an advanced degree in law. This allows the CCP to apply the *nomenklatura* system, in which the Party Organization Departments vet all candidates for the highest-ranking justice sector positions. Indeed the overwhelming majority of judges and nearly every president of the SPC have been Party members.[35] The law also established an appraisal system assessing the judges' decisions, reversals, and ideology, and grades them as excellent, competent, or incompetent. Judges with poor ratings can be removed or have bonuses docked.

Better-educated and professional judges are more likely to administer judicial services effectively. Fortunately, judges today appear more qualified and competent than at any time in Chinese history.[36] Since 2002, all new judges have been required to possess a bachelor's degree in law and sitting judges below the age of 40 were required to obtain one within five years. In mid-2005, 50% of judges had university degrees, as opposed to 6.9% in 1995.[37] The Supreme People's Court tightened entry into the judiciary with a rigorous National Judicial Examination. For the first exam, in March 2002, 360,000 people participated in the exam and only 24,000 passed (a 7% pass rate).[38] In 2005, the SPC issued a notice requiring judges to write better opinions explaining their facts and evidence, legal reasoning, and logical arguments.

The government has tied external supervision mechanisms directly to judges' salaries, making them personally as well as institutionally accountable to politicians. Under Article 35 of the *Judges Law*, judges appraised as incompetent are ineligible for a salary raise. Furthermore, a judge could lose his bonus if his decision is reversed on appeal. Since many Chinese judges already lack adequate remuneration, the threat of losing this extra income will significantly dampen the judge's willingness to defy political supervision. The lack of a secure salary has also led to corruption

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[35] LIEBMAN, *supra* note 32, at 627.
[36] Judge Jianli Song, *Essay: China's Judiciary: Current Issues*, 59 ME. L. REV. 141, 146 (2007).
[37] LIEBMAN, *supra* note 32, at 625.
[38] SONG, *supra* note 36, at 146.

among judges.[39] However, much of this corruption appears to stem from private parties or local elites rather than from the central government. Thus, government control over judicial salaries and budgets ensures that judges will remain accountable to the party-state.

While administration of the people's courts was transferred from the Department of Justice to the SPC in 1982, financing still depends on administrative organs and people's congresses.[40] Courts are funded directly from the local people's congress budget as well as from litigation fees.[41] This makes judges accountable to the local Party elite. Several years ago, the Politburo endorsed a Central Political-Legal Commission plan to centralize court funding,[42] but, aside from three billion yuan (approximately $380 million) to finance courts that had lost revenue due to a 2007 rule about litigation fees, most funding is still local.[43] Local elites have also resisted efforts to centralize judicial appointments.

Not surprisingly, local protectionism has become a significant problem in Chinese courts. Local elite influence has made courts reluctant to protect foreign trademarks, convict powerful local officials, and allow class action suits for environmental damage.[44] Politicians are keen to protect their constituents in courts. In one debt-collection case in Liaoning, a creditor sued a defendant in his home court in Dalian. The People's Congress in Shenyang, the defendant's hometown, then asked the court to retry the decision. Eventually, politicians from both jurisdictions pressured the parties to settle.[45] While in the past political interference had been more explicit, local people's congresses might now obscure their interference by adopting

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[39] Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 COLUM. J. ASIAN L. 97, 129 (Spring/Fall 2005).

[40] Chris X. Lin, *A Quiet Revolution: An Overview of China's Judicial Revolution*, 4 ASIAN-PACIFIC L. & POL'Y J. 180, 198 (Summer 2003).

[41] Donald C. Clarke, *Empirical Research in Chinese Law, in* RULE OF LAW: LEGAL AND JUDICIAL REFORM IN DEVELOPING AND TRANSITION COUNTRIES 22 (Erik Jensen & Thomas Heller eds., Stanford Univ. Press 2003).

[42] Donald C. Clarke, *Politburo proposes to centralize court funding*, CHINESE LAW PROF BLOG (Dec. 7, 2008), a*vailable at* http://lawprofessors.typepad.com/china_law_prof_blog/2008/12/politburo-propo.html.

[43] Yuhua Wang, *Court Funding and Judicial Corruption in China*, 69 CHINA J. 43, 49 (2013).

[44] *Cangnan County v. Long Gang Rubber Molding, Inc.*, discussed in LIN, *supra* note 40, at 219-20.

[45] PEERENBOOM, *supra* note 4, at 79-80.

statutes of general applicability that instruct (*zhishi*) the local court to follow a certain policy, such as to "take care of" (*zhaogu*) a particular foreign investor.[46]

2. INTRA-JUDICIARY

Chinese judges are accountable not only to politicians, but also to superior judges. Litigants have a right of appeal to higher courts, but lower court judges often ask for advice (*qingshi*) from superior or appellate judges during adjudication anyway. Article 7(7) of the *Judges Law* allows senior judges to supervise (*jiandu*) junior judges.[47] If a party appeals, the presiding judge risks a blemish on his record or loss of a bonus. For example, in one court, a judge may be fined 50 yuan for each case reversed on appeal and 100 yuan for each case remanded for retrial; in another, even one or two cases reversed on appeal may mean the judge cannot be assessed as "advanced."[48] However, litigants appear to believe appeals can change the verdict since the appeals rate has grown rapidly over the past few years. As such, appellate judges, who are often more politically ambitious than their Basic Court counterparts, can ensure that judges remain accountable by guiding their judicial decisions.

People's courts have adjudicative committees that supervise judges within the court. Each committee consists of ten judges nominated by the court president and approved by local people's congress. Theoretically, these committees act to ensure the quality of judicial decisions.[49] Some Chinese legal scholars argue that the committees protect judges since it is more difficult for outside parties to bribe or influence a committee than a single judge.[50] Nonetheless, adjudicative committees do not appear to play a dominant role in ensuring judicial accountability. In 2000, they were estimated to have supervised only 1% of all cases and 15% of criminal cases.[51]

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[46] Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 541 (Spring 2007).
[47] Judges Law, art. 7(7).
[48] CLARKE, *supra* note 41, at 22.
[49] Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152, 166 (Spring/Fall 2005).
[50] UPHAM, *supra* note 29, at 1703-05.
[51] *Id.* at 1682.

The Party has tried to improve the effectiveness of committees as accountability mechanisms. While in the past the committees played a large role in supervising cases, they now interfere only if the judge cannot decide the case after consultation with immediate superiors or for difficult, politically controversial, or important cases. Previously, committee judges did not hear the parties' original arguments,[52] but the FYRP 2005 requires the court president to sit in on cases to be decided by the committee.

As with juries, lay assessors (*renmin peishenyuan*) provide some measure of popular accountability inside the courtroom. At the Basic Court level, a typical panel will have one judge (*faguan*) and two lay assessors. In deciding cases, each person has an equal vote and the "minority should obey majority."[53] Unlike jurors, they typically serve for a period of time rather than a single case. However, in some counties, courts no longer use lay assessors. In others, lay assessors have essentially become court employees.[54] Yet other counties allow for summary proceedings in which a single judge can hear simple criminal cases.[55] According to SPC President Wang Shengjun in the 2009 Work Report, 55,681 assessors sat in on a total of 505,412 cases. This suggests that a relatively small number of citizens have become a semi-professional cadre of jurors sitting in on a small number of cases. Thus, it is not clear what accountability role, if any, lay assessors currently play at most Basic Courts.[56]

The Supreme People's Court has internal organs to discipline judicial staff. This institution is intended to crack down on corruption and serious ethical violations. However, the SPC's Work Report is not clear on how effective or widespread this mechanism is. In 2000, 1,200 judicial employees were disciplined; in 2001, 996 faced disciplinary sanctions.[57] According to the 2009 Work Report, 712 staff members were implicated in cases, of

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[52] Randall Peerenboom, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia*, 27 MICH. J. INT'L L. 823, 858-59 (Spring 2006).
[53] Judge Dong Tianping, *Presentation Transcript*, 5 U. BALT. INTELL. PROP. L. J. 33, 35 (Spring 1997).
[54] CLARKE, *supra* note 41, at 17.
[55] LIN, *supra* note 40, at 237.
[56] CLARKE, *supra* note 41, at 17.
[57] Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10(1) J. CHINESE POLI. SCI. 43, 54 (Apr. 2005).

which 105 were prosecuted for criminal liability.[58] However, given the extent of reported corruption among the people's courts, this seems relatively low.

3. COMMUNIST PARTY

The 1982 Constitution's preamble officially recognizes the leadership of the Chinese Communist Party and the country's status as a "people's democratic dictatorship." As such, the CCP plays an important, legally sanctioned role in overseeing the judiciary. All people's courts have internal CCP Political-Legal Committees (*zhengfa wei yuanhui*), which include the president of the court.[59] Before the judicial reforms of the 1990s, judges were required to ask political-legal committees for permission to issue a verdict for all individual cases, ensuring Party approval of all outcomes. Now, however, the Party sets overall guidelines and avoids direct involvement in most non-controversial cases.[60] The committee only interferes directly in political controversial or important cases. The committee's written instructions to judges are often general rather than specific, allowing judges some latitude to interpret them.[61] Overall, this is probably the most direct mechanism the CCP has of keeping judges accountable to Party policy goals.

The Communist Party-controlled media also plays an important role in holding the judiciary accountable for its decisions. The Chinese media are in large part responsible for shaping the public image of modern courts. Legal education campaigns (*pufa jiaoyu*) broadcast educational or fictionalized programs promoting courts as well-organized and corruption-free institutions.[62] This in turn can fuel demand for political oversight of judges to meet this idealized goal. National media organs also act as accountability mechanisms by aggressively reporting on cases. Since the media represents the Party's view, judges realize

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[58] SUPREME PEOPLE'S COURT, REPORT ON THE WORK OF THE SUPREME PEOPLE'S COURT (2009), *available at* http://news.xinhuanet.com/newscenter/2009-03/17/content_11024682.htm.
[59] LIN, *supra* note 40, at 198.
[60] AVINO, *supra* note 17, at 381.
[61] ZHU, *supra* note 46, at 543.
[62] Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, *in* RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 207-34, 233 (Tom Ginsburg & Tamir Moustafa eds., 2008).

that media criticism implicitly means Party criticism. Media attention helps to generate social controversy, which itself becomes a justification for intervention through judicial supervision. In interviews, judges have complained about media reporting of their cases.[63] Thus, the Party can disguise its influence through the media, claiming to represent the views of the masses.

There is some evidence that the Party's role is diminishing. Judges now only need to consult with Party cadres in important cases. A recent white paper on judicial reform by the Information Office of China's State Council notably does not even mention the Party.[64] However, as of early 2013, the Party's role in adjudication is both active and legally sanctioned.

4. PROCURACY

The Procuracy, a formally co-equal but separate branch of government with responsibility for law enforcement and prosecutions, provides another institutionalized accountability mechanism through individual case supervision (ICS) (*ge'an jiandu*). ICS not only allows parties to appeal a case to the Procuracy, but also allows the Procuracy itself to appeal. Peerenboom suggests that ICS primarily acts not to promote political or substantive outcomes, but rather as another check on corruption and incompetence within the judiciary.[65] Indeed, the Party has little at stake in most cases. However, the Procuracy has acted in some cases to protect the Party's reputation. For example, in a Beijing case, the Procuracy charged a taxi driver as an accomplice to a criminal gang. While the judge thought the defendant should never have been charged, the prosecutor refused to drop the charges.[66]

Despite the Procuracy's vast powers, ICS appears to play a small role in providing judicial accountability. ICS supervises relatively few cases. Most are civil or economic (80%), while only 10% are criminal cases. In 2002, ICS appeals by parties resulted in

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[63] Benjamin L. Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).
[64] Stanley Lubman, *Reading Between the Lines on Chinese Judicial Reform*, WALL ST. J., Oct. 12, 2012, *available at* http://blogs.wsj.com/chinarealtime/2012/10/28/reading-between-the-lines-on-chinese-judicial-reform/.
[65] PEERENBOOM, *supra* note 52, at 859-61.
[66] PEERENBOOM, *supra* note 4, at 75.

slightly over 50,000 cases retried out of the million heard by courts each year. The Procuracy itself protested only 16,300 cases.[67] In 2008, only 0.19% of all judgments were changed after the verdict became legally effective.[68] Therefore, Peerenboom suggests ICS may be more effective in deterring gross incompetence rather than corruption, since corrupt judges are more likely to cover their tracks.[69] On the other hand, of those civil and economic cases that went through ICS in 2002, around 30% resulted in changed verdicts.[70] This may convince Chinese litigants that ICS does provide effective judicial oversight and that the Party should increase judicial accountability.

C. JUDICIAL REVIEW

In many newly democratic countries, political elites encourage judicial review as a way to protect their policy preferences once they leave power.[71] By contrast, an authoritarian state that expects to remain in power for the foreseeable future, such as the CCP, generally has an interest in limiting judicial review and increasing political accountability. Thus, the assumption of judicial review (*sifa shencha*) by Chinese judges has important implications for the relationship between the NPC, State Council, and the people's courts. These innovations generally occur in politically safe areas, sometimes even in favor of the government,[72] but nonetheless may make the court a

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[67] *Id.* at 73.
[68] WANG, *supra* note 43, at 63.
[69] PEERENBOOM, *supra* note 4, at 78.
[70] In 1998, courts handled approximately six million cases, of which less than 2% were retried, but of these 20% to 25% resulted in a changed verdict. PEERENBOOM, *supra* note 52, at 861 n. 85. In 2001, of the 21,098 cases which the Procuracy protested, the court reversed its decision in 4,697 cases and remanded in 1,538 cases because of new evidence, and the parties mediated 6,368 cases. SUPREME PEOPLE'S COURT, 2002 ZUIGAO RENMIN FAYUAN GONGZUO BAOGAO [Supreme People's Court 2002 Work Report], *available at* http://www.court.gov.cn/work/200302120016.htm; cited in PEERENBOOM, *supra* note 52, at 862, n. 86.
[71] GINSBURG, *supra* note 9, at 17-30.
[72] While the scope of issues the Party considers "sensitive" is not clearly defined, it potentially includes not just important political and criminal cases, but also cases involving financial interests of the party-state, powerful individuals or companies, or even a large number of plaintiffs. LIEBMAN, *supra* note 32, at 626.

stronger institutional actor and less susceptible to accountability mechanisms.

Judicial review over administrative acts has been accepted in China since the late 1980s as enshrined in the *Administrative Litigation Law* (ALL) of 1989. The law lists eight justiceable claims for specific administrative acts over property and person, but not rights to association, protest, or speech. Since passage of the ALL, administrative litigation has proliferated. In the first ten years, courts heard an estimated 580,600 ALL cases, with plaintiffs winning over 40% against the government. From 2001 to early 2002, people's courts heard over 100,000 administrative cases.[73] The range of cases has expanded as well, including challenges to police searches, business directives,[74] and university decisions.[75] Under FYRP 2005, the Supreme People's Court has begun to review all death penalty sentences meted out by lower courts. In March 2008, it rejected 15% of sentences due to insufficient evidence or procedural irregularities.[76] Thus, for certain administrative acts, courts have become a real check on executive action.

Chinese courts cannot strike down statutes (*falü*) or regulations because of inconsistency or illegality. Traditionally, only the National People's Congress and the State Council have had the power to construe and repeal laws under the *Law on Legislation*. This has created a dilemma since the NPC and State Council have no incentive or constitutional process to interpret the law for individual parties.[77] A court will sometimes ignore a law it considers improper and decide the case on other grounds. In one case in Guangdong Province, a court found that a municipal regulation violated the *Administrative Penalties Law* (APL). Since it could not strike down the regulation, the court simply ruled against the police for violating the APL.[78] Moreover, between

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[73] LIN, *supra* note 40, at 206.
[74] *Diantou Longsheng Rock Materials Quarry v. City of Fuding*, cited in LIN, *supra* note 40, at 207.
[75] Thomas E. Kellogg, *"Courageous Explorers"?: Education Litigation and Judicial Innovation in China*, 20 HARV. HUM. RTS. J. 141, 143-45 (Spring 2007).
[76] BBC News, *China Court Rejects Death Rulings*, BBC NEWS WEBSITE, Mar. 8, 2008, http://news.bbc.co.uk/2/hi/asia-pacific/7284831.stm.
[77] LIN, *supra* note 40, at 200.
[78] *Id.* at 213.

2001 and 2004, plaintiffs in administrative suits won at a rate 17-22% - higher than many industrialized democracies.[79]

Some courts have even *de facto* struck down regulations. In the infamous *Seed case*, a court in Henan Province declared a provincial regulation "spontaneously invalid" when it contradicted national seed legislation.[80] While it is too early to predict how widespread and aggressive judicial review of laws may become, most judges will follow the Party's distinction between economic and political questions, with the latter not subject to review.[81]

In 2001, the Supreme People's Court attempted to seize the power of constitutional review or judicialization of the constitution (*xianfa sifahua*). The Court issued an opinion finding that Qi Yuling, a Chinese student, had a constitutional right to education.[82] Commentators in China and abroad hailed the decision as China's *Marbury v. Madison*.[83] Subsequent cases have had constitutional undertones, including several anti-discrimination suits[84] and an objection to a police inspection based

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[79] Fu Yulin & Randall Peerenboom, *A New Analytic Framework for Understanding and Promoting Judicial Independence in China, in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 129-30 (Randall Peerenboom ed., 2009). Obviously, other factors likely contribute to this relatively high rate of victory, such as Chinese administrative officials being less accustomed to anticipating court decisions. However, the point remains that administrative review in China is not a trivial power.

[80] LIEBMAN, *supra* note 32, at 632.

[81] LEE, *supra* note 49, at 167.

[82] The case began when Qi Yuling and Chen Xiaoqi both graduated from Tengzhou Municipality No. 8 High School of Shandong Province. Qi was granted admissions to the Jining Municipality School of Commerce of Shandong Province, but Chen was not. However, Chen stole the admissions letter, attended the school, and later accepted a job at Tengzhou Branch of the Bank of China, all under Qi Yuling's name. Qi claimed that Chen, and the institutions that had accepted her, had committed fraud and caused her an economic loss of 160,000 yuan and emotional distress valued at 400,000 yuan. For a summary of the case, *see* Shen Kui, *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM. L. & POL'Y 199, 201 (Jan. 2003).

[83] SPC Justice Huang Songyou even declared, "I believe that the Constitution can be gradually introduced into legal proceedings in China." Huang Songyou, *Judicial Application of the Constitution and its Significance*, PEOPLE'S COURT DAILY, Aug. 13, 2001, cited in Thomas E. Kellogg, *The Death of Constitutional Litigation in China*, 9(7) CHINA BRIEF 4, 5 (Apr. 2009).

[84] In one case, a Hepatitis B patient protested the rejection of her application for a civil service job on the grounds of her disease. *See generally*, Chen Chao, *Public Opinion Defeats HBV Discrimination*, CHINA INTERNET INFORMATION CENTER, September 23, 2004, cited in Thomas E. Kellogg and Keith Hand, *China Crawls Slowly Towards Judicial Reform*, ASIA TIMES, Jan. 25, 2008, http://www.atimes.com/atimes/China/JA25Ad01.html.

on privacy rights.[85] In 2004, the Jiangsu Province High Court even used the term "due process" (*zhengdang chengxu*) to hold that an agency's failure to give proper notice for a review implicated the plaintiff's rights.[86]

Despite this, judicial review has not circumvented the institutionalized mechanisms that the NPC uses to ensure that courts remain accountable. So far, constitutional review has not spread to lower courts; in fact, some Chinese jurists claim that the SPC jealously guards this power for itself.[87] Under the leadership of a new SPC president, the court withdrew the Qi Yuling decision because "it is no longer applied."[88] The NPC also tried to co-opt constitutional review by activating the Standing Committee's constitutional decision-making power under the *Law on Legislation*.[89] Although this mechanism has not yet produced any substantive constitutional decisions, some Chinese legal scholars view this as the future of constitutional litigation.[90] Furthermore, President Hu Jintao has publicly stressed that citizens should rely only on the *State Compensation Law* or *Administrative Litigation Law* to challenge state acts. Thus, the NPC appears to have reasserted institutionalized accountability over courts with regard to constitutional issues.

D. DEJUDICIALIZATION?

During the latter half of the Hu Jintao administration, China appears to have dampened its support for judicialization of disputes.[91] Courts are interpreting standing requirements more

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[85] In the case, a Shanxi couple was awarded damages after police stormed into their bedroom while they were watching an adult movie. Referred to in Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?,* 19 COLUM. J. ASIAN L. 185, 220 (2005).

[86] *Zhang Chengyin v Xuzhou City People's Government Building Registration Bureau Administrative Reconsideration Decision*, 2004. Published in Zuigao Renmin Fayuan Gongbao (Gazette of the Supreme People's Court), vol. 3, 2005. Cited in KELLOGG, *supra* note 75.

[87] LEE, *supra* note 49, at 162.

[88] Donald C. Clarke, *Supreme People's Court withdraws Qi Yuling Interpretation*, CHINESE LAW PROF BLOG (Jan. 12, 2009), *available at http://lawprofessors.typepad.com/china_law_prof_blog/2009/01/supreme-peoples.html.*

[89] KELLOGG, *supra* note 75.

[90] *Id.*

[91] James V. Feinerman, *In China, Justice in Reverse*, WASH. POST, Dec. 18, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/17/AR2008121702925.html.

narrowly and require parties to first exhaust administrative remedies.[92] In 2009, the National People's Congress replaced SPC president Xiao Yang, widely considered a reformer, with Wang Shengjun, a party operative who lacks formal legal training. These moves suggest that the Party has become more concerned with political accountability and more worried about judicial autonomy.

During the National Conference on Political-Legal Work in December 2007, President Hu told assembled judges, "in their work, the grand judges and grand procurators shall always regard as supreme the party's cause, the people's interest and the constitution and laws."[93] SPC Grand Chief Justice Wang has launched a campaign within the court system to promote these "Three Supremes." A few months later, he announced that, in handling death sentence cases, judges must consider not only the law but also the "feelings of the masses" (*minyi*).[94] He has also indicated that judges will be graded not just on their ability to adjudicate difficult cases, but also on whether their work contributes to local stability.[95]

Political elites have also expressed stronger support for ADR or "Ma Xiwu adjudication style" over litigation. According to the latest SPC Work Report, 59% of civil cases were settled by court mediation.[96] In the Chongwen District Court, Beijing, the number of cases mediated rose from 64% in 2003 to 92.4% in 2005.[97] The Party has been particularly concerned about mass-plaintiff suits regarding environmental, labor, and land issues, which often lead to public protests. From 2003 to 2004, the number of such cases rose by 9.5% to 538,941. However, courts have broken plaintiffs into smaller groups and emphasized conciliation.[98] Some China law scholars even believe that, until recently, the SPC issued secret instructions to lower courts not to accept any tort suits

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[92] PEERENBOOM, *supra* note 64, at 192.
[93] Jerome A. Cohen, *Body Blow for the Judiciary*, S. CHINA MORNING POST, Oct. 18, 2008, *available at* http://www.cfr.org/publication/17565/body_blow_for_the_judiciary.html.
[94] *Id.*
[95] KELLOGG, *supra* note 83, at 6.
[96] WANG, *supra* note 25.
[97] Martin Palmer & Chao Xi, *Section Eight: Asia: China*, 622 ANNALS 270, 277 (Mar. 2009).
[98] PEERENBOOM, *supra* note 64, at 193.

regarding the infamous melamine-tainted milk that poisoned around 290,000 babies.[99]

This alleged judicial retrenchment illustrates the difficulties of using institutionalized accountability to ensure judicial quality. With such direct political supervision over judges, courts are less able to develop institutional authority independent of the policy preferences of different administrations. However, these changes do not negate the progress that China has made thus far. The government might well have valid policy rationales for some moves, such as emphasizing ADR. These measures alone do not necessarily indicate abandonment of the rule of law. A more significant problem is the lack of transparency. Some of these dejudicialization reforms do not appear in NPC legislation, but rather in internal memoranda or Party policies. Moreover, some critics complain that the government has not adequately evaluated the successes and failures of previous reform plans.[100] It remains to be seen whether the PRC will take a more procedural approach to judicialization. Ultimately though, dejudicialization is not necessarily incompatible with improving judicial accountability and competence.

IV. PATRIMONIAL ACCOUNTABILITY: COURTS UNDER SUHARTO'S INDONESIA

A. HISTORY OF THE INDONESIAN JUDICIARY

The Indonesia judiciary inherited strong executive control under Dutch and Japanese colonial rule. However, it also developed a cadre of professional judges independent of and alienated from the country's nationalist leaders. These judges fought for greater respect and institutional autonomy. These two trends resulted in conflicts between the judiciary and executive, as presidents sought to make judges accountable to the administration. As such, the New Order never had the legitimacy or authority to institutionalize control over courts as the CCP did

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[99] Donald C. Clarke, *Supreme People's Court Work Report: Comments*, CHINESE L. PROF BLOG, Apr. 13, 2009, *available at* http://lawprofessors.typepad.com/china_law_prof_blog/2009/04/supreme-peoples-court-work-report.html.

[100] Staff Reporter, *supra* note 33.

in China. Rather, Suharto decided to influence judges through patronage and extra-constitutional procedures.

In 1965, after stopping a failed Communist coup attempt, General Suharto initially portrayed himself as a champion of the rule of law (*negara hukum*) in contrast to the chaos of Sukarno's presidency.[101] Judges abandoned their military uniforms and donned black robes.[102] IKAHI even believed it could lobby the new regime to rescind the 1964 law and grant the Supreme Court control over court administration and judicial review. However, with a solid majority for his Golkar party in the legislature, the *Majelis Permusyawaratan Rakyat* (MPR), and control over the distribution of development funds, Suharto effectively monopolized the legislative and bureaucratic institutions that oversaw the judiciary. The MPR did rescind the 1964 law, but Secretary of Justice Oemar Seno Adji rejected the judges' other demands. The MPR passed the *Law on Judicial Authority* No. 14/1970, which confirmed the Department of Justice's (DOJ) control over court administration and finance. By now, it had become clear to the judges that the New Order's conception of *negara hukum* did not include strong, autonomous courts. The regime's opponents regularly decried "*korupsi, kolusi, dan nepotisme*" (KKN), but the government never undertook serious judicial reforms.

