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ESSAY

CONSTITUTIONAL JUSTICE AND SOCIAL INTEGRATION WITH SPECIAL REFERENCE TO WOMEN: AN INDIAN EXPERIENCE*

*Usha Tandon***

ABSTRACT

The suppression and oppression of women had been universal and all pervasive, cutting across national boundaries, race or religion. Therefore, the aim of constitutional justice and social integration assumes prime importance for the deprived and degraded women. The Constitution of India, 1950, embodies the concept of “social justice” in its very Preamble. Though, the Constitution of India does not contain a specific exclusive provision for the equality of sexes, gender equality is guaranteed by the Constitution of India along with the general concept of equality contained in Article 14 and non-discriminatory provisions contained in Articles 15 and 16 of the Constitution. The Supreme Court of India is the interpreter of the constitutional provisions and the guardian and protector of fundamental rights. This paper analysis how the Supreme Court of India articulated sex equality and gender justice within the framework of the Constitution of India. A comprehensive account of the role played by the Supreme Court of India on gender equality is not a task that can be undertaken within the scope of an article like this. Therefore, it has to be selective and illustrative. The paper examines the judicial decisions in which issues of gender equality were raised mainly with reference to the constitutional guarantee of equality and liberty. The paper concludes that the Supreme Court of

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India has been endeavoring to reconstitute the fundamental rights to life and personal liberty under Article 21 of the Constitution of India in the context of women's experiences and concerns. However this does not mean that complete gender justice has been achieved. It is unfortunate that judicial attitude is not uniformly favorable to gender equality in India. Personal laws in India are gender biased against women in one respect or the other. However the Court in India seem to have taken a back seat when it comes to the unconstitutionality of personal laws.

I. INTRODUCTION

Social integration is the process of promoting the values, relations, and institutions that enable all people to participate in social, economic and political life on the basis of equal rights, equity, and dignity.¹ Social justice, the creation of a society for all, is the over-arching goal of social integration.² The historical subordination and suppression of women was universal and all pervasive with every nation, at one time, subjugating, exploiting, discriminating, ill-treating, and degrading its women. Women were denied the right to vote, right to work, guardianship rights, inheritance rights, and so on. Therefore, the aim of constitutional justice assumes special importance for the deprived and degraded women.

The Constitution of India embraces the concept of social integration, by using the expression "social justice." The Indian Constitution incorporates the goal of achieving social justice in express terms in the Preamble, followed by the Fundamental Rights, and further elaborated in the Directive Principles of State Policy. The Preamble explicitly resolves to assure its citizens social, economic, and political justice. The Constitution of India does not contain a specific exclusive provision for equality of the sexes, but gender equality is guaranteed by these constitutional provisions, along with the general concept of equality contained in Article 14 and non-discriminatory provisions contained in Articles 15 and 16.

¹ CLARE FERGUSON, PROMOTING SOCIAL INTEGRATION, REPORT COMMISSIONED BY THE UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (UNDESA) FOR THE EXPERT GROUP MEETING ON PROMOTING SOCIAL INTEGRATION, HELSINKI, FINLAND 6 (2008).

² David Miller, *What is Social Justice?*, in SOCIAL JUSTICE. BUILDING A FAIRER BRITAIN (Nick Pearce & Will Paxton eds., 2005).

The Supreme Court of India is the interpreter of the constitutional provisions and the guardian and protector of fundamental rights. This paper analyzes how the Supreme Court of India articulated gender equality and justice within the framework of the Constitution of India. A comprehensive account of the role played by the Supreme Court on gender equality is not a task that can be undertaken within the scope of an article. Therefore, this analysis is selective and illustrative. The paper examines the judicial decisions, in which issues of gender equality were raised, mainly with reference to the constitutional guarantees of equality and liberty. Naturally, this short account only highlights broad features of the role played by the Supreme Court of India and is not exhaustive.

