ISSN 1548-6605 (Print) ISSN 1930-2061 (Online)
DOI:10.17265/1548-6605

US-CHINA LAW REVIEW

VOLUME 12, NUMBER 8, AUGUST 2015

David Publishing Company
www.davidpublisher.com

US-CHINA LAW REVIEW

VOLUME 12, NUMBER 8, AUGUST 2015 (SERIAL NUMBER 116)

David Publishing Company
www.davidpublisher.com

Publication Information:
US-China Law Review is published monthly in hard copy (ISSN 1548-6605) and online (ISSN 1930-2061) by David Publishing Company located at 1840 Industrial Drive, Suite 160, Libertyville, IL 60048, USA

Aims and Scope:
US-China Law Review, a monthly professional academic journal, commits itself to promoting the academic communication about laws of China and other countries, covers all sorts of researches on legal history, law rules, legal culture, legal theories, legal systems, questions, debate and discussion about law from the experts and scholars all over the world.

Manuscripts and correspondence are invited for publication. You can submit your papers via Web Submission, or E-mail to law@davidpublishing.com. Submission guidelines and Web Submission system are available at http://www.davidpublisher.com/ or http://www.davidpublishing.com.

Editorial Office:
1840 Industrial Drive, Suite 160, Libertyville, IL 60048, USA
Tel: 1-323-984-7526 1-323-410-1082
Fax: 1-323-984-7374 1-323-908-0457
E-mail: law@davidpublishing.com; jurist@davidpublishing.com.

Abstracted/Indexed in:
Google Scholar
HeinOnline, W.S.Hein, USA
Database of EBSCO, Massachusetts, USA
Chinese Database of CEPS, Airiti Inc. & OCLC
Chinese Scientific Journals Database, VIP Corporation, Chongqing, P.R.China
Ulrich's Periodicals Directory
CSA Social Science Collection, Public Affairs Information Service (PAIS), USA
ProQuest, USA
Summon Serials Solutions
Universe Digital Library S/B, Malaysia
Norwegian Social Science Data Services (NSD), Norway

Subscription Information:
Print $520, Online $320, Print and Online $600 (per year)
David Publishing Company
1840 Industrial Drive, Suite 160, Libertyville, IL 60048, USA
Tel: 1-323-984-7526 1-323-410-1082
Fax: 1-323-984-7374 1-323-908-0457
E-mail: order@davidpublishing.com
Digital Cooperative Company: www.bookan.com.cn

David Publishing Company
www.davidpublisher.com

US-CHINA LAW REVIEW

VOLUME 12, NUMBER 8, AUGUST 2015 (SERIAL NUMBER 116)

CONTENTS

ARTICLES

US-CHINA LAW REVIEW

VOL. 12 **August 2015** **NO. 8**

THE CONSTITUTIONAL REFORM IN ROMANIA

Marian Enache[*]

The Constitution is, par excellence, the fundamental law, the legal and political settlement of a state. All other normative acts must be so designed that they do not contravene the Constitution. Therefore, between the Constitution and other normative acts there are some differences that highlight the supremacy of the Constitution. The constitutional revision can be supported and initiated when the social realities are changing, and these changes are so significant that some constitutional provisions no longer meet the reality or they tend to stifle real life in social relationships that are rapidly developing and changing.

INTRODUCTION

In the Romanian history and legal language, decisions which ensured political order were placed under various names such as: solid laws, fundamental laws, establishment, codex, regulation, constitution or constituent[1].

By mid-nineteenth century, different concepts were used, until, in 1866, the solution of a constitution was imposed. In everyday language, the term represented a compromise between the various Romanian political views, a feature that disappeared in the Constitution, as recast in the years 1938-1991.

The Constitution, as a written set of rules, an upper customary law, absolutely necessary for a state, was elaborated in the socio-political environments of the Principalities, by differentiating and crystallising some fundamental principles. In the center of the linguistic, historical and political

[*] Ph.D. in Constitutional Law and Political Institutions, Member of the Chamber of Deputies, Romanian Parliament; Research fields: Constitutional Law, Parliamentary Law, Administrative Law, Election Law, Private Law.

[1] Edda Binder Iijima, *The Concept of Constitution in the History of Romanian Thinking*, in V. NEUMANN, A. HEINEN, ROMANIA'S HISTORY THROUGH CONCEPTS 299 and subseq (Polirom Publishing House, Bucharest 2010).

 doi: 10.17265/1548-6605/2015.08.001

debate regarding the constitutional system in Moldavia and Wallachia, respectively in Romania, the focus was on the fundamental principles of the state. The first attempt at administrative reorganization was due to the Cărvunarilor Constitution of 1822. A first step in the formation of the Romanian nation and of the state was the Constitution of 1866. With it, the concept of Constitution becomes a part of the daily social-political languages.

The evolution of the Romanian constitutional thinking was done in response to the fundamental laws of the state imposed from the outside, as a reaction to concrete political consequences thereof. The period between 1821 and 1866 is characterized by the development of two complementary avenues on the evolution of the thinking and the drawing up of the Constitution[2]:

One-way is the claims of the middle and lower-ranking nobles in terms of participation in political life. The development of political awareness in this part of the nobility was due to their more frequent contacts with the West and the studies abroad, especially in France, which facilitated the assimilation of modern political and legal concepts and the practical lessons about developments.

The other direction on the development of the drafting of the Constitution was due to the intervention of the Great Powers. First, Russia has codified through several agreements with the suzerain power[3] the constitutional principles of the rule of law for Moldova and Wallachia, therefore imposing to them the Organic Regulations (1831/1832)[4].

The Constitution of 1866 met the criteria of a basic law, as it has been passed by the sovereign people represented by the Constituent Assembly. The Belgian constitution was the model: its attractiveness lies in the success of the introduction in Belgium of a constitutional monarchy with a foreign ruler. The Constitution of 1866 was a European document; it placed the country among the constitutional states of the continent. Developed by respecting the principle of the sovereignty of the people, the new Constitution stipulated a bicameral regime of the representatives and the separation of the powers of the state, defined the decision-making powers of the institutions of the state, regulated the access to power and guaranteed civil rights. The radical liberals, the conservatives from the middle and lower nobility, as well as a group of intellectuals and craftsmen have secured access to government. Although they ended the traditional power of the boyars, they excluded from power two social strata, Jews and peasants.

---

[2] Edda Binder Iijima,*op. cit.*, at 303.
[3] Convention of Akkerman in 1826 or The Peace from Adrianopol in 1829.
[4] Later, the Great Powers would take over the task of reorganizing the Principalities by Paris Convention in 1858.

Despite its progressive elements, it can be said that the fundamental law of 1866 implemented an exclusive "national code", by which discriminations were stated based on religion and social inequality.

The Constitution was modified in 1879, 1884 and 1917. The new Constitution in March 1923 essentially took over the decisions of the 1866 Constitution. The absence of a political consensus in case of the 1923 Constitution was seen in the crisis of the royal house (1926), in the return of Carol II (1930) and in the legal system, through radical and violent actions of the Legionnaire Movement.

The crisis of the state and of the society in the 30s led to the drafting of the new Constitution of 1938, decreed by Carol II, which was a violation of the basic principles of the constitutional idea from 1866. A separation of powers no longer existed; the authority and decision-making power were concentrated in the hands of the king. As a historical model, it referred to the constitutional project of Alexandru Ioan Cuza in 1863, which stipulated the government only through the Prince and the legitimacy of the new order directly through people (call for plebiscite). The Constitution of Carol II was suspended due to the 1940 territorial concessions to the Soviet Union and Hungary and with leaving of the political scene by its author.

General Ion Antonescu ruled Romania from 1940 to 1944 in the absence of a Constitution and in a provisional state legislature. Following the decision of the king Mihai I arms were turned against the fascists, and a royal decree in August 1944 formalized the old Constitution of 1923. Its provisions on the separation of powers and the guarantee of civil rights were undermined again in 1947, after the fraudulent takeover of power by the communists with the support of the Soviet Union. The abdication of King Mihai I opened the road to the proclamation of the Romanian People's Communist Republic.

The Constitutions of 1948, 1952 and 1965 meant a paradigm shift in terms of content, language and semantics of the constitutional text, also imposed and controlled by the exertion of external pressure. The concept of Constitution has been preserved, but its meaning altogether targeted a different political and social reality for the Romanians. The reassessment of the concept of a Romanian nation was made in the 1965 Constitution by unbundling the principles of the socialist internationalism and of the Soviet claim to authority. This repealed the autonomous rights of the minorities and postulated an indivisible and inalienable state territory.

I. THE 1991 CONSTITUTION—ELABORATION, ADOPTION AND APPROVAL

After the Romanian Revolution of December 1989, in the political and

legal process of rediscovery and revival of parliamentary we can distinguish two periods: before the elections of 20 May 1990 and after the convening of the Constituent Assembly, resulting from these elections[5]. In the first period, the beginning is the creation of National Salvation Front, as a result of the popular uprising in December 1989. Following the decision of the National Salvation Front to transform into a political party, it changed the name of the National Salvation Front Council in the Provisional Council for National Unity[6], in February of 1990. The main act of the Provisional Council was the Decree-Law no. 92/1990, which covered the main authorities of the political regime—the bicameral Parliament consisting of the House of Representatives and of the Senate, the Romanian President elected by universal, equal, direct and secret, freely expressed ballot and the Government, of a parliamentary origin, as well as the electoral system based on the principle of proportional representation[7].

After the Romanian Revolution of 1989 that overthrew the totalitarian communist regime, the Constituent Assembly established by elections of the House of Representatives and of the Senate[8] approved the establishment of a Commission for drafting of a draft of the Constitution[9], for the adoption of a new fundamental law that reflects the profound changes in the political, social and economic order, by establishing a new democratic system, a

[5] MARIAN ENACHE, PARLIAMENTARY DEMOCRACY 46 and subseq (Universul Juridic Publishing House, Bucharest 2012).

[6] For a broader development, *see* Marian Enache, *Mihai Constantinescu*, in THE REBIRTH OF PARLIAMENTARY IN ROMANIA (Polirom Publishing House, Bucharest 2001).

[7] Decree-Law no. 92/1990 for the election of the Parliament and the President of Romania, published in the Official Gazette of Romania, Part I, no. 35 of 18th of March 1990, repealed by Law no. 69/1992 on the election of the President of Romania, published in the Official Gazette of Romania, Part I, no. 164 of 16th of July 1992, in turn repealed by Law no. 370/2004 on the election of the President of Romania, republished in the Official Gazette of Romania, Part I, no. 650 of 12th of September 2011, with subsequent amendments. Decree-Law no. 92/1990 was, in fact, a small constitution, an act of constitutional character that foreshadowed some of the principles of the state organization established by the 1991 Constitution, such as the bicameral structure of Parliament and the principle of separation of legislative, executive and judicial powers.

[8] On 20th of May 1990, Romania's bicameral parliament held its first free elections after the communist period, in accordance with Decree-Law no. 92/1990 for the election of the Parliament and the President of Romania, issued by the Provisional Council of National Union and published in the Official Gazette of Romania, Part I, no. 35 of 18th of March 1990. Decree-Law no. 92/1990 was repealed by Law no. 69/1992 on the election of the President of Romania, published in the Official Gazette of Romania, Part I, no. 164 of 16th of July 1992.

[9] By Decision of the Constituent Assembly no. 1/1990 on the Regulation of the Constituent Assembly, republished in the Official Gazette of Romania, Part I, no. 42 of 2nd of March 1991, with subsequent amendments. The Commission was established on the basis of the existing political algorithm which resulted in the Constituent Assembly after the parliamentary elections of 20th of May 1990. Thus, the Commission was composed of 28 members, including 13 representatives of the F.S.N., 2 representatives of the P.N.L., 2 representatives of the U.D.M.R., 1 representative of the P.N.Ț.-C.D., and representatives of the national minorities and of the main universities in the country.

political pluralism, the separation of powers, the recognition and respect for the rule of law, as well as for the rights and freedoms of citizens.

After initially approving and improving the theses of the Constitution by the Constituent Assembly, the Constitution draft drawn up by the commission was presented in a final form for the discussion of the political forum that, through amendments made by all political parties, adopted the Constitution on 21 November 1991, subsequently submitted to the approval of the popular referendum[10] on 8 December 1991. With 8,464,624 (77.3%) votes out of a total of 10,948,468 participants, Romania's new democratic Constitution was ratified and entered into force on the same date[11].

Since the Revolution of December 1989, Romania finally broke ties with the communist-anachronistic structures; the new country's constitutional edifice inherently rejects the existence of a single party, opposes any monocratic tendency of a dictatorship and leaves no chance for distortion of the political and social space with totalitarian leadership methods.

The new Constitution, stemming from constitutional Romanian traditions, is anchored in the modern concepts of contemporary constitutional law and of public international law. The genesis and the legitimacy of the new Constitution is the very Romanian Revolution of 22 December 1989. The Constitution as a whole, promotes the rights and freedoms of citizens, on the assumption that the ratio between what should be allowed in a democratic society and what should be prohibited is ordered by the common good.

The fundamental act approved by Parliament includes not only a broad repertoire of the rights and freedoms of citizens, including the right to private property, but also a whole arsenal of political and legal guarantees.

Within the system of public authorities, the bicameral structured Parliament, constituting a fundamental center of the political and legislative power, has, in the economy of the constitutional provisions, a distinct place with differentiated tasks, enabling it to exercise the functions of control and regulation as a representative organ of the nation, resulted from free elections.

The Romanian presidential institution is an essential component of the Executive and a symbol of national unity, in which the President, being elected directly by the people, for a limited time, through the independence from political parties, becomes a mediating factor in the functioning of State

[10] The organization and the holding of the national referendum on the Constitution of Romania was regulated by Law no. 67/1991, published in the Official Gazette of Romania, Part I, no. 236 of 23rd of November 1991.

[11] Data provided by the Statement of the Central Electoral Bureau on the outcome of the national referendum on the Constitution of Romania, which took place on 8th of December 1991, published in the Official Gazette of Romania, Part I, no. 250 of 14th of December 1991.

powers and of the society.

The Government, an authority conducting domestic and foreign policy of the country, acts under the direct control of Parliament representatives who, through specific means of control, sanction the potential excesses of the Executive.

Local government observes the principles of local autonomy and of the decentralization of public services, enabling local communities to develop their own power to administer specific interests, within the framework of free elections.

For the third of the state powers, the judiciary, constitutional rules are intended for it to stand, unequivocally, under the coordinates of the rule of law[12].

For the Army, a decisive factor in the victory of the Revolution and a stability pillar of our democracy, being completely depoliticized, by making it subordinate solely to the will of the people, it was given, by the new Constitution, the well-deserved dignity and honor.

The freedom of speech in the Romanian society is no longer a crime, severely repressed, but a means of expression of opinions, attitudes and beliefs that converge towards raising the quality of the education and of the social awareness.

A distinctive feature of our Constitution is that it has organically integrated useful institutions of modern constitutional law. Thus, in the system of the guarantees of the citizen's rights was set the institution of the Ombudsman, a legal figure inspired by the Swedish Ombudsman, which has spread to many countries of the world. The Constitutional Court should also be highlighted and its role as a guarantor of the supremacy of the Constitution.

During the time when the 1991 Constitution was applied until the 2003 review, we could find that its provisions have proven fully viable, contributing to the formation of a new political system in Romania, a new constitutional and legal order in which the institutions, the structures and principles of the rule of law, the market economy based on the free enterprise, as well as the recognition and the guarantee of the rights and freedoms of citizens were perceived and rooted in the public consciousness.

Some of the main features that characterize the 1991 Constitution are as follows:

- the principle of non-retroactivity of the law was included for the first time in the Constitution, giving it a constitutional standing;

[12] The rule of law, the independence and the tenure of judges, the establishment of the Public Ministry, the authenticity of the rights to defense are some of the constitutional guarantees in the sphere of the justice enshrined in the supreme values of the Romanian society.

- the regulation of the Ombudsman[13];
- the regulation of the Constitutional Court and of its role as guarantor of the supremacy of the Constitution;
- the regulation of the Economic and Social Council;
- the regulation of the Superior Council of Magistracy and the guaranteeing, in this way, of an independent judiciary;
- the constitutionalising of the law, reporting of all ordinary legislation to the requirements, values and imperatives of the Constitution. It is noteworthy the influence the Constitutional Court (a first), after the European model, which ensures the supremacy of the Constitution in the relations between public authorities and by checking the constitutionality of laws by *a priori* and *a posteriori* control. The jurisprudence of the Constitutional Court is relevant in this regard.