The Indonesian judiciary was divided into general, religious, military, and later administrative courts.[103] The District Courts (*pengadilan negeri*) had three-judge panels to hear all cases,[104] although in more remote provinces it was not uncommon to have less than three judges.[105] The panel had the power to try cases and request evidence. Trials were divided into eight hearings. Cases could be appealed to a Court of Appeal (*pengadilan tinggi*), which could review case files or documents from the District Court in order to assess the adjudication of the District Court judge. The

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[101] Stuart Gross, *Book Review: Sebastiaan Pompe, The Indonesian Supreme Court: A Study of Institutional Collapse*, 53 AM. J. COMP. L. 947, 950 (Fall 2005).
[102] Daniel S. Lev, *Judicial Authority for the Struggle for an Indonesian Rechtsstaat*, 13(1) L. & SOC. REV. 37, 51 (Fall 1978).
[103] ASEAN LAW ASSOCIATION, INDONESIAN LEGAL SYSTEM 62 (2005), *available at* http://www.aseanlawassociation.org/legal-indonesia.html [hereinafter ALA].
[104] Law No. 13 of 1965, § 29, which was later repealed and replaced by Law No. 14 of 1970.
[105] ALA, *supra* note 103, at 53.

law placed no substantive limitation on the right to appeal, so parties frequently appealed adverse decisions.[106]

The Supreme Court nominally exercised supervision over all courts. It officially functioned as a court of cassation (*kasasi*), but also often accepted cases to distinguish facts or correct lower court decisions that threatened the executive. The number of justices on the Court shifted as Suharto's administration frequently decided to add more members to the bench, but by the 1990s it had settled on 51 justices with 1,300 support staff and 17 separate chambers.[107] Ironically, Sebastiaan Pompe, a Dutch scholar of Indonesian law, suggests some justices believed that expanding the Court's size would demonstrate its management skills and convince the Department of Justice to cede court administration. However, instead he argues the court's bloated size tended instead to reduce the coherence of its opinions and increased opportunities for corruption.[108]

B. MECHANISMS OF PATRIMONIAL ACCOUNTABILITY

Political accountability in the Indonesian judiciary was based on elite infiltration rather than institutionalized supervision. Suharto employed a two-pronged strategy. First, he appointed only loyal justices to the Supreme Court. Second, the Department of Justice exploited its management of the judicial civil service in lower courts.[109] Judges obeyed the executive not due to any institutional or legal requirement, but because judges realized their share of patronage and promotions depended on obeisance. Often, political elites demanded political compliance through vague warnings rather than explicit instructions, such as the Secretary of Justice advising a judge to be very "cautious" in a particular case.[110] This strategy depended overall on weakening the courts and the professionalism of judges to the point that they could not resist being held accountable to the executive.

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[106] *Id.* at 86.
[107] SEBASTIAAN POMPE, THE INDONESIAN SUPREME COURT: A STUDY OF INSTITUTIONAL COLLAPSE 280 (Southeast Asia Program Publications at Cornell Univ. 2005).
[108] *Id.* at 333-34.
[109] GROSS, *supra* note 101, at 950.
[110] ADRIAAN BEDNER, ADMINISTRATIVE COURTS IN INDONESIA: A SOCIO-LEGAL STUDY 229 (2001).

Since the New Order succeeded in appointing loyal personnel to the Supreme Court, senior justices aided the regime in holding subordinates accountable by issuing Supreme Court circulars promoting the executive's view of the law. Senior judges made sure to assign the most lucrative cases to the most obedient judges. In exceptional circumstances, senior justices would even overturn or "de-finalize" the decisions of other justices that infringed upon executive interests, even though no provision law allowed such overruling. By the end of the New Order, judges had devolved from a professional cadre to complicit in furthering New Order goals and engaged in massive corruption.

1. PRESIDENT SUHARTO AND THE BUREAUCRACY

The appointment process became one of the key mechanisms to ensure Suharto's subjugation of the Supreme Court. According to the Constitution, the DPR recommends justices to the Supreme Court while the president appoints them.[111] However, Suharto relegated the DPR to the sidelines of the nomination process. The executive would submit a list of its preferred nominees to the DPR, which might then approve nominees or add its own but never dares to reject the president's candidates. This left Suharto free to choose whomever he desired. Suharto forged agreements with appointees for leadership positions that "political interests in cases arising before the Court had to be protected."[112]

Judges on the lower courts were considered civil servants (*pegawai negeri*), so the Departments of Justice, Religion, and Defense controlled the appointments, promotions, and dismissals on the general, religious, and military courts, respectively. The departments rewarded and promoted judges who obeyed the executive's wishes and punished those who did not. Judges had a financial incentive to comply since salaries of appellate and Supreme Court judges were much higher than those of District Court judges.[113] Often, judges even paid a portion of the bribes they had received to the bureaucracy in order to receive further promotions.[114]

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[111] ALA, *supra* note 103, at 56.
[112] POMPE, *supra* note 107, at 354-55.
[113] BEDNER, *supra* note 110, at 269.
[114] POMPE, *supra* note 107, at 125.

The quality of judges declined during the New Order, often as the direct result of government policies. The Court's membership, considered professional and idealistic if institutionally weak in the 1960s, had fallen so low that by the mid-1990s it became widely denigrated and manipulated. More professional judges tended to resist executive influence or advocate for judicial review.[115] In the 1970s, the government abolished the judicial examination system (*examinasi*). Rather, the Department placed a premium on loyalty to both the regime and the bureaucracy. When the government created administrative courts in 1991, it had difficulty enlisting new graduates and general court judges and so often filled the chambers with registrars.[116] Furthermore, it did not provide sufficient funding for judicial training. Supreme Court justices considered junior judges so inept that they were called "letter boxes" for cases until they reached the Court on appeal.[117] Suharto often appointed retired military officers into the Supreme Court's leadership, bypassing older and more professional justices.[118]

The DOJ possessed enormous influence over judges since it could raise their salaries or assign them to more lucrative posts. From 1968 onwards, judges were included within the general civil servants' salary regulation. The DOJ controlled judicial salaries and promotions. As the economy grew, the disparity between judges' salaries and the rest of society became increasingly apparent. By 1994, the average salary of a first-instance court judges was not even five times the salary of an average worker.[119] Some judges even expressed shame regarding their low income, especially when compared to the lawyers and clients appearing

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[115] Professional justices facing retirement appeared more willing to take risks in their decisions. In the early 1990s, in the *Kedung Ombo* case, a Supreme Court chamber proceeding, Justice Asikin Kusumah Atmadja, just two days before his scheduled retirement, awarded villagers very generous compensation for damages caused by the government's Kedung Ombo dam in Central Java. POMPE, *supra* note 107, at 150; When Justice Sri Widoyati Soekito (1968-82), a particularly professional and independent member of the court during the 1970s, was being considered to replace Chairman Subekti (1968-74), the military began a rumor campaign against her. *Id.* at 95-99.

[116] BEDNER, *supra* note 110, at 268.

[117] *Id.* at 283.

[118] While there had been no ex-military officers on the Supreme Court in 1968, by 1982 there were eight. Furthermore, these justices tended to possess leadership positions within the court. *Id.* at 381-83 and Appendix One.

[119] BEDNER, *supra* note 110, at 268.

before their court.[120] Furthermore, Javanese culture required judges to accept *rezeki* or gifts given after a favorable judgment.[121] In such circumstances, corruption became an accepted means of supplementing salaries.

2. INTRA-JUDICIAL

While senior judges had no formal power to supervise cases or judges, they used their discretion over assigning cases to influence junior judges. As the economy grew, so too did the stakes and potential bribes in commercial litigation. In commercial cases, some justices even auctioned off decisions to the highest bidder.[122] Junior judges began to actively seek the most lucrative cases from senior judges.[123] Rather than assigning cases based on merit or expertise, senior judges distributed them as patronage for political compliance. As such, the external and internal accountability mechanisms worked together as the DOJ promoted loyal judges to senior positions, and those senior judges used their influence over junior judges on behalf of the DOJ.

The Supreme Court could issue circulars (*Surat Edaran Makamah Agung* or SEMA) to advise and guide lower courts on procedural issues. As publication of cases was rare, these circulars had a significant impact on lower court judges. However, during the New Order, the Court utilized this authority to issue circulars on substantive law that promoted the bureaucracy's preferred interpretation.[124] For example, during the 1970s, Supreme Court Chairman Oemar Seno Adji (1974-81) issued a SEMA instructing courts to exercise restraint in government tort cases and ensure that individual plaintiffs were not given too many rights.[125] Since Suharto had a direct role in appointing justices to the Supreme Court, the SEMA could be used to spread his policy goals throughout the entire judicial apparatus.[126]

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[120] *Id.*
[121] *Id.* at 234-38.
[122] Daniel S. Lev, *The Lady and the Banyan Tree: Civil-Law Change in Indonesia*, 14(2) AM. J. COMP. L. 243 (Spring 1965).
[123] POMPE, *supra* note 107, at 125.
[124] *Id.* at 266.
[125] Elucidation to Circular Letter No. MA/Pemb./0159/1977, cited in BEDNER, *supra* note 110, at 31.
[126] These circulars became known as *surat sakti* or "magic memos" due to their corrupting influence. *See* David Bourchier, *Magic Memos, Collusion, and*

If after the patronage, case assignments, Supreme Court circulars, or outright threats, the government failed to hold judges accountable to its political goals, it could "de-finalize" the decision. The first mechanism for doing this was through a "special review" procedure. This usually involved a complaint from President Suharto or another elite figure to the judge's superior within the court. The senior judge would then re-decide the case, taking into account the executive's interests. During the early 1990s, a chamber of the Supreme Court granted villagers much higher compensation for damage caused by the Kedung Ombo dam in Central Java than what the government had offered.[127] The government worried not just about the financial impact of the decision, but also the plaintiffs' symbolic victory over a World Bank-funded project.[128] After a personal request from Suharto to Chief Justice Purwoto (1992-94) to take "the most just decision" (*putusan seadil-adilnya*), a special review overturned the chamber's decision on the specious grounds that the Court could not award damages in excess of what the parties had claimed.

The second mechanism for "de-finalizing" decisions involved an indefinite stay of enforcement. In such cases, a superior court would instruct the District Court responsible for enforcement to stay any such action. In 1992, in the *Ohee case*, a Supreme Court chamber granted Papuan tribesmen Rp. 18.6 billion in damages for unlawful occupation of their land by the provincial governor. Rather than retrying the case, Chief Justice Soerjono (1995-96) simply instructed the District Court to annul enforcement of the judgment since the provincial governor of Irian Jaya was not a legal person. The order not to enforce the decision elicited much criticism and provoked unrest in Irian Jaya, but also demonstrated the legally dubious extremes elites took to protect their interests.[129]

Judges with Attitude: Notes on the Politics of Law in Contemporary Indonesia, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS (Kanishka Jayasuriya ed., 1999).

[127] The government offered a mere Rp. 800 to the 5,268 families, whereas the initial Supreme Court chamber offered Rp. 80,000 per square meter. POMPE, *supra* note 107, at 149-50.

[128] George J. Aditjondro, *Large Dam Victims and their Defenders: The Emergence of an Anti-Dam Movement in Indonesia*, in THE POLITICS OF THE ENVIRONMENT IN SOUTHEAST ASIA: RESOURCES AND RESISTANCE 41 (Philip Hirsch & Carol Warren eds., 1998).

[129] POMPE, *supra* note 107, at 159.

C. JUDICIAL REVIEW

While IKAHI lobbied the government in the late 1960s to grant the courts the power of judicial review, the judges did not have the influence within the bureaucracy to obtain this goal. Secretary of Justice Oemar Seno Adji countered that the MPR would serve as the arbiter of the constitutionality of laws and that Indonesia's civil law heritage did not allow judicial review. The government was particularly worried about judicial review, since Javanese tradition considered power to be indivisible and was reluctant to cede authority to another institution.[130] The final law allowed limited review over whether administrative regulations (*peraturan*) or decisions (*keputusan*) conflicted with higher laws, but only the bureaucracy could actually remove the regulation.[131] However, the courts were reluctant to exercise even this limited authority.[132]

By the early 1980s, political support grew for judicial review over the bureaucracy's increased involvement in society. In 1986, inspired by the Dutch model, the parliament established a system of administrative courts (*Pengadilan Tata Usaha Negara*). The law allowed the court to suspend the administrative decision, but urged courts to use this power with restraint.[133] As such, administrative courts exercised a low standard of review when reviewing controversial administrative orders. Furthermore, noncompliance with judgments and suspension orders seems to have been a significant problem.[134] Judges often complained about the refusal of defendants and officials to appear in court. In short, despite the legal innovation of an administrative court, it did not develop the institutional authority to actually exercise meaningful judicial review against the bureaucracy.

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[130] Benedict Anderson, *The Idea of Power in Javanese Culture*, in LANGUAGE AND POWER: EXPLORING POLITICAL CULTURES IN INDONESIA (1990).

[131] LEV, *supra* note 102, at 63.

[132] This apparent contradiction between the Court's desire for constitutional review and its reluctance to declare regulations invalid suggests that the judicial review debate was more symbolic than an actual power struggle. *See* GROSS, *supra* note 101, at 954.

[133] BEDNER, *supra* note 110, at 46.

[134] In the 1990s, Jakarta Administrative Court of Appeals Chairman Soebijanto claimed noncompliance was as high as 60%. *Id.* at 231.

D. REFORMASI AND THE FAILURE OF JUDICIAL ACCOUNTABILITY

After Suharto's fall from power in May 1998, Indonesia implemented an extensive reform program known as *Reformasi*. The lower chamber of the legislature, the *Dewan Perwakilan Rakyat* (DPR), enacted the *Judicial Power (Satu Atap) Law* No. 35/1999, which transferred court administration and finances from the DOJ to the Supreme Court. It also required the president to appoint the Supreme Court candidates chosen by the DPR and allowed justices to choose their own Chief and Deputy Chief Justices. In 2000, the DPR appointed several non-career judges to the Supreme Court in order to provide fresh perspectives and experiences.[135] Chief Justice Bagir Manan published "Blueprints" for judicial reform.[136] In Law No. 5/2004, the DPR passed amendments to the 1970 *Judicial Power Law* to enable courts to strike down regulations without any agency action. The DPR established a Judicial Commission to select candidates for the Supreme Court and monitor judicial conduct. In general, *Reformasi* made courts more willing to rule against the president and bureaucracy.

Despite these reforms, Indonesia's judiciary still suffers from the New Order legacy. In the absence of Suharto's patrimonial influence, there is now no effective accountability mechanism ensuring that judges are competent and honest. The *Satu Atap* law had the unexpected effect of preventing accountability by centralizing judicial administration. Many observers believe that because the justices choose the Chief Justice, it will be difficult to find truly reformist leadership at the head of the judiciary.[137] When some judges are accused of corruption, other judges tend to close ranks around their colleagues.[138] Progressive NGOs accuse the KPK of not aggressively investigating judicial leaders, although the KPK itself has been hampered with borrowing much of its prosecutorial staff from other agencies.

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[135] Tim Lindsey, *Legal Infrastructure and Governance Reform in Post-Crisis Asia: The Case of Indonesia*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES 14 (Tim Lindsey ed., 2007).

[136] Steward Fenwick, *Administrative Law and Judicial Review in Indonesia: The Search for Accountability*, *in* 329-58, 342 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

[137] U.S. Agency for International Development, INDONESIA – DEMOCRACY AND GOVERNANCE ASSESSMENT (FINAL REPORT) 10 (June 2008).

[138] LINDSEY, *supra* note 135, at 14.

Officially, the Judicial Commission has the authority to guard (*menjaga*) and enforce (*menegakkan*) judicial ethics. However, the commission has not been able to enforce its mandate. The Commission has failed to gain the judges' trust in part because most of its members come from the NGO or private sectors rather than the bench.[139] After a confrontation with the Supreme Court, the commission called for sacking the entire bench.[140] In return, the Supreme Court challenged the commission's jurisdiction in the Constitutional Court. Ironically, the Constitutional Court ruled that the commission's enforcement powers violated the independence of the judiciary.[141]

The quality of adjudication has not improved. The justice sector lacks basic capacity to deliver justice. Courts are routinely underfunded; typically, state funds cover only 30-40% of the judiciary's routine budget.[142] According to an ADB assessment, many judges lack legal reference materials, training, and experience.[143] Within courts, decisions are often difficult to locate due to poor documentation.[144] In more remote regions, courts often lack adequate infrastructure and supplies. Many of the newer courts, such as the Administrative and Constitutional Courts, are only present in major cities on Java and Sumatra. Because of these problems, witnesses are often unwilling to appear in court, depriving parties of key evidence.[145]

Indonesia's upper courts face enormous docket backlogs. Last year, the Supreme Court handled around 10,000 cases and has 20,000 others pending.[146] It receives around 7,500 cases per year. The High Courts receive 8,000 each.[147] While the DOJ insists that a shortage of judges led to the backlog, the Supreme

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[139] USAID, *supra* note 137, at 11.
[140] *See generally* Soren Davidsen et al., *Curbing Corruption in Indonesia (2004-2006)* (Yogyakarta: U.S.-Indonesia Soc. 2007), 40.
[141] FENWICK, *supra* note 136, at 347.
[142] Bert Hofman, *Indonesia: Rapid Growth, Weak Institutions*, CASE STUDY FROM *SCALING UP POVERTY REDUCTION: A GLOBAL LEARNING PROCESS AND CONFERENCE* IN SHANGHAI, MAY 25-27, 2004, 43 (World Bank, 2004).
[143] ASIAN DEVELOPMENT BANK, COUNTRY GOVERNANCE ASSESSMENT REPORT: REPUBLIC OF INDONESIA 118 (Manila: ADB, 2004).
[144] Until recently, Supreme Court decisions were difficult to find online.
[145] Harkristuti Harkrisnowow, *Victims: The Forgotten Stakeholders of the Indonesian Justice System*, *in* SUPPORT FOR VICTIMS OF CRIME IN ASIA 274 (Wing-Cheong Chan ed., 2008).
[146] USAID, *supra* note 139, at 10.
[147] ADB, *supra* note 143, at 114.

Court itself often fails to maintain a full bench. More likely, the backlog has developed because Indonesian law places no limitation on the right to appeal. District court judges frequently do not take requisite care in preparing decisions, thus leaving the parties unsatisfied and anxious to appeal.[148] In fact, district courts seem to handle cases too quickly; in 2000, on average judges heard only around 30 civil and criminal cases per year and spent an average of two days per case, while judges dispose of minor traffic accidents within minutes.[149] The chronic backlog and unlimited appeals discourage potential litigants who fear their case might never be resolved.

Unchecked, corruption in Indonesia's judicial system has become a serious problem. Indonesians overwhelmingly believe that judges are willing to engage in corruption.[150] In a survey of public service units, the Corruption Eradication Commission recently found that the district courts of West, Central, and North Jakarta ranked as the most corrupt in the country.[151] Transparency International assesses corruption in the judiciary as the most costly form of corruption in Indonesia.[152] For the regular courts, neither schedules nor decisions are published, making it difficult to assess what transpires during hearings. Litigants who win cases are entitled to their case fees, but in practice, they rarely receive the refund. The State Audit Board tried to audit these funds, but the judiciary rebuffed its attempts.[153] Unlike China's courts, which have become more professional and have seen their reputations enhanced since the late 1970s, Indonesians have lost faith in their courts.[154]

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[148] UNITED NATIONS DEVELOPMENT PROGRAMME, JUSTICE FOR ALL? AN ASSESSMENT OF JUSTICE IN FIVE PROVINCES OF INDONESIA 94 (2007).

[149] ADB, *supra* note 143, at 113-14.

[150] WORLD BANK, COMBATING CORRUPTION IN INDONESIA: ENHANCING ACCOUNTABILITY FOR DEVELOPMENT, EAST ASIA POVERTY REDUCTION AND ECONOMIC MANAGEMENT UNITY 81 (2003). *See also* PARLINA, *supra* note 16.

[151] Irawaty Wardany, *Judiciary the Worst in Graft: KPK Survey*, THE JAKARTA POST, Feb. 5, 2009, *available at* http://www.thejakartapost.com/news/2009/02/05/judiciary-worst-graft-kpk-survey.html.

[152] Transparency International Indonesia, MENGUKUR TINGKAT KORUPSI DI INDONESIA: INDEKS PERSEPSI KORUPSI INDONESIA 2008 DAN INDEKS SUAP (2009), *available at* http://www.ti.or.id/publication/84/tahun/2009/bulan/01/tanggal/21/id/3844/.

[153] USAID, *supra* note 139, at 10.

[154] There are some exceptions. For example, the Constitutional Court is generally well regarded and, despite a few allegations of improper behavior, none of the justices have been convicted of corruption. *See* Marcus Mietzner, *Political*

V. COMPARISON OF INSTITUTIONALIZED AND PATRIMONIAL JUDICIAL ACCOUNTABILITY

While both the People's Republic of China and New Order Indonesia utilized mechanisms to ensure that their judicial systems remained accountable to political elites, the nature of this control differed significantly. The Chinese Communist Party institutionalized procedures and laws for various executive, legislative, and judicial institutions to supervise cases. By contrast, Indonesia's New Order subverted the letter and the spirit of the law through control over judicial appointments and distribution of patronage. While neither judicial system never reached independence or even liberal constitutionalism, as discussed above the different accountability mechanisms yielded significantly different judicial outcomes. In particular, this section compares the mechanisms for judicial control, the success of these methods, and the effects on the institutional strength of courts.

A. MECHANISMS OF JUDICIAL CONTROL

Superficially, the mechanisms for control under both Communist China and New Order Indonesia are comparable. In each case, state institutions administered court appointments, removals, and salaries, and reviewed judicial decisions. China's people's congresses and Indonesia's Department of Justice played similar roles as the institutions that manage the judicial bureaucracies. Likewise, the state co-opted senior judges and used them to supervise lower judges. In both cases, the government manipulated the judicial system in order to incentivize judges to rule in favor of the regime.

However, China's CCP generally exercised its control within the confines of its law, while Suharto's New Order often referred to extra-legal means. Where China institutionalized its control through the people's congresses, the Procuracy, and adjudicative committees, the New Order had generally not institutionalized or constitutionalized its patrimonial incentives. Therefore, unlike in China, bribery and patronage played an important role in the Indonesian bureaucracy's ability to influence judges. Even when

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Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court, 10(3) J. EAST ASIAN STUD. 397 (2010).

the New Order used "institutionalized" methods, such as the Supreme Court's SEMA, it used them in a manner that diminished their credibility. Ultimately, relying on such informal and extra-legal means caused even greater damage to the rule of law and respect for the judiciary than did China's institutionalized control, as evidenced by the lack of any judicial accountability after *Reformasi*.

The sources and distribution of control over courts in each system were also different. In Indonesia, Suharto and the national elite possessed an effective monopoly over judicial administration. Debates did take place within the MPR over judicial laws, but the legislature complied with the central bureaucracy and Suharto. By contrast, in China, institutions and Party officials at different levels of government exercise some influence over courts. Because court administration is decentralized, lower level people's congresses successfully conditioned courts to protect local interests, sometimes in spite of the goals of the national government. In fact, in the majority of cases, the central CCP hierarchy has less influence than local elites do over courts.

Whether or not judicial accountability mechanisms have been constitutionalized can also affect the legitimacy of the courts. While Indonesia never developed formal judicial committees, such as China's adjudicative committees, very often the internal dynamics of courts functioned in a similar manner. Junior judges in Indonesia sought to placate superiors in order to receive more lucrative cases. In extreme cases, such as the *Kedung Ombo* and *Ohee* cases, Supreme Court even de-finalized or stayed enforcement of decisions without any grounding in law. In China, junior judges comply with the desires of the senior judges to avoid reversals on appeal. The incentive structures are different, but the effects of the *ad hoc* Indonesian process proved harmful whereas China's judiciary appears to be weaning itself off such internal supervision.

By reviewing controversial cases after a judge had issued a public opinion, the Indonesian judiciary weakened its institutional authority and appeared impotent in the face of executive pressure. By contrast, China's adjudicative committees and *qingshi* have a legal basis and are presented as innovations to improve the competence of lower judges. While ICS could have undermined judicial authority, the Procuracy only supervises a fraction of the total cases. Thus, paradoxically, courts and constitutionalism may

be better served by an authoritarian state that permits limited influence under its laws than a government that officially forswears interference but practices it in violation of its own laws. At least in the former case, the public expects – if not accepts – legal limits on the court, but in the latter the public may lose respect for a compliant court.

B. SUCCESS OF INFLUENCING JUDGES

While China and Indonesia had different standards for measuring success, the ultimate aim of both regimes was to prevent decisions that threatened elite interests. As such, both governments needed to ensure that judges would not rule against the government in important cases, publicly criticize the state's restrictions, or usurp the government's ability to pass laws and issue regulations. The New Order appeared able to suppress dissent, although its patrimonial control ultimately backfired and helped to delegitimize the regime. In China, even though courts have begun to engage in judicial review, the Communist Party has succeeded in mitigating any risk to the Party elite. In fact, according to surveys many Chinese have a fairly positive impression of the courts, perhaps even an unrealistically positive one, which helps buttress the regime's legitimacy.[155]

Indonesian judges appeared to resist the executive much more forcefully than their Chinese counterparts.[156] During the 1960s, the Supreme Court actively lobbied the MPR for judicial review. While the regime did not lose any high-profile case before *Reformasi*,[157] by the 1990s it could no longer keep controversial issues out of the courts. Activists increasingly sought to raise high profile, controversial issues in the courts. In addition to *Kedung Ombo* and *Ohee* cases mentioned above, plaintiffs challenged the closure of the popular opposition *Tempo* magazine[158] and the

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[155] Michelson and Read argue that there is a significant gap between perceptions by survey respondents who had used the court and those who had not. Court users were far more likely to have a negative impression of the system than non-users. Ethan Michelson & Benjamin L. Read, *Public Attitudes Toward Official Justice in Beijing and Rural China*, CHINESE JUSTICE 169, 171 (2011).

[156] There was a generational divide, with older justice such as Purwoto and Subekti seeking incremental reforms while young judges had less idealism. POMPE, *supra* note 107, at 156-57.

[157] *Id.* at 155.