II. THE CONSTITUTION OF INDIA

The Constitution of India, which was passed on November 26, 1949 and came into force on January 26, 1950,³ declares India to be a Union of States (Article 1).⁴ It guarantees the Fundamental Rights to all its citizens. The Directive Principles of State Policy are incorporated in it. The Constitution establishes a parliamentary form of government. Powers are divided between the Parliament of the Union (Part V, Chapter II) and Legislative Assemblies of each state (Part VI, Chapter III). The executive powers of the union are vested in the President, acting in accordance with the advice of the Council of Ministers headed by the Prime Minister and accountable to the Lower House of Parliament and the House of the People or the *Lok Sabha* (Part V, Chapter I).⁵ The executive

³ It is the longest written constitution of any sovereign country in the world, containing 448 articles in 25 parts, 12 schedules, 5 appendices and 98 amendments (out of 120 Constitutional amendment bills).

⁴ India is declared a union and not a federation. The states and union territories are specified in the First Schedule. The framers of the Constitution were of the view that "union" better describes the fact that the Union of India is not the outcome of an agreement among the old provinces with the result that it is not open to any state or group of states seceding from the union or unilaterally varying the boundary of their states. The constituent units of the Indian Union were not sovereign and independent in the same way as were the American colonies before they formed their federal union. See Constituent Assembly of India, Constituent Assembly Debate, Vol. 7, at 48 (1948).

⁵ The Constitution of India provides for a bicameral parliament consisting of the President and two houses known as the Council of States (Rajya Sabha) and the House of People (Lok Sabha). Rajya Sabha is the upper house and Lok Sabha is

powers of each state are vested in the governor, acting on the advice of the Council of Ministers headed by the chief minister accountable to the Legislative Assembly (Part VI, Chapter IV). It is federal in form but unitary in spirit.⁶ It is neither too rigid (as some provisions can be amended by a simple majority) nor too flexible (as some provisions require special majority for amendment) (Part XX). It declares India a secular state (Preamble). It guarantees single citizenship to all citizens (Part II). It introduces the adult franchise – every adult above eighteen years has the right to vote (see Article 326) – and the system of joint electorates. It establishes the Supreme Court of India (Part V, Chapter IV) consisting of the Chief Justice of India and seven, now thirty judges.⁷ High Courts⁸ for each state and subordinate courts (Part VI, Chapter VI) are also established.

III. THE SUPREME COURT OF INDIA

The Supreme Court came into being on January 28, 1950, two days after India became a sovereign democratic republic. As its name suggests, it is the apex court in India. The Supreme Court of India has original jurisdiction, appellate jurisdiction, and advisory jurisdiction. The Supreme Court is given original and exclusive jurisdiction in any dispute between the government of India and the state or between states involving any question of law or fact (Article 131). In addition, writ jurisdiction gives extensive original jurisdiction to the Supreme Court in regard to enforcement of the fundamental rights of its citizens. It is empowered to issue directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari to enforce court rulings.⁹ An appeal to the Supreme

the lower house. For details, see <http://164.100.47.132/LssNew/our%20parliament/Our%20Parliament.pdf>.

⁶ Some scholars call it a federal state, others a quasi-federal state, others a unitary state with federal features, See M.P. SINGH, V.N. SHUKLA'S CONSTITUTION OF INDIA A29-A39 (11th ed. 2008).

⁷ Vide the Supreme Court (Number of Judges) Amendment Act, 2008 (11 of 2009).

⁸ INDIA CONST. part VI, chap. V (every High Court consists of a chief justice and such other judges as the President may from time to time deem necessary to appoint as per India's Constitution, art. 216).

⁹ INDIA CONST., art. 32. It is pertinent to mention here that writ jurisdiction has also been conferred on the High Courts of states by Article 226 of the

Court from the High Court lies in any civil, criminal, or other proceedings if the High Court certifies that a substantial question of law pertaining to the interpretation of the Constitution is involved (Article 132). The Supreme Court may grant special leave to appeal from any decision “in any case or matter passed or made by any court or tribunal in the territory of India” (Article 136). The Supreme Court has special advisory jurisdiction in matters which may specifically be referred to the Court by the President of India under Article 143 of the Constitution. The Supreme Court also has the power to take cognizance of matters on its own (Article 32).

IV. CONSTITUTIONAL PROVISIONS FOR WOMEN

The principle of equality of the sexes is enshrined in the Indian Constitution in its Preamble, Part III, guaranteeing the Fundamental Rights; Part IV-A prescribing the Fundamental Duties; Part IV, dealing with the Directive Principles of State Policy; and Part IX- A dealing with panchayats and municipalities.