II. THE REVIEW OF THE CONSTITUTION IN 2003

The issue of constitutional revision is first a matter of policy and legislative drafting practice and, later, a purely doctrinal one. The constitutional revision can be supported and initiated when social realities are changing, and these changes are so significant that some constitutional provisions no longer correspond to reality or they tend to stifle real life as it regards to rapidly developing and transforming[14] social relationships.

Since the adoption of the 1991 Constitution and until its review in 2003, the Romanian state and society have developed in a European-style constitutional democracy. In 2003, the Romanian people expressed its decisive option of an integration into the Euro-Atlantic structures.

In those circumstances, the operation of reviewing, amending texts of the 1991 Constitution became necessary. The 2003 revision was aimed essentially at introducing specific regulations to allow Romania to join the European Union and NATO. The drafting Committee[15] of the text to revise

[13] Given correspondent in the institution of the European Ombudsman.

[14] MARIAN ENACHE, THE REVISION OF THE CONSTITUTION 9 (Universul Juridic Publishing House, Bucharest 2012).

[15] *The Committee to Develop the Legislative Proposal on the Revision of the Constitution* was established under Parliament Decision no. 23/2002, published in the Official Gazette of Romania, Part I, no. 453 of 27th of June 2002, and was made on the basis of the political algorithm of 21 deputies and senators with voting rights (9 were designated by the P.S.D. Parliamentary Group, 5 were designated by the P.R.M. Parliamentary Group, 2 each were designated by the P.D. Parliamentary Group, by the P.N.L. Parliamentary Group and, respectively, by the U.D.M.R. Parliamentary Group, and the Parliamentary Group of the National Minorities appointed one deputy), a member of the Government (Acsinte Gaspar – Minister for Relations with the Parliament), a representative appointed by the President Romania (Mihai Constantinescu – presidential advisor) and the Ombudsman (Ioan Muraru).

the Constitution and the Revision Assembly did not limit themselves only to this end, and they proposed the reconsideration of other texts of the 1991 Constitution, adopting new solutions on the organization of public authorities, as well as some new mechanisms and procedures for their operation.

Obviously, the Revision Assembly was held to observe, in their efforts to amend the Constitution, the imperative limits[16] expressly provided for in Art. 148 of the Constitution of 1991. We present below the main changes to the Constitution brought by the Law on the revision of the Constitution no. 429/2003, approved by national referendum[17] on 18-19 October 2003.

Access to culture was guaranteed. A new category of rights was introduced: the freedom of the individual to develop his spirit can not be restricted; the state must ensure the preservation and promotion of cultural spiritual identity of Romania in the world.

Also introduced was the right to a healthy environment, ensuring the legislative framework for exercising this right.

With regard to political rights, candidates for particular functions of the representative institutions of the state have to be at least 23 years of age for the Chamber of Deputies, at least 33 years for the Senate and at least 35 years for the President. Before this change the minimum age for candidacy for the position of senator and of President was the same, namely 35 years.

Employers' organizations have received constitutional recognition and are treated equally with the unions. Also, guaranteeing the right to work remained in its liberal version of freedom of choice, and not in the social-democrat one, as the obligation of the state to ensure a job for each person; social protection measures were supplemented with professional training.

Private property is guaranteed, the expropriation based on ethnic, religious, political or other criteria is prohibited; before the review, the constitutional provisions were limited the protection of this right.

Free access of persons to an economic activity, free enterprise, and their exercise under the law shall be guaranteed, and citizens are entitled to all forms of social insurance, public or private, as well as to the measures of

[16] The provisions on the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, the territorial integrity, the independence of the judiciary, the political pluralism and the official language shall not be subject to revision. Also, no revision shall be made if it results in the suppression of rights and freedoms of citizens or of their guarantees. The Constitution can not be revised during a state of siege or emergency, or in wartime

[17] The results of the national referendum were confirmed by the Constitutional Court Decision no. 3/2003 to confirm the result of the national referendum of 18th-19th of October 2003 on the Law amending the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 758 of 29th of October 2003.

social assistance according to law, a change which allows the express existence of private social insurance forms along with public ones and mentions distinct social assistance measures.

Disabled persons shall enjoy special protection, the state ensures the rule of a national policy of equal opportunities, prevention and treatment of disability, for the effective participation of people with disabilities in community life.

Military Duty for Romanian citizens was regulated by an organic law, and the compulsory nature of military service was eliminated.

The Ombudsman can be seized only with requests from individuals and not from businesses; he shall be assisted by two deputies; the term of office was extended from 4 to 5 years, and the task of his appointment was given in the competence of Parliament as a whole, whereas some of these provisions are already contained in the organic law governing the organization and functioning of the Ombudsman.

The minimum number of citizens who can initiate a legislative proposal has been reduced from 250,000 to 100,000; this change is part of the general trend of the constitutional revision in 2003, which wanted to create an environment favorable to participation of citizens in public life.

Legal documents and procedures before local authorities can be achieved in minority languages, in accordance with the provisions of a future organic law.

The right to vote in local elections and in those held for the election of the European Parliament was granted to all EU citizens resident in the country, after Romania's accession to the European Union; this provision was necessary and mandatory for all candidate countries for the accession to the European Union, under the *communautaire acquis*, which has to be accepted and applied as such from the beginning by countries wishing to join the European Union.

The Romanian state is based not only on the unity, but also on the solidarity of the Romanian people; the change on social solidarity can be justified by the increased importance given to the concepts of solidarity and social protection under the European construction and integration.

The differentiation of competencies of both Houses of Parliament and the slight decrease of the areas where joint sittings are mandatory, together with the abolition of the mediation procedure, were accompanied by the setting of time limits for the examining of the draft law in the first reading (45 days for ordinary laws and 60 days for codes of a larger scale). If these limits are exceeded, the draft laws will be considered as tacitly adopted and will be automatically sent to the other House for debate; the second

Chamber shall decide definitively on that bill; the domain of the organic law seems a little low; the differentiating of competencies of both Houses is an important step and technical changes related to enactment are likely to expedite the procedure of adoption of laws, while offering prompt solutions for any bottlenecks that might arise due to the maintenance of the Parliament bicameral structure. The delimitation of competencies of both Houses can not be regarded as a success, as practice has shown that in many cases it can actually reach a decision of the lawmaking Chamber, considering that legislative initiatives are adopted tacitly by the first Chamber notified.

Laws shall be published in the Official Gazette of Romania, Part I and come into force 3 days after their publication and not on the date of publication. This change is very important, since it enabled a better enforcement of laws, avoiding certain situations produced in the past in which judges and court hearings entering first thing in the morning could not objectively be familiar with laws, new or modified, which were published in that day and were applicable in cases to be decided by them.

The duration of the presidential mandate is different from that of the 4 years parliamentary term, and it is of 5 years. This change occurred during the debates in the Chamber of Deputies, the Senate agreed with it, and it is important to ensure continuity of the idea of state institutions.

Impeachment of the President may be decided by the Chamber of Deputies and the Senate in joint session, with a two thirds majority; it causes the suspension of the President; the court jurisdiction belongs to the High Court of Cassation and Justice; this change was required to the extent that the procedures relating to the liability of the President were not specified, the applicable rules being, mutatis mutandis, those on members of the Parliament.

The changing of the composition of the Government, which entails a change in its political structure, can be made only with the approval of Parliament, on the Prime-Minister's proposal, with the appointment of new ministers by the President of Romania. The President can not however propose the changing of the Prime–Minister; this addition was intended to preserve the semi-presidential essence of the Romanian political system, through participating in any decision on the structure of the Government of both the Prime–Minister and the President, with the mandatory approval of Parliament.

Either of the two Houses of Parliament may adopt simple motions that outline their position on issues of internal or international policy or on issues that were the subject of an interpellation.

Government liability for a bill only lead to the adoption of that draft amendments proposed by Parliament and accepted by the Government.

The adoption of emergency ordinances is allowed only in exceptional cases that can not be postponed, but the Government must justify the urgency. However, if the first Chamber notified with the approval of such ordinances does not adopt it within 30 days, the ordinance shall be considered adopted and will be forwarded to the second Chamber. Parliament will have to debate in an emergency procedure such an ordinance; this change was necessary in the context of Romanian legislation, where legislative instability was accompanied by primary regulatory powers that the Government had, and sometimes abused, but was poorly made.

Local government is based on the principles of autonomy and decentralization. The Prefect leads the decentralized services of ministries and of other central authorities in the territory; between the prefect and the local councils and mayors there are no subordination relationships.

The appointment of judges and all other decisions relating to their career will be proposed to the Romanian President only by the Superior Council of Magistracy. The Supreme Court became The High Court of Cassation and Justice and ensures the uniform interpretation and application of the law by all courts.

As we said above, the 2003 review aimed essentially at introducing specific regulations to allow Romania to join the European Union and NATO. These resulted in Title VI of the Romanian Constitution, republished, respectively in art. 148 and 149. From a legal perspective, a country's accession to the European Union requires ratifying several international treaties, generically named by the Constitution as constitutive treaties of the European Union. Prior to the revision of 2003, the Romanian Constitution had general provisions on the ratification of international treaties[18] and special provisions regarding only the just interpretation and application of treaties on international human rights[19], but did not include provisions on the statutory transfer of state powers to international organizations or on the joint exercise with other countries of competencies

[18] Art. 11 of the 1991 Constitution stated on para. (1) that "The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the treaties it is a party to", and on para. (2) that "Treaties ratified by Parliament, according to the law, are part of national law".

[19] Art. 20 of the 1991 Constitution stated on para. (1) that "Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to", and on para. (2) that "Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence".

specific to state sovereignty. This objective was achieved through art. 148, which establishes specific procedural rules for the ratifying of such treaties. Given the nature, the scope and the specifics of the international organization concerned in case of art. 149 of the Constitution of Romania, republished, Romania's accession to the North Atlantic Treaty is fundamentally different from the joining to the European Union; in fact, the objectives pursued by the Romanian state in the two situations are different. However, the constituent power provided for the same type of special procedure for the accession to the European Union, namely the ratification of an international treaty by adopting a *sui generis* law in the joint session of the Parliament, with a majority of two thirds of Senators and Deputies.

The application of the revised Constitution in 2003 meant in some ways a breakthrough, but there were also some failures that have later generated new objections and debates, which set again the question of a new revision of the Constitution, both among politicians and specialists and among the public opinion.

CONCLUSION

The temptations for a constitutional revision have not stopped among governors, politicians, or public opinion. Many promoters of the idea of a permanent revision of the Constitution believe that policy failures in all fields were caused by imperfections of the Constitution. Therefore, for example, there are civil society groups that initiate independent projects on the revision or even on the adopting of a new Constitution, which they propose on a large audience for discussion (e.g. The Constitution of the Citizens[20] or The Constitution of the Citizens-version Cojocaru[21]).

We recall here that the last attempt to revise the Fundamental Law by members of Parliament was initiated by Parliament Decision no. 17/2013 on the establishment of the Joint Commission of the Chamber of Deputies and of the Senate for drawing the legislative proposal to revise the Constitution of Romania, published in the Official Gazette of Romania, Part I, no. 95 of 15 February 2013, with subsequent amendments. Thus, the composition of the Commission was established (23 deputies and senators belonging to the entire political spectrum), which has as a mission to finalize the objectives and the theses on the revision of the Constitution, based on proposals received from parliamentary groups, as well as the drawing up of the legislative proposal to revise the Constitution and of the legislative proposal

[20] *Available at* http://constitutiacetatenilor.blogspot.ro.
[21] *Available at* http://www.variantacojocaru.ro/?tag=constitutia-cetatenilor.

on the organization and the conduct of the referendum on the Revision Law adopted by the Parliament. The Commission has effectively started working at the beginning of 2015.

The appetite for a permanent revision of the Constitution seems to dominate both the rulers and the politicians, who fancy too often and obsessive ideal schemes of constitutional revision, even if they are not appropriate or necessary. Is it about a substitution between the objectives of government programs more difficult to achieve and a so-called serious concern to modify an imperfect Constitution as the cause of all evils and failures of governments? Are the governments and a part of Romanian society focused on the exclusive fault of the Constitution, making it responsible for the failures of governments on public policy? Moreover, even if it were so, how are we to explain the failures of the parliaments and of the governments of legislature 2008-2012 and of 2012-2016 legislatures on the constitutional revision?

The new Parliament of Romania, a successful outcome after the 2012 elections of the Social Liberal Union who has achieved a score of 60% of the votes cast[22], started out audacious and optimistic for a comprehensive and appropriate review. Currently, members of the Constitution Review Commission formed in 2013, despite the declaration by the Constitutional Court of 26 articles as "intrinsically unconstitutional", try to recover under other editorial appearances what the Court found legally substantially unconstitutional. Is the contemplation of failure it so intense and is the ambition so great that one should try a proud and awkward enterprise to draw up a draft revision of the missed corpse, which was simply not removed even with the forceps of the Venice Commission?

Must the constitutional revision represent only an idea of improvisation of some partisan groups that alternate in the exercise of state power or a necessity to adopt constitutional solutions which are rational for the adaptation of the evolution of society as a whole? Therefore a reform of a society as a whole must be done at its normal time, neither too early, nor too late, when we are in the presence of determined conditionality of political changes. This is actually the specific difference between the Constitution, the fundamental law of a political order, and a law regulating social relations subsequent to those of a constitutional nature.

About this measure of a job well done, about the causes and the conditions in which constitutions should be revised there are more and more talks in the society, and discussions are held between Romanian specialists

[22] Source: http://www.becparlamentare2012.ro/rezultate.html.

in constitutional law, political science, sociology and history[23]. Opinions expressed in terms of the revision of the Constitution deal with the necessity and appropriateness of such an approach and converge on the idea that the process seems inadequate to the social realities and real needs of the Romanian democracy. Thus, if in the opinion of Professor Ioan Muraru the amendment of the Basic Law should be treated as an action of major responsibility, carried out with the support of the experts in the field, Professor Ion Alexandru argues that the purpose of the revision of the Constitution should be the strengthening of democracy, while Professor Genoveva Vrabie says that a constitutional revision is necessary, but for now, it is not appropriate, and Professor Mircea Criste shows that it should target for the consolidation of a genuine democracy and not some narrow, momentarily changes.

In the opinion of Professor Elena Simina Tănăsescu, any constitutional reform must be based on an analysis of political expediency, but also on a regulatory diagnosis and prognosis. In those circumstances, one might find that "sometimes it can be better not to alter the constitutional provisions that raise practical problems if it turns out that those are precisely the guarantees of the democracy and of the rule of law and the most effective ways of limiting the arbitrary power"[24].

The conclusion that emerges is that a new attempt to amend the Basic Law is not consistent with the current priorities of the Romanian society. Obviously, we always have to balance fairly the intense desire of some politicians to stand out and to quickly win the public prestige by the fact of being the authors of the review of the country's Basic Law (the Constitution), with the imperatives of the constitutional stability of a smoothly, fluent and democratic process and of a truly democratic state.

Even after the 2003 revision, the Constitution of Romania continues to fulfill its mission sufficiently well to provide a framework and a measure for the power manifested in a state, to the extent that it may deserve a greater period of stability, at least until Romania's political class should show that it understood that the Romanian state has stepped into the modern era through this fundamental law.

---

[23] *See The Opportunity of the Revision of the Constitution of Romania*, 5 "LAW"—LAW REVIEW 11—30 (2014).

[24] *See* Elena Simina Tănăsescu, *Should We Revise the Constitution of Romania?* 5 "LAW"—LAW REVIEW 11—13 (2014).

WOMEN AND DIVORCE: LEGAL JUSTICE STUDY OF SOCIETAL AND JUDICIAL PERSPECTIVE TOWARD UNRECORDED DIVORCE IN ACEH, INDONESIA[1]

Jamaluddin[*], Nanda Amalia[**] & Laila M. Rasyid[***]

This article aims to explore the perspective of a judge at the Sharia Court, ulama (Islamic traditional scholars), the parties litigant, tuhaadat (indegenious elders), as well as the public related to the implementation of Article 39 of the Marriage Act which stipulates that divorce can only be done in the presence of the trial—compared with the increasing number of divorce that occur outside the court or in other terms connotated as "cerai liar" (unofficial divorce) or divorce that is not recorded in the court (unrecorded divorce). According to the state, divorce law must involve legal institutions and judicial authorites, but for some people—divorce is a domestic matter—that does not need the state to involve. Reality shows that unofficial divorce would cause hardship for the parties, especially women in the terms of civil registration. It is almost certain that in every divorce imposed by a husband against his wife outside the court, her husband does not fulfill the obligation for his wife as a result of the divorce, such as nafkah idda (divorce stipend), nafkah madiyah (judicial stipend), mut'ah (divorce alms), and the division of shared properties.