[158] *Tempo case*, cited in *Id.* at 155.

ouster of Megawati Sukarnoputri from the opposition *Partai Demokrasi Indonesia* leadership.[159] The way these cases were handled provoked even greater public backlash, further embarrassing the regime and undermining its legitimacy.[160]

China's judges, most of whom are members of the CCP, have not demonstrated as much resistance to Party influence or issued any blatantly provocative rulings. Supreme People's Court justices have pursued reforms within the context of China's communist system without challenging the people's congress or the Procuracy supervision. The people's courts have decided cases that challenged administrative actions, but these were generally of a more local nature and have not undermined the broader legitimacy of the Communist Party. With few exceptions, the most controversial cases are either quickly dismissed or never heard by the courts. This may be partly due to the fact that the CCP does not face any well-organized opposition groups who could employ the courts to undermine the Party's legitimacy.

On the other hand, Chinese judges have pushed the boundaries of judicial review, such as *Qi Yuling* and the Henan *Seed case*. Some judges creatively applied national law even if they could not strike down non-conforming local law. Judicial networks in China may have encouraged judges to learn from each other and adopt such innovations.[161] By contrast, despite IKAHI's requests for constitutional review, the Indonesian Supreme Court never exercised even its limited powers of review over regulations. In fact, the most dramatic legal innovations, such as the "magic memos" and "special review" procedures, were developed to supervise judges rather than other branches of government. Ironically, the contrast suggests that judges in authoritarian states might be more willing or able to innovate under relatively clear, predictable, institutionalized rules rather than under a patronage network.

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[159] *Megawati case*, cited in *Id.*

[160] After the annulment of the *Ohee* decision, a prominent Supreme Court staff member, Setiawan, even published an article criticizing the Court's actions. Published in *Forum Keadilan* (Justice Forum), 25 May 1995, cited in *Id.* at 159.

[161] *See* Benjamin Liebman & Tim Wu, *China's Network Justice*, 8 CHI. J. INT'L L. 257 (Summer 2007).

C. JUDICIAL CAPACITY AND INSTITUTIONAL STRENGTH

It may be inappropriate to compare the institutional strength of Chinese and Indonesian courts because of differences in the international context. Whereas for the past two decades China has responded to international investor and donor demands for a stronger legal system, Suharto faced fewer such pressures while in office. The international community began to focus more closely on the quality of legal institutions after the Asian Financial Crisis, when foreign investors could not recover their loans in Indonesian courts.[162] Nonetheless, the conditions of Indonesian courts in the past decade compared to those of China suggest that Suharto's patrimonial authoritarian influence produced exceptionally weak institutions resistant to reforms, whereas China's institutionalized control seems to have allowed significant judicial professionalization and capacity building.[163]

While China has no intention of transplanting a "westernized" judicial system, it has undertaken several initiatives to improve the competence and capacity of judges, including the Five-Year Judicial Reform Programs. Because the people's congresses have a constitutional and legal right to review cases, stronger courts will not threaten their authority. Indeed, engaging in judicial reform appeases public demand for good governance and economic growth, and as such enhances the Communist Party's legitimacy. These reforms have also reduced barriers to conducting business. Indeed, reforms have proceeded fastest in provinces and cities with higher levels of foreign investment, suggesting that political elites are able to use their institutionalized control over the courts to attract investment.[164]

By contrast, Indonesia's patrimonial model of judicial subversion was inimical to reform and depended upon weak judicial institutions. Corruption not only thrived, but was also

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[162] Sebastian Mallaby, THE WORLD'S BANKER: A STORY OF FAILED STATES, FINANCIAL CRISES, AND THE WEALTH AND POVERTY OF NATIONS (2006).

[163] Andrew White, *The Paradox of Corruption as Antithesis to Economic Development: Does Corruption Undermine Economic Development in Indonesia and China and Why are the Experiences Different in Each Country?,* 8 ASIAN-PAC. L. & POL'Y J. 1, 17 and 31 (Fall 2006).

[164] *See* Nico C. Howsen, *Judicial Independence and the Company Law in the Shanghai Courts, in* JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2009); WANG, *supra* note 34.

encouraged. The quality and competence of judges declined markedly during the course of the New Order. The DOJ actually abolished judicial exams rather than raising educational standards. Suharto appointed more military officers to the Supreme Court in the 1980s than in previous years. Judges appeared resigned to the system, especially younger judges who entered the court in a cynical political environment. Even in the face of high profile corruption cases, senior Indonesian justices tended to isolate and dismiss such scandals.[165] Older justices did seek incremental changes to create a stronger judiciary, but their efforts met significant resistance. The only major innovation, administrative courts, did not threaten the bureaucracy. Most notably, Suharto never engaged in comprehensive judicial reform.

By 2013, the differences between the Chinese and Indonesian judicial systems are drastic. According to the World Bank, over the past 14 years China has performed significantly better than Indonesia in both the rule-of-law and control-of-corruption indices.[166] The World Economic Forum business surveys rank China's judiciary as 42nd in the world for efficiency of settling legal disputes, while Indonesia's ranks 69th.[167] According to the International Finance Corporation's *Doing Business* report, enforcing a contract in China's judicial system takes 406 days and 11.1% of the cost of the claim. By contrast, in Indonesia, the same contract would take 498 days and 139.4% of the cost of the claim.[168]

Of course, these cross-national measures obscure many important developments in both countries, and the research does not suggest that the Indonesian judiciary is "failing" in any sense. Since *Reformasi*, Indonesian courts have been much more willing

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[165] For example, in 1996, documents leaked to the press strongly suggested that Justice Adi Andoyo Sutjipto received bribes from the defense counsel in the *Gandhi Memorial School* case. Rather than heed calls for institutional reform, Chief Justice Soerjono launched an internal investigation concluding that there had been no corruption. POMPE, *supra* note 107, at 160-61.

[166] Data are available at Governance Matters 2008, WORLDWIDE GOVERNANCE INDICATORS (1996-2007), *available at* http://info.worldbank.org/governance/wgi/index.asp.

[167] WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2011-2012 (2011), *available at* http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf.

[168] INTERNATIONAL FINANCE CORPORATION, SMARTER REGULATIONS FOR SMALL AND MEDIUM-SIZE ENTERPRISES (2012), *available at* http://www.doingbusiness.org/data/exploretopics/enforcing-contracts.

and able to protect human rights. By contrast, as noted above, Indonesia's Constitutional Court (*Mahkamah Konstitusi*) has become an exception within the judicial system. The Court not only has a relatively clean reputation, but also has become a model in public administration.[169] More recently, the Supreme Court began adopting policies to increase transparency, including posting decisions online. For its part, China's judiciary is hardly free from corruption and has no voice in constitutional law. Nonetheless, the data do suggest that China's judicial system outperforms the Indonesian judicial system on many key measures of judicial performance despite – or because of – the fact that political elites maintain institutionalized control.

V. CONCLUSIONS

By comparing China and Indonesia, I have attempted to show that there are important differences in how authoritarian regimes manage judicial institutions. Institutionalized accountability creates a set of rules that allow political elites to sanction or reward judges based on the content of their decisions. Patrimonial accountability does not rely upon a set of formal laws, but rather informal patronage and networks to influence judges. More importantly, these differences have long-term consequences. Paradoxically, while judicial independence might be desirable in the abstract, in some cases, institutionalized limits on independence might limit the risks of corruption and improve judicial performance. It is important to clarify that institutionalized accountability does not guarantee better courts – if that were the case, North Korea would be an exceptional judicial system. However, they do create more political space for judicial reforms because reforms are less likely to threaten political elites. Moreover, when elites find judicial reform beneficial, institutionalized mechanisms allow them to better overcome resistance.

Unfortunately, the comparison between these countries cannot control for all possible variables. Despite the chaos of the Cultural Revolution, China does have a long history of

[169] *See* MIETZNER, *supra* note 154.

bureaucratized justice,[170] whereas the Indonesia justice system was initially established by the Dutch. There are also more recent differences between the countries. Suharto's New Order collapsed over fourteen years ago, before the international community focused on rule of law issues in developing countries. Nonetheless, as large, single-party authoritarian regimes, the two do share enough features to make the comparison a useful starting point for illustrating differences in political accountability. Future research should check the applicability of this theoretical framework to other authoritarian regimes.

Keywords
China, Indonesia, Judicial Independence, Judicial Accountability, Comparative Law, Judicial Politics, Authoritarian

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[170] As evidenced by the famous *Judge Dee* novels. *E.g.,* Robert van Gulik, CELEBRATED CASES OF JUDGE DEE (1976).

NAMAS AS A PRACTICAL MECHANISM IN THE POST-KYOTO ANTI-GHG DEVELOPMENT – TAIWAN'S PERSPECTIVE

Fan, Chien Te[*] *& Fang, Chao Yi*[**]

ABSTRACT

National Appropriate Mitigation Actions (NAMAs) officially initiated under the Bali Road Map have now become one of the main themes for deliberation in climate negotiations. After failing to achieve an officially enforceable agreement in the Copenhagen Accord in 2009, the following Cancun Agreements in 2010 include the idea of NAMAs; and, to some extent, they were officially recognized as one of the supportive devices and/or an alternative to the original cap based on the Kyoto Mechanism. Some considered them beneficial to the future development of the anti-GHG design. Now, NAMAs have been further recognized under the Durban Platform in 2011 as part of the "instrument with legal force," while the definition and function of NAMAs have not been certain. After the background explanation provided in Part I, this paper will start with the definition of NAMAs in Part II so as to lay down a foundation for a further case study concerning Taiwan's experiences. In the case study, the national policy and its implementation, especially in the context of the carbon market management, will be introduced. Then, in Part III, the authors try to articulate the policy driven ideology and/or the regulatory framework of Taiwan in this regard and make some comments regarding NAMAs' differences from the original Kyoto Protocol mechanism. Finally, taking the process of NAMAs negotiation as the foundation, this paper highlights the significance of the legal framework in hopes of achieving the carbon mitigation goal set under the NAMAs of Taiwan, which might be a meaningful lesson for putting NAMAs into practice.

[*] Professor of Law & Director, Institute of Law for Science & Technology, National Tsing Hua University, Taiwan.

[**] LL.M., Legal Specialist, International Division, Chinese Arbitration Association, Taipei, Taiwan.

I. INTRODUCTION

A. LATEST INTERNATIONAL NEGOTIATION ON NAMAS

When the 15th Conference of the Parties (COP 15) failed to form a legally binding agreement in 2010, the outcome of the 16th Conference of the Parties (COP 16), the *Cancun Agreements*, made a significant contribution in legalizing the *Copenhagen Accord,* which was the outcome of COP 15. Subject to the basic principles of balance and transparency,[1] two proposed resolutions, drafted by the subordinating working group for the Kyoto Protocol revision (AWG-KP) and for the Long-term Cooperative Action (AWG-LCA), were both adopted by the 16th Conference of the Parties (COP 16).[2] Following the provisions adopted in the *Cancun Agreements*, the 17th Conference of the Parties (COP 17), of the *United Nations Framework Convention on Climate Change* (UNFCCC), and the 6th CMP of the *Kyoto Protocol* (KP) concluded a so called "legally binding instrument," named the *Durban Platform for Enhance Action* (Durban Platform) on climate change.[3] This legal package provides that all parties participate in setting up an embarking benchmark to turn the new legal instrument into force by no later than the end of 2015. The Durban Platform, in its essence, is meant to bring in variable types of GHG mitigation commitments in addition to the original compulsory one under the Kyoto Protocol so as to turn the voluntary "targets" into legally enforceable "objectives," if possible.[4] Under the moderate and abstract conditions of the

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[1] *See* Conference of the Parties to the U.N. Framework Convention on Climate Change, 16th Sess., Cancun, Mex., Nov. 29–Dec. 10, 2010, 4-10, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter FCCC, Cancun Agreements].

[2] *See U.N. Framework Convention on Climate Change* [hereinafter FCCC], Rep. of the Ad Hoc Working Group on Further Commitments for Annex I parties under the Kyoto Protocol on its 15th Sess., Nov. 29–Dec. 10, 2010, U.N. Doc. FCCC/KP/AWG/2010/18 (Mar. 4, 2011) [hereinafter FCCC, FCCC/KP/AWG/2010/18]; FCCC, Rep. of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its 13th Sess., Nov. 29–Dec. 10, 2010, U.N. Doc. FCCC/AWGLCA/2010/18 (Feb. 4, 2011) [hereinafter FCCC, FCCC/AWGLCA/2010/18].

[3] *See* FCCC, Conference of the Parties, 17th Sess., Durban, S. Afr., Nov. 28–Dec. 11, 2011, 4, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2011).

[4] *See* FCCC, Ad Hoc Working Group on Long-term Cooperative Action under the Convention, 15th Sess., Bonn, May 15–24, 2012, *Informal Summary of the AWG-LCA Workshop In-session Workshop on the New Market-Based Mechanism Summary by the Co-Chairs of the Workshop*, ¶ 6.

Durban Platform, the second period of the KP is scheduled to commence either in 2013 or 2015 with the mitigation target to be decided this year in COP 18. Although the second commitment period was refused and/or resisted by several major industrialized countries, e.g., the USA, Japan and Canada, the shared vision in establishing a comprehensive and legally binding scheme for long-term cooperation by the year 2020 was successfully incorporated into the Durban Platform.

Indeed, the inefficient negotiations have distracted the focus of the original KP goal which is mandatory mitigation cap from the FCCC/KP agenda. Although the Convention preferred the idea of being driven by the two-track basis, viz., the KP revision and LCAs promotion, National Appropriate Mitigation Actions (NAMAs) [5] have gradually become the main theme for deliberation since the Copenhagen Accord. [6] NAMAs, in comparison with the National Appropriate Mitigation Commitments (NAMCs) set for developed countries, were taken as the realization of the principle of "common but differentiated," and, by their nature, as a voluntary carbon reduction policy scheme in promoting developing countries' carbon reduction contribution. Subject to the NAMA and/or NAMC schemes, the encompassing of original mitigation wishes, the cap was in some ways transmitted into the "Commitments" of developed countries and "Actions" of developing countries so as to match the special characteristics of each individual country. In addition, guided by the Bali Road Map, "mitigation" has been taken as part of the efforts to promote the goal of global sustainability, together with "adaptation," "finance," "technology transference," and "capability building," which are all badly needed by the least developed countries (LDCs) and/or developing countries. We might be able to call this, "the creation of a dual-commitment and inter-dependence period" between Annex I and Non-Annex I parties.[7]

Obviously, the inclusion of NAMAs as the device for

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[5] *See* FCCC, Cancun Agreements, *supra* note 1; *see also* FCCC, Conference of the Parties, 13th Sess., Bali, Indon., Dec. 3–15, 2007, 3-12, 22-24, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter FCCC, Bali Action Plan].

[6] *See* FCCC, Bali Action Plan, *supra* note 5; *see also*, FCCC, Conference of the Parties, 15th Sess., Copenhagen, Den., Dec. 7–18, 2009, *Copenhagen Accord*, 2-3, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter FCCC, Copenhagen Accord].

[7] *See* United Nations Framework Convention on Climate Change, Mar. 21, 1994, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

commitment plays a crucial role in harmonizing the confrontation between industrialized blocs and the developing countries. The application of NAMAs brings in a possible post-Kyoto scenario for the involved parties, including a new legal framework emphasizing the competition for "Sustainable Resources" rather than a mandatory rule based on cap control design.

B. THE CHALLENGE/OPPORTUNITY OF NAMAS TO DEVELOPING COUNTRIES

Through NAMAs, i.e., NAMAs' credit development and other policy complementary benefits,[8] a developing country is able to acquire the adaption resources, including technology, finance and expertise for building its low-carbon community and promoting sustainable economic growth. To see this from another perspective, functioning as partners to the NAMAs, developed countries could not only assist the less developed countries but also disseminate their green technology, promote their green industry, and strengthen their national competitiveness as a result. In other words, the converging process of NAMAs' transformation does not necessarily mean the replacement of the Cap-and-Trade scheme. Rather, NAMAs indicate an alternative choice to developing countries, in parallel with the cap-based Kyoto Mechanism, and one which might be beneficial for the future articulation of carbon reduction facilities.[9]

If we believe that the mandatory commitment of carbon reduction by developed countries is a command-and-control model, then NAMAs have been designed to encourage developing countries' participation by offering accessibility to the sustainable resources. The design might decrease the hostility between Annex I and Non-Annex I parties' blocs and increase their willingness to "jointly and severally" commit to carbon reduction.

However, the transmission from mandatory commitment to

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[8] *See* S.A.G Elgie, *Carbon Offset Trading: A Leaky Sieve or Smart Step,* 17 J. ENVIR. L. &. PRAC. 23.

[9] *See,* Synthesis Report on the Composition of, and Modalities and Procedures for, the Adaptation Committee, including Linkages with Other Relevant Institutional Arrangements, Rep. of Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its 14th Sess., Bangkok, Thai., 5–8 Apr. 2011, Bonn. F.R.G., 6–17 June 2011, U.N. Doc. FCCC/AWGLCA/ 2011/3 (Mar. 28, 2011); *see also* Harro van Asselt & Joyeeta Gupta, *Stretching Too Far? Developing Countries and the Role of Flexibility Mechanisms Beyond Kyoto*, 28 STAN. ENVTL. L.J. 311, 358 (2009).

voluntary actions shall never be taken as a release from the Measurable, Reportable & Verifiable (MRV),[10] provided under the new LCAs provisions, as a required approach when conducting carbon reduction.[11] Any developing country which applies for funding support and/or other resources through a NAMAs scheme shall abide by the compulsory MRV regulations. Other self-funded NAMAs shall also follow the domestic MRV regulations promulgated by each country in compliance with the Convention requirement.

The 32nd subordinating body meeting (SB32), held in Cancun, has paved the way for the adoption of LCAs. In the SB32, the negotiators explicitly included the main context of MRV and the principle of Balance and Transparency[12] in the draft of LCAs and these contexts were highlighted as a part of the Cancun Agreements.[13] To this author, all of these turn out to be the key elements for NAMAs' further development. Listed below are some of the points which deserve our particular notice.[14] Firstly, in regard to the submitted National Communications,[15] the mitigation actions from Annex I parties should be strictly reviewed by MRV rules, and non-Annex I parties should include the governing regulations which contain the MRV rules of carbon emission reduction. Secondly, both non-Annex I parties and

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[10] *See* FCCC, Cancun Agreements, *supra* note 1. The Cancun Agreements state that a Standing Committee shall be established under the COP to assist in MRV support provided to developing country parties (Paragraph 112).

[11] *See* FCCC, Cancun Agreements, *supra* note 1, at ¶ 38, 40, and 41.

[12] *See* FCCC, Bali Action Plan, *supra* note 5, at 3-12, 22-24.

[13] *Id.*

[14] *See* Synthesis Report on the National Economic, Environment and Development Study (NEEDS) for Climate Change Project, Rep. of the Subsidiary Body for Implementation on its 33rd Sess., Cancun, Mex., Nov. 30–Dec. 4, 2010, U.N. Doc. FCCC/SBI/2010/INF.7 (Mar. 1, 2011). *See also*, Rep. on the Review and Assessment of the Effectiveness of the Implementation of Article 4, paragraphs 1(c) and 5, of the Convention, Rep. of the Subsidiary Body for Implementation on its 32nd Sess., Bonn. F.G.R., May 31-June 9, 2010, U.N. Doc. FCCC/SBI/2011/INF.4 (May 26, 2010). *See also*, International Organization for Standardization (ISO), *Stakeholder View of MSS for MRV under NAMA* (UN Foundation Press 2010).

[15] *See* European Commission, *The Fifth National Communication from the European Community Under the UNFCCC*, ch. 5, http://unfccc.int/resource/docs/natc/ec_nc5.pdf (last visited Feb. 15, 2012); U.S. Dept. of the State, *U.S. Climate Action Report 2010: The Fifth National Communication of the U.S.A. Under the UNFCCC*, ch. 4, http://unfccc.int/resource/docs/natc/usa_nc5.pdf (last visited Dec. 2, 2012); Ministry for Ecology, Energy, Sustainable Development and the Sea, *The Fifth National Communication of France to the UNFCCC*, ch. C, http://unfccc.int/resource/docs/natc/franc5abs.pdf (last visited Dec. 2, 2012).

Annex I parties are required to report the relevant information for NAMCs or NAMA/Cs every two years. Thirdly, non-Annex I parties are required to register on NAMAs' platform in order to obtain international funds, technological assistance, and support for capability building. Obviously, both the Annex I and non-Annex I parties have reached their compromise which brings hope to the negotiations and demonstrates an innovative carbon emission reduction approach, in the near future, to the world. Should the LCAs enter into force, as it is interpreted from the Cancun Agreements, NAMAs shall prove their value.

In conclusion, clarifying the meaning of NAMAs shall be the first priority in the future for every developing country. A NAMA-oriented approach, complementing a package of innovative cross-governmental agency policies, will facilitate administrative cooperation, formulate an effective and efficient goal of global competitiveness, and promote domestic technology development.

II. THE DEFINITION OF NAMAS

A. OBJECTIVE OF NAMAS AND MRV

As mentioned, the concept of NAMAs was founded in the Bali Road Map in 2007.[16] In the first paragraph and paragraph (b) of item (ii) of the plan, developing countries are required to propose their needs under the context of sustainable development by submitting their appropriate mitigation activities.[17] The framework was formulated in the Copenhagen Accord and was further stipulated within the Cancun Agreements.[18] According to Cancun Agreements, NAMAs can be categorized into three types:[19]

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[16] *See* FCCC, Bali Action Plan, *supra* note 5.
[17] *Id.*
[18] *See* FCCC, Cancun Agreements, *supra* note 1; *see also,* FCCC, Copenhagen Accord*, supra* note 6.
[19] *See* FCCC, Cancun Agreements, *supra* note *1*; *see also Center for Clean Air Policy, Nationally Appropriate Mitigation Actions by Developing Countries: Architecture and Key Issues*, 2009; *see* European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a Comprehensive Climate Change Agreement in Copenhagen,* COM (2009) 39 final (Jan. 1, 2009).

1. Unilateral NAMAs: NAMAs initiated by developing countries are known as unilateral NAMAs. They are domestic finance projects implemented unilaterally.
2. Sponsored NAMAs: Sponsored NAMAs, also known as supported NAMAs, mean that Annex I parties would provide financial support for less developed countries in order to promote the mitigation action, domestically. Seen from international negotiations, most nations have taken sponsored NAMAs as a mechanism to attract funding and private investors. Generally, sponsored NAMAs will be a project founded by developed countries which provide financial, technical and/or capability building assistances to developing countries for implementation.
3. Credit NAMAs: Credit NAMAs mean that reductions from mitigation actions, by developing countries' agencies, can be recognized as credits in carbon market transactions. This is a financial supporting plan which offers credits generated from carbon reductions. However, it has been argued that developing countries might be forced to follow stricter MRV standards under credit NAMAs, and this will make NAMAs less flexible, compared to the Clean Development Mechanism (CDM), a process similar to credit NAMAs.

In regard to MRV completeness and the subsequent funding support for NAMAs, the idea of emphasizing the obligation of developed countries to assist developing countries was clearly listed in the Cancun Agreement and re-assured in the Durban Platform. However, there are still limited guidelines relating to MRV development,[20] as with the substance of the funding mechanism.

B. THE INTERACTION BETWEEN CREDIT NAMAS AND CURRENT MITIGATION ACTIONS

While the first two types, viz., unilateral and sponsored NAMAs, focus on assistance to developing countries in fulfilling

[20] *See* Hirofumi Aizawa et al., *MRV Trends and Developments in Climate Change Negotiations* 4-25 (Inst. for Global Environmental Strategies 2010), available at http://www.indiaenvironmentportal.org.in/files/mrv_dec2010.pdf (last visited Sept. 5, 2011).

their commitments of GHG mitigation, credit NAMAs have been designed for decreasing the internal costs of Annex I parties to the Kyoto Protocol by assisting less developed countries. Therefore, NAMAs represent a policy tool to channel financial resources and integrate innovative energy into the long-term strategy and ultimate national GHG mitigation objectives. This statement is ideal for the credit NAMAs.

In turn, the most appreciable values of a NAMA are voluntariness and flexibility which provide parties variable types of resolutions derived from the climate change challenges under the principle of "common but differentiated." However, the intrinsic value of NAMAs can be easily undermined by incautious policy formulations absorbed into the rule set for the contemporary GHG mitigation scheme.

For instance, in Taiwan's NAMAs, the goal of reduction has been set as "at least a 30% deduction, based on business-as-usual (BAU), of the total GHG emission volume by 2020," [21] without referring to the coverage of industry sector and/or associated technology development.[22] Obviously, a pure mitigation objective such as this can never be qualified as any one of the three NAMAs categories. Instead, it is a deviation from the spirit of NAMAs which fails to reflect Taiwan's national perspective in pursuing sustainable resource management when vowing to commit to the GHG mitigation. Indeed, as a newly-industrialized country, Taiwan's social and economic conditions are similar to OECD countries', but Taiwan has no obligation in reducing GHG emissions like that imposed by the Kyoto Protocol on Annex I parties, such as Japan and the U.S.A. In addition, Japan has expressed her reluctance to keep the original commitment in reducing the GHG made in April of 2011, so we shall not take NAMAs as a Cap Control model. Different from a pure commitment to reduce GHG through a cap scheme, NAMAs are officially defined as:[23]

1. a set of policies and/or actions which a country decides to undertake;

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[21] *See* Environmental Protection Administration of Taiwan, *Second National Communication of the Republic of China (Taiwan) under the UNFCCC Executive Summary*, ch. 1 (Aug. 2011), http://unfccc.epa.gov.tw/unfccc/chinese/ upload/20120418/abstract_en.pdf [hereinafter EPAT, *National Communications of Taiwan*].

[22] *Id.*

[23] *See* FCCC, Cancun Agreements, *supra* note 1.

2. part of a voluntary and non-binding national scheme to reduce greenhouse gas emissions; and
3. supported by technology, financing and capacity building from the industrialised world.