A. Preamble

The Preamble to the Indian Constitution declares India to be a sovereign, socialist, secular, democratic republic;¹⁰ assures its citizens justice, promises social, economic, and political equality of status and opportunity; guarantees liberty of thought and expression; and endeavors to promote fraternity among citizens. Though no special mention of gender equality is made in the Preamble, the expression “social justice” does encompass it. Further, equality of status and opportunity for all citizens means equal status between men and women in terms of opportunity

B. Fundamental Rights

The provisions regarding fundamental rights have been enshrined in Part III of the Constitution (Articles 12-35) and are

Constitution of India, and the power conferred on a High Court is not in derogation of the power conferred on the Supreme Court.

¹⁰ INDIA CONST., Preamble. The words “socialist” and “secular” were added to the Preamble in 1976 by constitutional amendment.

applicable to all citizens irrespective of gender. Articles 14-18 deal with the right to equality. Article 14 expressly guarantees equality before the law.¹¹ Article 15 guarantees women the right not to be discriminated against because of their gender.¹² The Constitution of India not only grants equality to women but also empowers the state to adopt measures of positive discrimination in favor of women to neutralize the cumulative socio-economic, education, and political disadvantages faced by them.¹³ Article 16 guarantees women right to equal treatment in public employment.¹⁴

C. Fundamental Duties

Article 51A(e) imposes a duty on every citizen to renounce practices derogatory to the dignity of women.¹⁵ The Constitution and its scheme envisages responsible citizens. In that sense, fundamental duties perform an educative role. These duties are not self-executing and the state must make laws for their implementation. In the absence of such laws, for example, mandamus cannot be sought against an individual who does not observe his duties under this article.¹⁶

¹¹ INDIA CONST., art. 14 (the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India).

¹² INDIA CONST., art. 15 (prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth — (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them. (emphasis added)).

¹³ INDIA CONST., art. 15(2):

No citizen shall, on grounds only of religion, race, caste, **sex**, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children. (emphasis added).

¹⁴ INDIA CONST., art. 16:

Equality of opportunity in matters of public employment. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, **sex**, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (emphasis added).

¹⁵ The fundamental duties were added to the Constitution of India by (Forty-Second Amendment) Act 1976, § 11.

¹⁶ *Surya Narain v. Union of India*, A.I.R. 1982 (Raj.) 1 (India).

D. Directive Principles of State Policy

Part IV of the Constitution, entitled “Directive Principles of State Policy,” contains the positive welfare obligations of the state, in contrast to negative obligations under Part III which guarantee fundamental rights. These principles are intended to be imperatives of state policy. They are in the nature of instructions issued to future legislatures and executives for their guidance. The Directive Principles of State Policy differ from the Fundamental Rights in one important aspect and that is that, unlike Fundamental Rights, they are not enforceable by any court.¹⁷ If the state is unable to take any positive action in furtherance of the directive principles, a lawsuit cannot be brought against it in court.¹⁸ The state is required to secure for all citizens, without discrimination between men and women, equal rights to an adequate means of livelihood and equal pay for equal work.¹⁹ The state is also required to secure just and humane conditions of work and for maternity relief.²⁰

E. Panchayats and Municipalities

Part IX of the Constitution of India, added by the Constitution (Seventy-Third) Amendment, Act 1992,²¹ deals with panchayats (self-government for the rural areas). Part IX-A of the Constitution, added by (Seventy-Fourth) Amendment, Act 1992, deals with the municipalities (self-government for the urban areas).

¹⁷ The concept has been borrowed from the Irish Constitution.

¹⁸ The want of enforceability has led some critics like K.C. Wheare to describe them as “little more than manifesto of aims and aspirations.” However, the Indian Supreme Court ruled that, although they are expressly made unenforceable, that does not affect their fundamental character; they still very much form part of the constitutional law of the land; and they are fundamental in the governance of the country. See *Keshvananda Bharti v. State of Kerala* (1973) 4 S.C.C. 225, 881 (India).

¹⁹ INDIA CONST. 1950, art 39. Certain principles of policy to be followed by the state. The state shall, in particular, direct its policy towards securing (a) that the citizens, men and women equally, have the right to an adequate means of livelihood and (d) that there is equal pay for equal work for both men and women.