[1] This study was finance by Directorat General on Research and Community Service, Year 2014. The authors would like to thank DITLITABMAS DIKTI. A part of this paper has been presented in the 5th Biannual International Conference on Aceh and Indian Ocean Studies (ICAIOS) UIN Ar-Raniry Campus, Banda Aceh, November 17-18, 2015 under title "Cerai Liar dalam Masyarakat Aceh: Studi Sosio-Legal tentang Hukum Perceraian dalam Perspektif Masyarakat, Ulama dan Hakim Mahkamah Syar'iyah" (Illegal Divorce in Acehnese Society: A Socio Legal Study on Divorce Law as Perceived by Society, Islamic Scholars and Judges of Islamic Court." A profound acknowledgement we should address to Al Chaidar who has translated this article from Bahasa Indonesia for his meticulous effort.

[*] Jamaluddin, a Professor at Faculty of Law and Lecture at Graduate Program in Legal Studies, Faculty of Law - Malikussaleh University, Aceh, Indonesia. Research fields: Family Law and Customary Law.

[**] Nanda Amalia, Lecture at Graduate Program in Legal Studies, Faculty of Law, Malikussaleh University, Aceh, Indonesia. Research fields: Women and Legal Justice System & Contractual Law.

[***] Laila M. Rasyid, Lecture at Graduate Program in Legal Studies, Faculty of Law, Malikussaleh University, Aceh, Indonesia. Research fields: Customary Law.

 doi: 10.17265/1548-6605/2015.08.002

INTRODUCTION

This research moved from the data presented by the various print media[2] and statistical data presented by the Supreme Court through its website[3] related to the increasing number of divorce rates from year to year. Aceh was specifically chosen as a test site considering its existence as the privileges province which imposes *Syariah Islam* and considering the phenomenon of the increasing number of divorce rates in the community. On January 12, 2010, local news website Serambi Indonesia reported that there were 19 districts/cities in Aceh which had a high divorce rate and the contested divorce dominated all the cases. Statistical data presented by the Directorate General for Religious Courts also showed an increasing number of verdict against divorce cases in Aceh. In 2008, there were 765 cases of thalak divorce and 1.598 contested divorce filed by wife. In 2009, there was a decrease in the number of thalaq divorce as many as 711 cases but contested divorce filed by wife cases increases with the number 1,754. In 2010 and 2011 also showed an increase number, there were 850 thalaq divorce cases and 2,034 contested divorces filed by wives, and in 2011, there were 1,011 divorce cases and 2,408 contested divorce filed by wives.[4]

Preliminary studies has been conducted in early January 2012 dicovered, there were 11 (eleven) divorce cases filed by women to the sharia court Lhokseumawe because they had previously been divorced by her husband outside the court. In many cases, the petition for divorce filed by women was forced to, because they have to get legal certainty on the status before the state. To confirm this, the authors interviewed one of the judges on the sharia court Lhokseumawe and got information that approximately 80 percent of incoming divorce cases are because the woman has been divorced at home.[5]

The increasing number of divorce rates filed to the Court of Religion and Sharia Court[6] in Aceh is a phenomenon that can not be denied and

---

[2] *See* more, www.ccde.or.id/index.php?option=com_content&view=article:isteri-ramai-ramai-gugat-cerai-suami; and on the issue of high rate of divorced, *see*, www.lintasberita.com/Nasional/.../Angka-Perceraian-Naik-100-Persen; www.detiknews.com/read/2011/08/04/.../menekan-angka-perceraian?...; Angka Perceraian Pasangan Indonesia Naik Drastis 70 Persen ...www.republika.co.id.

[3] Further more on this issue, *see*, http://putusan.mahkamahagung.go.id/ditjen/agama/; www.republika.co.id (last visited Jan. 24, 2012) and http://www.badilag.net/statistik-perkara/10119-informasi-keperkaraan-peradilan-agama-tahun-2011.html.

[4] Source, http://www.badilag.net/statistik-perkara/10119-informasi-keperkaraan-peradilan-agama.

[5] Interview with Judge FH on 21 January 2012.

[6] Sharia Court (*Mahkamah Syar'iyah*), usually abbreviated as *M. Sy*, is a formal religious court in Aceh. Sharia Court was established in 1992 to conduct religious related process of law in Aceh Province as a part of national legal justice system in Indonesia.

becoming the background of this study. The implementation of Article 39 of the Marriage Act becomes ineffective when associated with the protection of women's rights as a result of the divorce. There were implication due to the article 39 (1) for women in particular, when the divorce has been pronounced by her husband not before the trial[7] and personally based on her religious beliefs, she considers herself divorced—but on the other hand, the state does not recognize this kind of divorce.

Legal certainty to the status of a wife who has been divorced outside the court can only be obtained through the judge's decision, but the reality in the society inficates different situation. According to a report on the legal aspects of divorce out of court—conducted by SMERU Research Institute and Indonesian Supreme Court—showed that nine out of ten female heads of households can not access the court for their divorce case. The study also found that the court fees and transportation costs to court is still a major obstacle for women.[8] In Aceh, the conditions are not less than those shown in SMERU's studies. This condition is exacerbated by the lack of legal understanding of society—particularly women—related to the legal protection which can be provided by the state through religious courts to the fulfillment of women's rights after divorce. *Tuha Peut*—as an apparatus of vilages—had not been able to demonstrate its existence as executive officers of the *Majelis Peradilan Damai Adat Aceh*[9] (Aceh Judicial Council of Indigenous Peace), they should be able to facilitate the fulfillment of women's right after divorce. This condition is believed to be positioning women in a weak condition, not only because of the legal uncertainty over her status but also because of the condition that forces her to become the head of the family and meet all the needs of the household. Not to mention the oblique view of the neighbours of the widow who was divorced by her husband.

The debate over legal certainty to the status of a woman who has been divorced outside sharia court appears, both religious law and state law. This

---

[7] Cf, ABD. RAHMAN GHAZALY, FIQIH MUNAKAHAT 205 (Kencana, Jakarta 2003) "...that according to Islamic law, does not make it right to divorce in the hands of others, either someone else's wife, the witness or the Court. In addition to that right of divorce is in the hands of the husband but the majority of Islamic legal scholars found that divorce with playfulness (not really intended to do so) is deemed valid, it is based on a saying of the Prophet Muhammad (*hadith*) narrated by Imam Ahmad, Abu Dawud, Ibn Majah, and Tirmidhi and Imam Hakim validated three cases, in fact deemed true and play the game (also) holds true, namely the problem of marriage, divorce and *ruju'* (reconciliation)."

[8] Source, http://www.pa-sangatta.go.id.

[9] Majelis Perdamaian Adat Aceh (Aceh Judicial Council of Indigenous Peace) has been promoted by the Government of Aceh as a part of Aceh previleges' program.

debate is not only related to the conditions of legal pluralism[10] and showing the weakness of this plural legal system[11] but also the formalization of sharia law made by the Sharia Court against legal provisions of *talaq* (divorce). As well, their thoughts on the importance of state intervention protect women—specifically wives—for her rights. To examine the phenomenon as it has been described previously, this study seeks to discuss the descriptive differences between the public and the judges on the Syar'iyah court about unrecorded divorce. The study found that a divorce considered as "lawful" is interpreted differently in each scene of the case, the incident and anyone who handled the case.

I. NOTES ON METHODOLOGY AND DATA ANALYSIS

This paper is based on the fieldwork we undertook in six districts and cities in Aceh province which are the district of Nagan Raya, Pidie, Bener Meriah, Bireuen, North Aceh, and Langsa in 2014. These six research areas have been deliberately with some consideration, namely, (1) The six regions are considered to represent a geographic area of Aceh province. (2) the increasing number of divorces—recorded and unrecorded divorce—in the region over the years—as in North Aceh and Pidie Langsa. Respondents were determined by purposive sampling. Respondents were drawn from each district/city—they were husbands/wives who fulfill their divorce before the court and they who does not fulfill in to the court. While the informant was determined by the selection criteria people considered the most understand the problems studied, including: Chairman of the Consultative Council of Ulama (MPU) Aceh; Chairman and 6 member Board of MPU at District and City level; Chief Justice and Chief Justice Syar'iyah Aceh Syar'iyah at 6 Regencies and Cities; Syar'iyah Court judges; *Imuem Mukim* (local religious clerics), *Imuem Chik* (senior village clerics), *Ulama Dayah* (traditional Islamic scholars), *Keuchiek* (head of village), *Imuem Gampoeng* (village cleric), and community leaders.

This study is a qualitative research by applying normative and empirical approaches. This study used two methods of data collection, the

[10] Arskal Salim, *Legal Pluralism in Indonesia : The presence of Islamic Law in National Laws and Regulations*, HARMONI 15, 15-34(2008), October—Desember Issue.

[11] Weak legal pluralism is interpreted as a concept of political authority (the state) that recognizes more than one legal systems to apply formally for groups of different communities. While strong legal pluralism refers to the existence of more than one legal systems that each is independent and its entry into the community is not dependent on recognition or endorsement by a political entity. In this concept, between each of the legal system have the same position, there is no hierarchy higher or lower, between one another.

collection of primary data and secondary data. Primary data collection (primary sources) was performed by using in-depth interviews with Syar'iyah Court judges on the location of the research as well as the parties —husband and wife—and the *tuha adat* (Elders Indigenous Law Practitioners) litigants and the general public. Observations on trial in the sharia court and observation of the conditions surrounding the research area as well as the condition of the divorce issues outside of court that is felt by the parties are also used as part of data collection. Focused group discussion also conduct, which aims to get an overview of the community perspective and sharia court judges and scholars to the protection of women's rights as a result of unrecorded divorce.

II. DIVORCE LAW IN INDONESIA

Before discussing further to the Indonesian legal regulation relating to divorce, the following sections will be discussed in advance about the dissolve of marriage according to Islamic law. It needs to be understood that divorce is just one of the four (4) things to decide marriage in Islam. According to Islamic law, marriage may dissolve due to several possibilities as follows:[12] (1) Due to the death of one of the couple, both husband and wife; (2) Due to the breakdown of marriage at the discretion of the husband by reason and expressed his will with certain words. Divorce is commonly known as *talaq*. Islamic law specifies that the right of *talaq* is dropped on the husband and the husband can use this absolute right anywhere and anytime, without the need to tell or to ask permission to anyone. In *fiqh*, the divorce situation as marriage is a private matter and therefore does not need to be regulated in the public. (3) The dissolve of a marriage at the discretion of the wife, while her husband does not want this marriage break up. Marriage break condition is referred to as *khulu*. The will to break the marriage which was delivered by his wife in a certain way is received by the husband and continued with his words to break the marriage. (4) Disconnect marriage can also be caused by the will of the judge as a third party after noticing something on her husband and/or wife that signifies no failure by the marital relationship continues. This condition is referred to as *fasakh*.

Talaq is litterally interpreted 'to release' or 'to free'. The statute is *makruh*, because it includes the acts that although justified however unpopular and hated by the Prophet and the God, Allah SWT. Husband to his wife who dropped a *talaq* must meet several terms and conditions, namely: (1)

[12] AMIR SYARIFUDDIN, HUKUM PERKAWINAN ISLAM DI INDONESIA: ANTARA FIQH MUNAKAHATDAN UNDANG—UNDANG PERKAWINAN 227-228 (Kencana, Jakarta 2014).

a husband who pronounce *talaq* must necessarily be someone who has grown, healthy minds, conscious and on his own will; (2) newly divorced women still is the wife or a women who still married to him, and a woman who are in a state of *talaq raj'iy*; (3) the utterance *sighat* (the pronounciation) of *talaq*.

In Indonesia, the dissolving marriage case also obtain settings, not just in the Marriage Act, but also in Government Regulation No. 9 Year 1975 as the implementing rules of the Marriage Law and Islamic Law Compilation (KHI, *Kompilasi Hukum Islam*). Article 38 of the Marriage Act regulates marriage breakdown divided into three (3) things: a. death, b. divorce and c. the court's decision. This provision is reaffirmed in Article 113, which reads "The breakdown in the marriage that caused by divorce occurred because of *talaq* or by divorce lawsuit". *Talaq* own meanings set out in Article 114 which states KHI "divorce is the husband pledge before the trial courts that became one cause of marriage breakdown in a manner referred to in Article 129, 130 and 131 of KHI".

Relevant provisions of divorce according to the Marriage Act under Article 39 which states: in Paragraph (1) Divorce can only be done in front of the court after court concerned tried and did not work to reconcile the two sides. In Paragraph (2) To make divorce there must be sufficient grounds, that between husband and wife was not going to live in peace as husband and wife. In Paragraph (3) The procedure for divorce in front of the court stipulated in legislation. Divorce in court—according to the majority of Islamic scholars—not become a necessity, however, the law in Indonesia has declared itself as a must as provided for in Article 39 Paragraph (1) of the Marriage Law. This provision is expressed also in the formulation of the same paragraph in Article 65 of Law No. 7 of 1989 on the Religious and Article 115 Compilation of Islamic Law or KHI.

III. SHARIA COURT JUDGE'S PERSPECTIVE ON UNRECORDED/UNOFFICIAL DIVORCE

This study believes that the existence of the *Syar'iyah* Court as an institution through judges plays a central role in managing conflict resolution at the family level through the judicial process. To that end, the discussion on the presence of a judge at the *Syar'iyah* Court as an agent of justice would not be separated from discussing the attitudes and the behavior of judges and their gender's case sensitivity in handling cases related to family conflicts. Arskal Salim[13] specifically documented gender

[13] ARSKAL SALIM, ET AL., DEMI KEADILAN DAN KESETARAAN: DOKUMENTASI PROGRAM SENSITIVITAS JENDER HAKIM AGAMA DI INDONESIA 53 (Jakarta : PUSKUMHAM-UI and The Asia Foundation 2009).

sensitivity among religious judge at the *Syar'iyah* Court in Aceh, West Sumatra and South Sulawesi. This study found that gender analysis could help judges to solve the problem of unrecorded divorce. Gender analysis will be studied in depth which is the most disadvantaged in the event of legal uncertainty due to the legal dualism, positive law on the one hand and religious laws on the others. It is certain that the most disadvantaged are women because their legal status became uncertain before the state. This study also discusses the discourse of sanction for a husband who gives divorce without judicial process.

This study believes the importance of legal certainty over the status of divorced wives. However, there were problems associated with the trial procedures that must be faced by women. Most judges consider that the main reference in making legal consideration on divorce cases is what revealed in the court proceedings and it should be based on legal provisions in force in the courts. This condition—how the judges made their considerations—still relies solely on statutory provisions. The provisions of the Marriage Act, which states that divorce, can only be done through the *Syar'iyah* Court approved by all the judges who become informants in this study. There is criticism to religious courts in Indonesia—as stated by the editorial column of *Majalah Peradilan Agama*[14]—delivered by Tim Lindsey (2012: 14), that Islamic justice in Indonesia is only at the level of symbols, not the contents. This can be proved then from divorce judgments that it is tantamount to a general judicial decision, and even in his view the judgment identical to the product trial in a secular country like Australia. It can be shown from the lack of in-depth studies on the most authoritative sources such as Al Quran, *Hadith* and *Fiqh* (Islamic jurisprudence) in the religious court decision as was also seen in the decision of the *Syar'iyah* court.

Concerning the divorce matters, Arskal Salim[15] have demonstrated the existence of two kinds of divorce: the first, filed divorce and acknowledged that the divorce is yet legally happening because it does not meet the terms and conditions of legitimate; and the second, the divorce which recognized has occurred and the pair or the plaintiff went to the Islamic Court to obtain administrative approval. Although not stated explicitly, this study found a third variety of forms of divorces—the figure of this kind—could be higher than the official court statistics presented by the Sharia Court in Aceh and Religious Courts in Indonesia. This is the unofficial, unrecorded or illegal divorce, known as "cerai liar", which is in fact accepted by the parties and is

[14] For futher details, *see*, *Majalah Peradilan Agama*, 2, in the editorial section 3 (September—November 2013).
[15] *Ibid*, at 59.

believed to disconnect the marriage bond between husband and wife but it is not registered to the court.