NAMAs are a new mechanism composed of the traditional instrument of GHG mitigation, a wide range of long-term policy considerations concerning a country's sustainable development and the cost-benefit analysis accompanying the application of NAMAs. In the Durban Conference of 2011, the MRV guideline was recommended to be applicable to all kinds of flexible mechanisms, including NAMAs.[24] In this sense, NAMAs should be taken as a set of policies and measures which are measurable, reportable and verifiable now, and should promote integration of available resources in a country so as to pursue the GHG reduction with flexibility through supports from developed countries. In other words, NAMAs can be defined as a new national program, with variable types of policy measures and specific course of actions, which has been recognized as the most important tool to reduce carbon emissions other than the Kyoto Mechanisms (CDM and JI).[25]

C. NAMA AS A NEW MECHANISM FOR MITIGATION ACTIONS

Firstly, a government shall identify the most suitable sectors of the country for NAMA's design, formulate the policies, and provide the resources for the purposes. A government should avoid the unnecessary overreaching coverage of reducing all sectors' emissions at one time so as to allow room for the "common but differentiated" and "voluntary" mitigation.[26] Secondly, the Durban Platform has established anew institution, known as the Green Climate Fund (GCF), which channels resources to developing countries for future emissions reduction. Some of the scholars argue that the major portion of supported NAMAs should come from public funds in order to avoid possible

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[24] *See* OECD, *Measurable, Reportable and Verifiable Mitigation Actions and Support*, A summary of OECD/IEA analyses for the COP 15, 12-45.

[25] *See* FCCC, Conference of the Parties, 7th Sess., Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, U.N. Doc. FCCC/CP/2001/13/Add.1 (Jan. 21, 2002); *see also* HANNA WANG-HELMREICH ET AL., CURRENT DEVELOPMENTS IN PILOT NATIONALLY APPROPRIATE MITIGATION ACTIONS OF DEVELOPING COUNTRIES ch. 3, 8 (Wuppertal Inst. for Climate, Environment & Energy 2011).

[26] *See* UNFCCC, *supra* note 7, at art. 3.

controversy, but others have pointed out that the development of public funds is still indefinite. In reality, public funds such as GCF are required to establish a legal instrument to cooperate with private sectors and the private participants could assess the sufficient risk analysis and capital gain from public sectors.[27] Thirdly, the policy should try to avoid the concept of CAP in order to emphasize the differences between encouraging domestic and foreign capital, and foreign investment. Furthermore, NAMAs could be applied subject to variable conditions of every country through different preferences taken by each country. Taking Mexico's NAMAs as an example, residential and commercial sectors, backed with international public/private supports, are subject to a careful review on the efficiency and effectiveness of the industrial growth and carbon reduction potential. The Mexican project emphasizes co-relative consideration among the elements of social, economic and ecological benefits.

Therefore, a set of policies is packaged to satisfy the needs of project development, and residential, commercial and environmental departments were appointed jointly as the government agencies which are responsible for the NAMA's implementation.[28] In its experience, the key elements of a NAMA's practice have been highlighted as follows:

1. there must be well established policies;
2. green finance (mortgage loans) shall be promoted and supported;
3. there must be new and enhanced insulation standards for the building and its appliances; and
4. incentives for energy efficiency improvement and alternative energy applications shall be provided.

Learning from this example, a NAMA should be an integ

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[27] *See* HELME, N., WHITESELL ET AL., GLOBAL SECTORAL STUDY: FINAL REPORT, ch. 1, 6-13 (Center for Clean Air Policy, 2010). *See also* CLARE BREIDENICH & DANIEL BODANSKY, MEASUREMENT, REPORTING AND VERIFICATION IN A POST-2012 CLIMATE AGREEMENT 12-16 (2009).

[28] The residential and the environmental protection sectors have been considered the critical part of economic, social and ecological development. *See* FCCC, Rep. of Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its 2nd Sess., Bonn, F.R.G., June 2-12, 2008, U.N. Doc. FCCC/AWGLCA/2008/8 (Mar. 8, 2011) [hereinafter FCCC, Mexico submission]. *See also* FCCC, Arrangements for Intergovernmental Meetings, 32nd Sess., Bonn, F.R.G., May 31-June 9, 2010, U.N. Doc. FCCC/SBI/2010/L.21, ¶ 19 (June 9, 2010).

rative-oriented policy framework, fully backed up with international and/or domestic green finance so as to gear up with required incentives to promote a country's low carbon industry and/or community.

III. A CASE STUDY ON NAMA'S PRACTICE: TAIWAN'S EXPERIENCES

A. NAMAS IN THE CONTEXT OF NATIONAL POLICY (AND THE POLICY IMPLICATION OF NAMAS IN TAIWAN)

In May 2010, Taiwan announced the "National Carbon Reduction Plan and Projects," setting carbon reduction targets "back to 2005 emission in 2020, and back to 2000 emission in 2025." In order to achieve this goal and to implement the major projects in the direction of carbon reduction, a comprehensive legal system for planning and implementing – "Ten Programs" and "Thirty-Five Benchmark Programs" – will be established as the first priority of national development.[29] The current proposed legal system includes: (1) improving the regulatory system of greenhouse gas management to promote the "Greenhouse Gas Reductions Act;" (2) developing sustainable energy to promote the "Sustainable Energy Basic Law;" and (3) developing renewable energy and energy management to promote the "Renewable Energy Development Ordinance," its sub-laws, and energy tax legislation.

Moreover, to facilitate low-carbon energy development, subject to all the legal research, it is difficult to disconnect from the economic-oriented approach, given that national legislation is being influenced by the international politics, economics and technologies. Without concerning the economic-oriented perspective, these superficial legal arguments will lose the original goal of pursuing social welfare. Therefore, this research proposal particularly should refer to the development of international law and economic efficiency as foundations to complete the NAMA framework, including the goal of pursuing social welfare and technological/industrial development. We present the following points.

In this research paper, we suggest that Taiwan should achieve

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[29] *Id.*

the goal by amending the domestic laws and regulations as follows. The country should build a sound regulatory system from global development experiences, combining the policies from climate change and energy industry to build a complete regulatory system, employing proper administrative tools and controls to create growth opportunities for green-energy industries. Taiwan should transform the low-carbon energy system, not only by developing a low-emitting, low-polluting, safe, independent and sustainable low-carbon energy system, but also reducing natural resource consumptions and environmental impacts. Taiwan should create a low-carbon community and society, by building low-carbon cities, creating a low-carbon culture, nourishing a low-carbon life-style and creating a low-carbon economy. The island can also create a low-carbon industrial structure by facilitating industry's low-carbon methodology, increasing the added value, lowering carbon emission per unit of production and strengthening green energy industrial development.

Another policy would be constructing green transportation networks which can see lower carbon emission from the transportation sector. This includes a convenient, rapid, and intelligent transportation system, the use of low-carbon fuels, and alleviating the growth of car and motorcycle usage. Green landscapes and eco-friendly buildings can be constructed. Old buildings can be transformed into eco-friendly buildings by energy savings, carbon-reduced living environment, and strengthening the carbon sink function of natural resources like forests. Energy saving and carbon-reduced technical capacity can be expanded by employing technologies to facilitate the goal of energy saving and carbon reduction to gain international competitiveness. Energy savings and carbon reduction in public works can be promoted. The government should lead energy saving and carbon reduction campaigns by establishing energy saving goals and carbon reduction specifications for public works. Energy saving and carbon reduction education should be deepened by promoting the idea of energy saving and carbon reduction in schools to strengthen public awareness. Public exposure to the idea of energy savings can further public understanding. Establishing domestic views on energy saving and carbon reduction can make the public aware of the importance of energy saving and carbon reduction.

B. NAMA'S RELATED LEGAL DEVELOPMENT IN TAIWAN (AND A REVIEW OF TAIWAN'S CONTEMPORARY NAMA-RELATED LEGISLATION)

Following the principles mentioned above, Taiwan has recently reconciled the previous legislation and present legal efforts so as to complete the policy shortfall. First, threatened by the shortage of stable energy supplies and global fuel price fluctuations, Taiwan follows the 3E policy (Energy, Ecology and Economy) as guidance for national development. Subject to the current policy instrument in Taiwan, the Executive Yuan of Taiwan adopted the "Sustainable Energy Policy" in June 2008. The Taiwanese government decided to promote green energy actively, which is listed as one of the major new industries for development.[30]

Three years ago, in 2009, the Taiwanese government initiated three national programs covering different areas: the "National Energy Science and Technology Program," "New Trillion-dollar Energy Industry Program" and "National Carbon Reduction Plan" to foster the transformation of national development into a low carbon society. For this purpose, the fund will be expected to rise from five to ten billion NTD within four years to support the energy-related R&D, and to further support the national development of sustainable energy. The "Sustainable Energy Policy," is the declaration that the Taiwanese government will further strengthen energy efficiency,[31] and initiate the obligation to establish the framework to promote renewable energy development and to create an eco-friendly environment for the next generation.

In regard to the new development of the UNFCCC, the Taiwanese government should be awarded credit NAMAs, to compare with the KP-based market mechanism, which imposes a mandatory obligation of carbon mitigation on developed countries. NAMAs enable finance and technology assistance to less developed countries. In short, the project-based KP flexible mechanism has already developed a market mechanism attributed to carbon finance to assist the developing and less developed

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[30] *See* Taiwan, *GHG Reduction in Taiwan*, Bureau of Energy, the Ministry of Economic Affairs, available at http://unfccc.epa.gov.tw/unfccc/english/04_our_efforts/061_policy.html (last visited Oct. 13, 2011).

[31] *See* Ministry of Economic Affairs of Taiwan, *The Target of Sustainable Energy Policy Convention*, June 5, 2008.

countries[32] under the credit NAMAs scheme. Now, based on the spirit of NAMAs, developed countries can not only assist the developing countries with technology and finance programs, but also obtain capital through the actions to adjust their internal reduction costs.

However, the NAMAs announced by Taiwan, as mentioned, did not refer to the market and/or finance function of the scheme. Indeed, well designed NAMAs may be beneficial to a country's internal cost adjustment and provide the incentive for technology innovation and dissemination at the same time. Moreover, carbon credit management provided under the complete policy framework can not only improve energy efficiency but also obtain the extra benefits to subsidize industrial reduction costs in green technology development. Consequently, it is extremely important for Taiwan to improve the legal system so as to complete Taiwan's carbon management.

C. INTEGRATING NAMAS WITH CARBON MARKET MANAGEMENT IN TAIWAN

For developing counties, NAMAs are not only a policy instrument to promote social change, technology and national competitiveness, but also a legal foundation to encourage carbon market participation.[33] Under the original Kyoto Mechanism framework, Taiwan may hardly qualify itself as a stakeholder to the carbon market. Envisioning the new trend of the NAMA scheme, the extensive coverage of public/private participants is encouraged. Below are some of the policies thinking brought to government's attention recently in Taiwan.

Firstly, under the post-Kyoto round negotiations, parties agreed to consider an additional cut of carbon emission as a necessary process to promote NAMAs, and realized the severity of carbon emissions from different sectors. In other words, the question is which sector can take responsibility for carbon reduction in a cost effective way. In 2012, Taiwan's NAMA was still a non-sector based project. It includes all sectors as a whole and requires all the government agencies to participate jointly and commit to share the burden of carbon reduction, without taking

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[32] *See* UNFCCC, *supra* note 7, at art. 21.

[33] *See* Environmental Protection Administration of Taiwan, *Taiwan's Participation in the UNFCCC* (Nov. 2009) [hereinafter EPAT, *Taiwan's Participation in the UNFCCC*].

social, economic and ecological benefits of each sector's contribution in carbon reduction into consideration. Unlike the aforementioned Mexican experience,[34] Taiwan did not consider social, economic and ecological benefits in its NAMAs formulation process, which makes the whole scheme looks costly and burdensome to the government. In the future, we suggest that Taiwan closely scrutinize the cost effectiveness of emission reduction in different sectors and consider all the beneficiary elements in formulating its policy.

Secondly, it is important to emphasize the price mechanism and the balance between supply and demand for carbon management. As the credit market mechanism provided for a NAMA's project is similar to that of the CDM, for Taiwan, the offset program has been newly established, subject to the "Environment Impact Assessment Law," for the fulfillment of carbon reduction commitments.[35] Therefore, it is important for Taiwan to learn how to design a workable CDM project which generates genuine credits for the purpose of reduction. In addition, NAMAs are not only designed for the purpose of emission trading and/or offset, but also applied to facilitate the development of existing emission trading systems through the facilitation of financial flows.[36] As a result, Taiwan needs to learn more about the comprehensive policy effects of NAMAs and experiences of CDM practices so that we can really benefit from the design for promoting social, economic and ecological benefits to the country.

Thirdly, given the fact that many believe that public resources should better be allocated for adaptation purposes vis-à-vis mitigation needs,[37] it becomes convincing that a NAMA should be designed to attract capital and technology assistance from the private sector rather than from the public sector. Unfortunately, for the moment, there are two drawbacks in Taiwan. One is the lack of support in legal justification or framework for the investment from the public sector. The other is that there is no incentive for private sector participation. It will be one of the main

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[34] *See* FCCC, Mexico submission, *supra* note 28.
[35] *See* EPAT, *Taiwan's Participation in the UNFCCC*, *supra* note 33, at 2, 4.
[36] *See* FCCC, Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, *Views on Possible Improvements to Emissions Trading and the Project-Based Mechanisms*, 18th Sess., Bonn, F.R.G., June 1-12, 2009, 2-3, FCCC/KP/AWG/2009/MISC (May 13, 2009).
[37] *See* Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: from Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001).

barriers for Taiwan's promotion of NAMAs.

Even though there is no clear progress in climate negotiation, many international communities have promoted NAMAs[38] by initiating flexible carbon mitigation efforts through unilateral, bilateral and/or regional mitigation framework. This leads to considering the possibility of global carbon market linkage for Taiwan. In the future, indeed, this is an issue which Taiwan has long encountered; viz., how can Taiwan be fairly included in the global carbon mechanism provided under the Kyoto Protocol? Could NAMAs bring Taiwan a feasible opportunity?

D. COMMENT ON THE POLICY AND LEGAL FRAMEWORK OF TAIWAN'S NAMAS

After the release of Taiwan's NAMAs, President Ma pointed out that even if Taiwan is not a contracting party to international conventions, the administration should still actively consider how to implement the international norm by domestic legislation.[39] Accordingly, in the prepared *National Communication* submitted to the UNFCCC, Taiwan demonstrates its efforts in harmonization between the domestic legal system and international conventions, as well as the assessment and implementation of social welfare.[40]

Take the Japanese experience as an example. Subject to the principle of rule of law, in response to the needs of greenhouse gas control and sustainable development, Japan has adopted a series of measures including the *Global Warming Countermeasures Law, Greenhouse Gas Emissions Trading System,* and *Renewable Energy Law* in response to the international obligation initiated by the Kyoto Protocol.[41] Besides, Japanese administration adopted integrated strategies such as the directive of energy-saving methods, economic incentives of GHG reduction, and the

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[38] *See* WOLFGANG STERK, NATIONALLY APPROPRIATE MITIGATION ACTIONS: DEFINITIONS, ISSUES AND OPTIONS 3-5 (Wuppertal Inst. for Climate, Environment and Energy, June 13, 2010).

[39] *See* Office of President of Taiwan, *President Ma Convenes Conference on Response to Climate Change*, PRESIDENT.GOV.TW (May 26, 2010).

[40] *See* EPAT, *National Communications of Taiwan*, *supra* note 21, at ch. 1-3.

[41] *See* 日本環境省大臣：把可再生能源整合到電網 待國會批准 (*The Integration of the Renewable Energy Act and Smart Grid)*, JRJ.COM (Sep. 14, 2011), http://big5.jrj.com.cn/gate/big5/finance.jrj.com.cn/people/2011/09/14145211034468.shtml (last visited Oct. 13, 2011); *see also, 日本環境省估算採用再生能源的可能性* (*The Possibility of Reconsidering the Renewable Energy Act)*, NIKKEIBP (July 22, 2011), http://big5.nikkeibp.com.cn/eco/news/catpolicysj/906-20110721.html (last visited Oct. 13, 2011).

Environmental Tax.[42] The *Net Carbon Reduction* and its legal system, which are the core idea of legal reformation, are surrounded by an energy legal framework. At present, in addition to the review for renewable energy development, the innovations of the *Gas-Electrical Legal Framework*, *Intellectual Electrical Network*, and *Nuclear Power Energy* are worthy for Taiwan's legislative and policy references. Through a comparative study, especially with the Japanese legal framework, the measures and ideas should be learned by Taiwan.

Furthermore, in the U.S.A., when the government proposes new subsidies, energy agencies usually consult public opinion so as to decrease the negative impact and increase employment opportunities consistent with the idea.[43] Besides, since carbon management has become an important part of the national *Energy Act*, the carbon trading system in the U.S.' *Energy Acts* still plays a role for promoting renewable energy.[44] In Taiwan, the policy remains in the draft article of inventory and GHG transaction; thus, the government failed to achieve the purpose of the benefit from NAMAs.[45] Subsequent to the post-Kyoto negotiations, Taiwan is expected to be gradually integrated into the international carbon finance system. For Taiwan, it is important to draft an appropriate system for carbon management to assist industry and technology development, as well as increase employment opportunities.

In the end, focusing on Articles 14 and 15 of the *Energy Management Law* in Taiwan, for the control of energy equipment, apparatuses, vehicles, etc., the policy should avoid the intervention into people's property rights under the principle of rule of law so as not to abuse people's rights.[46] Accordingly, the rule of the amended *Energy Management Law* should require manufacturers or importers to be consistent with the standards of specific energy equipment, apparatuses and vehicles and demand that the company comply with energy requirements set by the central

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[42] *Id.*

[43] *See* U.S. Environmental Protection Agency, *What is EPA Doing about Climate Change?,* EPA, http://www.epa.gov/climatechange/EPA activities.html (last visited Oct. 13, 2011); *see California Public Utilities Commission*, State of California, U.S., http://www.cpuc.ca.gov/puc (last visited on Oct. 13, 2011); *see also U.S., The White House Press*, Washington, U.S., available at http://www.whitehouse.gov/energy/Overview.pdf (last visited Feb. 13, 2011).

[44] *Id.*

[45] *See* EPAT, *National Communications of Taiwan*, *supra* note 21, at ch. 4-5.

[46] *See Energy Management Law* (Taiwan), arts. 14, 15.

authority.[47] However, there still lacks a comprehensive measure theory for the MRV system and energy efficiency standards in Taiwanese policy. The legal framework shall not only focus on the energy provider, but also include some energy consumers.

IV. WOULD NAMAS BE A PRACTICAL MECHANISM IN THE POST KYOTO ANTI-GHG DEVELOPMENT?

A. SCALING UP NAMAS: AN ARTICULATION ON A WORKABLE NAMA

The design of the NAMA framework can be applied to attract private investment in the commercial sector through a complementary arrangement, which is also the goal for COP16.[48] Since most of the countries are short of the required financial resources to promote technology development to ensure their capability in carbon reduction commitments, NAMAs could be a good solution. In turn, whether or not a developing country is eligible to participate in any of those NAMAs proposed in the world, increasing financial and technical involvement through their domestic legal frameworks has been the main concern for developing countries.

By the same token, it is also possible for a developing country, especially for Taiwan, to design and implement a unilateral NAMA project on its own ability. In essence, unilateral NAMA projects are projects of domestic finance which are unilaterally implemented by a single state. In principle, the nature of unilateral NAMAs is mainly a finance project to attract investment via the premise credits.[49] However, since the Taiwanese government simply takes NAMAs as a control instrument, it is hard to see a cognitive perspective to develop the finance market mechanism in Taiwan. Therefore, it is important for Taiwan and developing countries to think about how to change this perspective to fit the meaning of original NAMAs. Another issue which should be considered in Taiwan in the near future is

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[47] *See* EPAT, *National Communications of Taiwan*, *supra* note 21, at ch. 3-4.

[48] *See* FCCC, World Business Council for Sustainable Development, *Scaling up Low-Carbon Investment through the UNFCCC* (Feb. 21, 2011).

[49] *See* Ruben Kraiem, *the Legal Impact of Climate Change, 2011 ed., "The Global Climate Change Regime in 2011: Its Role and Its Direction."* Thomson Reuters/Aspatore, 5-14 (2011).

facilitating a complete plan of a financing capacity building program.

Unlike Taiwanese NAMAs, which manages carbon reduction in an overall goal, other international practices usually do not include all the public sectors in NAMAs, since NAMAs are designed for particular sectors under different situations from the comprehensive approach covering policies and regulations. There are three steps to scale up NAMAs. Firstly, the policy should try to avoid the concept of CAP so as to emphasize the differences of individual sectors. Secondly, the policy should build up the legal environment which opens opportunities for domestic and foreign investment. Thirdly, the policy should integrate capital and technology to lift the ambition of energy saving and carbon reduction.

In Taiwan, however, legislators failed to pass the *Greenhouse Gas Reduction Act* to initiate NAMAs, since the irrational discourse over energy saving and carbon reduction is still trapped in the conflict between narrow environmentalism against utilitarian thought.[50] Seen from the details of NAMAs as discussed, NAMAs are not simply an idea of cap control design anymore, but an important legal basis aimed at a low carbon economic society to programmatically participate in the international community and to further promote domestic green technology and employment opportunities. In other words, without the legal instrument and premise of carbon reduction, Taiwan will not be able to negotiate with other states, and will lose the opportunity to participate in the UNFCCC and cooperate with other states.

B. A POST-KYOTO NEGOTIATION FOR GREEN FUTURE THROUGH NAMAS' PRACTICE

The most significant achievement of the Cancun Agreements is the legalization of the Copenhagen Accord.[51] However, at a working group meeting in July 2011, because the consensus of a meeting was only to confirm the elements and part of the final resolution, it seemed that the focus was placed mainly on the revision of the KP and left the LCA issues to COP 17 in Durban.

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[50] *See* EPAT, *National Communications of Taiwan, supra* note 21.

[51] *See* FCCC, FCCC/KP/AWG/2010/18, *supra* note 2; *see also* FCCC, FCCC/AWGLCA/2010/18, *supra* note 2.

Thus, while the original expectation for the working group was to come up with the consensus before COP 17, the situation depends on the working group's continuing work on those issues up to now. In regard to the long-term cooperation agreement, the importance of NAMAs has risen rapidly in view of the factors discussion, and without any significant opposition. In other words, according to the outcome of the Durban Platform, the progress not only demonstrated the successful outcome of the Bail Road Map, which focuses on *Shared Vision, Mitigation Actions, Adaptation Actions, Technology Transfer, Finance, and Capacity Building*, but also integrated the meaning of those elements again.[52]

Furthermore, being consistent with the MRV standards, LCA is unequivocal avoidance of global warming to prevent the irreversible damages for all the parties. The principle must count on the intention of countries (mandatory or voluntary) to pursue the ultimate goal of mitigation.[53] After environmental sustainability has been re-emphasized in the negotiations, not only NAMAs but also adaptation actions became an essential and indispensable part of priority, especially to less developed countries. In Copenhagen, although it has failed to launch an agreement on quantity measure standards, the meeting still came out with the consensus on patent transfer and green funds for mitigation and adaptation actions. This consensus strengthens the capacity building in less developed counties from theory discussion to practical operations.[54]

In conclusion, a post-Kyoto negotiation for the green future is still based on the design of NAMAs which was initiated by the six dimensions of the Bali Road Map in relation to effective tools. The development of post-Kyoto negotiations by LCA connects those elements toward a long-term vision of reduction goals in the content of mitigation, adaptation, technology transfer, and finance through the design of capacity building. Obviously, after Durban, the post-Kyoto negotiations for NAMAs undoubtedly bring in a

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[52] *See* FCCC, Bali Action Plan, *supra* note 5.

[53] *See Cancun Agreements*, *supra* note 4, ¶ 36-46; *see also* CAN International, *CAN-International submission on Measurement, Reporting and Verification* (Mar. 28, 2011), http://unfccc.int/resource/ docs/2011/smsn/ngo/258.pdf.

[54] *See* FCCC, Ad Hoc Working Group on Long-term Cooperative Action under the Convention, *Views on the Composition of, and Modalities and Procedures for, the Adaptation Committee, including Linkages with Other Relevant Institutional Arrangements*, 14th Sess., Bangkok, Thai., Apr. 5–8, 2011, Bonn, F.R.G., June 6–17, 2011, U.N. Doc. FCCC/AWGLCA/2011/MISC.1 (Mar. 11, 2011).

scenario of inter-dependence of each element so as to grant more flexibility for each country's mitigation design.

V. CONCLUSION

To sum up, policy makers should consider not only the carbon reduction actions but also a policy to assure energy security. Since energy security is the fundamental vein of society, reflected by the correlation between development of national economies and national security for energy, developing NAMAs could fit into different conditions through different priorities selected by countries. It is convincible that NAMAs will become a critical facility which leads green energy and resources to the development of new technology and industry.[55] Based on the integration of energy and economic development for a developing country, and the discussion of a higher level of national energy security, the contradiction still exists between a single approach to boost economic growth or to seek entire national energy security. Therefore, I would like to point out that, for a developing country, NAMAs were not designed mainly for the purpose of reducing carbon emission and taking part of the national efforts to complement a cap control scheme, but rather established as a comprehensive policy for different sectors under their own specific situations. Especially for Taiwan, as a "unilateral" developing country, it is recognized as neither the founding developed country nor the legally developing member states, NAMAs should not be highlighted mainly for the purpose of achieving carbon reduction, but for the purpose of pursuing sustainable development. In this sense, all government agencies should operate their duties under the legal framework of NAMAs to pursue NAMAs participation.

Keywords
UNFCCC, Kyoto Protocol, Kyoto Mechanism, NAMAs, GHG Mitigation, Energy Policy, Energy Regulation

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[55] *See* FCCC, *Bali Action Plan, supra* note 5.

THE NATIONAL HUMAN RIGHTS COMMISSION OF KOREA AND NORTH KOREAN HUMAN RIGHTS: A LAW AND POLICY ANALYSIS

Andrew Wolman[*]

ABSTRACT

This essay analyzes the appropriate role of the National Human Rights Commission of Korea in addressing North Korean human rights issues. It first addresses the legal question of whether the commission is permitted to document and raise awareness of North Korean human rights as a matter of both international law as well as domestic legal authorization. Then, the essay more broadly analyzes whether the commission is an appropriate body to engage North Korean human rights from a policy perspective, especially when compared with other potential loci for dealing with North Korean rights issues. It concludes that there is no legal barrier to the commission documenting and raising awareness of North Korean human rights, and, in certain respects, it is well suited to do so, although doing so would present certain dangers.