²⁰ INDIA CONST. art. 42 (provision for just and humane conditions of work and maternity relief). The state shall make provision for securing just and humane conditions of work and for maternity relief).

²¹ *Id.* An earlier version, the original Part IX, dealing with Territories in Part D of the First Schedule, was repealed by the Constitution (Seventh Amendment) Act, 1956.

Both Part IX and IX-A reserve not less than one-third of the total number of legislative seats for women.²²

V. CONSTITUTIONAL JUSTICE FOR WOMEN

We have seen that the Constitution of India guarantees to all persons within its territory the right to equality and equal protection of the law. The Supreme Court of India interpreted the Equality Clause by ruling that equals must be treated alike and by invoking the principle of reasonable classification to allow differential treatment in those circumstances where people are not similarly situated.²³ However, the Constitution specifically bars

²² INDIA CONST. art. 243D. Reservation of seats:

(1) Seats shall be reserved for—

(a) the Scheduled Castes; and

(b) the Scheduled Tribes,

in every Panchayat.... Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.

(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

INDIA CONST. art. 243T. Reservation of seats:

(1) Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes in every Municipality and the number of seats so reserved shall bear....

(2) Not less than one-third of the total number of seats reserved under clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Municipality shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Municipality.

(4) The offices of Chairpersons in the Municipalities shall be reserved for the Scheduled Castes, the Scheduled Tribes and women in such manner as the Legislature of a State may, by law, provide.

The constitutional validity of the reservation portion of the Seventy-Third and Seventy-Fourth Amendments has been upheld by the Supreme Court in *K. Krishna Murthy & Ors v. Union Of India*, (2010) 7 S.C.C. 202 (India).

²³ *Chiranjit Lal v. Union of India*, A.I.R. 1951 S.C. 41 (India). For classification to be reasonable, it is necessary that those who are selected for different treatment must be distinct from those who are excluded from it, and the criteria of classification must have a nexus with the object of such classification.

any classification solely on the basis of gender (Article 15 (2)). There is another provision in the Constitution which allows the state to make a special law for the benefit of women (Article 15 (3)). Now, let us consider how these provisions have been applied by the Supreme Court of India in a given situation.

A. Supreme Court of India and Right to Work

In the *Muthamma case*,²⁴ a senior female member of Indian Foreign Service, challenged the constitutional validity of some of the foreign services rules as being discriminatory to women. She alleged that she had been illegally and unconstitutionally denied promotion to Grade I of the foreign service. In her petition, she challenged Rule 8(2) of the foreign service's Conduct and Discipline, Rule 1961, which prescribed that a female member of the service shall obtain permission in writing from the government before marriage, and the member may be required to resign any time after marriage if the government is satisfied that her family and domestic commitments will hamper her duties as a member of the service. She also challenged Rule 18(4) of the Indian Foreign Service's Recruitment, Cadre Seniority, and Promotion, Rule 1961, which stated that no married woman shall be entitled as a right to be appointed to the service.²⁵

The Supreme Court ruled that discrimination against women is found in Rule 8(2) and Rule 18(4) and is in defiance of Article 16 of the Constitution. The apex court observed that

this writ petition by Miss Muthamma bespeaks a story that makes one wonder whether Articles 14 and 16 belong to myth or reality. The credibility of constitutional mandates shall not be shaken by governmental action or inaction but it is the effect of the grievance of Miss Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after freedom. There is some basis for the charge of bias in the rules and this makes ominous the indifference of the executive to bring about the banishment of discrimination in the heritage of service rules.

It is pertinent to mention that Rule 18(4) was deleted during the pendency of the writ, and Rule 8(2) was on its way to oblivion as

²⁴ *C.B. Muthamma v. Union of India*, A.I.R. 1979 S.C. 1868 (India).

²⁵ *Id.* at 1869.

its deletion was gazetted, so no scope was left for the Court to strike down these rules. The petitioner had also been promoted, after the institution of this proceeding. The Court, however, directed the respondent to review the petitioner's case with particular focus on seniority vis-a-vis her juniors who had been promoted in the interval of some months. It was further impressed upon the respondent the need to overhaul all service rules to remove the stains of gender discrimination, without waiting for ad-hoc inspiration from writ petitions or gender charity (p. 1870).