Based on the interview at 6 locations of the research, the authors see there were common view of the judges, that they based their understanding of the provisions of Law No. 1/1974, PP 9/1975, and Compilation of Islamic Law (KHI)—they do not recognize divorce outside of the sharia court. It is interesting for further discussion, whether this understanding motivated by the presence of sharia court? So, they could not make their sentence contrary to the legislation? If so, then this indicates a condition in which a judge would only be a mere mouthpiece of the law (in Dutch: *spreekbuis van de wet,* or in French*: bouche de la loi*), and at the end, how the principle of *ex aequo et bono* can be applied? Why the judge did not use this principle to achieve justice?

The following section of this paper will be presented excerpts from the interview judges in this area of research related to understanding and experience in handling illegal divorce cases. One of the judges in the sharia court, Pidie, stated that "… Many divorce cases are filed with the sharia court Pidie but the parties were divorced outside the court, as if they had not submitted the case to follow the trial divorce again, even just to ask the administrative records to validate their divorce. But the court still encourages the parties to divorce proceedings in court. For them that are already divorced outside of the court and can not be reconciled, the trial seems only a formality process, but inevitably judges must performed mediation for the parties."[16]

He also explained that "… Although the party who filed the divorce case has been dropped divorce out of court, the sharia court does not consider it as legitimate divorce, such a pronouncement was merely the cause of the quarrel and the parties wanted a divorce." According to him it is in line with the principle held by Syar'iyah tribunal judges namely reconciling the parties who want to divorce as an effort to prevent the occurrence of divorce. In line with the views as stated previously, the deputy of Bener Meriah Sharia Court[17] also revealed that the sharia court never considered their first divorce or divorce even three who had spoken out of the court. He believes that a divorce can only take place in front of the court, as married to the rules of law the divorce must be based on the rule of law.

Related to the views of people who adhere to the jurisprudence of divorce (*fiqh thalaq*), for him, jurisprudence is not a law, it is only a

[16] Interview with AriefIrhami, a judgeat Sharia Court Pidie, 16 May 2014.
[17] Interview with Taufik Ridha, Deputy Head of Sharian Court in Bener Meriah, 15 August 2014.

discussion of the Muslims law. However, if the jurisprudence is included here among the forms of legislation then as a judge, he will enforce it as law. A similar view was also expressed by judges in the sharia court of Meulaboh, "… that what is embraced by the public in the case of divorce, the KHI and the Marriage Act should also be considered as jurisprudence because they are the result of human studies and should be obeyed by the people."[18]

This condition would show us, there is still a lack of attention of the state to provide maximum access for women to obtain legal certainty and justice. On one side, this condition also indicates that judges have no creativity in performing legal discovery in its decision. The judge's ruling or sentence should be progressive, the decision should not in a various formal legalistic which is able to maintain an order only, but the sentence would have to be able to encourage improvements in the community and build social harmony in the society. This progressive ruling would need to be done by sharia court's judges in handling cases involving family conflicts as divorce cases. Judges need to have the moral courage to break through the various screens that may exist when a statutory provision is contrary to the public interest, decency, civilization and values that live in the community.

What caused this to happen? Maybe this was due to the judges' concerns of examination process they will face if their verdict contrary to the statutory provisions. This is stated by one of the judges on the sharia court of Lhoksukon, "… instead we do not understand what was desired by the litigants, but as judges we are bound by the statutory provisions. The provision stipulates that divorce can only be done after the judge is not able to reconcile the two sides through the trial procedures. This regulation made by the state with the aim of providing protection for people, especially women. However, if Aceh provides special arrangements for these through local regulations then, of course, as a judge, I will also comply with the special regulations."[19] For some people in Indonesia—justice and fairness—maybe just merely wishful thinking, but in the context of the court and its decision, judges have a great role to build a logical argument and intertwine with rational considerations in the perspective of common sense. This context should be understood that the judge is not to formulate a rule of construction to match the case or problem with the logic of a rule only. The judge should make a legal reasoning with various existing technical decision

[18] Interview with Bahtiar and Tarmidzi, head and deputy of Sharia Court in Meulaboh, 11 August 2014.
[19] Interview with Azis, Judge of Sharia Court in Lhoksukon, 26 May 2014.

which will reflect fairness. This condition is presumably also the mandate of Article 5 of Law No. 48/2009.

In the context of unrecorded divorce, then presumably the judge must be able to produce a progressive divorce decision, which oriented on justice and fairness. The decision may consider the specific conditions experienced by women due to sociological construction that inevitably they have to face. The decisions should consider the rights of wife and children after divorce, even when divorce has dropped outside sharia court proceedings. The progressive decision need to consider the economic capacity of husbands, so that even if not required by the wife, the wife's rights as a living post-divorce *'iddah* and *mut'ah* can be directly charged to the husband, as well as child protection. Children living allowance should always be considered in accordance with the ability of the parents. So when the husband has the economic capability or wealth, the children's needs can be directly charged to husband through the verdict, although the wife does not request it. At least, through the progressive divorce decision, the judge has sought to make laws for the benefit of man, and not *vice versa*. Through its decision, the judge has given the legal protection of the rights of women and children after divorce.

IV. SOCIETAL PERSPECTIVE ON UNRECORDED DIVORCE

This study considers it is important to explore what is understood by the society related to the divorce, especially their views on unrecorded divorce and the rights for both parties after divorce. The society in this study is the litigant parties, both of which have filed a divorce without the divorce process before the sharia court—nor the parties who filed the divorce case before the trial. In addition, people who were interviewed are the general public who have heard or knew the practices of "talaq's imposition"[20] by the husband over the wife without proceedings in sharia court. *Geuchik*'s understanding, as well as the *tengku imum* and the *tuha peut* of village, about divorce practices undertaken by communities in surrounding villages will also be an important part and will enrich this article.

Based on information from respondents and informants, the study found many women in each of the research sites are already divorced by her husband without court proceeding. This condition, if associated with the Marriage Law, PP No 9/1975 and KHI are certainly very contradictory. The

[20] The term "*jatuh thalak*" (fallen a thalak or fallen a divorce) is a term that is commonly found in people of Aceh, to describe a condition in which the husband had been pledged or thalak signaled to his wife that have been enacted "law" of the woman, i.e. divorce.

dissolve of a marriage relationship between husband and wife in the provisions of the Marriage Act can be caused due to various reasons[21]. These conditions would also be the reason for the divorce between the parties, although the reasons are the most dominant in almost the average location of the study due to a third party, namely the existence of the marriage the husband with other women as well as the reasons irresponsible husband on the economy of the family. Associated with not filing this divorce case before the trial in the sharia court motivated by a variety of reasons, including: (1) the consideration or feeling of no need to have a divorce certificate, (2) family considerations, and (3) access to Syar'iyah court is burden some, in terms of cost, the distance between home and the court and the trial procedures are considered complex. Women's life in Aceh is also experiencing the problems that quite a lot, both domestic issues and social problems. In general, people still have a negative view of a couple that decided to divorce. For society, the divorce is bad, evil; hurt feelings of one or both couple and detrimental to the children and families of both parties. One judge in Langsa said divorce issues is "a matter of the heart".[22] When the wife wants a divorce and proposes the divorce against her husband, it is seen even worse than that meted divorce husband to wife. This happens because there is still the belief among the society that the husband's position is religiously and culturally higher in rank than wife. Interviews that researchers do in Nagan Raya find information from one of the women, Mrs Henny[23] who has been divorced by her husband without getting a divorce certificate. She explained the reason for the divorce because her husband had remarried without her permission and moved to the Southeast Aceh region. During this abandoned, she neither asked her husband for certificate of divorce; nor proceed it to the sharia court. She did not make the absence of a divorce judgment because she believed that the statement of divorce submitted by her husband has become a verdict for her legally by sharia law. In fact, after this period she got married again to a

[21] KHI Article 116 states that divorce can occur for a reason or reasons : a) one party commits adultery or become drunks, compactor, gamblers and others that are refractory, b) one party leaving the other side for 2 (two) years row without consent other party and without valid reason or because of other things beyond their means, c) one party gets a prison sentence of 5 (five) years or more severe punishment after the marriage takes place, d) one of the parties committed atrocities or severe persecution endangering the other party; e) one party gets disability or disease as a result are unable to perform his duty as a husband or wife, f) between husband and wife continuous disputes and quarrels , and no hope of living in harmony again in the household, g) violates husband on taklik talaq h) conversion or apostasy which led to the non-harmony in the household.

[22] Interview with a Judge of Sharia Court in Langsa, 12 June 2014.

[23] Interview with Mrs. Henny, in Nagan Raya, 9 August 2014.

married man as his second wife.[24] Her second marriage was conducted in the presence of local village *qadhi* (traditional judge) and did not last long, the reason is that the husband is often having an affair with another woman. At this second marriage, her marital relationship with her husband ended up (also) only with a sheet certificate of divorce signed by her husband and left at home without direct consent of the wife. Until now the husband never comes home and never gives her anything good living for herself and her rights during the waiting period (*iddah*).

More or less the same conditions faced by Nurul Asriah,[25] She was divorced by her husband by pronouncing directly a thalaq one (*thalaq satu*). Court proceedings were never made at all, either from her or from her husband. She said that, for many times she had asked her husband to proceed the divorce to the sharia court but her husband always replied and said "… There must not be a letter (divorce certificate), if you want to get married just do it."[26] Besides of the talaq pronounced by her husband, she also believes that her marriage has ended because several conditions: (1) the fact that her husband has returned her to her family—which sociologically —believes as a form of divorce, (2) her husband returned to his parent's house, (3) her husband no longer provides her for any living allowance.

Other thought expressed by Ratna,[27] she was divorced from her husband and got a certificate of divorce signed by her husband but did not submit it to the sharia court because of the demand from his husband and her family. According to the family, even they divorced but the relationship between families should be protected. It could be different, if, Ratna proceeded the divorce to the sharia court. This condition would be a reflection that for some society, taking care of certificate of divorce to sharia court strap can cause the loss of family harmonious relationship of both parties who had previously been established. This condition raises the following question: What's about the certainty of the legal status of women?

---

[24] The conditions, second marriage or a third marriage of a woman in concealment or marriage that is not recorded at KUA (The Office of Religious Affairs)—usually caused by several conditions. The major condition caused of the husband who is still bound by another marriage and does not apply for a permit of polygamy, and the other reason is that quite often revealed because of the absence of divorced certificate.

[25] Interview with Mrs.Nurul Asriah, of Gampong Guha Ulueu Aceh Utara, 27 May 2014.

[26] Similar statement also expressed by Mrs. Marzuani when her husband asked to take care of certificate of divorce and did not go to meet its demands (interview date in Pidie, dated May 15, 2014). She has been abandoned by her husband approximately 18 (eighteen) years, since 1998 until now, no certificate of divorce and a living *iddah*. He never asked village officials to create a certificate of divorce but by the village was not granted by reason of the absence of their authority to issue similar. The village apparatus asked the concerned to keep taking care of divorce papers to the court.

[27] Interview on 11 August 2014.

What's about the rights that should be held by women in post-divorce? Isn't it becoming the main concern of the community?

The most common strategy in divorcing a wife is by unilateral letter written by husband from a remote place. These written letters—usually used by a unilateral divorce from the man or husband to his wife—well known by the local village officials or not, may be a common practice among people of Aceh. For women, it is becoming sort of grip, that her husband no longer bound her. As Henny's experience as mentioned above, several other female informants also experienced similar conditions. One unforgettable thing experienced by Mrs. Lisnawati was when she underwent her marriage with her husband only for 3 (three) days. At the day 4, her husband returned to his parent's house and said nothing to her. He never gave any reason why he never returned to Mrs. Lisnawati's home. But the main reason that bothered her and caused this condition was something much ado about carnal and psychological factors.[28] Her husband never once pledged divorce for her, but a few months after, she received the envoys from her husband bringing a letter signed by her husband and stating a divorce for her.[29]

Up to the time of the interview, their marital relationship had broken up approximately for 6 (six) years, and she never initiated to proceed the divorce or the annulment of marriage to the court. She thought she never needed the certificate of divorce, until she met a man and he wanted to marry her. This man asked her a divorce certificate and provided her a sum of eight hundred thousand rupiah (Rp. 800.000, -) to apply to the court. Unfortunately, the trial process has led her disappointed and to think for not continuing the process. She got an 'awkward' experience dealt with the court and she felt the judge asking her for questions she did not understand. At the peak of this drama, Lisnawaty told the trial "… If it is so difficult and complicated to issue a sheet of certificate of divorce, I would not need to attend the hearing again." At that time, the judge responded her by asking, "… so, do you want to undo the lawsuit?" And this question was addressed directly by Lisnawaty to convey that she was not going to continue this process anymore.

Apparently, the proceedings in the sharia court is still considered

[28] At the time of the interview, Mrs. Lisnawati said "… it seems like he was embarrassed, because he can not do for the 'it'. Although it does not convey the specifics, presumably researchers understand there is the possibility of the husband is not able to sexually satisfy spiritual needs of husband and wife, and psychologically it is quite a burden for him to decide to leave home. Several times the wife has tried to foster communication and convey his request to invite the husband seek treatment but never addressed by the husband".

[29] To confirm this, the researchers also find Geuchik Gampong Uleu Guha, interview dated May 27, 2014.

complicated for some people even when they feel that actually they need the assurance from the state that is represented by sharia court to issue a divorce certificate. The above descriptions provide an overview of how women deal with divorce pronounced by her husband and do not get the assurance of their marital status before the state.

This study also finds another experience related to the unregistered divorce. We interviewed Huliyati[30] who facing the same condition but because of different reason. Personally, she claimed that she—no longer—has any relationship with her husband, especially since she decided to expel the husband from the house for being caught having an affair with another woman. Since then (approximately 3 years ago) many times she asked her husband to proceed the divorce papers to the sharia court; but this request was not addressed by the husband for reasons that he did not want to split up with Huliyati. Although the husband, in his testimony did not want to divorce, but since three years ago, her husband also never again provided living expenditures for Huliyati, therefore she was sure she will would not be back again with her husband. She herself objected to bringing the case to sharia court due to the cost issue. She had thought of her inability to provide a court fees and a travel cost to the court. She also considered the problem of the distance to the sharia court that she thought far away and costly. However, she expressed her desire to be able to get a legal certainty and justice from the state with no further complicated things. In her expression she said,

> … If there were a free trial to be able to release a certificate of divorce, it would be better. Why does the government cannot assist people like me? It was clear I was aggrieved. So far I bear the cost of household spending, but it turns out my husband betrayed me, why do I have to take care of divorce papers?

Another experience is expressed by Riyana.[31]

> … Indeed, prior to trial, the husband had never divorce me, but at that time I also intend to divorce him, but after I knew he (husband) want to re-marry again to another women, I cancel for my plan to file the divorce into the sharia court and he (her husband) eventually raise this case to court.

In further explanation she said that when the proceedings in sharia court she initially demanded a certain amount of money as a *nafkah iddah* (stipend during 3 months waiting period), but because the husband said he was not able to fulfill it, he made the decision to no longer demand it, solely for the trial can be completed and later she got a divorce certificate.

[30] Interview with Mrs. Huliyati in North Aceh, 27 May 2014.
[31] Interview with Mrs. Riyana, in Pidie, 15 August 2014.

We believe that an exploration related to public perception—particularly the parties litigating divorce out of court—not comprehensively without displaying information from the husband. We met two informants and one[32] of them said that he has stated the divorce to her wife not clearly by *talaq* but initiate the *talaq* by expressing such as "… *kalau udah gak mau nurut lagi apa kata saya, ya sebaiknya kita cari jalan lain (if you don't want to obey me any more, than we should find another way)*". After stating this to his wife, he asked 2 (two) *ulama* (scholar) for their opinion in religious viewpoint. It was reflecting the *talaq* decision or not. One of the *ulama* stated that it had decided cues such as marital relations while the other *ulama* suggested otherwise, he assumed that similar gesture was not yet decided the marriage. Finally, after praying *istikharah* and asking god for the best decisions he should take, he decided to file the case into the sharia court. Beside spiritual reason he took his decision also based on his position as a civil servant. He believed that administrative procedure due to his status should be well managed. He also thought that it was important for him to give the legal decision for her wife, not only based on sharia but also based on the state law. He mentioned about the harmonious relations when marrying his wife and he also hoped for the same condition after divorce.