[*] Juris Doctor, Member of New York State Bar, Associate Professor, Graduate School of International and Area Studies, Hankuk University of Foreign Studies, 270 Imundong, Dongdaemungu, Seoul, Korea 130-791, Phone: +82(10)5718-8438, E-mail: Amw247@yahoo.com.

I. INTRODUCTION

South Koreans are peculiarly affected by the dire human rights situation in North Korea. They oftentimes feel great sympathy for their ethnic brethren in the North, but attempts to address human rights practices in the North are complicated by security concerns as well as the widespread desire for closer relations and eventual unification. Over the past two decades, this has led to controversy regarding how the South Korean government should respond to North Korean human rights abuses. Much of this controversy has recently centered on the appropriate role of the National Human Rights Commission of Korea (NHRCK). In part, this is a byproduct of the continuing debate over the passage of the North Korean Human Rights Act. In some of the draft Acts proposed in recent years, the NHRCK would play a major role in documenting and publicizing North Korean abuses. In part, it is a result of increasing NHRCK activities on North Korean issues. Absent alternative legislative action in the area, the NHRCK has stepped forward of its own accord to assume a greater role in addressing North Korean human rights, primarily through its May 2011 establishment of the North Korea Human Rights Documentation Center and Archives.

This essay will analyze the appropriate role of the NHRCK in addressing North Korean human rights issues. After some brief background on human rights in North Korea and the South Korean response, the essay will first address whether the NHRCK is legally permitted to engage in this North Korea-focused activity. This section of the essay will look at both potential international law prohibitions as well as questions of authorization under South Korea's domestic legal framework. Then, the essay will more broadly analyze whether the NHRCK is an appropriate body to engage with North Korean human rights from a policy perspective. This section will review other potential loci for dealing with North Korean rights issues before looking at the relative advantages and potential drawbacks of the NHRCK.

II. HUMAN RIGHTS IN NORTH KOREA

Over the past two decades, it has become abundantly clear that North Korea is the site of extraordinarily persistent and grave

human rights abuses. As the U.N. High Commissioner of Human Rights, Navi Pillay, recently stated, "the deplorable human rights situation in DPRK … has no parallel anywhere else in the world."[1] Political freedoms are non-existent, and even mild criticism of the regime or its leadership can lead to imprisonment. Freedom of religion is also minimal, with Christians frequently being persecuted (an estimated 50,000 to 70,000 are currently held in prison camps).[2] The state places heavy restrictions on freedom of movement within the country and prohibits unauthorized departures from the country. In addition, the North Korean criminal justice system is considered to be extremely harsh and lacking independence. Executions are authorized for a variety of ill-defined crimes, and observers have reported the existence of numerous public executions in recent years.[3] Perhaps the signature evil of the North Korean regime is its system of six prison camps, where an estimated 200,000 individuals are confined in extraordinarily brutal conditions.[4]

North Korea's poor human rights record is not confined to the sphere of civil and political rights. In the realm of economic and social rights too, the population suffers severe deprivations. International attention in this respect is usually focused on the right to food. While conditions have improved since the great famine of the mid-late 1990s, periodic shortages still occur, with chronic malnutrition in many areas of the countryside.[5] This dismal situation results in part from government mismanagement of the economy and a military-first policy that directs an inordinate proportion of the country's resources to the armed forces.[6] Thousands of North Koreans have escaped the desperate

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[1] Press Release, United Nations Office of the High Commissioner for Human Rights, Pillay Urges More Attention to Human Rights Abuses in North Korea: Calls for International Inquiry (Jan. 14, 2013), available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12923&LangID=E (last visited May 13, 2013).

[2] Boris Kondoch, *The Responsibility to Protect and Northeast Asia: The Case of North Korea*, 24 KOREAN J. OF DEF. ANALYSIS 433, 439 (2012).

[3] Morse Tan, *A State of Rightlessness: The Egregious Case of North Korea*, 80 MISS. L. J. 681, 703-04 (2010).

[4] Press release, Amnesty International, Images Reveal Scale of North Korean Political Prison Camps (May 3, 2011), available at http://www.amnesty.org/en/news-and-updates/images-reveal-scale-north-korean-political-prison-camps-2011-05-03 (last visited May 13, 2013).

[5] Diana Park, *Surviving Food Insecurity in North Korea*, 11 GEO. J. INT'L AFF. 133 (2010-2011).

[6] Jason Strother, *Defectors Link North Korea's Weapons Program to Food Shortage*, DEUTSCHE WELLE, Apr. 13, 2012, available at http://www.dw.

conditions of their home country, braving extreme dangers to reach China and eventually the safety of South Korea or other asylum countries.

While North Korea's human rights abuses have been the subject of horror all over the world, they have had a particularly strong effect in South Korea, where complex sentiments of kinship and unity with the North Korean people mix with feelings of enmity against the Kim regime. Although most South Koreans strongly oppose the brutal human rights abuses of the North Korean government, there has been no unanimity on a response to those violations. On the contrary, there has for many years been a fairly rigid partisan divide on the question of what South Korea should say or do in response. Conservative politicians have generally favored harshly criticizing the North Korean human rights record. Some would argue that the conservative criticism has been principled, but others would claim that it is instrumental, with the aim of weakening and delegitimizing an 'enemy' state. Progressive leaders, on the other hand, for many years refrained from broaching North Korean human rights issues, because they believe that criticizing North Korea on human rights matters would needlessly antagonize the North's leadership and make it more difficult to engage in cooperative activities that would eventually lead to unification.[7] As will be detailed below, the NHRCK has since its establishment struggled to establish a role for itself in dealing with North Korean human rights abuses that are difficult to ignore but politically sensitive.

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de/defectors-link-north-koreas-weapons-program-to-food-shortage/a-15880910 (last visited May 13, 2013).

[7] *See* Hyo-Je Cho, *Two Concepts of Human Rights in Contemporary Korea, in* CONTEMPORARY SOUTH KOREAN SOCIETY: A CRITICAL PERSPECTIVE 96, 102 (Hee Yeon Cho et al. eds., 2012). To a certain extent, however, this reluctance eroded in the latter part of the Roh Moo-hyun presidency; in 2004 and 2005, Korean ambassador to the U.N. Choi Hyeok expressed his concern over human rights conditions in the North, and in 2006 South Korea voted for the first time in favor of the U.N. General Assembly's annual resolution condemning human rights abuses in the North. Keum-Soon Lee, South Korea's Policy toward North Korea and North Korea's Human Rights 419, International Symposium on Human Rights in North Korea, Seoul, Korea (Nov. 30, 2006) (on file with author).

III. RESPONSE FROM THE NATIONAL HUMAN RIGHTS COMMISSION OF KOREA

The National Human Rights Commission of Korea was set up in 2001 with a mandate to "ensure the protection of the inviolable and fundamental human rights of all individuals and the promotion of the standards of human rights."[8] The NHRCK undertakes many types of tasks, including most notably the investigation of complaints of human rights violations and issuance of recommendations on the human rights implications of legislation and policies.[9] The scope of the NHRCK's mandate is relatively wide. According to its statute, 'human rights' are defined as "any rights and freedoms, including human dignity and worth, guaranteed by the Constitution and Acts of the Republic of Korea, recognized by international human rights treaties entered into and ratified by the Republic of Korea, or protected under international customary law."[10] In addition, the scope of its jurisdiction explicitly covers foreign residents, when they are located in the Republic of Korea, and Korean nationals wherever they may be.[11] Perhaps the most significant attribute of the NHRCK is its independence from government control. As is the case with other national human rights institutions around Asia, the commission independently addresses those matters that fall within its purview.[12]

From its earliest years, the NHRCK has naturally faced the question of whether it should actively address North Korean human rights, and, if so, how. During the first five years of its operation, a small policy group within the NHRCK researched North Korean rights issues and there were annual conferences on the subject.[13] However, at that time, the NHRCK almost never expressed its opinion on issues related to North Korea. Perhaps its most high profile North Korea-related action in its early years was an April 2004 recommendation that the government enact a law to

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[8] National Human Rights Commission Act of Republic of Korea - Act No. 6481, May 24, 2001 (NHRCK Act), art. 1.

[9] NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, MANDATE AND JURISDICTION, at http://www.humanrights.go.kr/english/about_nhrck/mandate_01.jsp (last visited May 13, 2013).

[10] NHRCK Act, *supra* note 8, art. 2(1).

[11] *Id.* at art. 4.

[12] *Id.* at art. 3

[13] Hyok-chol Kown, *South Korea and Human Rights in North Korea*, HANKYOREH 21 (Apr. 24, 2003).

investigate the damages suffered by families of South Korean abductees to North Korea, and consider the payment of compensation to victims.[14] Other similar opinions regarding abductees and their families were issued in 2006 and 2008.[15]

In December 2006, the NHRCK made its first public step towards greater involvement with issues of North Korean rights when it released a policy statement on North Korea that recommended that the South Korean government "develop solidarity and vitalize cooperation with the international community in order to gain concrete improvements regarding North Korean human rights."[16] It also recommended that the government "pursue diplomatic efforts as a top priority, particularly with national authorities of countries where North Korean defectors are situated, in order to resolve the problem of forced repatriation".[17] While this clearly indicated a trend toward greater involvement, the NHRCK ensured that its recommendations were aimed at the South Korean government. It did not directly engage with North Korea (or China) and explicitly noted that North Korean human rights issues could not be part of its investigation mandate because of constitutional concerns.[18]

After the December 2006 statement, the NHRCK became more active in issuing recommendations on some of the more sensitive aspects of North Korean human rights. In 2007, an official NHRCK delegation traveled to Mongolia, China, and Thailand in order to better grasp the conditions faced by North Korean escapees in those countries.[19] In August 2008, it issued a recommendation to the Ministry of Foreign Affairs and Trade to intensify diplomatic efforts with the Chinese government aimed at ending the repatriation of North Korean defectors.[20] In September 2008, a recommendation was issued that humanitarian food aid to

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[14] NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2012 COMPILATION OF HR VIOLATIONS 412-13 (2012).
[15] *Id.*
[16] NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, BASIC POSITION ON NORTH KOREAN HUMAN RIGHTS (Dec. 11, 2006).
[17] *Id.*
[18] *Id.*
[19] Press Release, National Human Rights Commission of Korea, Official Visit to Understand the Situation of North Korean Human Rights (March 27, 2008), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited May 13, 2013).
[20] NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, NORTH KOREAN HUMAN RIGHTS 5 (2012).

North Korea be undertaken independently of political concerns.[21] In 2008, organizational structures were first established to deal specifically with North Korean issues: an Inter-Governmental Agency Consultative Council (formed at NHRCK's initiative). an Experts' Forum on North Korean Human Rights, and a Special Committee on North Korean Human Rights.[22]

A more forceful engagement with North Korean human rights issues did not occur until Lee Myung-bak appointed Hyun Byung-chul to be the commission's new chairman in July 2009. Hyun was perceived as more conservative than his predecessors and has consistently expressed his desire to more actively address North Korean rights issues.[23] In addition, President Lee clearly conveyed his desire at that time that the NHRCK concentrate more on North Korean violations (although the propriety of such guidance is questionable given the NHRCK's independence from government control).[24] This was followed in December 2010 by an NHRCK recommendation urging passage of a form of the North Korean Human Rights Act that would statutorily ensure the role of the NHRCK in documenting North Korean human rights. In late 2011, the NHRCK then submitted a more comprehensive policy recommendation to the South Korean government on North Korean human rights, encompassing both the rights of North Koreans in North Korea as well as the rights of North Korean escapees and issues related to prisoners of war, abductees, and separated families.[25]

While the North Korean Human Rights Act has not yet passed, on March 15, 2011, the NHRCK independently inaugurated the North Korea Human Rights Documentation Center & Archives. This center, which was ostensibly modeled

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[21] *Id.*
[22] *Id.* at 6.
[23] Yong Jae Mok, *NK Human Rights Among Top Priorities*, DAILYNK, June 21, 2011, available at http://www.dailynk.com/english/read.php?cataId=nk02500&num=7855 (last visited July 3, 2013). At one point Hyun went so far as to apologize for the previous passivity of the NHRCK with respect to North Korean rights issues. *Human Rights Commissioner Apologizes to N. Korean Defectors*, CHOSUN ILBO, May 12, 2011, available at http://english.chosun.com/site/data/html_dir/2011/05/12/2011051200970.html (last visited May 13, 2013).
[24] Jeong-ju Na, *Seoul Toughens Stance on N. Korean Rights*, KOREA TIMES, July 20, 2009, available at http://www.koreatimes.co.kr/www/news/nation/2012/04/113_48791.html (last visited May 13, 2013).
[25] Press Release, National Human Rights Commission of Korea, NHRCK Submitted the National Policy Recommendation on North Korean Human Rights (Dec. 7, 2011), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited May 13, 2013).

after West Germany's Salzgitter Center to record East German human rights violations, has been engaged in recording North Korean human rights violations, pursuant to complaints made by both victims (largely North Korean defectors settled in South Korea) and non-profit groups active in the field.[26] The materials received by the center are intended to educate the public about human rights conditions in North Korea, inform governmental policy, and "provide grounds for the punishment of the violators of international laws and to warn them of punishment, consequently suppressing human rights infringements." [27] The establishment of this center was controversial within the South Korean government. There was no explicit statutory authorization for the NHRCK to establish this center, and there were immediate objections from officials in the Ministry of Unification and Ministry of Justice who felt that their agencies were better suited to lead on North Korean human rights documentation.[28]

IV. LEGAL ANALYSIS

The NHRCK's shift in focus towards a greater emphasis on North Korean human rights has been controversial for a number of reasons. One criticism from some commentators has been that it would be a violation of international law for the South Korean government to actively address human rights violations in North Korea or would exceed the NHRCK's mandate under Korean domestic law.[29] This section will analyze whether either of these is the case.

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[26] Si-soo Park, *Archive on NK Rights Marks First 100 Days*, KOREA TIMES, June 21, 2011, available at http://www.koreatimes.co.kr/www/news/nation/2011/06/117_89350.html (last visited May 13, 2013).

[27] NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2012 COMPILATION OF NORTH KOREAN HUMAN RIGHTS VIOLATIONS, Preface (2012).

[28] Jong Eun Lee, *Bukingweongirokbojonso Yuchi Nohgo Ilbu Beommubu Ingweoneui Shingyeongjeon* [Tension Between MOJ and NHRC Over North Korean Human Rights Archive], DONGA ILBO, Mar. 16, 2011, available at http://news.donga.com/3/all/20110316/35604651/1 (last visited May 13, 2013).

[29] Jang-Hie Lee, *Understanding North Korean Human Rights Issues in the Aspect of International Law, in* NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2005 COMPILATION OF NORTH KOREAN HUMAN RIGHTS VIOLATIONS 70 (2005).

A. INTERNATIONAL LAW

Historically, international law has placed limits on the degree to which one sovereign state can interfere with the internal affairs of another sovereign state. This general norm of non-interference is contained both in customary international law and has often been characterized as implicit in Articles 2.4 and 2.7 of the United Nations Charter.[30] It is also reflected in numerous non-binding declarations adopted by the U.N. General Assembly, perhaps the most notable being the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.[31]

In order to ascertain whether the NHRCK's work on North Korean human rights actually violates these broad non-interference duties, it is necessary to analyze, first, whether the NHRCK's actions can be attributed to the Republic of Korea; second, whether the relationship between North and South Korea constitutes an international relationship governed by international law; third, whether the general non-interference principle encompasses the type of human rights actions being undertaken by the NHRCK; and fourth, whether there are any specific non-interference legal norms that could bind South Korea in the absence of a generally applicable prohibition.

The first element of the analysis is relatively clear-cut. While independence has often been repeated as an important attribute of national human rights commissions, this should not disguise the fact that such commissions are evidently instruments of the state. Commissioners are state employees, and the NHRCK's budget is regulated by the Ministry of Planning and Budget, and the Ministry of Public Administration and Security.[32] In 2009, the

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[30] Müge Kinacioğlu, *The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate*, PERCEPTIONS 15, 38 (Summer 2005).

[31] *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028 (Dec. 17, 1970); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

[32] ASIAN NGOS NETWORK ON NATIONAL INSTITUTIONS, 2008 REPORT ON THE PERFORMANCE AND ESTABLISHMENT OF NATIONAL HUMAN RIGHTS

Constitutional Court confirmed the NHRCK's status as a state organ.[33] As noted in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the "conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State."[34] While one can debate the terminology of whether or not the NHRCK should be called a 'governmental' body, there is no doubt that it is an organ of the state, whose actions should therefore entail state responsibility.

Given that the NHRCK's actions can be attributed to the state, the next question is whether the relationship between South Korea and North Korea is 'international' and therefore regulated by international law. At the level of domestic law, the Korean Constitution is quite clear that the South Korean state encompasses the entire Korean peninsula.[35] In addition, the 1991 Basic Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation characterizes inter-Korean relations as "not being a relationship as between states," but instead "a special one constituted temporarily in the process of unification."[36] This "special" relationship sometimes takes on quasi-international law attributes for practical reasons; for example, the four inter-Korean economic cooperation agreements signed in December 2000 were eventually forwarded to the National Assembly for its consent as if they were treaties.[37] The South Korean government continues to maintain, however, that the relationship between North and South Korea is not like a relationship between states.[38] This consistent insistence means that, at the domestic level, South Korean actions toward the North are, at least in theory, considered to be covered by domestic law, rather than international law.

INSTITUTIONS IN ASIA 16 (2008), available at http://archive.forum-asia.org/in_the_news/pdfs/ANNI2008web.pdf (last visited May 13, 2013).

[33] Constitutional Court [Const. Ct.], 2009 Hun-Ra6, Oct. 28, 2010, (22-2 KCCR, 1) (S. Kor.).

[34] Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission, U.N. Doc. A/56/10 (2001), art. 4.1.

[35] Constitution of the Republic of Korea, adopted 17 July 1948 (last amended 1987), art. 3 ("[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands").

[36] Basic Agreement on Reconciliation, Non-Aggression, and Exchanges and Cooperation, Preamble (1991).

[37] Seong-Ho Jhe, *Four Major Agreements on Inter-Korean Cooperation and Legal Measures for their Implementation*, 5 J. KOREAN L. 126, 131 (2005).

[38] *Id.* at 132.

However, it is equally clear that international law as a system is not controlled by characterizations made in the South Korean Constitution, and that an internationally wrongful act can therefore not be excused by the fact that it was not 'international' under a state's domestic laws.[39] Therefore, the pertinent question is whether both North and South Korea are separate states, and therefore separate subjects of international law. Here, the answer is an uncontroversial "yes." International lawyers have developed two main ways of assessing statehood: the constitutive approach, which bases statehood upon recognition by other members of the international community, and the (dominant) declaratory approach, which bases statehood on the fulfillment of certain objective criteria.[40] If one takes the constitutive approach, it is indisputable that North Korea has achieved sufficient recognition to be considered an international subject, given its membership in the United Nations and recognition as a sovereign by all states save South Korea and Japan. If one uses the declaratory approach, then a cursory glance is all that is needed to show that North Korea possesses a permanent population, a defined territory (the existence of border disputes being irrelevant for this purpose), a government, and the capacity to enter into relations with the other states, thus fulfilling the classic 'declaratory' criteria for statehood outlined in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States.[41]

Next is the question of whether the general non-interference principle encompasses a prohibition on the type of North Korea-related human rights work undertaken by the NHRCK, specifically the accepting and recording of complaints of North Korean human rights violations. North Korean governmental representatives have claimed that this is the case, although they do not couch their non-interference objections in explicitly legal terms.[42] In fact, prior to

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[39] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission, U.N. Doc. A/56/10 (2001), art. 3; 1969 Vienna Convention on the Law of Treaties, art. 27, 1155 UNTS 331.

[40] *See* MARTIN DIXON, INTERNATIONAL LAW 127-28 (2007).

[41] Convention on Rights and Duties of States, 1933, art. 1, LNTS, 165, 19. While neither North Korea nor South Korea is party to this convention, the criteria for statehood contained therein are often cited as the traditional requirements of the 'declarative' theory of statehood. DAVID RAIČ, STATEHOOD & THE LAW OF SELF-DETERMINATION 24 (2002).

[42] Many states accused of human right violations, including North Korea, contend that such accusations constitute interference with their internal affairs. DAVID

1945, human rights were – at least according to some commentators – considered to be part of the internal affairs of a sovereign nation.[43] However, this changed with the United Nations Charter and the post-World War II development of international human rights law. Today, human rights are generally accepted as being of more than just a domestic matter that can be hidden behind a shield of sovereignty.[44]

There are, of course, limits to the extent of interference that is legitimate based on human rights abuses. There is much debate, for example, regarding the legality of military intervention to prevent a government from engaging in massive human rights abuses, and the majority view is probably still that the use of force in such circumstances is illegal absent Security Council authorization.[45] It is also sometimes noted that human rights cannot be used as an excuse to exert pressure on other states or create disorder among states.[46] However, it is now accepted that documenting and publicizing human rights abuses, as the NHRCK has been engaged in, is permissible and indeed common at the United Nations and foreign capitals around the world.[47]

As the preceding analysis demonstrates, the NHRCK's North Korea-related work would not violate the general international law principle of non-interference. However, it is also worth asking whether there are any specific non-interference norms binding South Korea's actions towards North Korea. In fact, in the 1972 South-North Joint Communiqué, South and North Korea each declared their intention to "cultivate an atmosphere of mutual trust

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HAWK, PURSUING PEACE WHILE ADVANCING RIGHTS: THE UNTRIED APPROACH TO NORTH KOREA 59 (2010).

[43] Heewon Han, *Newly Arising Issues on the Limitation of Intervention Law and Refugees under the North Korean Human Rights Act of 2004*, 1 ATOMS FOR PEACE: AN INT'L JOURNAL 355, 362 (2007).

[44] Danilo Türk, *Reflections on Human Rights, Sovereignty of States, and the Principle of Non-Intervention, in* HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN 758 (Morten Bergsmo ed., 2003).

[45] *See, e.g.,* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 710-12 (6th ed. 2003); Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Toward International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EURO. J. INT.L L. 23, 23-30 (1999).

[46] Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. Doc. A/RES/36/103 (Dec. 9, 1981).

[47] *See, e.g.*, Maziar Jamnejad & Michael Wood, *Current Legal Developments – The Principle of Non-intervention*, 22 LEIDEN J. INT'L L. 345, 376 (2009) ("what should be (and largely is) uncontested is that states and international organizations are entitled to criticize the human rights situation in other countries").

between North and South by refraining from vilifying the other side." [48] This was echoed by the 2007 Declaration on the Advancement of South-North Korean Relations, Peace and Prosperity, which states that "[t]he South and the North have agreed not to interfere in the internal affairs of the other"[49] and that "[t]he South and the North have agreed not to antagonize each other."[50] Thus, the anti-vilification language of the 1972 Joint Communiqué clearly goes beyond what general international law requires, reflecting North Korea's particular sensitivities on this matter. It is not clear, however, whether such clauses would cover the type of human rights statements that have emanated from the NHRCK; such would be a matter of interpretation. More importantly, however, the joint declarations can in no way be seen as binding treaty provisions under international law. Fundamentally, international law accepts as treaties all agreements between states that are governed by international law.[51] Yet it is clear that the joint declarations between the North and South were not intended to be governed by international law. First, neither side recognizes the other as a sovereign; second, they are not characterized as treaties by the parties or ratified by the South Korean parliament; and third, the relevant parties have explicitly underlined their non-international law nature.[52]

B. DOMESTIC LAW

While there is no international law obstacle to the NHRCK documenting complaints relating to human rights violations in North Korea and publicizing abuses, that does not mean that they are authorized to do so under South Korea's domestic legal framework. Under South Korea's domestic system, the powers of the NHRCK are established in the National Human Rights Commission Act. Regarding the Act's scope of application, Article 4 states that the Act "shall apply to all citizens of the

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[48] July 4th North-South Joint Statement (July 4, 1972), art. 1.
[49] Declaration on the Advancement of South-North Korean Relations, Peace and Prosperity (Oct. 4, 2007), art. 2.
[50] *Id.* art. 3.
[51] Vienna Convention on the Law of Treaties, *supra* note 39, at art. 1(a).
[52] According to former Unification Minister Hyun In-taek, "the accords are political declarations entailing basic directions of the inter-Korean relations. They are not documents that have received parliamentary ratification," Sang-ho Song, *Hyun Downplays Inter-Korean Declarations*, KOREA HERALD, Mar. 30, 2010, available at http://nwww.koreaherald.com/view.php?ud=200902170000 57 (last visited May 13, 2013).

Republic of Korea and all foreigners residing therein."[53] As an initial matter, it is therefore necessary to establish whether North Koreans are in fact "citizens of the Republic of Korea."

This seemingly absurd question is in fact a source of some debate. As mentioned, the South Korean Constitution considers the territory of the Republic of Korea to consist of the entire Korean peninsula.[54] Meanwhile, South Korea's Nationality Act specifies that a "person whose father or mother is a national of the Republic of Korea at the time of a person's birth…shall be a national of the Republic of Korea at birth."[55] Thus, both scholars and courts have accepted that, in principle, provided an individual born in North Korea is not descended from two foreign (non-North or South Korean) parents, he or she should be considered – from birth – to be a South Korean national.[56] This being the case, Article 4 of the NHRCK Act must be interpreted to apply to North Koreans.

While the general scope of the NHRCK Act would apply to North Koreans, it is important to note that this general applicability may not apply to the NHRCK's duty of "investigation and remedy with respect to human rights violations."[57] This is because petitions alleging human rights violations can only be investigated and remedied if human rights "guaranteed in Articles 10 through 22 of the Constitution are violated by the performance of duties (excluding the legislation of the National Assembly and the trial of a court or the Constitutional Court) of state organs, local governments or detention or protective facilities."[58] The reference to "state organs, local governments or detention or protective facilities" has normally been interpreted to refer to organs of the South Korean state (although the language does leave some room for interpretation as to whether North Korean government organs should also be considered "state organs").