In another case, *Air India International*,²⁶ the air hostesses of Air India International Corporation filed a writ petition in the Supreme Court of India challenging the constitutional validity of Regulations 46 and 47 of Air India Employees Service Regulations, which contain discriminatory service conditions. Under the regulations, an air hostess was to retire from service upon marriage if it took place within four years of beginning employment, upon the first pregnancy, or upon attaining the age of thirty-five years. The air hostesses contended that these regulations were gender discriminatory, as similar regulations did not apply to male employees doing similar work. While the Supreme Court upheld the first requirement that an air hostess should not marry before the completion of four years of service, it held that the requirement of resigning after the first pregnancy was unconstitutional as being discriminatory against women.²⁷ The Court also held that the third condition that an air hostess should retire at age thirty-five was discriminatory (p. 1855) and asked Air India to change its rules so as to permit women to work till they reached the age of superannuation applicable to male employees.

B. Supreme Court of India and the Right to Dignity

Article 21 of the Constitution of India guarantees to all persons the right to life and personal liberty.²⁸ The Supreme Court of India has given a very liberal interpretation to Article 21 so as to include the "right to life" the "right to live with dignity."²⁹ The Indian courts have taken recourse to the constitutional right to life

²⁶ *Air India International v. Nargesh Meerza*, A.I.R. 1981 S.C. 1829 (India).

²⁷ *Id.* at 1850-51.

²⁸ INDIA CONST. art. 21 (protection of life and personal liberty; no person shall be deprived of his life or personal liberty except according to procedure established by law).

²⁹ *Francis Coralie Mullin v. Administrator, UT of Delhi*, A.I.R. 1981 S.C. 746 (India).

and personal liberty for mainstreaming women's rights into the paradigm of human rights. In *Life Insurance Corporation (LIC) of India case*,³⁰ the Supreme Court of India recognized that a woman's right to privacy is an integral part of the right to personal liberty. In this case, a married woman received an appointment with the LIC as an assistant. After some time, within the probationary period, she applied for a maternity leave of three months. While she was availing the maternity leave, her services were terminated with a notice without assigning any grounds. She filed suit in the High Court, and the High Court refused to interfere with the termination, since the petitioner's work during the period of probation was found to be unsatisfactory. Thereafter, the petitioner appealed to the Supreme Court. The corporation justified the termination of petitioner's services on the ground that she had deliberately withheld the fact of her pregnancy when she completed the declaration form for her medical examination. Rejecting the contention of the corporation, the Court observed that "when we are moving forward to achieve the constitutional guarantee of equal rights for women, the Life Insurance Corporation of India seems to be not moving beyond the status quo."³¹ The Court found that there is nothing on record to indicate that the petitioner's work during the probation was unsatisfactory. The reason for termination was only the declaration given by her upon entering service, and the petitioner was medically examined by a female doctor who found her medically fit to join the post.

The Court further observed that

the real mischief though unintended is the nature of the declaration required from a lady candidate especially the particulars required to be furnished under columns (iii) to (viii)³² which are indeed embarrassing, if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems.

³⁰ *Neera Mathur v. Life Insurance Corporation of India*, A.I.R. 1992 S.C. 392 (India).

³¹ *Id.* at 393.

³² *Id.* at 394:

- iii) Have the menstrual periods always been regular and painless, and are they so now?
- iv) How many conceptions have taken place? How many have gone full-term?
- v) State the date of last menstruation.
- vi) Are you pregnant now?
- vii) State the date of last delivery.
- viii) Have you had any abortion or miscarriage?

The interim order for the reinstatement already given was made absolute.