In the sharia court proceedings, he agreed that the judge did not consider his talak which he already conveyed to the wife, even one of the judges stated "… since the case was submitted to us by the court, then the provisions and regulations must follow our terms". He also followed all the procedures requested by the sharia court. He did not think that this was a heavy requirement because his goal was to find the certainty over their status. He also met the obligation to pay a living waiting period set by the court Syar'iyah fifty thousand rupiah (Rp. 50.000,-) per day as long as 3 month and 10 day for his wife.

There is a negative paradigm toward divorce which can not be separated from the general understanding of the people who think that marriage as a sacred event that is conducted under the authority of religion and government. In this position, condemnation of divorced couples can be understood as a marriage entered into sacred territory and involves all parties. In terms of impact, the divorce also has broad impact, in addition to psychological impact on children and families, divorce is also an impact on the breakdown of social order, giving the bad example for another couple, as if divorce is the only way when families are faced with their private and domestic problem.

[32] Interview with ZN, in Lhokseumawe, 28 June 2014.

As mentioned earlier, that in this section will also be presented the perception of the general public, including *geuchik, tuha peut* village, *mukim* and other surrounding communities associated with the practice of imposing divorce outside the sharia court. It is important to understand that, the people of Aceh mostly seek and obtain justice through traditional problem solving (custom). From the fieldwork, we find that people in the community are often unaware of how disputes settled according to custom. In fact, the traditional dispute resolution with the unstructured nature, delivery orally and flows according to the community's development can provide maximum benefits to the society, especially the litigants. The development of law in Aceh and the enactment of formal legal system cause many good understanding of the traditional institutions and the general procedure of settlement process customary dispute.[33]

At the village level, traditional institutions occupy an important position in resolving conflict issues that arise in the community. Customs agencies have the authority to assign a divorce and may issue a certificate of divorce. Though based on existing regulations stating that divorce is invalid if performed outside the religious court. In fact, this has been mostly done by the custom agencies (such as *geuchik* and *tengku imum*) with the aim to solve the society's problem and give the benefit to the party. However, this study finds that in many divorce cases that occur outside the sharia court, the elder of local indigenous have not been able to give a decision which protects women in the enjoyment of their rights after divorce. This study also finds that for many cases the husband does not carry out his obligation to fulfill his wife's rights such as the right of the waiting period and *kiswah* and *maskan*. This fact shows that the role and functions of traditional institutions today have undergone significant changes, in the present decision customary institutions in solving the problems considered valid but unenforceable. So if there is a violation decisions agreed upon, then the punishment may be given in the form of social sanction.

Some informants said that "there are several reasons why people do divorce out of the sharia court, which are: (1) the prolonged duration of the trial, and (2) the high costs for the trial process, and (3) for some people, they were reluctan to fill the case because they still hope to get another chance in harmonious life between him and his wife"[34] However, related to divorce practiced by the local community without fitting process as

[33] Juniarti, Strategic Role of Customary Courts in Aceh in Providing Justice for Women and Marginalized People, conference proceeding.
[34] Interview with Bustaman HS, one of *Tuha Peut* (the four senior village principal) of Kampung Keuniree, Pidie, 5 May 2014.

regulated by the Marriage Act addressed differently by village officials. Largely considering that this practice is not uncommon and is not against the law in the context ofIslamic (religious) legal system. However, how the parties litigant also eventually feel the need for certainty in the form of state law divorce certificate, we got a response from *Geuchik Gampong* Keunireen, Pidie, he stated "… that in fact there are many litigant parties who ever had experience of divorced outside of the court and came to *geuchik* to request the issuance of a certificate of divorced. Facing this, he made it clear to the parties that *geuchik* has no authority for it and the parties are encouraged to settle into the court."[35] The same practice associated with divorce in the village also occurred in the Nagan Raya. Abu Bakar Us as *Mukim* in Gampong Seumot conveyed that, "… in the community we still find a lot of cases of un-official divorce. The husband just sends his wife a letter stating he is divorcing his wife". He also stated that "… the divorce (un-official divorce) usually occured due to a support to perform illegal marriages. The husband stated the divorce to his wife so he could perform another (unregistered) marriage conducted by *qadhi* (traditional law preacher)."[36]

Another viewpoint delivered by Mustafa Syamaun,[37] he explained that since he served as *geuchik* and now is becoming a member of *tuhapeut* in the *gampong*, he have never mediated the spouse who tend to get divorce, sometimes the news came suddenly and all he knew was that the spouse had been divorced. The spouse—they do not report it and prefer to leave the village (usually the husband) and do not want to see the *gampong* officals so that the mediation between spouses has never happened. We also found one *geuchik* who explicitly expressed his consent to handle a divorce case going on in the community. He thought that if *geuchik* gave a discretion to address the problem at the village level, the task of sharia court is no longer heavy.

[35] Interview with Abu Bakar, Village Head (*Geuchik Gampong*) Keunireen, Pidie, on 15 August 2014.
[36] Interview with Abu Bakar, *Mukim*(Vilage Coordinator) of Seumot village,District of Beutong, Nagan Raya, 10 August 2014. A similar comment arises when researchers get to interview people in the SaraaTeube village, Langsa. That the practices of married people without KUA (Office of Religious Service) also carried by one in the village *teungku* (Islamic traditional scholar at village level) (when the study was conducted, tengku has passed away, but there seems to be his successor). Even when the researchers looked for a place to stay tengku, community researchers encountered immediately offered to deliver and ask whether the goal of researchers is to get married concealment. Interviews conducted by the author with Ms. May and Ms. Nur was informed that the practice of marriage concealment, as well as a certificate of divorce and *fasakh* (a saying of divorced statement) commonly made by the village officials, usually signed by *teungku* and many people who seek the religious decision of *teungku*, even not only the people around the area of Langsa or Eastern Aceh respectively. (Interview with Ms May and Ms Nuron June 8, 2014).
[37] Interview with Mustafa Syamaun, one of *Tuha Peut* (the four senior village principal) of Gampong Guha Uleu, Aceh Utara, 5 June 2014.

At least, the court already has earned a record and first consideration from the village level due to mediation or problem's settlement. He also stated that the legal certainty of their divorce status would be more realistic.[38]

CONCLUSION

Based on the above-mentioned description and discussion, this study concludes that there were different perception and acceptance between the judges on the sharia court, public society and *ulama* related to un-recorded divorce. Judges of sharia court leaned their decision based on Marriage Act and KHI, they confirmed that the divorce without court proceeding does not have the force of law (no legal force). Therefore, the law considers it as 'never existed'. But for some society members—particularly women who have been divorced by their husbands without trial—understand that *thalak* which has been pronounced by the husband is legitimate—in the sense that all requirements meet the legal termination of marital relationship between the two—had dissolved. Similarly, if *thalak* (is) not promounced, the husband no longer fulfill his obligations —emotionally and carnally— in a certain time period, then the marital relationship between them is considered to drop out. Among scholars —both modern Islamic scholars and traditional clerics from *dayah* who are member of *Ulama* Consultative Assembly (MPU)—some believe that magnitude of divorce is valid insofar as they meet the conditions and the resulting in the dissolve of a marriage, although not filed to the trial court. Divorce experienced by Muslims in Indonesia today is still a relatively large lump because it is not based upon a growing awareness that law jurisprudence permits divorce without the involvement of the judiciary.

Meanwhile, the discussion on women's right on her legal status due to unrecorded divorce has demonstrated, there are problems overshadowing women; the problems of unequal position, the lack of bargaining power between man and women; husband and wife. The problem arises when women face their divorce status, with no post-divorce rights. Husband perception on the fulfillment of alimonies payment as a religious obligation also contributes to the loose implementation of law, as well as the economic problem faced by the majority of Indonesian people.

[38] Interview with Zulkifli Oka, *Geuchik* (village head) of Alur Pinang, Langsa, 7 June 2014.

FATCA AND CRS COMPLIANCE: BRAZIL'S TREND TOWARDS AUTOMATIC EXCHANGE OF INFORMATION

José Rubens Scharlack[*]

Although legislation allowing tax authorities to have access to banking information of taxpayers be in force for several years and Brazil be entering into agreements providing for even automatic exchange of taxpayers' banking information, the extent of Brazil's constitutional protection of banking secrecy is not yet clear and, accordingly, so is reliability of Brazil's FATCA and CRS compliance. Under Brazil's OECD-oriented Double Tax Treaties, banking secrecy is not regarded as broken because of Contracting States sharing taxpayers' confidential information, which must be kept secret. Also, under FATCA's Intergovernmental Agreement, account holders who do not comply with its due diligence standards shall be subject to account termination or to the 30% American withholding taxation. Finally, in order to reach full CRS compliance, Brazil must have rules providing for proper financial institutions' reporting levels. Such rules exist and can be found in Complementary Law 105/2001, but a higher command, set forth in the Federal Constitution, might oppose a formidable barrier to the intended automatic exchange of banking information. So far, the Supreme Federal Court (STF) considers banking secrecy as included in the constitutional protection of intimacy, private life and data secrecy. However, STF has been slowly building new, divergent arguments on this matter, exploring the differences between "secrets of being" (a person's thoughts, ideas and emotions) versus "secrets of having" (a person's assets, income and economic activities) and also between the transfer of confidential information from one authority to another versus the leak of such information to the public. A close analysis of the respective precedents shows that banking data secrecy's judicial protection may come to an end soon. Only if STF concludes such shift of understanding and aligns with OECD's position on the matter, will Brazil's road towards international tax enforcement be safely open.

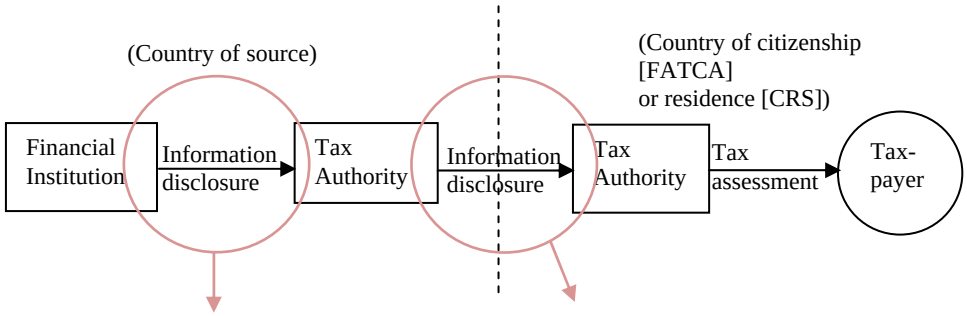
[*] attorney in Brazil, founding partner of Rodante & Scharlack Advogados—RSCH. Research fields: Domestic and Cross-border Tax Law.

 doi: 10.17265/1548-6605/2015.08.003

INTRODUCTION

Although legislation allowing tax authorities to have access to banking information of taxpayers be in force for several years [1] and Brazil's representatives be signing agreements allowing even automatic exchange of information—*among which banking information*—of taxpayers, these have been resisting and carrying on judicial litigations against such disclosures. For the sake of legal certainty, this situation demands a final and binding conclusion from the Brazilian highest constitutional Court. So far, however, the extent of Brazil's constitutional protection of banking secrecy is not clear and, therefore, so is reliability of FATCA and CRS compliance.

The graphic below gives a better idea of the problem explored in this article:



- Data secrecy protected by article 5, item XII, of the Federal Constitution;

X

- Automatic disclosure demanded by article 5 of Complimentary Law 105/2001 and by article 2 of Decree 4489/2002.

- Model 1 IGA (signed between Brazil and USA in 2014);
- Article 26 of the OECD Model Convention (present in Brazil's 32 DTT's);
- Multilateral Convention on Mutual Administrative Assistance in Tax Matters (signed by Brazil in 2011).

On the "second leg" (between the Brazilian and foreign tax authorities), there is a whole international net of legally binding treaties and conventions providing for the disclosure of taxpayers' banking information, which, however, depends on the enforceability and reliability of the "first leg" (between the Brazilian financial institution and the Brazilian tax authority), where the problem lies: although there be specific and mandatory legislation for even automatic disclosure of taxpayers' banking information, such

[1] In Brazil, both tax enforcement and information exchange have progressively relied on electronic systems. Given the fact that Brazil is a federation, federal, state and municipal tax authorities have exchanged information provided by the taxpayers by means of periodic electronic (federal, state and municipal) tax returns. Also electronic audits have taken place, mainly on the federal level. Information inconsistencies between the different tax returns have given place to both electronic and physical tax audits.

disclosure (and legislation) is arguably unconstitutional and has been successfully challenged (so far) by individuals and corporations.

I. THE EXCHANGE OF INFORMATION IN BRAZIL'S 32 DOUBLE TAX TREATIES

Brazil has currently in force 32 (thirty-two) treaties to avoid double taxation. Those are the ones signed with Japan (internalized into the Brazilian legislation in 1967), France (internalized in 1972), Belgium (1973), Denmark (1974), Spain (1976), Sweden (1976), Austria (1976), Luxembourg (1980), Italy (1981), Norway (1981), Argentina (1982), Canada (1986), Ecuador (1988), The Philippines (1991), Slovak Republic (1991), Czech Republic (1991), Hungary (1991), South Korea (1991), The Netherlands (1991), India (1992), China (1993), Finland (1998), Portugal (2001), Chile (2003), Israel (2005), Ukraine (2006), South Africa (2006), Mexico (2006), Peru (2009), Turkey (2013), Trinidad Tobago (2014) and Venezuela (2014).

It is important to remind that, although being a non-OECD country, Brazil has used the OECD Model Tax Convention as a base for its treaties. Therefore, the treaties' clause on information exchange has undergone a similar metamorphosis to Article 26 of the Model Tax Convention: later treaties (especially those incorporated into domestic legislation after 2000) tend to have a much broader and compelling clause on exchange of information than older ones.

Also, it is worth pointing that, under these treaties, banking secrecy does not seem to be a problem for the exchange of information between tax authorities. The respective clause seems to be construed in a way that banking secrecy would not be regarded as broken by the mere disclosure of the information between the Contracting States, since, under its provisions, the disclosed information must be kept secret and be used only by the competent authorities. Furthermore, the latest version of Article 26 of the Model Tax Convention (reproduced, for example, in Brazil's treaty with Turkey) states, rather clearly, on paragraph 5, that a Contracting State shall not "*decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person*".

It seems, therefore, that the issue of banking secrecy has been addressed by the double taxation treaties, although in different shapes and to unequal extents throughout time. Nevertheless, the vast majority of treaties do not provide for automatic exchange of information. Only more recently

such has been adequately addressed, via the FATCA and CRS approaches.

Finally, all of the treaties signed by Brazil are clear as to information exchange shall not be done in a way that conflicts with Brazilian internal laws. And, as it is known, the highest law of all is the Constitution.

II. BRAZIL'S CURRENT LEVEL OF FATCA IMPLEMENTATION

In September 23rd, 2014, Brazil has signed the Model 1 Reciprocal Intergovernmental Agreement (IGA) with the United States of America. Such IGA follows another agreement, signed in 2007 (and approved by the Congress in March, 2013), for the exchange of information between the two countries' tax authorities. The IGA shall enter into force as soon as it is ratified by the Brazilian National Congress and shall ease the local application of the Foreign Account Tax Compliance Act (FATCA), which, so far, depends on the individual decision of each financial institution in Brazil.

Long before Brazil's adhesion to the IGA, however, the Brazilian Federation of Banks (FEBRABAN) had been advising financial institutions to make a fast decision on whether or not to comply with FATCA. According to FEBRABAN, global events such as 2014 FIFA World Cup and the 2016 Olympic Games, alongside with domestic economic growth and the ascension of non-Brazilian investors and working force into the country, would be key factors pro-FATCA compliance.

FATCA has, indeed, been affecting the business of Brazilian financial institutions for some years already. From all industries within the financial sector, commercial banks are the ones more heavily affected. Most of them had already adhered to FATCA by the time Brazil signed the IGA. According to FEBRABAN, although FATCA be the outcome of a tax rule, the greatest efforts for its implementation are on the operational level, requiring structural and systemic changes. As a matter of fact, FATCA gave final shape to the already existing Anti-Money-Laundering (AML) and Know-Your-Customer (KYC—and similar: KYE, KYS, KYP etc.) initiatives organized by FEBRABAN in light of changes made in 2012 to the Brazilian AML Law (Law 9,613/1998, as amended by Law 12,683/2012).