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[53] NHRCK Act, *supra* note 8, at art. 4.
[54] Constitution of the Republic of Korea, *supra* note 35, at art. 3.
[55] Nationality Act, Act no. 16 (Dec. 20, 1948), art. 2.
[56] *See, e.g.*, Chulwoo Lee, *South Korea: The Transformation of Citizenship and the State-Nation Nexus*, 40 J. CONTEMPORARY ASIA 230, 232 (2010); *Nationality Act Case*, Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000, (12-2 KCCR 167) (S. Kor.).
[57] NHRCK Act, *supra* note 8, at art. 19(2).
[58] *Id.* at art. 30(1). This restriction does not apply to the investigation of "discriminatory acts." *Id.* at art. 30(2).

While it may not therefore be permissible for the NHRCK to investigate and remedy complaints regarding North Korean human rights, it is worth stressing that such actions have not been undertaken by the NHRCK so far. In fact, these actions would be relatively unrealistic given the difficulty of investigating discreet violations in North Korea and the impossibility of obtaining an individualized remedy from the North Korean government. To date, the NHRCK has essentially been involved in documentation and awareness-raising activities, which can comfortably be situated within the NHRCK's other mandated duties, namely to survey human rights conditions,[59] raise public awareness of human rights,[60] and undertake other measures necessary to protect and improve human rights.[61] These activities are not limited to rights abuses by state bodies, and, in fact, the NHRCK has engaged in a significant amount of work on rights abuses by non-state actors, and especially by corporations.[62]

V. INSTITUTIONAL ANALYSIS

Although it would be legal for the NHRCK to record North Korean human rights violations that does not necessarily mean that it would be wise for it to do so. In general, national human rights commissions in other countries have avoided addressing human rights abuses beyond their borders. For example, in the Universal Periodic Reviews at the United Nations Human Rights Council, national human rights commissions often comment on the human rights record in their own state, but they refrain from speaking out in discussions of other states (even though they are

[59] *Id.* at art. 19(4).
[60] *Id.* at art. 19(5).
[61] *Id.* at art. 19(10).
[62] *See, e.g.*, Press Release, National Human Rights Commission of Korea, NHRCK Held a Joint Seminar on Business Management Integrated with Human Rights (July 6, 2011), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited May 13, 2013); Press Release, National Human Rights Commission of Korea, NHRCK Publishes Resources for Broadcasting & Corporate Human Rights Education (Sep. 20, 2007), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited July 3, 2013); Press Release, National Human Rights Commission of Korea, NHRCK Co-hosts International Conference on Corporate Social Responsibility (Sep. 28, 2007), available at http://www.humanrights.go.kr/english/activities/board_list.jsp (last visited May 13, 2013).

permitted to do so).[63] The only significant exception to this rule elsewhere is cases where the home state or a home state national has committed a human rights violation outside the state's borders.[64] In addition, there are certainly alternative institutional loci within South Korea which could alternatively play the leading role in recording North Korean human rights violations and raising public awareness of said violations. The next section will briefly discuss these other alternatives, and the following section will analyze the attributes the NHRCK can bring to the table when compared with these other bodies.

A. OTHER INSTITUTIONAL POSSIBILITIES

Realistically, there are three other divisions of the South Korean government that could plausibly take the lead role in recording and raising awareness of North Korean human rights: the Ministry of Unification (MOU); the Ministry of Justice (MOJ), and the National Intelligence Service (NIS). Each of these could in turn act either directly or through a subsidiary foundation. These possibilities will be discussed in turn.

As regards North Korean human rights the most widely discussed agency alternative to the NHRCK is the MOU. The MOU generally takes the lead in inter-Korean negotiations, and has previously been involved in compiling records of North Korean human rights abuses through the Korean Institute for National Unification. The MOU would bring certain advantages to North Korean human rights documentation tasks. Most notably, it has experience in human rights work through the Center for North Korean Human Rights Studies, which was created by the Korean Institute for National Unification (KINU) in December 1994. KINU is the major government-sponsored think tank on North Korean issues, and is affiliated with the MOU. Since 1996, the Center for North Korean Human Rights Studies has produced

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[63] Chris Sidoti, *National Human Rights Institutions and the International Human Rights System, in* HUMAN RIGHTS, STATE COMPLIANCE AND SOCIAL CHANGE 115 (Ryan Goodman & Thomas Pegram eds., 2012).

[64] For example, the NHRCK investigated a complaint of sexual harassment of a Korean national by another Korean national at a Korean-run NGO in Cambodia, eventually recommending that the victim receive a then record high damage award (30,000,000 won) and that the NGO develop sexual harassment guidelines. Press Release, National Human Rights Commission of Korea, Highest Amount of Damages Awarded in Cambodian Sexual Harassment Case (Oct. 15, 2007) (on file with author).

annual White Papers on human rights in North Korea, compiled in large part with the assistance of the non-profit Database Center for North Korean Human Rights. The MOU also has certain disadvantages. Human rights are not central to MOU's mandate, and it has a reputation of not wanting to strongly address rights, presumably out of a worry that doing so would complicate negotiations on inter-Korean cooperation and eventual unification.[65]

The MOJ is another alternative that has been frequently discussed for dealing with North Korean human rights. MOJ has experience with human rights issues through its Human Rights Bureau, which contains four separate divisions: the Human Rights Policy Division, the Human Rights Support Division, the Human Rights Investigation Division, and the Women and Children's Policy Team.[66] Among other tasks, the Human Rights Investigation Division monitors and investigates possible human rights violation in the course of law enforcement activities and performs inspections of detention facilities. The skill set involved in these activities could presumably be used to document complaints regarding North Korean human rights. At least arguably, the Supreme Prosecutors Office (SPO) under MOJ could also undertake investigations, but the SPO has no direct expertise in human rights issues, has long been heavily criticized for its politically biased prosecutions, and is seen by much of the public as a bastion of conservative political power.[67]

The last government body that is worth mentioning is the NIS. It may seem absurd on first glance for the NIS to take on this role, as the NIS previously had a distinctly anti-human rights reputation (and still does among some today).[68] However, the NIS naturally

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[65] *See, e.g.*, Yun Tae Kim, *No North Korean Human Rights Department Within the Unification Ministry*, DAILY NK, March 10, 2008, available at http://www.dailynk.com/english/read.php?cataId=nk03600&num=3363 (last visited May 13, 2013) ("Perhaps it is wiser to have the Ministry of Unification withdraw from North Korean human rights issues. The past decade shows that officials of the ministry cannot help improve the North Korean human rights situation with their mistaken notion that it is better off not to provoke North Korea by addressing its human rights abuses").

[66] Ministry of Justice, Human Rights Bureau, at www.moj.go.kr/HP/ENG/eng_03/eng_3080.jsp (last visited May 13, 2013).

[67] Min-uck Chung, *Park Vow to Abolish Prosecution's Power Center*, KOREA TIMES, Dec. 2, 2012, available at http://www.koreatimes.co.kr/www/news/nation/2012/12/608_125973.html (last visited May 13, 2013).

[68] Won-je Son, *Marking 50th Year, NIS Powers Swell Under Lee*, HANKYOREH, June 10, 2011, available at http://english.hani.co.kr/arti/english_edition/e_national/482157.html (last visited May 13, 2013).

has the best access to intelligence about events actually taking place in North Korea. NIS is also the lead agency in interviewing North Korean escapees who make it to the South, giving it an opportunity to inquire about human rights abuses and receive complaints. On the other hand, NIS is poorly suited for playing the public role that would be necessary to raise awareness about North Korean human rights issues due to its emphasis on secrecy, the suspicion with which it is viewed by segments of the Korean populace, and the fact that human rights promotion and protection are not generally part of its mandate.

B. ADVANTAGES AND DISADVANTAGES OF THE NHRCK

When compared with the other plausible institutional loci for addressing North Korean human rights, the NHRCK possesses certain important advantages. Perhaps its greatest advantage is its considerable experience in accepting human rights complaints and in human rights promotion. From its founding in 2001 until December 31, 2011, it received a total of 58,672 human rights complaints, along with 137,308 counseling cases and 201,468 civic petitions or inquiries.[69] While there are fundamental differences between the process of dealing with human rights complaints from South Korea and those that took place in North Korea, the NHRCK's twelve years of experience in the area of human rights protection should provide it with institutional knowledge that would also assist in dealing with North Korean violations. While other agencies such as MOJ and MOU have some experience dealing with rights, none of them has the same level of expertise.

Another area where the NHRCK stands out is in its level of independence from political control. Unlike government agencies, national human rights commissions are in principle not supposed to take instructions from the government, and, while this is not always the case in practice, at least until recently the NHRCK received good marks in this regard.[70] In fact, there have been many instances of the NHRCK taking positions contrary to the

[69] NATIONAL HUMAN RIGHTS COMMISSION OF KOREA, 2011 ANNUAL REPORT 69 (2012), available at http://www.humanrights.go.kr/english/publications/publications01.jsp (last visited May 13, 2013).

[70] According to a 2008 analysis, the NHRCK was one of only two national human rights institutions in Asia to enjoy a "fair amount of independence and autonomy from government interference." ASIAN NGOS NETWORK ON NATIONAL INSTITUTIONS, *supra* note 32, at 15.

desires of the administration in power. For example, during the recent Lee Myung-bak administration, the NHRCK called for an end to the National Security Act. In previous progressive administrations, the NHRCK also publicly clashed with the sitting government, perhaps most notably by stating its opposition to South Korea's involvement in the Iraq War and asserting that its commissioners did not have to follow government travel restrictions.[71] Unfortunately, however, many observers claim that this autonomy was eroded during the Lee Myung-bak administration, and it is as yet uncertain how the commission will fare under a Park Geun-hye administration.[72] Given the strong partisan divide over North Korean human rights issues, this independence from political control is probably beneficial to establishing the credibility of any findings on North Korean rights issues. It may also arguably provide the ancillary benefit of allowing the South Korean leaders to plausibly deny responsibility for any findings that would upset the North Korean regime, in order to avoid retaliation.

A final advantage of the NHRCK would be the greater credibility of its findings in the eyes of the public, both inside and outside of Korea. In part, this credibility would be a product of the commission's independence from government control, but, beyond that, it would also be assisted by the fact that the NHRCK has a membership that is pluralistic by both law and custom. The commission is statutorily required to include at least four women.[73] In recent years, it has also included a Buddhist priest, and a mix of lawyers, academics, and activists. On the international level, the NHRCK's credibility is supported by its A-grade accreditation from the International Coordinating Committee of National Instruments for the Promotion and Protection of Human Rights, which indicates compliance with the U.N.-endorsed Paris Principles relating to the status of national institutions.

One potential danger of using the NHRCK to address North Korean human rights would be the possibility that the NHRCK's

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[71] *Human Rights Commission in Crisis,* HANKYOREH, Nov. 22, 2011, available at http://english.hani.co.kr/arti/english_edition/e_editorial/506563.html (last visited May 13, 2013).

[72] *Id*.; Moon-young Lee, *Amnesty International Reports Curtailed Human Rights under Lee Administration*, HANKYOREH, May 13, 2011, available at http://english.hani.co.kr/arti/english_edition/e_national/477819.html (last visited May 13, 2013).

[73] NHRCK Act, *supra* note 8, at art. 5(5).

core competency of protecting and promoting South Korean human rights could suffer from a greater emphasis on North Korean affairs. Additional funds spent on North Korean issues means less money for protecting and promoting South Korean human rights, and additional staff working on North Korean issues could mean less manpower for domestic South Korean projects. Of course, the government could increase the overall budget to reflect the expanded mandate, but the recent conservative Lee Myung-bak administration in fact took the opposite tack, cutting the NHRCK budget and staff considerably at the same time that it was increasing work on North Korean issues.[74] Any decreased emphasis on South Korean rights by the NHRCK would certainly be a very negative outcome, not only due to the great potential of the NHRCK to improve the many human rights problems in the South, but also because neglecting South Korean issues would decrease the organization's credibility when promoting North Korean rights.

Another potential danger of NHRCK involvement in North Korean affairs would be the potential of North Korean issues leading to political interference in the NHRCK's independence. North Korean issues are among the most sensitive matters that the South Korean government deals with and fundamentally affect the country's security outlook, economic growth, as well as its core ideological concerns. Thus, there is always the possibility that the government may at some point instruct the NHRCK to focus its attention on a particular human rights issue, or to ignore some other potential issue, in order to further the greater public interest in stability or security. Such interference would be disastrous to the NHRCK's domestic and international reputation and should be avoided.

Both of these dangers can be avoided, however, by a presidential administration that is willing to value human rights in both North and South Korea, as well as respect the independence of the NHRCK. It is too early to know whether that will be the case with the incoming Park Geun-hye administration, but one can predict that she will at a minimum show more respect for the

[74] Korea House for International Solidarity, *Republic of Korea: Endless Despair, in* ANNI REPORT ON THE PERFORMANCE AND ESTABLISHMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS IN ASIA 172 (Asian NGO Network on National Human Rights Institutions, 2012); Doo Sik Kim, *Lee Myung Bak Jeongbuhaeui Kukgaingweoneuiwonhae Uigeeinga Kihwoeinga?* [The National Human Rights Commission Under MB Government, How to Turn Crisis into Opportunity?], 39 KOR. J. L. & SOC. 49 (2010).

NHRCK than did Lee Myung-bak, who even before taking office had expressed a desire to end the commission's independence.[75] If the Park administration is in fact willing to support the NHRCK and avoid improper meddling, then there is no reason why it should not play a prominent role in documenting and raising awareness of North Korean human rights abuses.

VI. CONCLUSION

As the foregoing analysis shows, there is no barrier in either international law or domestic South Korean law to the NHRCK's documenting and raising awareness of North Korean human rights issues. The policy question of whether the NHRCK is the most sensible part of the Korean government to be engaging in these tasks is a more difficult question. The NHRCK certainly shows some comparative advantages in relation to other agencies that could possibly engage in these tasks. For example, its institutional independence can be seen as a benefit because it reduces the likelihood of over-politicization (a particular danger in North Korea-related issues) and allows for the credible denial of responsibility by political leaders who might want to negotiate with North Korean representatives regarding other issues without being seen as guilty of insulting the dignity of the North Korean state through their human rights work. The NHRCK has also developed a comparative expertise in the work of human rights monitoring and the application of international human rights standards, and is generally viewed as a highly credible institution.

On the other hand, by concentrating on North Korean issues, the NHRCK could potentially lose focus from its primary goal of promoting and protecting human rights in South Korea, and its engagement in such a critical policy area could eventually put the commission's independence at risk. These potential dangers could be avoided by a conscientious administration that raises the NHRCK's budget and staffing to reflect its new responsibilities, and respects the commission's independence. Overall, the potential drawbacks are outweighed by the advantages that the NHRCK brings to the table.

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[75] *See* AMNESTY INTERNATIONAL, SOUTH KOREA'S HUMAN RIGHTS COMMISSION UNDER THREAT (Jan. 23, 2008), available at http://www.amnesty.org.au/news/comments/8373/ (last visited May 13, 2013).

It should be stressed, however, that this analysis has focused on documentation and awareness-raising activities, which are among the most important ways in which the South Korean government has chosen to address North Korean human rights. They are not, however, the only tools in the South Korean government's arsenal. United Nations condemnation and investigation of North Korean human rights is increasingly important, and South Korea has the potential to help formulate a concerted global response, whether vocally or simply by providing behind the scenes leadership. This would evidently be part of the Ministry of Foreign Affairs and Trade's competency, where the NHRCK can play only a very limited role. MOJ, also, may have a future role in prosecuting human rights abusers, something that NHRCK is not equipped to do. Although different agencies may have important roles in addressing North Korean human rights issues, this analysis has demonstrated that the role of the NHRCK is potentially valuable when it comes to documentation and awareness-raising, and that, as long as certain precautions are taken, legal and policy objections to its work are misguided.

Keywords
North Korea, Human Rights, National Human Rights Commission of Korea, Non-Intervention, Human Rights Documentation

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EUTHANASIA AS A CONTEMPORARY ISSUE IN THE JURISPRUDENCE OF RIGHTS: THE POSITION OF ISLAMIC LAW

Omipidan Bashiru Adeniyi[*]

ABSTRACT

The Universal Declaration of Human Rights [UDHR] of 1948, which formed part of the constitution of many if not all countries, never envisaged that people would today hide under the guise of these rights to seek abortion on demand, trans-sexual rights, and the right to die, amongst others. This has become possible because several countries, responding to pressure from advocates of these rights, have relied on some aspect of their constitution, particularly, the right to personal liberty, to legalize the concepts. This paper focuses on one such issue – euthanasia which is gradually becoming the easiest way of telling the terminally ill, aged, and disabled that they are no longer useful. From Oregon and Washington in the United States, to Belgium, Switzerland, and Luxembourg, the story has been the same. Similarly, debates on whether to legalize or criminalize euthanasia are currently ongoing across the world. Proponents of the concept place importance on the patient's quality of life, allowing him or her to die with dignity instead of in pain. Opponents argue that, no matter the extent of pain, the principle of sanctity of life should be the priority. The paper examines the position of Islamic Law on the concept and concludes that, no matter the situation or condition of a terminally ill patient, a person has no right to either kill him/ her or be assisted in doing so.

[*] Senior Lecturer, Faculty of Law, University of Ilorin, Ilorin, Nigeria; E-mail: obashiruadeniyi@yahoo.com.

I. INTRODUCTION

Contemporary issues in the jurisprudence of rights are numerous. The most prominent and talked about of all these issues are euthanasia and/or assisted suicide. Others include same-sex marriage and abortion. These issues are at the centre stage across the globe, so that certain groups make it mandatory for countries, particularly in Africa, to either legalize the practice or lose financial aid.[1] The decision of the United States Supreme Court, in *Roe v. Wade*,[2] has contributed immensely to the current agitation for abortion on demand. This is because that decision, although peculiar to the United States, gave women the sole right to decide when to carry out abortion. Similarly, a gay activist sees the marriage between two males or females as something natural and within the law.[3] The United States remains a supporter of these concepts, particularly abortion and same-sex marriage. For example, Barrack Obama set-aside June every year as Gay pride month.[4] In Nigeria, the parliament and a majority of the citizens have taking bold step of unanimously declaring same-sex marriage illegal in the country.

A careful perusal of the Universal Declaration of Human Rights [UDHR] does not reveal anything to suggest that the rights therein include the right to die, right to abort, or Lesbian, Gay,

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[1] Jonah Fisher, *Nigerian leaders unite against same-sex marriages*, BBC NEWS (Dec. 05, 2011), http://www.bbc.co.uk/news/world-africa-15992099; *see also* Byben Agande, Daniel Idonor & Inalegwu Shuaibu, *Same Sex Marriage: FG, N/Assembly Damn US*, VANGUARD (Dec. 8, 2012), http://www.vanguardngr.com/2011/12/same-sex-marriage-fg-nassembly-damn-us. In October 2011, UK Prime Minister David Cameron suggested that the aid budget could be cut to countries that did not recognize gay rights. The President of the Nigerian Senate responded, "If there is any country that does not want to give us aid on account of this, it should keep its aid." David Mark, President of the Senate, proclaimed this as the bill completed its third reading. He added, "We hold our values, customs and tradition dearly. No country has the right to interfere with the way we make our laws." *Nigerian Senate votes for draconian anti-gay law*, PETER TATCHELL (Nov. 30, 2011), http://www.petertatchell.net/international/nigeria/nigerian-senate-votes-for-draconian-anti-gay-law.htm.

[2] *Roe v. Wade*, 410 U.S. 113 (1973).

[3] PETER TATCHELL, *supra* note 1. Peter Tatchell, Director of the human rights advocacy organization (the Peter Tatchell Foundation), said, amongst other things, that, "This bill violates the equality and non-discrimination guarantees of Article 42 of the Nigerian Constitution and Articles 2 and 3 of the African Charter on Human and People's Rights, which Nigeria has signed and pledged to uphold."

[4] Planned Parenthood is the largest provider of abortions in the U.S. In 2009, Planned Parenthood performed 332,278 abortions, from which it derives about $164,154,000 or 15% of its annual revenue.

Bisexual, and Transgender rights (LGBT).[5] This position has been further confirmed by the ruling of the European Court of Human Rights in Strasbourg, delivered in March, 2012, wherein the court held that same-sex marriage is not a human right.[6] This may, however, be mere academic exercise as countries and jurisdictions have since gone ahead to establish these 'rights,' while similar bills are currently before the parliament in some other countries.[7]

Today, euthanasia represents the newest avenue of eliminating the terminally ill and vulnerable persons all over the world. This concept, according to history and many scholars, is traceable to the ancient Greeks and the Romans. Research has, however, shown that there are limitations to tracing the concept to these two jurisdictions. The reason is that euthanasia to the ancient Greeks and Romans meant *eu* (Good) and *thanathos* (death).[8] In other words, people committed suicide or were assisted in dying when they were defeated in wars. This (suicide or assisted suicide) occurred sometimes because such persons were not happy with the ways and manners of the government in directing the affairs of the state.[9] This is not what the concept is today.[10] Current agitations for euthanasia and/or assisted suicide can be attributed to the development of three theories. These theories are the Malthusian theory of over population, [11] Charles Darwin's theory of

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[5] What countries have done is to re-read these rights into the right to personal liberty and other fundamental human rights as guaranteed by the constitution of the countries.

[6] Steve Doughty, *Gay Marriage is not a 'Human right': European ruling torpedoes Coalition stance*, THE DAILY MAIL (Mar. 20, 2012), http://www.dailymail.co.uk/news/article-2117920/Gay-marriage-human-right-European-ruling-torpedoes-Coalition-stance.html.

[7] *French President Signs Same-Sex Marriage into Law*, KUWAIT TIMES (May 18, 2013), http://news.kuwaittimes.net/2013/05/18/france-becomes-14th-country-to-legalize-same-sex-marriage. France became the14th country to legalize gay marriage on Saturday, May 18, 2013, when President Francois Hollande signed the bill that legalized same sex marriage into law.

[8] It was believed amongst people of the ancient Greece and Rome that healthy persons are very useful to the society and so have no moral justifications to commit suicide. This was an additional reason why suicide by any fit and agile person amounted to an abomination in these jurisdictions.

[9] Wallace B. Fye, *Active Euthanasia: An Historical Survey of its Conceptual Origins and Introduction into Medical Thought*, 52(4) BULL. HIST. MED. 492, 492-502 (1978).

[10] It has today become the means of eliminating healthy people who are tired of life but not terminally ill. *See also* Dutch Way of Death, SAN FRANCISCO CHRONICLE (Apr. 20, 2001), http://www.sfgate.com/default/article/Dutch-way-of-death-2929616.php.

[11] THOMAS R. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION (John Murray, 6th ed. 2000), *available at* http://www.econlib.org/library/Malthus/malPlong1.html. The theory showed the danger of overpopulation.

evolution,[12] and the eugenics theory.[13] All the aforementioned theories encouraged the elimination of species that are unproductive in favour of the productive ones.[14] These theories

[12] CHARLES DARWIN, ON THE ORIGIN OF SPECIES (John Murray, 1st ed. 1859). *See also* Fye, *supra* note 9, at 499-500; Emmanuel J. Ezekiel, *The History of Euthanasia Debates in the United States and Britain*, 121(10) ANNALS INTERNAL MED. 793, 793-802 (1994). In his book, Charles Darwin states that humans originate as a distinct species by descent from some lower form, through the laws of variation and natural selection than to explain the birth of the individual through the laws of ordinary reproduction. The birth of the species and of the individual are equally parts of that grand sequence of events which our minds refuse to accept as the result of blind chance. In simple terms, Darwin's theory ascribes creation to hormones and genes rather than God, thereby encouraging self autonomy which is one of the arguments in support of the legalization of euthanasia and/or assisted suicide.

[13] ANTHONY J.F. GRIFFITHS ET AL., AN INTRODUCTION TO GENETIC ANALYSIS (7th ed. 2000). *See also Eugenics Definition*, DICTIONARY.COM, http://dictionary.reference.com/browse/eugenics (last visited May 6, 2013). All the characteristics of negative eugenics mentioned above were the ones Adolf Hitler adopted in his Nazi euthanasia programme, wherein over 245,000 persons were said to have been eliminated. Eugenics can be defined as "the study of or belief in the possibility of improving the qualities of the human species or a human population by such means as discouraging reproduction by persons having genetic defects or presumed to have inheritable undesirable traits (negative eugenics)." It has also been described as a concept which encourages "reproduction by persons presumed to have inheritable desirable traits (positive eugenics)." From the above definition, it can be deduced that the eugenics principle is all about the production of lives that are healthy and the elimination of creations that are unhealthy. Thus, the word 'positive eugenics' refers to human beings that have no defects like illness, while, 'negative eugenics' refers to eliminating handicapped persons and persons with diseases like cancer, Alzheimer's, and deformities. All these characteristic features of negative eugenics are the major reason why euthanasia and assisted suicide advocates are calling for the legalization of the concept today. Modern utilitarian principles of 'life unworthy of life' derived the said principle from eugenics theory. *See* Elof Carlson, *Scientific Origins of Eugenics*, EUGENICS ARCHIVE, http://www.eugenicsarchive.org/html/eugenics/essay2text.html (last visited May 7, 2013). Thus, it can, therefore, be inferred that agitations for euthanasia and assisted suicide actually originated from these theories. *See* Ilora Finlay, *Don't Fear Death: Enjoy the Setting Sun*, THE TIMES (July 15, 2009), http://www.thetimes.co.uk/tto/law/columnists/article2049129.ece; Black Edwin, *The Horrifying American Roots of Nazi Eugenics*, PRISON PLANET (July 6, 2009), http//www.prisonplanet.com/the-horrifying-american-roots-of-nazi-eugenics.html. Margaret Sanger was said to have been responsible for the deaths of over 300, 000 unborn children in Planned Parenthood abortion clinics scattered all over the United States. *supra* note 4.