In *Goutam Kundu v. State of West Bengal*,³³ a wife filed a petition against her husband for maintenance of herself and her newborn under Section 125 of the Criminal Procedure Code, 1973. The judicial magistrate issued an order awarding maintenance. The husband, disputing the paternity of the child, filed a criminal miscellaneous application for a blood group test. He claimed that if it was established that he was not father of the child he would not be liable to pay the maintenance.³⁴ The application was dismissed. Appellant's revision application was also rejected by the High Court. The husband filed an appeal by special leave to the Supreme Court. After referring to English law, American law, and Indian judicial precedents on the point, the Supreme Court held that courts in India cannot order a blood group test as a matter of course. Section 112 read with Section 4 of the Evidence Act debars evidence, except in cases of non-access between the spouses, to refute the presumption of legitimacy and paternity. It is a rebuttable presumption of law that a child born during lawful wedlock is legitimate and that access occurred between the parties. This presumption can only be displaced by a strong preponderance of evidence and not by a mere balance of probabilities.³⁵

A very revolutionary judgment from the Supreme Court of India exhibiting its gender sensitive approach is *Bodhisattwa Gautam v Subhra Chakraborty*.³⁶ In this case, the appellant, a college lecturer, had persuaded a woman, who was his student, to have sexual intercourse with him on the promise of marriage. He then went through a false ceremony of marriage with her. She became pregnant on two occasions, and, on both occasions, he compelled her to undergo an abortion. He then abandoned her on the pretext that he never married her. The woman lodged a complaint under various provisions of India's Penal Code. He applied to the High Court to quash the prosecution, and the application was rejected by the High Court. He then filed a Special Leave Petition (SLP) to the Supreme Court. Though the SLP was dismissed, the appeal resulted in a historic judgment where the

³³ A.I.R. 1993 S.C. 2295 (India).

³⁴ *Id.* at 2296. It may be noted that this contention was baseless because Section 125 of the Code of Criminal Procedure makes a person liable to maintain even his illegitimate minor child.

³⁵ A.I.R. 1993 S.C. at 2301.

³⁶ A.I.R. 1996 S.C. 922 (India).

Supreme Court of India took *suo motu* notice of the facts in the complaint and issued a notice for the petitioner to show cause why he should not be compelled to pay compensation to the woman. The Court held that offenses like rape were crimes against a person's most cherished human rights, namely the right to life. The Court held that under Article 32 of the Constitution of India it could take *suo motu* notice of the facts, and the Court directed the appellant to pay interim compensation of Rs 1000 per month to the woman pending the prosecution.

Another remarkable case decided by the Supreme Court that protected and promoted the dignity of women, is the *Visakha case*.³⁷ In this case, a Public Interest Litigation was filed by women's organization for the enforcement of the fundamental rights of working women under Articles 14, 19, and 21 of the Constitution, in view of the prevailing incidents of sexual harassment at work places, and sought judicial intervention in finding suitable methods, in the absence of specific legislation, for realizing gender equality in the workplace.³⁸ The Court considered and applied the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to enlarge the meaning and promote the constitutional guarantee of gender equality. The Supreme Court observed that sexual harassment at the workplace amounted to discrimination under Article 14 and a denial of the right to live with dignity guaranteed by Article 21 of the Constitution. The Supreme Court also observed that the fear of sexual harassment prevents a woman from pursuing her career and, thus, violates her right to carry on any occupation guaranteed by Article 19(1)(g) of the Constitution. This case is important as, in the absence of domestic law occupying the field, it laid down guidelines³⁹ to check the evil of sexual harassment of working women at all workplaces (252-254) and to protect the right to work with dignity. The guidelines included duties for employers to ensure that there

³⁷ *Visakha v. State of Rajasthan* (1997) 6 S.C.C. 241 (India).

³⁸ The immediate cause for filing this writ petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. *Id.* at 246.

³⁹ The Court exercised its power under Article 32 of the Constitution of India. *Id.* at 251. Article 32 empowers the Supreme Court of India to issue directions, orders, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari which may be appropriate for the enforcement of Fundamental Rights. The Guidelines were, as a matter of fact, Directions issued by the Court under this article.

was no hostile environment for women, barred victimization of affected women and witnesses, and directed an express ban on sexual harassment through rules and regulations of service or standing orders in the private sector. The guidelines contemplated complaint committees at all workplaces, headed by a female employee, and with not less than half the members of each committee being women. The case also defined sexual harassment to include any sort of unwelcomed, sexually-determined physical, verbal, and non-verbal conduct and covered situations that disadvantaged women in their workplace or threatened their employment status, recruitment, or promotion.⁴⁰ The Court issued these guidelines to fill the legislative vacuum⁴¹ and emphasized that the guidelines would be treated as the law declared by this Court under Article 141 of the Constitution of India.