On the other hand, given the fact that all bank accounts—at least the ones held in participating Foreign Financial Institutions (FFI's)—shall be subject to due diligences in order for them to be regarded as whether "US Accounts" or not, and that those account holders who do not comply with the due diligence requests of the bank (the 'recalcitrant' ones) shall be

subject to account termination or to the 30% American withholding taxation (WHT), a number of conflicts (including judicial ones) may arise, in regards to compliance with both reporting and tax withholding obligations, due to data secrecy constitutional protection in Brazil.

III. BRAZIL'S CURRENT STATUS ON CRS ADHESION

The Common Reporting and Due Diligence Standard (CRS), as part of OECD's, the G20's and the European Union's Standard for Automatic Exchange of Financial Account Information, has its legal base on Article 26 of OECD's Model Convention and on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (the "Multilateral Convention"), article 6 of which reads:

> Article 6—Automatic exchange of information
> With respect to categories of cases and in accordance with procedures which they shall determine by mutual agreement, two or more Parties shall automatically exchange the information referred to in Article 4.

Therefore, as per article 6 of the Multilateral Convention and according to OECD's official guidance[2]

> Automatic exchange under the Convention requires a separate agreement between the competent authorities of the parties, which can be entered into by two or more parties thus allowing for a single agreement with either two or more parties (with actual automatic exchange always taking place on a bilateral basis). Such a competent authority agreement then activates and 'operationalizes' automatic exchange between the participants.

Despite having signed the amended Multilateral Convention in November 2011, Brazil has not yet translated it into domestic law. Moreover, unlike other 61 (sixty-one) jurisdictions who have already signed the Multilateral Competent Authority Agreement (CAA) providing for actual automatic exchange of information, Brazil has not done so. It has not declined on automatic exchange of information either[3], which leads to the conclusion that Brazil's full adherence to CRS is rather a matter of time than of choice[4].

Finally, as it is with FATCA and the double taxation treaties, in order

---

[2] Standard for Automatic Exchange of Financial Account Information, OECD, 2014, at 8, item 14.
[3] As other 51 (fifty-one) jurisdictions have done. Please *see* https://thebanks.eu/articles/countries-which-will-not-automatically-exchange-account-information#full_list_no_exchange.
[4] Automatic exchange of information has not been common in the international field for Brazil. However, there does not seem to be any cultural resistance to this kind of approach by the Brazilian bodies of administration, specially having in mind that it already occurs within the different levels of the federation.

to fully implement CRS compliance, Brazil *"must have rules in place that require financial institutions to report information consistent with the procedures contained"* [5] therein. Such rules exist and can be found in Complementary Law 105/2001, but, as it shall be seen below, a higher command, set forth in the Federal Constitution, might oppose a formidable barrier to such a flow.

IV. BANKING SECRECY CONSTITUTIONAL PROTECTION

According to the so far existing precedents of the Supreme Federal Court (STF), banking secrecy is considered to be included in the constitutional protection of intimacy, private life and data secrecy, set forth in article 5th, items X and XII, of the Brazilian Federal Constitution:

> Art. 5th. (…)
> X – intimacy, private life, honor and image of the people are sacred, being assured the right to indemnification for material or moral damages arising from its violation;
>
> (...)
> XII – the secrecy of mail and of telegraphic communication, of data and of telephone communication is sacred, safe, in the latter case, by judicial order, in the hypothesis and in the way set forth by law for the purposes of criminal investigation or criminal procedural proof;

Banking data secrecy has been regulated by Complementary Law 105/2001, which ruled that banking data should only be disclosed in case of any illicit conduct (and specially in the case of terrorism, money laundering, crimes against the public administration and other relevant crimes), under judicial order or under command of the competent Brazilian tax authority within the proper administrative procedure. According to said law, the Central Bank of Brazil and the Securities Commission have full access to the existing banking data in Brazil and, despite having the obligation to hold confidentiality on the assessed information, are allowed to execute exchange information agreements with other audit bodies (including non-Brazilian ones).

It is also a fact that many Brazilian citizens and entities have successfully relied on banking secrecy to avoid disclosing unwanted information to Brazilian authorities. Indeed, ever since the Brazilian Constitution has passed, STF has regarded banking information as an example of the data protected by item XII of Article 5th, also covered by the protection of intimacy and private life mentioned by item X of the same

[5] Standard for Automatic Exchange of Financial Account Information, OECD, 2014, at 10, item 26.

article. The precedent below[6] gives a clear view of the mindset of our Supreme Court in the 2000's:

> The breach of anyone's intimacy – whenever in the absence of a probable cause – reveals itself incompatible to the model established at the Constitution of the Republic, for the secrecy break cannot be manipulated, in an arbitrary way, by the Public Power or by its agents. If it were not this way, confidentiality break would be converted, illegitimately, in an instrument for general search, which would give to the State—despite the lack of concrete inditia—the power to rummage over other people's confidential records, in order to make possible, by means of the illicit use of an indiscriminate inquest (which not even the Judiciary can order), the access to data supposedly stained with legal-probating relevance, due to informative elements which could possibly be found.
>
> The reason for the secrecy breach needs to be contemporary to the very legislative deliberation which determines it.
>
> The demand for motivation—which must be contemporary to the act of the Parliamentary Inquiry Commission which orders the confidentiality breach—qualifies as a premise of legal validity of the deliberation from such a legislative investigation body, and cannot be fulfilled later on, as of the rendering of information within a writ of mandamus. Precedents. (STF, Plenary, MS # 23.851-8, Rapporteur Minister Celso de Mello, judgement held in09/26/2001, unanimous decision)

However, during the time these precedents were being discussed and built within STF, some of the Ministers began do differentiate the kind of data which would in fact demand protection under constitutional principles. This initial discussion was first noticed in the following precedent, of 2006:

> Data Confidentiality—Auditing Role of the Central Bank—Clearance—Unfeasibility. The auditing role of the Central Bank of Brazil does not contain the possibility of, within the administrative field, reaching banking data of account holders, clearing the secrecy foreseen at item XII of article 5th of the Federal Constitution. (STF, Plenary, RE # 461.366-2, Rapporteur Minister Marco Aurélio, judgement held in 08/03/2007, majority decision)

The first Minister to inaugurate such new argumentative inquiry was Minister Carmen Lucia. Although she ultimately voted against the disclosure *in casu*, she made a very interesting distinction between the information pertaining to the person's inner emotions and thoughts (data related to the 'being'), possible of intimacy, private life and data secrecy constitutional protection, and the information related to the assets, income

[6] Please also refer to: STF, Plenary, RE#418.416-8, Rapporteur Minister Sepúlveda Pertence, decision held in 05/10/2006, majority decision, and STF, Plenary, MS # 22.801-6, Rapporteur Minister Menezes Direito, judgement held in 12/17/2007, unanimous decision.

and economic activities of the person (data related to the 'having'), which should not be covered by secrecy because those assets, income and activities directly relate to the society and should rather be disclosed. An excerpt of her vote is transcribed below:

> I have already expressed here that I distinguish, within item X of article 5th, to the effects of tax and banking secrecy, what the Portuguese distinguish between secrets of the 'being' and secrets of the 'having'. Secrets of the 'being' are, yes, absolute within the Constitution. What you are, think and feel are absolute secrets protected by the Constitution, because they refer to the life and dignity of each one. This has even been brought to the Supreme, for example, in cases of diseases, the individual is obliged, by a job, to take on an exam and the result goes public or is leaked from one company to another. This is absolute, because the individual may want or not to disclose his/her condition.
>
> Secret of the 'having' is something which came to be in the Modern State, with the exacerbation of the individualism. From Portugal we inherited, until the beginning of last century, what was romantically called 'assets under the moonlight': everyone who was about to occupy a public position would have to show his/her assets, so that one knew who would occupy the public positions. In such a task, I have analyzed how, before, everything had to be clearer; and, today, we fight for transparency.
>
> The very word candidate comes from candid, because the individual had to present what he had; and, since ancient Rome, he appeared in a white robe to show he/she had no moral stain a all. He showed all he had, including his body; Meaning that he had physical conditions to occupy that position. The so-called 'assets under the moonlight' were so that the one who candidated himself would show everything he had and, therefore, his conditions would be known by all. I believe these 'secrets of the having' to be relative.

Moreover, Minister Carlos Brito, who casted a divergent vote in this precedent, also inaugurated a concept that came to be better explored in later precedents: "one thing is to have access to data, another is to disclose such data, break the confidentiality of such data". To which he was echoed by Minister Sepulveda Pertence: "What is really concerning is the impunity of true breaches; that is, not the transfer of secrecy to a responsible authority, but the so-called leaking of confidential information."

Therefore, when the time came to issue a precedent on the constitutionality of Complementary Law 105/2001, specifically involving the transfer of taxpayer's data from Brazilian financial institutions to the Brazilian tax authorities, STF has issued a relevant precedent in 2010, considering such an unconstitutional data secrecy breach:

> Data Secrecy—Clearance. As foreseen in item XII of article 5th of the Federal Constitution, the rule is the privacy as to mail, telegraphic

> communication, data and communication, being the exception—the breach of secrecy—submitted to the appreciation of an equidistant body—the Judiciary—and, even so, to the effect of criminal investigation and criminal lawsuit probation.
>
> Banking Data Secrecy—Federal Revenue. Conflicts with the Letter of the Republic legal rule granting to the Federal Revenue—party to the legal-tax relationship—the clearance of the secrecy of data pertaining to the taxpayer. (STF, Plenary, RE # 389.808, Rapporteur Minister Marco Aurélio, judgement held 12/15/2010, majority decision)

Such precedent, however, was issued by a partially empty Supreme Court (9 out of 11 Ministers) and at very close margin of votes (5 versus 4). Also, among the loosing votes, the arguments on "secrecy of being" versus "secrecy of having" and also on the lack of secrecy breach when information be transferred to the care of the competent inquiring authority instead of being disclosed to the general public, first arisen at RE # 461.366-2, came back with renovated strength. The (loosing) votes of Ministers Dias Toffolli, Carmen Lucia and Carlos Britto are partially reproduced below:

Excerpt of Minister Dias Toffolli's vote:

> Very well, in this sense my understandings is that here there is no secrecy breach. There is, actually, a transfer of secret data from one bearer who has the duty of confidentiality to another bearer who shall maintain the duty of such confidentiality. If he/she/it does not maintain it, will commit a crime and shall be held responsible.

Excerpt of Minister Carmen Lucia's vote:

> Mr. President, I also beg Minister Rapporteur's pardon, but, as I already voted in other occasions, I also do not see, here, aggression to fundamental rights, once it does not seem to me that there has been a breach of intimacy; once it is not authorized by law to make public, but only to transfer to another body of administration, for the fulfillment of the finalities of the Public Administration, those data. Therefore, it absolutely does not seem to me that there has been any unconstitutionality even to configure the need of an interpretation according to the Constitution.
>
> I also think there is no way to fulfill the finalities of the State, especially of the Tax Administration, and even of the Criminal Law, in cases where there must be an investigation and punishment, if there is no access to such data, which, anyhow, are already within the knowledge of the financial institutions who are not even State.

Excerpts of Minister Carlos Britto's vote:

> Therefore, it seems to me that the conjugation of item XII with item X of the Constitution supports the thesis in which what is prohibited is not the access to data, but the secrecy breach, is the leaking of the data. It is the leak, the

> disclosure. And, in this case, the applicable laws, when referring to the transfer of secret data, it is clear that they impose to the public body the non-disclosure clause, the breach of which characterizes the commitment of a crime.
>
> On the other hand, this kind of interpretation which arises from Minister Toffoli's vote makes, implicitly, a very valuable distinction to Minister Carmen Lucia and to me. Whenever I can, as well as Minister Carmen Lucia, I make a differentiation between 'being' and 'having'.
>
> What Law takes more and more into consideration, notably Constitutional Law, is the preservation of data relating to 'being'.
>
> (…)
>
> The data of 'having', of assets, income, economic activities, in their objectiveness, they are all oriented towards an overture. The future shall not preserve but the data of the 'being'. Data of the 'having' shall be progressively wide open, because assets and income are gained from the society, and society needs to know the means by which these goods, currency convertible, were obtained and in which they consist. Such is of the natural logic of a society who makes of transparency and visibility true pillars of democracy.

CONCLUSION

Probably unlike other countries, Brazil's full adherence to FATCA and CRS, or, in a broader approach, to automatic exchange of information for tax purposes, demands more than treaties and internal laws. It demands that banking secrecy judicial protection be removed.

In this sense, the constitutional protection of taxpayer's banking information from tax authorities, although still in force, has been receiving more and more divergent votes within the STF. Indeed, as shown above, a close analysis of the respective precedents points to the probable end of judicial protection of banking data secrecy in the near future. Moreover, old preliminary injunctions have been reverted[7] within the STF and overruled in newer requests[8], which shows that the Supreme Court understands there is a new balance to be reached on this subject.

Such judicial resistance is the last standing force against international automatic exchange of information for tax purposes. Should STF continue with its progressive shift of understanding and comprehend that there is no clause within the Federal Constitution providing for "secrecies of the having" and follow OECD's understanding that careful transfer of secrecy data between competent authorities is not the same as secrecy breach, then taxpayers shall no longer be able to hide their assets behind a court order

[7] V.g. RE 387604, decision of 02/23/2011, AGA 662902, decision of 06/21/2011, RE 555112, decision of 09/22/2011 and AGA 714857, decision of 11/03/2011.
[8] V.g. MS 33340, decision of 05/26/2015.

and refrain from taxation, be it in Brazil or in their citizenship (FATCA) or residence (CRS) jurisdiction. The road will be open for the final legislative initiatives (signature of the Multilateral CAA and incorporation of the Model 1 IGA and the Multilateral Convention into domestic law) to contribute to Brazil's inclination towards international tax enforcement.

GENDER JUSTICE IN NIGERIA: INCOHERENCE OF GLOBAL TREATIES AND CUSTOMARY LAW

Kayode Olatunbosun Fayokun[*]

Nigeria is a signatory to numerous international treaties for the protection of women with attendant obligations of making her laws keep track with international legal standards. However, one thing is to subscribe to international legal documents, it's another to follow through by domesticating, implementing and ensuring their enforcement. This paper focuses on the development of international legal regime for women's rights and gender equality. The paper observed a wide gap between global standards and customary norms and practices. The paper identifies and highlights the several areas of Nigeria customary law lagging behind international legal standards on gender equality. Having observed a general lack of coherence between principles outlined in global treaties and customary law, the paper suggests ways of ensuring a convergence between global standards and Nigerian customary law.

[*] LL.B., LL.M., M.Phil., Ph.D., Department of Business Law, Faculty of Law, Obafemi Awolowo University, ILE-IFE, Osun State, Nigeria. Research fields: Human Rights, Education Law.

 doi: 10.17265/1548-6605/2015.08.004

INTRODUCTION

The Nigerian nation-state was created by the British government in 1914 through the amalgamation of the separately administered northern and southern protectorates. At international, regional, sub-regional and national levels, global treaties are acknowledged as crucial for the protection of human rights and freedom. Global treaties became popular with the adoption of the Universal Declaration of Human Rights in 1948. Regardless of prevailing dominant discourse grounded in western theories, all human societies have their ideologies of human rights, albeit with cultural peculiarities. Discussions on gender dimensions of human rights enshrined in global treaties endorsed by Nigeria should necessarily be situated within the country's historical experience from the pre-colonial to the modern period. In pre-colonial Nigeria, human rights discourse is located within the various geo-political entities that comprised modern-day Nigeria before 1914. Rights in traditional African societies emphasised communal, rather than individual rights and freedoms. Strong cultural norms have placed women and children under the protective care of the male folk thereby inhibiting rather than enhancing the individual rights of the woman.