[14] Karl Binding & Alfred Hoche, *Permitting the Destruction of Unworthy Life*, 8(2) ISSUES L. & MED. 231, 241 (1992). These two German writers provided Adolf Hitler a way to terminate lives of handicapped children in Nazi Germany. Adolf Hitler's Nazi Germany ought to be given the credit of initiating what has today become the indiscriminate killing of human beings which is the result of his euthanasia programme. His advisers gave all sick persons the nickname 'empty shells of human beings.' Currently, sick ones are referred to as 'useless eaters,' which are unworthy of life.

indeed gave birth to the modern utilitarian bioethics principle which postulates that unworthy lives should make way for worthy ones through the elimination of the former. In other words, there is no justification in expending taxpayer money on an illness that is incurable. Rather, in the eyes of the proponents of this theory, the person with such illness is no longer worthy of living.[15] Today, euthanasia and/or assisted suicide have been legalized in five places. These are the states of Oregon and Washington in the United States, in 1997 and 2008,[16] respectively; the Netherlands, which was the first country to legalize both euthanasia and assisted suicide in 2001;[17] Belgium in 2002,[18] Switzerland in 2002,[19] and Luxembourg in 2009.[20] Although Britain is yet to

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[15] Hilary White, *British moralist says Dementia patients have a duty to die*, LIFESITENEWS (Sep. 23, 2008), http://www.catholic.org/international/international_story.php?id=29538. Baroness Mary Helen Warnock referred to those suffering from dementia as useless eaters who are wasting the resources of Britain and who should go and commit suicide unless their family can cater for their treatment.

[16] The state of Oregon legalized physician-assisted suicide in 1994 (*see* Oregon Death with Dignity Act, ORS 127. 800-8987 (1994)), while the state of Washington followed suit in 2008 (Washington Death with Dignity Act, RCW 70.245 (2008)). The contents are similar to that of the state of Oregon. *See also* Catharine Paddock, *Washington State Legalizes Assisted Suicide*, MEDICAL NEWS TODAY (Mar. 06, 2009) http://www.medicalnewstoday.com/articles/141318.php. Pressures are on in some other states to follow suit. The state of Montana's district court legalized assisted suicide in 2009, *supra* note 23. The person who sought the assistance of the court for the order, died naturally before the decision was handed down.

[17] *Wet toetsing levensbeeindinging op Verzoek en hulp bij zelfdodoing* [*Termination of Life on Request and Assisted Suicide (Review Procedures) Act*] (2002) (Neth.).

[18] Adams M. Nys H, *Comparative Reflections on the Belgian Euthanasia Act 2002*, 11(3) MED. L. R. 353, 353-76 (2003). The law was passed on the 23rd of May, 2002, and came into force on the 23rd of September, 2002.

[19] *Tread Carefully When You Help to Die: Assisted Suicide Laws around the World*, ASSISTEDSUICIDE.ORG (Mar. 1, 2005) http://www.assistedsuicide.org/suicide_laws.html; *see also* Cassani U., *Assistance au suicide*, *le point de vue de la pénaliste*, 55 MÉDICINE ET HYGIÈNE 616, 616-617 (1997). Article 115 of Switzerland's Penal Code is the provision that allows for physician and non-physician assisted suicide. However, euthanasia remains illegal in the country. Parliament passed it into law in 2001. Switzerland remains the only country in the world, which did not amend its penal code, on the way to legalization. A separate section was created as stated above. As of this article, euthanasia and assisted suicide remain illegal in Britain. However, many Britons have been going to the DIGNITAS clinic in Switzerland where persons who are terminally ill or depressed are being assisted in dying. According to the country's director of public prosecution, those accompanying their relatives and loved ones to DIGNITAS to commit suicide will not be prosecuted. He stated further that it is not the interest of the public to embark on such prosecution. *See also* David Brown, *Dignitas Founder Plans Assisted Suicide of Healthy*

legalize the concept, it has published guidelines on when assisting in a suicide will amount to a crime.[21] On the other hand, on 6th November 2012, the U.S. state of Massachusetts voted 51%-49%, in a referendum, to reject the legalization of physician-assisted suicide for the terminally ill. The measure was defeated after a strong campaign by a diverse coalition called 'No on Question 2.' The coalition is made up of disability rights organizations, doctors, nurses, community leaders, faith-based groups, and patients' rights advocates.[22] Today, some other countries have bills pending before their respective parliaments either to legalize or criminalize the concept. There is also the effect that the concept has in countries without specific laws either for or against. In these countries, lives have been lost and many more will be lost. The deaths of Terri Schiavo and Eluana Englaro, in the United States and Italy, in 1997 and 2009, respectively, call for urgent actions. Countries where the concept of euthanasia and/or assisted suicide is illegal should enact specific laws to either allow or criminalize the concept. Added to this is the role of courts in trying to usurp the law-making process reserved for legislatures. In countries with little or no laws on the issue, they have made pronouncements in favour of either euthanasia and/or assisted suicide. The 31st of December 2010 decision of the Montana's state Supreme Court in

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Woman, THE TIMES (Apr. 3, 2009), http://www.thetimes.co.uk/tto/news/world/europe/article2599579.ece.

[20] Julien Ponthus, *Luxembourg Parliament adopts Euthanasia Law*, REUTERS (Feb. 20, 2008), http://www.reuters.com/article/2008/02/20/us-luxembourg-euthanasia-idUSL2011983320080220.

[21] Precisely on the 7th of July, 2009, another attempt to change the law was defeated on the floor of the House of Lords by a margin of 194 votes to 141. *See also*, *UK Assisted Suicide Amendment Defeated*, ZENIT (July 8, 2009), http://www.zenit.org/en/articles/uk-assisted-suicide-amendment-defeated. However, on the 25th of February, 2010, the British director of public prosecution, acting on the orders of the Law Lords, published a guideline on when assisting a suicide will warrant prosecution. This guideline was a sequel to the decision of the British Law Lords in a case involving a multisclerosis sufferer, Debby Purdy, who wanted the court to assure her that, if accompanied to commit suicide, her husband would not be prosecuted. This decision and the guidelines are seen by euthanasia and/or assisted suicide opponents as an attempt to formally legalize the concept in Britain. *The Director of Public Prosecution*'s *Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide*, THE CROWN PROSECUTION SERVICE (Feb. 2010), http://www.cps.gov.uk/publications/prosecution/assisted_suicid_policy.html (last visited May 8, 2013).

[22] Peter Saunders, *End of Year Update on Euthanasia, Assisted Suicide and Palliative Care*, NRL NEWS TODAY (Dec. 26, 2012), http://www.nationalrighttolifenews.org/news/2012/12/end-of-year-update-on-euthanasia.

allowing assisted suicide for Montanans is a clear example.[23] There is a need to curb this viewpoint from spreading to developing countries in an era where the western world is pressuring African countries to accept homosexuality and limitless abortion, among other liberalities, as the basis for aids and grants.[24] The condemnations that greeted the decisions of the Nigerian parliament in outlawing same-sex marriage and that of a Malawian court on the same issue affirm this fact.[25]

Islamic law, on the other hand, is a unique law who, according to believers, is traceable to Allah (God), the sole Law Giver. Under Islamic law, human life is inviolable and, as shall be seen in the subsequent part of this work, rights under Islamic law do not include taking one's own life no matter the level of hardship or suffering. As of this article, no country practicing either full Islamic penal law or Islamic Law of personal status have legalized euthanasia and/or assisted suicide. This is mainly due to the fact that the sanctity of life is the second objective of Islamic law which all adherents of the religion must abide by without choice. It will therefore be interesting to see how euthanasia in the jurisprudence of rights and the Islamic law perspective on this issue can co-exist. Thus, this paper examines euthanasia as a contemporary issue in the jurisprudence of rights, with particular emphasis on the position of Islamic law.

II. DEFINITION OF EUTHANASIA

Euthanasia has been defined by different authors in different ways. It is however important to state here that all these definitions point to the fact that euthanasia means a painless death

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[23] Peter J. Smith, *Montana Supreme Court Legalizes Doctor-Assisted Suicide*, LIFESITENEWS (Jan. 5, 2010), http://www.lifesitenews.com/news/archive//ldn/2010/may/10010504.

[24] Thaddeus M. Baklinski, *Malawi Judge rules against Gay Couple*, LIFESITENEWS (May 19, 2010), http://www.lifesitenews.com/news/archive//ldn/2010/may/10051906.

[25] *Id*.; *see also supra* notes 1 & 3. In this scenario, after the Malawian judge had convicted the accused persons for what the judge described as gross indecency and unnatural acts, the United States Department spokesman, P.J Crowley, condemned the court's decision, saying that the United States views the criminalization of sexual orientation and gender identity as a step backward in the protection of human rights in Malawi and urged the government to respect the human right of all its citizens.

or 'mercy killing.'[26] This definition is in accord with the one given by Luke Gormally.[27] According to him, "There is euthanasia when the death of a human being is brought about on purpose as part of the medical care being given to him or her."[28] Perhaps, this definition is arrived at in view of the conclusions of the proponents of euthanasia and/or assisted suicide that it is a form of medical treatment.[29]

III. TYPES OF EUTHANASIA

The classification of euthanasia is multifarious. However, for the purpose of this paper, euthanasia can be voluntary, active voluntary or physician-assisted, passive voluntary, non-voluntary, involuntary and indirect euthanasia.

A. VOLUNTARY EUTHANASIA

When a person asks a doctor to bring an end to his or her life, such process is called voluntary euthanasia.[30] Similarly, voluntary euthanasia has also been defined as a process whereby a patient has specifically asked that he or she be injected with an overdose of lethal drugs in order to end his or her life.[31] The reason why it is voluntary is because the patient made this consent clear regarding how he or she should be medically taken care of, before being incapacitated. In situations where the patient is incompetent to make decisions of this kind, his or her parents or guardian can do so.

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[26] Oluyemisi Bamgbose, *Euthanasia Another Face of Murder*, 48(1) INT'L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 111, 111-121 (2004). *See also* HAZEL M. BIGGS, EUTHANASIA, DEATH WITH DIGNITY AND THE LAW 12 (Hart Publishing 2001).

[27] LINACRE CENTRE, EUTHANASIA: CLINICAL PRACTICE & THE LAW 11 (1994).

[28] *Id.*

[29] Oregon's Death with Dignity Act of 1994 and the Netherlands' Termination of Life on Request and Assisted Suicide (Review Procedures) Act of 2002 describe euthanasia as medical treatment.

[30] PUTERI NEMIE JAHN KASSIM, LAW AND ETHICS RELATING TO MEDICAL PROFESSION 261-262 (2007). *See also* NORCHAYA TALIB, EUTHANASIA: A MALAYSIAN PERSPECTIVE 7-8 (2002).

[31] David A. Asch, *The Role of Critical Care Nurses in Euthanasia and Assisted Suicide*, 334 NEW ENG. J. MED. 1374, 1374-1379 (1996).

B. ACTIVE VOLUNTARY EUTHANASIA OR PHYSICIAN-ASSISTED SUICIDE

When a person (included in this category are parents, relations and friends) injects another with a lethal drug, which causes death to that other person, the act is referred to as 'active voluntary euthanasia.'[32] When such act is directly carried out by a medical doctor, it becomes physician-assisted suicide.[33] It is important to note that the term medical doctor as employed above equally includes nurses or any other health care provider.[34] The most important thing is the one who gives or administers the poison.

C. PASSIVE VOLUNTARY

When a patient who is competent to make a choice asks that his or her treatment be withdrawn, and he or she dies as a result, it is called passive voluntary euthanasia.[35] Situations of this kind usually occur when the patient feels his or her chances of surviving the ailment are nil. The situation is also the same when a patient is incompetent to make a decision about his or her treatment. It is also important to state here that the right to refuse treatment is included in this definition. The right to refuse treatment may occur when the patient's legal guardian, solely on his or her own or in conjunction with the treating doctor, decides that, from all prognoses and diagnoses, it will be futile to continue with the patient's treatment.[36] This classification has led to serious controversy amongst scholars. This is because some scholars do not see any difference between active and passive euthanasia. Thus, to these scholars, since the entire act will ultimately lead to death, like active euthanasia, passive euthanasia does not exist.[37]

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[32] *Id.*; *see also* TALIB, *supra* note 30.
[33] RALPH BAERGEN, ETHICS AT THE END OF LIFE 191 (2001).
[34] *Id.*
[35] TALIB, *supra* note 30.
[36] Diane E. Meier et al., *A National Survey of Physician Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193, 1193-1201 (1998).
[37] Yale Kamisar, *The Reasons so Many People Support Physician-Assisted Suicide and Why These Reasons Are Not Convincing*, *in* ETHICS AT THE END OF LIFE 175-184 (2001); *see also* David Orientlicher, *The Supreme Court & Physician-Assisted Suicide — Rejecting Assisted Suicide but Embracing Euthanasia*, 337 NEW ENG. J. MED.1236,1236-1239 (1997); James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78, 78-80 (1975).

The above position was given credence by Justice Scalia of the United States' Supreme Court. According to him,

> ... it would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide; … starving oneself to death even in the context of a terminal illness or permanent vegetative state is no difference from putting a gun to one's temple as far as the common law definition of suicide is concerned.[38] Thus in the view of the erudite justice there is no difference among assisted suicide, active voluntary euthanasia, and passive euthanasia.

However, other scholars, in differentiating active from passive euthanasia, explain that it is one's fundamental right to refuse or cease treatment which is considered futile, but that there is no right to assisted suicide.[39] Some scholars, sensing the difficulty in distinguishing between active and passive, chose to call the acts by their names, i.e., double effect, withdrawal, withholding and refusal of treatment. This, according to them, will reduce unnecessary public debates which results from attempting to classify 'letting die' (passive) and 'killing' (active voluntary) as the same or different.[40]

D. NON-VOLUNTARY EUTHANASIA

This is a situation whereby the decision to kill the patient is taken by his or her family and relations.[41] Non-voluntary euthanasia can also be defined as the intentional administration of medications meant to cause the death of the patient. This is the case if the patient is incompetent or otherwise mentally incapable of providing the necessary consent.[42] The incapacitation of the patient may be a result of being in a state of coma.

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[38] *See* Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 2841 (1990).
[39] *See Vacco, Attorney General of New York, et al. v. Quill et al.*, 521 U.S. 793 (1997).
[40] DERYCK BEYLEVELD & ROGER BROWNSWORD, HUMAN DIGNITY IN BIOETHICS AND BIOLAW 235; *see also* Emmanuel. J. Ezekiel, *The History of Euthanasia Debates In the United States and Britain*, 121 ANNALS INTERNAL MED., 793, 799 (1994).
[41] *Id.*; *see also* KASSIM, *supra* note 30; TALIB, *supra* note 30, at 9-10.
[42] *See* Ezekiel, *supra* note 12, at 793-802.

E. INVOLUNTARY EUTHANASIA

When a patient is given a lethal injection or overdose of a drug meant to bring an end to his or her life without such patient's consent, then involuntary euthanasia has occurred.[43] In this situation, the patient's family and relations are not carried along in the decision-making. Similarly, the patient whose life is to be taken, and who is also competent to take a decision about his or her treatment, was not consulted on whether he or she would prefer death. It is important to point out that this method is dangerous. This is because it would be wrong to conclude that death is the best option for a person, who is ill, but whose parents, guardian or relatives were not consulted prior to taking such an important decision. The parameters for deciding death for a competent but sidelined patient are unknown. It has been discovered from available research that babies born with one defect or another have been the major victims of involuntary euthanasia which doctors carry out either on their own or in concert with the parent of such babies.[44]

F. INDIRECT EUTHANASIA

When a patient dies as a result of the effect of the drugs administered on him or her by the physician, then indirect euthanasia has occurred.[45] Here the intention of the doctor matters a lot. If the intention is to reduce pain, for instance in case of a patient with cancer, the resultant death will free the doctor from prosecution. This act is described by some scholars as being the same as active euthanasia, but the intention to reduce pain makes indirect euthanasia different. In the case of active euthanasia, the physician is very much aware that death will be the result of his or her actions.

On the 'double effect' doctrine (indirect euthanasia), it is submitted that there is the same regulatory need to avoid abuse. Although there is nothing wrong in providing relief for a sick

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[43] *See* Ezekiel, *supra* note 12; *see also* FUNSHO ADARAMOLA, BASIC JURISPRUDENCE 67-71 (3rd ed. 2004).

[44] *Involuntary Euthanasia is out of Control in Holland*, EUTHANASIA.COM, http://www.euthanasia.com/holland99.html (last visited June 7, 2013); *see also, Dutch Euthanasia Doctor Admits to Killing 4 Newborns with Lethal Injection*, LIFESITENEWS (Apr. 27, 2005), http://www.lifesitenews.com/idn/2005/apr/05042706.html.

[45] TALIB, *supra* note 30, at 10.

person, when such relief is done to pave way for the termination of life, then it becomes unacceptable. This is exactly what the court held to be the position in the case of *R v Adams*.[46] In this case, Dr. John Bodkin Adams was accused of an alleged killing of a patient, who was eighty-one years of age. It was the contention of the prosecution that, in administering large doses of morphine and heroin on the patient, the accused deliberately killed the deceased to share in her will. The defense argued that the drugs were only administered for the purpose of alleviating the pain and distress of the patient.

Delivering its ruling, the court, per Devlin J., held amongst others things that "... a doctor, because he is required to take care of the patient, is not expected to be calculating in minutes or even hours, days and weeks, the effect of drugs he has administered on the patient." He stated further that, if the administration of the medicine which is to restore the dying patient back to status quo ante and which remains the basic preoccupation of medical doctors cannot be achieved, a doctor can still do more. This includes, doing all that is within his capability to relieve the pain and suffering of the patient, even if such actions will lead to the patient's death.[47] Based on the above, the doctor was eventually discharged and acquitted.

IV. ARGUMENTS FOR AND AGAINST THE CONCEPT OF EUTHANASIA AND ASSISTED SUICIDE

Generally, arguments in support and against the concept of euthanasia and/or assisted suicide all over the world are the same. Although these arguments are many, this paper shall discuss the most fundamental ones which are individual autonomy, sanctity of life, quality of life and the role of doctors.

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[46] *See R v. Adams*, 365 CRIM. L. REV. (1957). In this case, the defendant, John Bodkin Adams, was a doctor who was charged with murder by "easing the passing" of elderly patients by giving drugs calculated to hasten their deaths (one had left a bequest - including a Rolls-Royce - to him in her will). The court held that a doctor has no special defence, but "he is entitled to do all that is proper and necessary to relieve pain even if the measures he takes may incidentally shorten life" (i.e., as a secondary intention). On these grounds, the defendant was acquitted. This case was the first to formulate a 'double effect' in respect of the mens rea of murder. Liability for murder can be avoided if medicine which is beneficial to the patient is administered despite being aware that death will be the resultant effect of the drug administered on the patient.

[47] *Id.*

A. INDIVIDUAL AUTONOMY

It is the view of the proponents of euthanasia and/or assisted suicide that a person owns his/her body and should therefore be allowed to do whatever pleases him or her with such body. Although the principle of individual autonomy can be said to be more applicable to assisted suicide, it can still be used for both. This is because in both situations the patient has an input into what is to happen to him or her except in a situation where by such patient is in a vegetative state, such that he or she cannot express his or her wishes.[48] This much was emphasized by the American Civil Liberties Union in the amicus brief filed before the United States Supreme Court in the case of *Vacco v. Quill*. According to the content of the brief, if a competent but terminally ill patient, who suffers unbearable pain, is denied the right to hasten his or her death, then that denial is against that patient's right to liberty.[49] In other words, a patient's right of autonomy has been withheld if such a patient is not allowed assistance in dying when his or her condition is unbearable.[50]

If one believes that God creates and takes life, then nobody has a right to take the life which he or she has not created. It, therefore, follows that the reason for wanting to legalize euthanasia and/or assisted suicide is inappropriate. Arguing further, opponents of legalization are of the view that, even though autonomy is a fundamental value, it does not justify euthanasia.[51] According to them, this is because not every individual act that does not harm his or her fellow human being is permitted under the principle of autonomy.[52] To buttress this proposition, an example of the prohibition of slavery is made. In the view of John Stuart Mill, all voluntary acts can never be based on autonomy. He stated further that once an individual consents to being sold into

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[48] MARGARET P. BATTIN, THE LEAST WORST DEATH: ESSAYS IN BIOETHICS ON THE END OF LIFE (1994).

[49] Amicus Brief filed by the American Civil Liberty Union to the United States Supreme Court in the case of Vacco, Attorney General of New York, et al. v. Quill et al., 521 U.S. 793 (1997). In this case, the ACLU emphasized patient autonomy.

[50] Daniel W. Brock, *Voluntary Active Euthanasia*, 22(2) HASTINGS CTR. REP. 10, 10-22 (1992); *see also* Robinson, *V. A, Symposium on Euthanasia*, 19 MED. RES. REV. 143, 143-147 (1913).

[51] Daniel Callahan, *When Self Determination Runs Amok*, 22 HASTINGS CTR. REP. 52, 52-55; Leon R. Kass, *Is there a Right to Die?*, 23 HASTINGS CTR. REP. 34, 34-43.

[52] *Id*., Callahan.

slavery, he or she automatically loses his right to liberty. He added that there can never be freedom without being freed, and so there can be no freedom in selling one's freedom.[53] In applying the slavery principle, opponents of legalization of euthanasia and/or assisted suicide conclude that death negates freedom or independence. Thus, euthanasia and/or assisted suicide can never be justified on the basis of autonomy.

B. SANCTITY OF LIFE VERSUS QUALITY OF LIFE

The principle of sanctity and quality of life represent another fierce argument for and against euthanasia and/or assisted suicide. This is because opponents of the concept are of the view that life belongs to Allah (God), and that no matter the extent of one's suffering, taking one's life should never be the best option. They argue further that to say arguments against legalization on the basis of the sanctity of life are merely religious is untenable as virtually all countries are signatories to the United Nations Declaration on Human Rights, 1948.[54] This declaration has been adopted wholly by all countries of the world. Article 16(3) of that declaration guarantees the right to life and provides instances when such life should be taken. With respect, euthanasia and assisted suicide are not within these exceptions.

Furthermore, the argument that killing while being attacked amounts to taking somebody's life also has flaws. This is because killing under self-defense is an act of saving human life. For instance, when 'A' attempts to kill 'B,' the latter has a right to defend himself/herself. Thus, in the process of defending him/herself, if 'A' dies as a result, 'B' will not be guilty as all he (B) did was simply defend him/herself. The analysis shows that self-defense does not have any correlation with euthanasia. Opponents argue further that all religions hold in high esteem the sanctity of life and so no one reserves the right to take the life of another. Islam for instance, admonishes adherents against harming or killing one another. Both Islam and Christianity hold this view in high esteem.[55]

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[53] JOHN S. MILL, ON LIBERTY (Hackett Publishing Co., Inc. 1978).
[54] *See* Binding & Hoche, *supra* note 14.
[55] The Qurʿān (Al-Ma'idah: 32); *see also* Jerome Hamer, *Sacred Congregation for the Doctrine of the Faith: Declaration on Euthanasia*, VATICAN (May 5, 1980), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19800505_euthanasia_en.html; *Terri Schiavo Remembered*,

However, proponents of euthanasia and/or assisted suicide are of the opinion that the quality of life matters most when a patient is seriously in pain. Hence, to them, it will be useless to continue to keep a patient alive when he or she is in pain. Their conclusion is that a person should be allowed to die with dignity rather than continue in pain. Thus, taking an intravenous injection or swallowing a pill prescribed by the physician is a way of dying with dignity. This principle can be said to have emanated from the modern school of Utilitarianism. According to this school, the life that is unworthy can be sacrificed for that which is worthy. Proponents of this point argue further that, in some situations, hastening death, apart from being morally justified, can also be premised on being humane.[56] This is because when a person suffers from an illness where pain and death is certain it will then be humane to end such life.

C. REDUCTION IN HEALTHCARE COST

One of the arguments in support of the legalization of euthanasia and/or assisted suicide is that the treatment of terminally ill persons is usually expensive and, since death will be the resultant effect, such huge amounts should not be wasted on them. This argument seems tenable but those who argue against legalization believe that, if these concepts are legalized, emphasis will be placed on euthanasia and/or assisted suicide over the welfare of the sick, aged, disabled and other vulnerable people in our society. They rely on Oregon State cutting health care costs and agreeing to pay for assisted suicide shortly after passing the Oregon's Death with Dignity Act of 1997.[57] They argue further

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THENEWAMERICAN.COM (Apr. 1, 2009), http://www.thenewamerican.com/culture/family/item/439-terri-schiavo-remembered.

[56] *See* Binding & Hoche, *supra* note 14.

[57] *See supra* note 16. The state of Oregon may want people to embrace assisted suicide at all cost. The logic is simple because the emphasis will no longer be on equipping available health facilities but on assisted suicide. Thus, severely ill patients and others who are not severely ill, having been denied access to proper medical care through exorbitant charges, would have no other option than to choose assisted suicide which is cheaper. For example, Barbara Wagner, who suffered from cancer of the breast, requested the Oregon health plan to buy her drugs that would keep her alive longer, but the Oregon authority told her that they could only pay for "comfort care" which includes "physician aid in dying" (popularly known as assisted suicide). The cost of maintaining her with the drugs she requested was too expensive and Oregon stated that it could not afford to spend such a huge amount of money on the treatment of a single person.

that drugs used in assisted suicide are cheaper than the cost of treatment of pain. For instance, the assisted suicide drug costs only $40 whereas the cost of treating pain to a satisfactory level cannot be less than $40,000, minimum. It, therefore, follows that, if euthanasia and/or assisted suicide is legalized based on the desire of Oregon state to cut health costs, medical personnel will not only lose their jobs but sick people may have no choice other than to embrace euthanasia, which may be a goal of the proponents of legalization.[58]

Proponents are, however, of the view that, if euthanasia and/or assisted suicide is/are legalized, such huge amounts, usually expended on what they call unworthy lives, will be diverted to taking care of lives that are still worthy of living. They ask what use it is to continue a life that has outlived its usefulness. It is important to remark here that cutting health care costs is one among the many reasons that opponents of legalization are against the legalization of euthanasia and/or assisted suicide.[59] It has been argued further in favour of health care containment that issues relating to the care of severely or terminally ill persons should not be left for the government alone. This matter, according to proponents of legalized euthanasia and/or assisted suicide, involves expensive decisions which the government alone cannot handle.

D. EUTHANASIA AND ASSISTED SUICIDE WILL CHANGE THE ROLE OF DOCTORS

It is a generally accepted fact that the role of doctors is to save lives and not to kill. If, however, in the process of providing the patient with adequate care death ensued, the doctor would have discharged his or her responsibility diligently.[60] Opponents of euthanasia and/or assisted argue that proponents of the concept do not see anything wrong in a doctor assisting a patient to die. As one doctor puts it, "If there's no hope of recovery for a patient, it

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[58] Rita L. Marker, *Assisted Suicide and Cost Containment*, INSIGHT, http://www.patientsrightscouncil.org/site/cost-containment (last visited May 7, 2013).