In another path breaking judgment,⁴² the Supreme Court of India recognized the right of prostitutes and sex workers to a life of dignity in view of Article 21 of the Constitution. The Court directed the central and state governments to prepare policies for giving technical/vocational training to sex workers and sexually abused women in all cities in India.

C. Women and the Right to Religion

The Constitution of India separately recognizes a right to religion. This right covers the freedom of conscious, the free profession, practice, and propagation of religion (Article 25), and the freedom to manage religious affairs (Article 26). However, this is subject to limitations based on public order, morality, and the non-derogation of other rights guaranteed under the Fundamental Rights chapter. Religion has, however, proved to be the formidable barrier against the realization of women's rights. Most of the religious practices accord a subordinate place to women. Freedom of religion may, therefore, include such practices and precepts that justify and perpetuate women's subordination. Women are, for example, denied the access or right to worship or the right to be priests.

⁴⁰ The Guidelines given in this case had to a large extent been followed in all work places.

⁴¹ The law against sexual harassment has been passed and is entitled The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal), Act, 2013, Act No. 14 of 2013.

⁴² *Budhadev Karmaskar v State Of West Bengal*, (2012) Crim. L.J. (S.C.) 316. Basically, it was a case involving the murder of a prostitute.

A case where a woman was denied entrance to a temple came before the Kerala High Court.⁴³ A Public Interest Litigation was filed in the High Court against allowing women to trek Sabri hills and offer prayers at the Sabrimala shrine; the petition alleged that these acts were contrary to the temple's custom. The petitioner pleaded that the temple was not accessible to menstruating women between the ages of ten and fifty, and this right of religious denomination was protected under Article 26 of the Constitution. The respondent contended that barring women within the age group violated their Fundamental Rights guaranteed under Articles 15 and 25 of the Constitution and was discrimination on the ground of sex. The court, however, observed that "the restriction imposed on women aged above 10 and below 50 from trekking the holy hills of Sabrimala and offering worship at the Sabrimala Shrine is in accordance with the usage prevalent from time immemorial. Such restriction is not violative of Article 15...."⁴⁴

It is unfortunate that the High Court did not hold that the religious practice, which was discriminatory against women, was unconstitutional. Freedom of religion guaranteed by Articles 25 and 26 of the Constitution of India is "subject to other provisions of this Part," which means that it has to be exercised subject to the other Fundamental Rights, including the right to equality.

D. Supreme Court of India and Personal Laws

In India with respect to family matters there is no uniform law and each community is governed by its individual law based on religion. This law is codified, to a large extent, for Hindus,⁴⁵ which constitute the majority in India; un-codified for Muslims and Jews; and partly codified for Christians and Parsees. All these community-specific laws are gender biased against women in one respect or the other. Article 13 of the Constitution of India expressly declares void all laws, including existing laws, that are inconsistent with or in derogation of the Fundamental Rights.⁴⁶

⁴³ *S. Mahendran v. Secretary, Travancore Dewaswom Board*, A.I.R. 1993 (Kerala) 43 (India).

⁴⁴ *Id.* at 57.

⁴⁵ The word "Hindus" includes the Sikh, Jains, and Buddhists. *See, e.g.*, Section 2, Hindu Marriage Act, 1955

⁴⁶ INDIA CONST. art. 13:

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

On numerous occasions, women, from different religions, challenge the discriminatory provisions of community laws in the Supreme Court, on the ground that they violate the right to equality. However, the courts in India seem to have taken a back seat regarding the unconstitutionality of community laws. As far back as 1952, a Division Bench of the Bombay High Court⁴⁷ held that community laws were not laws within the meaning of Article 13 of the Constitution and, therefore, do not have to withstand judicial scrutiny regarding their constitutionality. They are part of tradition and, hence, outside the definition of law.