This paper reflects divergent views regarding the status of women in indigenous African communities in the light of sweeping modernisation and globalisation. This ranged from viewing women as *'jural minors'* under the guardianship of their husbands and fathers to portraying them as independent adults with full control over their individual lives and resources. The globalisation of human rights has meant that Nigeria is now signatory to several international (United Nations), regional (African Union) and sub-regional (Economic Community of West African States) treaties and conventions. Many of such conventions contain provisions for equality between men and women while enjoining State parties to eliminate all forms of discrimination on the basis of gender in their national laws. Of course, the most gender-specific is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), popularly termed as the Women's Bill of Rights, which Nigeria signed and ratified in 1985. Significant United Nations documents have built on the principles in CEDAW some periodic intervals since 1979. However, a cursory look at Nigerian law shows a wide gap remains between the endorsement of international, regional and sub-regional treaties and their domestication in Nigeria.

The foregoing issues constitute the focus of this paper and are addressed as follows. The first section explores the relevant global treaties

for the protection of women's rights. It conducts us through a theoretical review of international gender and human rights legal instruments and examines existing literature on human rights from a gender perspective. Section two investigates the human rights and gender dimensions of laws in pre-colonial, colonial and post-colonial Nigeria. It argues that while it is undeniable that the notion of human rights existed and some rights were protected in pre-colonial Nigerian societies, the rights of women and girls were often derogated. Examples included gender-bias in property rights, in marriages, in inheritance and succession, in widowhood and the exclusion of women and children from decision-making structures in some traditional societies. During colonial times, the subjugation to colonial authority carried with it the imposition of European values along with socially stratified differences in the enjoyment of rights based on race, class and sex. The repression of women's rights by the colonial state and the ensuing agitation by women to safeguard them was amply demonstrated by anti-colonial protests such as the Abeokuta women's riots and the Aba women's riots.[1]

In post-independence, the rights of Nigerians are guaranteed by the Constitution.[2] However, there is a significant disparity between the *de jure* constitutional rights of women in principle and their *de facto* rights in practice. During the military era, while both men and women groaned under the repressive military regimes, women were disproportionally denied the right to political participation manifested by their under-representation in public office, a situation that persists, though to a lesser degree, under the democratic state.[3] While these symbolise the general lack of coherence between global treaties and local realities, the appreciable efforts at domesticating for instance the Convention on the Rights of the Child (CRC) as state law in some states of the Federation have met with stiff resistance in other states. In view of the foregoing, the last section proffers policy recommendations for ensuring convergence of law between global treaties and local realities through their domestication and implementation at the local level.

---

[1] Funke Okome, *Domestic Regional and International Protection of Women against Discrimination*, http/asqafrica.ufl.edu/files/okome-vol6-issue3.pdf.

[2] *See generally* sections 33-46 or Chapter IV of the Constitution of the Federal Republic of Nigeria (CFRN) 1999, commonly referred to as the Fundamental Rights provisions of the Constitution.

[3] According to Femi Falana, "since military rule is antithetical to democratic governance, the Constitution became the first casualty" under military rule. FEMI FALANA, FUNDAMENTAL RIGHTS ENFORCEMENT IN NIGERIA 9 (Legal Text Publishing Company Ltd. 2010).

I. INTERNATIONAL COMMITMENTS ON GENDER

A. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW, often regarded as the Women's Bill of Rights, came into effect in 1979 as a firm commitment of all member states of United Nations to eliminate all forms of actions and attitudes which hitherto created preferences for men over women in any form, including trade and employment opportunities. A crucial part of the convention is Article 1 presenting the definition of discrimination which simply implies any act or practice which aims at excluding or preventing females from enjoying the same right as males. This definition covers the hitherto less pronounced property rights and trade-related discrimination which prevented the female from full benefits of ownership or inheritance of land. Article 15 is designed specifically to protect women's property rights. Women are to be accorded full legal capacity identical to that of men to conclude contracts and administer property. State parties agree that all contracts and legal instruments directed at restricting the legal capacity of women are deemed null and void. In most developing countries, existing customs often confer sole property rights on men ('the male child') after the death of a parent thereby discriminating against women ('the female child'). This is a barrier on the full exercise of economic rights of females under such circumstances. To this effect, Article 3 specifically declares that women have the same rights as men to enjoy all human rights and fundamental freedoms. The abolition, abrogation and repeal of such customary practices were declared deemed for implementation in all member countries.

In the field of employment, Article 11 declares that women shall have the same employment opportunities including the right to the application of the same criteria for selection in matters of employment and the right to work with equal remuneration as men. Article 5 makes express provision for elimination of pre-conceived ideas or notions, prejudices and customary practices that women are inferior to men who led to the delineation and classification of certain tasks as reserved mainly for men and others solely for women. This provision provided a level-playing field for male and female in the labour market, in all sectors of the economy and in the family. It also redefined the roles of men and women in the household. Gender inequality in employment organisations are to be eradicated.

B. Beijing Declaration

The United Nations Fourth World Conference on Women, Beijing 1995, marked a significant turning point in the global agenda for gender equality. The Beijing Declaration and Platform for Action which was unanimously adopted by 189 countries set an agenda for women empowerment and advancement especially in twelve critical areas of concern. The Conference summarily reaffirmed, as stated in the 8th Declaration, the principles enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights and especially the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Platform of Action which was based on the identified twelve critical issues of concern set strategic objectives and actions for the achievement of gender equality. In clear and bold terms gender mainstreaming was adopted as the preferred strategy for integrating gender issues into policies and programmes at all levels. Declaration 13 reiterates that women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process, and access to power, are fundamental for the achievement of equality, development and peace. Declaration 15 states that men and women have equal rights, opportunities and access to resources, equal sharing responsibilities for the family and that a harmonious partnership between them are critical to their well-being, their families as well as to the consolidation of democracy. Declaration 16 in addition, affirms that eradication of poverty, economic growth, social development, environmental protection and social justice requires the involvement of women and that equal opportunities and equal participation by men and women are keys to people-centred sustainable development.

In Declaration 24, all member countries were mandated to take necessary measures to eliminate all forms of discrimination against women and the girl child as well as remove all obstacles to gender equality, advancement and empowerment of women. In order to achieve this, the countries were instructed in Declaration 26 to promote women's economic independence, including employment opportunities and eradicate the persistent and increasing burdens of poverty on women. This is to be achieved by addressing the structural causes of poverty through changing of economic structures, ensuring equal access for all women, including those in rural areas, ensuring that they are made vital development agents and made to have equal access to productive resources. The determination to achieve these female empowerment mandates by the Conference is

enshrined in Declaration 35.

The Platform for Action highlighted specific objectives and assigned specific roles to the relevant institutions for implementation. It should be noted that in each case, governments were to enact laws and amend relevant sections of the existing ones to protect the resolutions in the declarations and tailor every action towards the achievement of the stated strategic objectives. Non-Governmental Organisations (NGOs), regional development banks, bilateral and multilateral donor agencies at international, regional and sub-regional levels are also assigned specific roles towards the actualisation of the objectives.

C. Beijing Declaration + 5

The UN General Assembly meeting tagged, "Women 2000: Gender Equality, Development and Peace for the Twenty-first Century", took place between 5 and 9 June, 2000, at the United Nations Headquarters, New York, five years after the l995 Beijing Declaration. The adopted outcomes are contained in the document entitled "Further actions and initiatives to implement the Beijing Declaration and Platform for Action". The meeting was conveyed mainly to review progress in the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women and the Beijing Declaration and Platform for Action.

D. Beijing Declaration +10

The meeting of the General Assembly of the United Nations on the review of the United Nations Millennium Declaration held 14 to 16 September, 2005. The meeting reaffirmed the Beijing Declaration and Platform for Action adopted at the Fourth World Conference on Women and the outcome of the twenty-third special session of the General Assembly. It welcomed the progress made thus far towards achieving gender equality, stressing that challenges and obstacles remain in the implementation of the Beijing Declaration and Platform for Action and, in this regard, pledged to undertake further action to ensure their full and accelerated implementation especially in the identified twelve thematic areas. The assessment areas include:

Women and Poverty: Many factors were recognised as having contributed to widening economic inequality between men and women. These include income inequality, unemployment and deepening poverty levels. More so, gender inequalities and disparities in economic power-sharing, unequal distribution of unremunerated work between men and

women, lack of technological and financial support for women's entrepreneurship, unequal access to, and control of capital, particularly land and credit, and access to labour markets, as well as all harmful, traditional and customary practices, were pointed out to have constrained women's economic empowerment and exacerbated the feminization of poverty.

Education and training of women: It was observed that there must be an increased awareness that education is one of the most valuable means of achieving gender equality and the empowerment of women. However, in some countries, efforts to eradicate illiteracy and strengthen literacy among women and girls and to increase their access to all levels and types of education were constrained by the lack of resources and insufficient political will and commitment to improve educational infrastructure and undertake educational reforms.

Women and health: It was recognised that more programmes have to be implemented to create awareness among policy makers and planners of the need for health programmes to cover all aspects of women's health throughout women's life cycle. These have contributed to an increase in life expectancy in many countries. Limitations still exist however, in that there is still a wide gap between and within rich and poor countries with respect to infant mortality, maternal mortality and morbidity rates, as well as with respect to measures addressing the health of women and girls, given their special vulnerability regarding sexually transmitted infections, (including HIV/AIDS and other sexual and reproductive health problems), together with endemic infectious and communicable diseases, such as malaria, tuberculosis, diarrhoeal and water-borne diseases and chronic non-transmissible diseases.

Violence against women: Reports revealed that governments have initiated policy reforms and mechanisms, such as interdepartmental committees, guidelines and protocols, national, multidisciplinary and coordinated programmes to address violence. Some Governments (Nigeria inclusive) have also introduced or reformed laws to protect women and girls from all forms of violence and laws to prosecute the perpetrators. It was however identified that there is a lack of comprehensive programmes dealing with the perpetrators, including programmes, where appropriate, which would enable them to solve problems without violence. Inadequate data on violence further impedes informed policymaking and analysis. Socio-cultural attitudes which are discriminatory and economic inequalities reinforce women's subordinate place in society. This makes women and girls vulnerable to many forms of violence, such as physical, sexual and psychological violence occurring in the family, including battering, sexual

abuse of female children in the household, dowry related violence, marital rape, female genital mutilation and other traditional practices harmful to women.

Following the evaluation of progress made in the ten years since the Fourth World Conference on Women in implementing the Beijing Declaration and Platform for Action, as well as the current challenges affecting its full realization, governments recommit themselves to the Beijing Declaration and Platform for Action and also commit themselves to further actions and initiatives to overcome the obstacles and address various identified challenges. In taking continued and additional steps to achieve the goals, governments recognize that all human rights are universal, indivisible, interdependent and interrelated, and are essential for realizing gender equality, development and peace in the Twenty-first century.

E. Beijing +15

The Commission on the State of Women undertook a fifteen-year review of the implementation of the Beijing Declaration and Platform for Action and the outcomes of the twenty-third special session of the General Assembly. Emphasis was placed on the sharing of challenges and good practices with a view to overcoming remaining obstacles and new challenges, including those related to the Millennium Development Goals (MDGs).

F. Beijing +20

At the fifty-ninth session of the Commission on the Status of Women (CSW) which took place at the United Nations Headquarters, New York, in March, 2015, the Commission undertook a review of progress made in the implementation of Beijing Declaration and Platform for Action. It was revealed that more than 100 countries of the world still have laws limiting women's participation in the economy.

G. African Charter on Human and Peoples Rights

In Africa, regional documents have extended the promotion and protection of human rights. These include the African Charter on Human and Peoples Rights (1981), African Charter on the Rights and Welfare of the Child (1990), Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) and the Protocol to the African Charter on Human and Peoples'

Rights on the Rights of Women (2003).

II. RATIFICATION AND IMPLEMENTATION OF INTERNATIONAL TREATIES

According to Okpara,[4] a Treaty "is an agreement formally signed, ratified, or adhered to between two nations or sovereigns". It is an international agreement concluded between two or more state parties in written form and governed by international law. Other terminologies adopted for describing a Treaty are Accord, Convention, Covenant, Declaration or Pact. The word "Protocol" also means a treaty which revises or adds to the provisions of the earlier treaty.

Nigeria is a state party to all the numerous treaties discussed above and other treaties which she had ratified. In international law, ratification means the final establishment of consent by the parties to a Treaty to be bound by it.[5] It usually includes the exchange of deposit of instruments of ratification. Thus, a State which ratifies a treaty agrees to be bound by it on the basis of *pacta sunt servanda*.

Countries have different ways of transforming treaties into local laws. In Nigeria, like in most Commonwealth countries, transformation is by domestic legislation. Section 12(1) of the 1999 Constitution provides as follows:

No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

A treaty which is yet to be domesticated binds nobody. Such non-incorporated treaties cannot change any aspect of Nigerian law even though Nigeria is a party to those treaties. Indeed, as Okpara[6] rightly observed, non-incorporated treaties have no effect in Nigeria upon the rights and duties of citizens either at common law or as statute law. Our domestic courts have no jurisdiction *de jure* to construe or apply them. However, *de facto*, they indirectly affect the rightful expectation by the citizens that government acts affecting them would observe the terms of treaties to which Nigeria is a party.

The legal position in Nigeria contrasts with what happens in some countries like France and the USA.[7] For example, in France and USA transformation is automatic. Treaties or agreements duly ratified or

---

[4] Opkara, *op.cit*.
[5] BYRAN A. GARNER, BLACK'S LAW DICTIONARY 1540 (8th Edition).
[6] *See generally* OKPARA, HUMAN RIGHTS LAW & PRACTICE IN NIGERIA CHENGLO LIMITED (Enugu, Nigeria 2005). *See also* Abacha v. Fawehinmi [2002] All E SCNQR 489.
[7] Article 55 of the 1958 French Constitution.

approved are once published superior to that of the domestic law. In the US, a treaty once duly made and is ratified by the US, becomes self-executory. Thus, there is automatic incorporation. According to Article VI of section 2 of the American Constitution 'all treaties made … the supreme law of the land and the judges shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding'.

III. INTERNATIONAL RECOURSE SYSTEMS

It should be noted that filing of complaints to the UN from Nigeria in respect of violation on human rights is possible. This possibility has been created by the Optional Protocol to the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, all of which are binding on Nigeria.

It is significant for a country like Nigeria that there are international recourse systems. The word 'recourse" suggests an act of seeking help or assistance. In other words, and for our purpose, it means a method by which a right may be enforced. International law has many ways through which guaranteed rights may be monitored or enforced. Two systems make up the recourse machinery at the international plane and they are those based on the Charter and those originating from Treaties.

Organs originating from the Charter: This category includes the General Assembly, The Economic and Social Council (ECOSOC), the Commission on Human Rights, the Commission on the Status of Women and other organs or bodies emanating directly or indirectly from the UN Charter. Each of these organs has the power to create a subsidiary organ to assist in the implementation of its functions, as it may deem necessary. The principal organs derive their legitimacy and power from specific provisions of the UN Charter. This is why they are called UN Charter based organs.

Organs originating from Treaties: This category of system of enforcement and protection of human rights is created out of the provisions of treaties. They arise because specific treaties provided for their creation. For instance, the Committee on the Elimination of Racial Discrimination was created in 1969 to monitor the implementation of the Convention on the Elimination of Racial Discrimination. The Human Rights Committee was established in 1977 under Article 28 of ICCPR to oversee the enforcement of the ICCPR. Likewise, the Committee on Economic, Social and Cultural Rights was created in 1985 to monitor the implementation of ICESCR. In

existence are also the Committee on the Elimination of Discrimination against Women of 1981 (CEDAW); the Committee against Torture (1987); and the Committee on the Rights of the Child, 1990.

IV. EVOLUTION OF HUMAN RIGHTS IN NIGERIA

There is no denying of the existence of some recognition of human rights in pre-colonial era in the various indigenous communities now presently known as Nigeria. Each ethnic grouping had its own notion of human rights which the natives enjoyed in varying degrees in their communal native settings. However, the socio-economic and political inequalities of the native societies as well as the gender imbalance of the pre-colonial era far outweigh any quantum of recognition placed on people's rights and individual freedom. Interwoven with native law and customs were the African traditional beliefs, meta-physics, religion, magic, superstition and voodooism which greatly constrained the practice of human rights wherever they existed. Slavery, which existed before the arrival of the white man, and the slave trade which the white man introduced, were major derogations from human rights. Other forms of derogation include the Osu Caste system in Igboland, trial by or deal which beclouded the criminal justice system in Yorubaland, the purdah system under Islamic autocratic regimes which denied women any public status and the killing of twins in the far-eastern communities around Calabar. Thus, the practice of human rights in pre-colonial times was hardly visible.