[59] *Id.*

[60] This is known as the 'double–effect' doctrine. It is a situation whereby a doctor gives a patient, who is seriously in pain, drugs that are meant to reduce such pain. If those drugs eventually result in the death of the patient, the doctor will not be liable provided he did not administer such drugs with the intention of killing the patient. This proposition has received judicial blessing in the case of *R v. Adams* earlier referred to in this work.

is only humane to allow him to put an end to his pain and agony in a dignified manner."[61]

However, research has shown, as stated by Dr. Steven Hutchison, that

> ...dignity does not mean physician assisted suicide or euthanasia. Rather it is a relationship between a physician and his or her patient, such that the patient is in control of what is happening to his or her life. It may also mean valuing a patient's life in a way that the treating doctor treats his or her patient with compassion by giving him or her sense of belonging even though the suffering of the patient cannot be cured.[62]

By the above definition, the doctor's role has been relegated from saver of life to its taker. This is no doubt contrary to the tenets of the Hippocratic Oath. According to the Hippocratic Oath, "to please no one will I neither prescribe a deadly drug nor give advice which may cause death." Thus, it is the belief and respect for the oath that has led the majority of physicians all over the world to condemn the practice of euthanasia and/or assisted suicide because it will erode the confidence of the patients in them. Moreover, there is the need to exercise caution in wanting to legalize this concept to avoid abuse as evident in the failure of various safeguards inserted in the euthanasia and/or assisted suicide laws of countries where the concept has been legalized, with particular reference to the Netherlands which legalized both euthanasia and assisted suicide and which continues to be a

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[61] Shibani Chattopadhyay, *Right to Die*, THE TELEGRAPH – CALCUTTA (Nov. 28, 2007), www.telegraphindia.com/1071120/asp/atleisure/story_8598544.asp. In India, a new bill that would make euthanasia legal was being proposed. Comments of stakeholders were sought on the proposed bill and Dr. B. k Rao, who is the Chairman of Ganga Ran Hospital in New Delhi, India, made the above comment as part of his own contribution on the bill. It is important to state here that, in all arguments in favour of legalization, the words "dying with dignity" or "death in a dignified manner" has always been used. No argument, however, has told us how the assistance in dying, either through intravenous injection or overdose of morphine, amounts to death with dignity. Patients who take those drugs usually undergo a serious comma with some not dying within 72 hours of the taking of the drug. For example, a patient had to be helped to die, under the Oregon law, by his brother, when the drug he took could not kill him as expected.

[62] Stephen Hutchison, *Legalizing Euthanasia Needs Careful Thought*, THE INVERNESS COURIER (Dec. 23, 2008), http://www.invernesscourier.co.uk/News/Behind-The-Headlines/Legalising-euthanasia-needs-careful-thought-8305.htm.

reference point in arguing for and against the concept.[63] Proponents have constantly argued that the concept is working very well in the Netherlands. Opponents, on the other hand, have always showed concern about euthanasia and/or assisted suicide in view of their practice which has been extended beyond the enabling laws without any formal amendment to existing law.[64]

V. THE POSITION OF ISLAMIC LAW ON THE CONCEPT OF EUTHANASIA AS A CONTEMPORARY ISSUE IN THE JURISPRUDENCE OF RIGHTS

The cardinal objectives of Islam are five. These objectives are the basis of existence in life and they must never be toyed with by adherents of the faith. Emphasis shall be laid on one of the objectives, which is the right to life. This is because in Islam, as shall be seen in the latter part of this paper, no one has the right to either take his/her own life or that of another except with just causes. It follows therefore that no matter the extent of one's illness or suffering, such person(s) is/are enjoined to always rely on Allah (God) for help, instead of embracing euthanasia and/or assisted suicide.

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[63] JOHN GRIFFITHS ET AL., EUTHANASIA AND LAW IN THE NETHERLANDS, 4 (Amsterdam Univ. Press 1998); *see also* Tony Sheldon, *Killing or Caring?*, BMJ.COM (Mar. 10, 2005), http://www.bmj.com/content/330/7491/560.1; Gudrun Schultz, *Holland to Allow Baby Euthanasia*, LIFESITENEWS (Mar. 06, 2006), http://www.lifesitenews.com/news/archive//ldn/2006/mar/06030601.

[64] Julia Belian, *Deference to Doctors in Dutch Euthanasia Law*, 10 EMORY INT'L. L. REV. 255, 255-257 (1996). Jonathan T. Smies, *The Legalization of Euthanasia in the Netherlands*, 7 GONZ. J. INT'L. L. (2003-4); *see also* John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, *in* EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES 290 (1995) (citing Jaarverslaag Openbaar Ministerie 1994, Ministerie Van Justitie, Den Haag 1995); Wesley J. Smith, Holland Experience with Euthanasia is One We Can't Afford to Repeat, Forced Exit, Dallas, 111 (2003); Patrick B. Crane, *Researcher to Dutch Government: Allow Euthanasia for Newborns based on foreseeable suffering*, LIFESITENEWS (Dec. 8, 2009), http://www.lifesitenews.com/news/archive//ldn/2009/dec/09120811; Tony Paterson, *Euthanasia squad offer death by delivery: Dutch Doctors starts controversial scheme offering assisted suicide in patients' homes*, INDEPENDENT (Mar. 2, 2012), http:/www.independent.co.uk/life-style/health-and-families/health-news/euthanasia-squad-offer-death-by-delivery-7469070.html; Ben Brumfield, *Dutch euthanasia clinic offers mobile service*, CNN (Mar. 7, 2012), http://edition.cnn.com/2012/03/07/world/europe/netherlands-euthanasia-clinic/index.html.

VI. THE OBJECTIVES OF SHARĪʿAH

The main objective of Sharīʿah is to guarantee the protection of the following:

1. the practice of religion,
2. the uplift of the mind and personality,
3. the right to life,
4. the right to property, and
5. the right to progeny.

It is important to note that all the above-mentioned objectives are very important in Islamic law.[65] Thus, the violation of any of the above objectives attracts serious sanctions even though the individuals concerned have the right to either retaliate or forgive the wrongdoer.[66] It is therefore necessary to examine the Right of God (*ḥaqq Allah*) and Right of man (*ḥaqq-al-ʿabd*).[67] In other words, the right of God signifies a public right, while right of man means a private right. The significance of the above classification is that, while an individual may forgo or forgive an injury inflicted on him by another person, the right of Allah has a prescribed punishment which is not alterable.[68] What this means is that, if a person commits an offence which is the right of Allah, such person must face the maximum punishment prescribed by Him (Allah) for that offence.[69] An example of the right of an individual, which also overlaps with the right of Allah, is murder. It follows, therefore, that, if a person kills another intentionally, such person must also die. This is on the basis of the law of equality (*Qiṣāṣ*).[70] However, if the family of the deceased decides to forgive the accused or accept compensation in the form of blood money *(Diyat*), it shall suffice.[71] This is so because the interest of an individual can never be separated from that of the society as a

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[65] MOHAMMED SHABBBIR, OUTLINES OF CRIMINAL LAW AND JUSTICE IN ISLAM 314 (2002).
[66] MOHAMMED H. KAMALI, SHARI'AH LAW: AN INTRODUCTION 17.
[67] *Id.*
[68] SHABBIR, *supra* note 65, at 57-58.
[69] The Qurʿān (Al-Nūr: 2); *see also* The Qurʿān (Al-Baqarah: 229). This is so because it is the commandment of Allah that one should desist from such act. Thus, a rejection of Allah's directive results in punishment.
[70] Al-Ma'idah, *supra* note 55; *see also* BEIRUIT, A. AL-JAZIRI'S DISCUSSION OF FORGIVENESS IN KITĀB AL-FIQH ʿALĀAL-MAẒĀHIB AL-ARBAʿAH 258-59 (1986); M. ABU ZAHRAH AL-'UQUBAH 368-69, 453-54 (Cairo n.d. 1986).
[71] *Id.*; *see also* SHABBIR, *supra* note 65, at 282.

whole.[72] The simple logic here is that any crime that is detrimental to the peaceful co-existence of a community equally has an overall effect on the individual in such community.[73]

Thus, in murder cases the right of the individual is given prominence over that of the society. This is because families of the deceased have the power to demand restitution or forgive the accused.[74] It must, however, be noted that, in spite of the forgiveness in cases where it occurs, such occurrence does not constitute a bar on the right of a judge to impose punishment on the accused person.[75] The essence of this punishment is to protect the society at large from further harm in the future by the same offender.[76] In buttressing this point, Islamic jurists are of the opinion that the rights of man are part of the rights of Allah.[77] They stated further that, in accordance with the principles of the rights of Allah, mankind should avoid causing injury to each other.[78]

VII. THE POSITION OF EUTHANASIA UNDER ISLAMIC LAW

Islam places the utmost priority on human life. In other words, the sanctity of life is one of the cardinal principles of Islam.[79] Islam therefore forbids a Muslim from taking the life of his or her fellow Muslim.[80] It is important to state, however, that under certain circumstances, as shall be seen later, Islam allows the taking of life of a fellow Muslim.[81] Thus, as a way of showing the importance which Allah attaches to human life, the *Qurʿān* puts it succinctly:

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[72] 7 BADĀ'U-WAL-ṢANĀ'I 33; 4 FATḤ AL-QADĪR 12; *see also,* 1 A. Q. OUDAH SHAHEED & S ZAKIR AIJAZ, CRIMINAL LAW OF ISLAM 108-109 (International Islamic Publishers, 1st ed.).
[73] *Id.* 7 BADĀ'U-WAL-ṢANĀ'I 33; 4 FATḤ AL-QADĪR 12.
[74] *Id.*
[75] *See supra* note 69. The Qurʿān (Al-Nūr: 2).
[76] *Id.* This is a clear demonstration of the importance placed by Islam on the sanctity of life of mankind.
[77] SHAR-UL-ZARQUI, AL-MUKHTAṢAR AL KHALĪL 8, 115; *see also* SHAHEED & AUAZ, *supra* note 72, at 109.
[78] *Id.* SHAR-UL-ZARQUI, AL-MUKHTAṢAR AL KHALĪL 8, 115.
[79] *Id.*
[80] *See* ZARQUI, *supra* note 77.
[81] 5 AL-MUSLIM, SAHIH AL-MUSLIM 107-108; 8 AL-BUKHARI, SAHIH AL-BUKHARI 148.

> And do not kill anyone whose killing Allah has forbidden, except for a just cause. And whoever is killed wrongfully [Mazluman -- intentionally with hostility and oppression, and not by mistake], we have given his heir the authority [to demand *Qisas,* -- Law of Equality in punishment -- or to forgive, or to take *Diya* [blood money]. But let him not exceed limits in the matter of taking life [i.e., he should not kill except the killer]. Verily, he is helped [by the Islamic law].[82]

From the above verse, coupled with the cardinal objectives of Shar'iah (Islamic Law) earlier mentioned, Islam forbids either taking one's own life or that of another except when a person commits an offence, necessitating such killing, like killing of another fellow human being. Even then, Islam encourages the families of the one killed to either demand retaliation or forgive the killer. For example, if the family of the deceased is desirous of revenging the death of their kinsman, then the one who killed must also be killed. If the family is inclined to forgive or take ransom (blood money) in lieu of the death of their kinsman, that will equally suffice.

However, the Islamic law position as stated above is not in agreement with the aims and objectives of the proponents of euthanasia and/or assisted suicide. This is because, unlike Islam which emphasizes the sanctity of life, euthanasia is all about the quality of life of a person who is ill.[83] Hence, euthanasia, in the view of its adherents, refers to a pain-free death or mercy killing.[84] To these persons, there is no basis for allowing a person whose ailment has become incurable to continue to wallow in pain.[85] It

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[82] The Qurʿān (Al-Isra':33).

[83] *See supra* note 16. This is the crux of the arguments in support of euthanasia and or assisted suicide. It is also the basis upon which some countries have legalized the concept. For instance, in the Netherlands where euthanasia and assisted suicide were legalized in 2001, a person whose state of health is hopeless is qualified to request euthanasia and assisted suicide. Oregon and Washington in the United States of America, by their laws on assisted suicide enacted in 1997 and 2008, respectively, allow anybody whose ailment would kill him or her within six months or less, to request assistance to die. *See* Catharine Paddock, *Washington State Legalizes Assisted Suicide*, MEDICAL NEWS TODAY (Mar. 06, 2009), http://www.medicalnewstoday.com/articles/141318.php; *See also Wet Toetsing Levensbeeindinging op Verzoek en Hulp bij Zelfdodoing* [*Termination of Life on Request and Assisted Suicide (Review Procedures) Act*] (2002) (Neth.).

[84] *Thanatology Definition*, *Encyclopedia Britannica Online*, available at http://search.eb.com/eb/article-9071928.

[85] HAZEL M. BIGGS, EUTHANASIA, DEATH WITH DIGNITY AND THE LAW 12 (Hart Publishing 2001); *See also* KASSIM, *supra* note 30.

will therefore be better to ease such pain by allowing the person to either kill him or herself, or be assisted to die.[86] Islam does not allow anybody to take his or her own life because of suffering or illness.[87] Rather, Allah enjoins Muslims to be patient, while awaiting His (Allah or God) mercy.[88]

A. THE SANCTITY OF LIFE IN ISLAM

As earlier stated, life is one of the main priorities of Islam. It follows therefore that, except in circumstances mentioned above by Allah in the *Qurʿān,* Islam forbids the taking of life.[89] Thus, the importance attached to the sanctity of life by Islam can be seen in the reaction of Allah to the killing of *Hābil* (Abel) by his brother *Qābil* (Cain). It is important to state here that both of them are the sons of the Prophet Adam (a.w.s). Allah declared as follows, "On that account, we ordained for the children of Israel that if any one slays a person – unless it be for murder or spreading mischief in the land, it would be as if he slew the whole people. And if anyone saves a life, it would be as if he saved the life of the whole people."[90]

The above is a re-affirmation of the importance attached to life by Allah (God). The story of Cain (Qabil) and Abel (Habil) as described above is the basis for the revelation of the verses relating to sanctity of life, wherein Allah proclaimed that the killing of a fellow human being is equal to wiping out an entire nation.

It is important to also state here that the sanctity of life principle includes children. This is important because it can be used to debunk the claim of proponents of euthanasia and/or assisted suicide who extended the practice to babies born with deformities. Perhaps, they have done so to save spending on an illness which they regard as irredeemable. Thus, in response, Allah says,

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[86] *Id.* KASSIM, *supra* note 30.
[87] The Qurʿān (Luqmān:17); *see also* The Qurʿān (Al-Zumar:42).
[88] *Id.* The Qurʿān (Luqmān:17).
[89] Al-Isra', *supra* note 83. This verse states that except in the following situations, where a person has killed another, the commission of the act zina (illegal sexual intercourse), and apostasy, the life of a Muslim cannot be taken by another Muslim. Thus, taking of life on the basis of an illness or suffering has no support in Islam.
[90] Al-Mā'idah, *supra* note 55.

> ...kill not your children because of poverty. We provide sustenance for you and for them; come not near to Al-Fawāḥish [shameful sins, illegal sexual intercourse] whether committed openly or secretly; and kill not anyone whom Allah has forbidden, except for a just cause [according to Islamic law]. This He commanded you that you may understand.[91]

In another breath, Allah emphasizes the fact that killing is forbidden except for a just cause. He explains further that, whosoever kills another, the families of the person killed have a right of retaliation in Islamic law. Allah therefore puts it this way,

> And do not kill anyone whose killing Allah has forbidden, except for a just cause. And whoever is killed wrongfully [Mazlūman -- intentionally with hostility and oppression and not by mistake], we have given his heir the authority [to demand Qisas, - Law of Equality in punishment- or to forgive, or to take Diya (blood money)]. But let him not exceed limits in the matter of taking life [i.e. he should not kill except the killer]. Verily, he is helped [by the Islamic law].[92]

Allah also showed in another verse that He (Allah) created mankind and therefore reserves the right to take his or her soul whenever He (Allah) wants. The verse states further that, if He (Allah) is ready to take the soul of mankind, nobody can delay or prolong it. Thus, the verse states:

> And if Allah were to seize mankind for their wrongdoing, He would not leave on it [the earth] a single moving [living] creature, but He postpones them for an appointed term and when their term comes, neither can they delay nor they advance it an hour [or a moment].[93]

As a furtherance to the provision of *Suratu-l an- Naḥl (The above verse),* Allah showed clearly that He alone can determine who dies and when. Thus, the Almighty stated clearly "... And no person can ever die except by Allah's Leave and at an appointed term...."[94]

To show the extent to which Almighty Allah forbids suicide and assisted suicide, He said "O you who believe! Eat not up your

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[91] The Qurʿān (Al-Anʿām:151).
[92] Al-Isrā', *supra* note 82.
[93] The Qurʿān (Al-Naḥl:61).
[94] The Qurʿān (Al-'Imrān:145).

property yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely, Allah is Most Merciful to you."[95] It follows from the above verse that except in circumstances permitted by Islam, nobody has the right under the Sharīʿah to kill his or her fellow human being. This verse has therefore showed undoubtedly that Islamic law does not allow euthanasia in whatever form.

VIII. WHEN THE KILLING OF A FELLOW MUSLIM WILL BE LAWFUL

As earlier stated, the life of a Muslim can be lawfully taken in certain situations. These situations are:

a. where the person to be killed had earlier killed another (in this situation, the families of the deceased have the right of revenge if they want to, or if they refuse *Diya* (blood money);[96]
b. where two married persons are convicted for committing adultery (*Zinā)* (in this situation, the law is that they are stoned to death);[97] and
c. where the person had apostatized (that is, the person changed his or her religion from Islam and then began to slander the religion).[98]

A. THE ḤADĪTH OF PROPHET MUHAMMAD (P.B.U.H)

The hadith refers to the sayings, actions and tacit approval of Prophet Muhammad (Pbuh). Thus, as earlier stated, the ḥadīth is meant to complement the holy Qurʿān in certain aspects where the former has decided either to be brief or silent on an issue. The following hadith buttress the fact that euthanasia and/or assisted suicide have no place, no matter how little, in Islam. This is because all the *Aḥādīth* are affirmations of the principle of the sanctity of life in Islam. According to Jundub, the prophet was reported to have said that, "A man sustained an injury during one

[95] The Qurʿān (Al-Nisā':29).
[96] Al-Bukhārī & al-Muslim, *supra* note 81, at 398.
[97] *Id.*
[98] The Qurʿān (Al-Tawbah:11-12).

of the wars in the early days of Islam and he committed suicide, and so Allah said 'My slave has caused death on himself hurriedly so I forbid paradise for him."[99]

In the same vein, Abū Hurairah reported that the Prophet (Pbuh) said, "He who commits suicide by throttling shall keep on throttling himself in the Hell-fire and he who commits suicide by stabbing himself shall keep on stabbing himself in the Hell-fire." [100] Furthermore the Prophet (Pbuh), according to Abū Hurairah, is also reported to have said, "avoid the seven great destructive sins." When asked by the people what those seven sins are? The Prophet answered:

> (1) to join partners in worship with Allah; (2) to practice sorcery; (3) to kill a person which Allah has forbidden except for a just cause (according to Islamic law); (4) to eat up Riba (usury); (5) to eat up the property of an orphan; (6) to show one's back to the enemy and fleeing from the battlefield at the time of fighting; and (7) to accuse chaste women who never think of anything touching their chastity and are good believers.[101]

It can therefore be concluded on the strength of the above that, in consideration of the definition of euthanasia and/or assisted suicide, it is illegal under Islamic law. The reason is that Islam has, as one of its priorities, the sanctity of life. This is further strengthened by the fact that Allah is the creator of mankind. He owns life and therefore possesses the sole right of determining when and how a person should die.[102]

Thus, on the strength of all the above verses and traditions of the holy Prophet Muhammad (Pbuh), it is submitted that euthanasia and/or assisted suicide has no place under Islamic Law. Similarly, if adequately employed, Islamic Law can be used to stem the spread of this 21st century practice. The dissemination of these provisions through public awareness campaigns and supplications (prayers) for identified terminally ill persons has been widely accepted even by the conventional law as the only

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[99] 2 SAḤĪḤ AL-BUKHĀRĪ 445.
[100] *Id.* at 446.
[101] 8 SAḤĪḤ AL-BUKHĀRĪ 840.
[102] Kiarash Aramesh & Heyder Shadi, *Euthanasia: An Islamic Ethical Perspective*, 6(5) IRANIAN JOURNAL OF ALLERGY, ASTHMA & IMMUNOLOGY 35, 35-38 (2007).

option for euthanasia and/or assisted suicide, today.[103] It must equally be said here that to date no Islamic country or places where Islamic law is in operation has ever allowed euthanasia and/or assisted suicide. This is because, as succinctly discussed above, euthanasia and/or assisted suicide falls within penal offences which carry the death penalty. Besides, it is the right of Allah as entrenched in the holy Qur'an, and all rights of Allah must without option be strictly followed by its adherents.

IX. CONCLUSION

In conclusion, euthanasia and/or assisted suicide call for greater action in view of the trend which it has taken across the globe. A careful perusal of the reasons for legalizing or wanting to legalize the concept earlier discussed has largely been due to the desire to reduce the heavy cost being expended on terminally ill persons, particularly those with cancer. Thus considering the state of the health sector and the level of poverty, particularly in developing countries, such a concept would, if allowed, put terminally ill and vulnerable persons in our society in danger. This is in view of the low cost of the drugs used when a person desires euthanasia and/or assisted suicide compared to the huge cost in treating, for instance, a cancer patient.[104] Thus, while normal medical treatment is ongoing, reliance should be placed on Allah

[103] Conventionally, it is called palliative and hospice care. The essence of this type of care is to reduce, but not to cure, the patient's ailment. This is done by providing all the necessary drugs that can reduce the patient's suffering. When all these fail, palliative sedation is embarked upon. The intention here, as opposed to terminal sedation, is to reduce pain, and not to kill the patients. However, in an attempt to do this, natural, as opposed to induced death may occur. Furthermore, another team, saddled with praying for the patients will go ahead, reading chapters of the Holy Qur'an or the Bible to the patient. The aim here is to assure the patients that, with Allah, his or her ailment can be cured. This act is a re-assurance to the patient that he or she has neither been forgotten nor abandoned by friends and relatives even in the face of death. This is an important aspect because research has consistently showed that, rather than the illness, terminally ill persons turned to euthanasia and assisted suicide because of fear of constituting a burden to their families and friends. They, terminally ill and vulnerable persons, are equally wary of being abandoned. Angela Morrow, *NHPCO Releases Statement on Palliative Sedation*, ABOUT.COM (May 11, 2010), http://dying.about.com/b/2010/05/11/nhpco-releases-statement-on-palliative-sedation.htm; Angele Morrow, *Does Palliative Sedation Cause Death?*, ABOUT.COM (July 9, 2009), http://dying.about.com/od/ethicsandchoices/f/sedation_vs_euthanasia.htm.

[104] *See supra* note 57.

(God), as the only one that can cure ailments or remove one's suffering. This is done by constantly praying so that the one who is sick would get better, while they (those who are ill) are equally reminded of the need to rely on Allah (God). The holy *Qurʿān* on this point says,

> My son! Aqim-Al-Ṣalat [perform As-Salat], enjoin [on people] Al- Ma' ruf- [Islamic Monotheism and all that is good], and forbid [people] from Al-Munkar [i.e., disbelief in the Oneness of Allah, polytheism of all kinds and all that is evil and bad], and bear with patience whatever befalls you. Verily, these are some of the important commandments [ordered by Allah with no exemption]. [105]

The above verse, which urges adherents to be patient in time of adversity, is corroborated by a hadith (sayings, actions and tacit approval of the holy prophet Muhammad [Pbuh]) narrated by Anas.[106] At this juncture, it is important to state that the ailment or sickness of Prophet Ayyūb (Job) (a.s.w) should serve as a lesson to Muslims and non-Muslims who have the intention of killing themselves due to ill health.[107] Prophet Ayyūb (Job) is reported to have suffered from a chronic skin disease which lasted for a period close to 18 years. During this period, everybody, except his wife, abandoned him. In spite of this, Prophet Ayyūb (Job) did not stop worshipping the Almighty Allah until he recovered. [108] In appreciation of what Ayyūb (Job) did, Allah referred to him as an epitome of patience.[109]

The combination of all these processes is called hospice and palliative care as earlier mentioned. Hence, the various provisions of the holy Qur'an and *Sunnah* of the holy Prophet Muhammad are enough to handle this dangerous concept if properly put into use by stakeholders. In the light of all the above, families and relations of sick persons are also enjoined to show affection and

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[105] Luqman & Az- Zuma, *supra* note 87; *see also* Al-'Imran, *supra* note 94.

[106] SAḤĪḤ AL-BUKHĀRĪ, *supra* note 101, at 362. In this hadith, the prophet was reported to have said, "None of you should long for death because of a calamity that had befallen him; and if he cannot, but long for death, then he should say, O Allah! Let me live as long as life is better for me, and take my life if death is better for me." *See also* The Qurʿān (al-Hijr:99); Az- Zuma, *supra* note 88.

[107] Sayed Sikandar Shah, *Mercy Killing is Islam: Moral and Legal Issues*, 1(2) ARAB L. Q. 112, 112 (1996). *See also* ICMAD AL-DIN ISMA, 'IL IBN KATHIR, QIṢAṢ AL-ANBIYĀ, 256-262 (1989); MOHAMMED IBN AHMED AL- QURTUBI, AL-JĀMIʿ LI AḤKĀM AL-QURʿĀN, 7, 133 (ND).

[108] *Id.,* Shah.

[109] The Qur'an (Al-Anbiyā:83-84).

love to their sick relatives. This should be done even when the ailment is terminal in nature, until Allah (God) finally takes away such person's life. Doing this translates into an assurance to the patient that he or she has not been abandoned. This position tallies with the views of opponents of the concept of euthanasia and/or assisted suicide that terminally ill and vulnerable people in the society need re-assurances, love, prayers, and support from families and friends as they approach death. Once all the above are effectively done, it will dissuade them (terminally ill and other vulnerable people) from embracing euthanasia and/or assisted suicide.

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