The colonial period (in spite of the civilization which came with it), arguably, did not witness an enhancement of human rights practice as may be thought. In fact, the colonial period has been described[8] as a period of diminished or even extinguished human rights activity.[9] This informed Onje Gye-Wado's[10] conclusion that:

> "The basic underlying tendency and means of action of colonialism was the subjugation of the colonized peoples to the rules of the colonizers, the fact of colonialism suggests the erosion of human rights. Thus, the colonized peoples' civil and political rights were non-existent".

The imposition of English law on Nigeria meant that customary law

---

[8] Onje Gye-Wado, *Human Rights and Reconstruction in African Law, Justice and the Nigerian Society* (I. A. Ayua ed., Essays in Honour Hon. Justice Mohammed Bello, NIALS 1995), as quoted in OKPARA OKPARA, HUMAN RIGHTS: LAW AND PRACTICE IN NIGERIA 47 (Chenglo Ltd. Nigeria 2005).

[9] FEMI FALANA, FUNDAMENTAL RIGHTS ENFORCEMENT IN NIGERIA 2 (Legal Text Publishing Company Ltd. Lagos, Nigeria 2004).

[10] Onje Gye-Wado, *Human Rights and Reconstruction in African Law, Justice and the Nigerian Society* (I. A. Ayua ed., Essays in Honour of Honourable Justice Mohammed Bello, NIAS 1995).

and the indigenous legal system became inferior. The customary norms of the natives were only accepted as valid if they were not repugnant to 'natural justice, equity and good conscience'. Customary law was allowed to exist side by side with the English law. The administration of English law and English-type courts do not on their own guarantee the enjoyment of full rights of liberty, due process, free speech, etc. to the colonial subjects.

It is significant that post-independent Nigeria witnessed the entrenchment of human rights provisions in the Constitution. However, the entrenchment of fundamental rights in the Constitution in post-colonial Nigeria has not meant an end to the agitation for the actualisation of human rights especially in the protection of vulnerable people and for self-actualisation among the minority groups. It may be said for example, that whether in pre-colonial, colonial or post-colonial times, the general trend has been that women in particular under strong cultural and religious inhibitions, have enjoyed a situation, which, in the face of the modern notions of human rights, is still 'dehumanizing'.

V. AGE-OLD GENDER DISPARITY

Olarinde [11] posited that the status of the African woman in the traditional and cultural settings was not better than that of a slave and has always been culturally, economically, psychologically and sexually. In native Africa, a female was little more than a piece of property.[12] She was an 'inferior being', a 'beast of burden', a 'sexual objec't and a victim of male viciousness. This makes many writers to view the African woman as a depository of an unfair culture. Buchi Emecheta corroborating this assertion puts it mildly:

> The African woman 'has a position and status, which is in many ways definitely inferior to that of a man, and this is in spite of the fact she does most of the hard work in supporting the family. They were regarded as socially inferior to men, and were always treated as minors before or after marriage a woman was under the control of her father or husband and on his death of some other male member of her family. She could never sue independently at court she would own property but could not dispose of it without her guardian's consent[13].

The subjugation of women under traditional beliefs in African traditional settings is age-long. Feminism is almost synonymous with

---

[11] E. S. Olarinde, *Some Injuries to the Rights of Women and Proposed Remedies*, 1(1) NIGERIAN FEMINIST LAW JOURNAL (1993).
[12] E. S. Olarinde, *Some Injuries to the Rights of Women and Proposed Remedies*, 1(1) NIGERIAN FEMINIST LAW JOURNAL (1993).
[13] Buchi Emecheta, *op.cit.* at 175

weakness and is a disadvantage. A female suffers from various disadvantages from cradle to the grave. She suffers from all sorts of discrimination and humiliation from her immediate family, the extended family and the society at large. Feminism is shackled by African traditional religion, cultural beliefs and practices, which the natives held sacrosanct from time immemorial.

A. The Girl Child

Most men prefer to have male children because this is seen as a sign of strength and means of perpetuating their names or posterity. The constant birth of female children is regarded as a curse and a family shame. Female children are therefore sometimes disdainfully rejected from birth. There is an unhidden preference for the welfare and training of male children at the expense of female children even when the latter are more promising. In the long run, this has a negative effect on the general development of women because of their lack of exposure and inability to contribute to matters, which even directly affect their gender particularly. Daughters are not regarded as permanent members of their father's family. They are usually denied succession rights to the estate of their family. Unmarried daughters who remain in their father's compound are not entitled to maintenance from the family wealth as a matter of legal obligation.

B. Child Marriage

In many traditional communities in Africa, early marriage is the norm. A female has no freedom of choice of a spouse in native marriage practices a father or any elderly representative of the family arranges marriage for girls. It is a taboo for her to express any negative feelings or objections. Early and forced marriages were practised under customary law. Since the customary and Sharia legal systems do not clearly specify a minimum age of betrothal (other than recognizing the attainment of puberty), child marriages continue unabated especially in the Muslim dominated communities of northern Nigeria. Among the Hausa-Fulani for example, young girls between the ages of 9—11 years are given out in early marriage, mostly to comparatively much elderly men, thereby exposing them to various health risks like obstetrics fistula (V.V.F.) which is a serious condition of vesico impairment as a result of having children at too early an age.[14] Some traditional practices like female circumcision and dreaded

[14] E. S. Olarinde, *op. cit.*

'zurzur cut' (a traditional practice involving making razor cuts in the upper and lower walls of the female genitals to allow free passage during intercourse, often leading to haemorrhage), also affect the health and general well-being of the child bride.

Under the Convention on the Rights of the Child (CRC) 1989, which Nigeria ratified in 1991, government is committed to ensure the overall protection of children and young persons aged under18. Child marriage which substantially infringe on this protection is undoubtedly a violation of child rights. CRC has been domesticated in Nigeria. The Child Rights Act (CRA) was passed in 2003 to keep to international standards on the rights of the child and to give effect to government commitments under the CRC. However, since the CRA is a Federal statute, it has no direct effect until domesticated as state law. Many of the states where child marriage is prevalent, having raised strong objections on religious grounds, have chosen not to implement it. Nigeria operates a complicated Federal structure with civil, customary and Islamic marriage laws running on almost parallel lines. Customary marriage is preserved under Item 61 Second Schedule (Part 1) of the Constitution. Latest attempts to amend section 29 (4) of the Constitution so as to reconcile Nigerian law with international standards on minimum marriageable age of 18, were forestalled at the National Assembly.[15]

C. Women in Marriage

By marriage, a female is regarded uprooted from her father's family and given out like a chattel to the family of the spouse. In the family of the spouse, since she was purchased with a dowry or received as a gift, she is assigned her domestic role of procreation of children and housekeeping. There are traditional institutions and inhibitions still depriving the woman of control over her body and her health. Some traditional practices are usually carried out on women during delivery, which may cause infection in mother and child such as the eating of certain delicacies or drinking of concoctions to aid the delivery or determine the sex of her baby.

Thus, customary law have not promoted gender equality but rather disparity between men and women. The recognition and treatment accorded to women as a class, under native law (substantive or procedural), has not been equal with that of men.

---

[15] *See* Alexander Aplerku, *One Senator Kept Child Marriage Alive in Nigeria Last Month*, http://www.vice.com/read/child-marriage-was-nearly-made-illegal-in-nigeria-last-month (Last visited May 25, 2015).

D. Law of Succession

Customary succession law generally does not allow women to inherit landed property. In Hausa-Fulani customs, females cannot inherit real property. Also among the Igbo tribe, daughters have no right to inherit real property. Similar discrimination exists in Yoruba succession law. In Ogunkoya v. Ogunkoya,[16] it was held that in the matter of the distribution of the estate of a deceased, wives are also regarded as chattels who are inheritable by other members of the family of the deceased under certain conditions.

The subjugation of widows under native law is quite instructive. Widows are discriminated against politically, socially, religiously and in all spheres of life. One rule of customary law which runs across all the traditional African societies is the inability of a widow, in intestate succession, to inherit landed property from her deceased husband's estate. It is remarkable to find such uniformity in the customary laws of so many people groups in Africa. The rule applies irrespective of the services the widow may have rendered to her deceased husband, or of her contributions, financial or otherwise to the accumulation of the intestate estate. A case in point is Niezieaya v. Okagbue.[17] Ephraim died in 1909 survived by a wife, Mary, and a daughter. Mary took possession of his property consisting of a piece of land and a house. She collected rents and erected new buildings on the land. She paid all rates and received all the rents without accounting to anyone. Her efforts greatly enhanced the value of the property. On her death, Mary bequeathed this property to certain beneficiaries whose rights were challenged by a relation of Ephraim. In an action brought by the deceased's beneficiaries to confirm their rights, Reynolds J. was "of the opinion that his action must fail on the grounds that by native law and customs possession by a widow of land can never be adverse to the rights of her husband's family so as to enable her to acquire an absolute right to possession of it against the family. This being so, it follows that the plaintiffs would acquire no rights over the land through Mary". Though the decision has its merits, nevertheless, we respectfully submit that the judges in appropriate cases should apply the repugnancy principle to declare invalid any rule of customary law which solely aims at depriving a woman of her proprietary rights merely on the ground of her gender. In Meribe v Egwu,[18] a rule of customary law which allows a baren woman to 'marry' another woman for

[16] Unreported (West African Court of Appeal Decision).
[17] Unreported (1951) Suit No. 29/59 Obollo District Court, Nsukka.
[18] (1972) 10 CCHCJU.

her husband in order that she might have issues through her, was declared 'repugnant to natural justice, equity and good conscience'. As it is, following the Niezianya v. Okagbue principle, where a husband in his lifetime allots a farm, a house or some other form of landed property to his wife for her use and enjoyment, the widow does not thereby acquire inheritance rights in it. A contention that she did acquire such rights under Yoruba native law was rejected in no uncertain terms by the West African Court of Appeal in Dosumu v Dosumu:[19]

> The native law and custom alleged here is, briefly, that property can he allotted and descend through a wife, if such native law and custom existed, it would-mean that on the death of the childless wife, not of the same family as her husband, property vested in her would pass away from the husband's family from whom the wife became entitled to it, to the wife's family.

Again, in Eze v Okwo,[20] a man was survived by three widows but no issue. Before his death, the deceased instructed his senior wife to administer his property and use the income thereof to maintain herself and the other wives, and to continue staying in his compound with the hope that they might have issues for him. The senior wife attempted to carry out the wishes of her husband but was challenged by his nephew, the plaintiff in this case. He claimed not only that he was the rightful administrator of his uncle's estate but also that the plaintiff should be expelled from her late husband's compound. It was held that a widow could neither inherit her husband's intestate state nor administer it. What is clear here is that under customary law a widow has no share in her husband's intestate estate. In Oshilaja v Oshilaja,[21] Odesanya, J. observed that: the customary law that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in the courts that it has become judicially noticeable.

Similarly, Beckley, J. in Sogunro–Davies v Sogunro-Davies[22] & Ors. opined that a wife was deprived of inheritance rights in her deceased husband's estate because: in an intestacy under native law and custom, the devolution of property follows the blood. Therefore a wife or widow not being of the blood, has no claim to any case.

Curiously, instances abound under native law where slaves or even strangers who performed the burial rites are allowed to inherit landed property. In Suberu v Sunmonu, Jibowu F. J. in rejecting the decision of the Lagos High Court on the inheritance rights of a widow had said:

---

[19] (1929) 2 NLR 79 at 80
[20] (1957) 2 FSC. 31
[21] Suit No. CA/L/46/88 at p. 8
[22] Odje, P., The Law of Succession in Southern Nigeria, at 345

> "... it is a well settled rule of native and custom of the Yoruba people that a wife could not inherit her husband's property since she herself is, like a chattel, to be inherited by a relative of her husband".

Thus, a marriage under customary law extends, for a woman, beyond the life of the husband. The death of her husband does not dissolve the marriage. She is inherited by her husband's heir. For instance, the Court of Appeal, in the case of Ogunkoya v Ogunkoya[23] had said that:

The wives left are also regarded as chattel who are inheritable by other members of the family (in Yoruba sense) of the deceased under certain conditions.

In this case, a widow brought an action to claim the house left by her husband. At times, the right to inherit the widow by a next of kin falls on the widow's first son. In some ethnic groups such as the Esan in Nigeria, the consent of the widow is not required. Among the Yoruba of Nigeria her consent is required. If she refuses to accept the new husband she my obtain divorce and repay the dowry. He must take steps to dissolve the marriage before she can free herself from the legal obligations to the deceased husband's family.

It may be observed that this rule subsists in Nigerian communities because they are mostly patrilineal societies. Odje,[24] contends that the "true rationale of the rule would seem to lie in the practice of exogamy". The wife and her husband must belong to different families. Okoro,[25] says that this practice removes women from their original families to the families of their husbands. The consequence is that daughters are not regarded as permanent members of their father's family with the resultant denial of succession rights to their father's property. As regards her husband's family "the fact that she is not a blood descendant of her husband's family deprives her of succession rights in that family". For an unmarried daughter, her brother who becomes the heir or successor has only a moral and not a legal obligation to maintain them. Therefore, we can safely say that in the law of intestate succession in most native communities such as among the Igbo and the Bini, a woman has no place either as a daughter or as a widow. Where a widow is neither inherited nor has children to look after her, she falls back on her own father's family. There, as a daughter she may not be able to enjoy her father's property. In effect, a female inherits neither from her father nor her husband's estate.

---

[23] Okoro, Customary Laws of Succession in Eastern Nigeria.
[24] Odje, P., The Law of Succession in Southern Nigeria, at 345.
[25] Okoro, Customary Laws of Succession in Eastern Nigeria, at 345.

CONCLUSION

On a macro level, there is abundant evidence that continued social disintegration, intolerance, marginalization, hunger, unemployment and poverty constitute serious threats to world peace. These problems are undermining the institutions of democracy, infrastructure and the economy. Poverty for instance cannot he addressed as purely economic feature. Its causes and effects are interwoven with very diverse issues of human rights, health, nutrition, cultural traditions, and environmental influences, political, social, historical and religious conditions, which combine together to create a common trend. It was rightly submitted that gender discrimination provides a common thread linking all these contributing factors. In traditional African society, discrimination against the female folk is institutionalised. Advancing gender equality by reversing the various cultural, social and economic handicaps that are inimical to women development is one way of unlocking the potentials of women and fast-tracking societal development.

We must admit that there have been some noticeable developments in the efforts to improve the lots of women in Nigeria given the enactment of laws like the Child Rights Act, which is a direct domestication of the UN Convention on the Rights of the Child. There is however a need for constitutional amendment to give its provisions full implementation. Constitutional review should aim at allowing automatic incorporation of international conventions and treaties on human rights into our basic law. There is also the need for judicial activism on behalf of Nigerian judges to outlaw customs that are manifestly 'repugnant to natural justice, equity and good conscience' (a phrase which must be expounded to keep customary law in line with global treaties). Gender imbalance in the law is a form of injustice. It may be appreciated that the main cause of the disregard for women rights is rooted largely in ignorance. It is firmly believed that the best panacea for this trend is proper education and appreciation of gender equality and uniqueness. With proper appreciation of the nature of womanhood, ancient prejudices affecting women rights will be discarded. Statute laws abrogating discriminating laws are the first necessary steps to ensuring gender balance. Although without first removing the constitutional inhibitions, this may be less drastic, slow or prove inadequate for radical and effective socio-cultural changes now required since it has been shown that it is difficult to change age-old cultural beliefs and traditional practices.

It is hereby suggested that it is high time that aggressively serious campaigns emphasizing the need of female education be mounted at all

levels. This will greatly enhance female participation in policy and decision-making processes and dissolve unfavourable taboos or inhibitions. As a complementary and follow-up to this, the Beijing Platform For Action should be simplified, translated into various languages spoken in Africa and distributed to the grassroots while making it part of the curricula of formal and informal education.

US-CHINA LAW REVIEW
VOLUME 12, NUMBER 8, AUGUST 2015
David Publishing Company
1840 Industrial Drive, Suite 160, Libertyville, IL 60048, USA
Tel: 1-323-984-7526, 323-410-1082; Fax: 1-323-984-7374, 323-908-0457
http://www.davidpublisher.com, www.davidpublisher.org
jurist@davidpublishing.com, law@davidpublishing.com