This remains the dominant view of the courts. For instance in 1996, the Supreme Court refused to strike down discriminatory tribal law disentitling tribal women from inheriting land, when the constitutionality of the law was challenged by tribal woman as being discriminatory.⁴⁸ The Court ruled that the law was justified on the ground that it was necessary to retain the land in tribal hands to preserve the tribe's identity. To allow tribal women to marry non-tribal men and inherit tribal land, which could then be alienated, would erode community identity. In another case,⁴⁹ a mother wanted to invest in the name of her son in the National Bank, and she signed the relevant form as natural guardian. The form was rejected by the bank, which argued that under the law⁵⁰

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,

(a) "law" includes any Ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) 'laws in force' includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

⁴⁷ *The State of Bombay v. Narasu Appa Mali*, 1952 A.I.R. (Bom) 84 (India).

⁴⁸ *Madhu Kishwar v. State of Bihar*, (1996) 5 S.C.C. 125 (India).

⁴⁹ *Githa Hariharan v. Reserve Bank of India*, A.I.R. 1999 S.C. 1149 (India).

⁵⁰ Hindu Minority and Guardianship Act, 1956, Section 6:

Natural guardians of a Hindu minor. The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are (a) in the case of a boy or an unmarried girl the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother; (b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father; (c) in the case of a married girl - the husband. Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section (a) if he has ceased to be a Hindu, or (b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic

the father of the son is the natural guardian and after him the mother. The mother challenged the law before the Supreme Court on the ground that it discriminated against women and violated Articles 14 and 15 of the Constitution. The Supreme Court refused to strike down the law but held that the words “after him” did not mean on the death of the father but rather in his absence. Hence, the right of the mother to the guardianship of her child was made contingent on the absence of the father. By not testing the validity of the impugned law on the crucible of constitutionalism, the Supreme Court lost the opportunity to articulate a clear jurisprudential basis within which the demand for the equality of women could be articulated.⁵¹

Another mechanism, which has been adopted by the Supreme Court of India, is to pass the buck to the legislature relying on the doctrine of separation of powers. For instance, in *Ahmedabad Women Action Group v Union of India*,⁵² a Public Interest Litigation, the petitioner had challenged the constitutionality of gender discriminatory provisions of various community laws. While dismissing the petition, the Supreme Court observed that these are all matters for the legislature.⁵³

VI. CONCLUSION

The Supreme Court of India has been endeavoring to reconstitute the fundamental rights to life and personal liberty under Article 21 of the Constitution of India in the context of women’s experiences and concerns. Illustrating the relationship between the Indian Constitution and social order, Gary Jacobsohn⁵⁴ termed the Indian Constitution a “militant” constitution in contrast to an “acquiescent” Constitution, signifying that it embodies a conscious mandate to transform and restructure the existing norms and traditional social relationships. The Supreme Court of India, as a protector and guardian of the

(yati or sanyasi). Explanation. In this section, the expressions “father” and “mother” do not include a step-father and a step-mother.

⁵¹ MEN’S LAWS AND WOMEN’S LIVES 8 (Indira Jaisingh ed., 2005).

⁵² (1997) 3 S.C.C. 573.

⁵³ *Id.* at 581.

⁵⁴ GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 238-52 (2010), available at file:///C:/Users/admin/Desktop/Downloads/Gary%20Jeffrey%20Jacobsohn-Constitutional%20Identity%20%20-Harvard%20University%20Pres s%20(2010)%20(1).

Fundamental Rights, has adopted the stance that it acts as the “sentinel on the qui vive” vis-à-vis the Fundamental Rights, including women’s rights. However, this does not lead to the conclusion that complete gender justice has been achieved. It is unfortunate that the judicial attitude is not uniformly favorable to gender equality. Community laws have become an island within the Constitution, untouched by the ethos. In fact, there has been no transition from colonialism to constitutionalism in community laws,⁵⁵ which continue to adversely affect the cause of women. The Supreme Court’s approach seems to be to swim with the legislative currents, not against them, and to declare community laws as outside the purview of the Constitution and its anti-discrimination provisions. It is a “please all” option.⁵⁶ The Constitution of India empowers the Supreme Court to declare all gender discriminatory provisions unconstitutional, but this requires courage and craft by the Supreme Court since it also involves political confrontations.

Further, the Constitution of India provides for the attainment of a uniform civil code, which is a law common to all communities in personal matters such as marriage, divorce, maintenance, adoption, inheritance, succession, etc. Article 44 of the Constitution prescribed in 1950 that “The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” It has been sixty-five years now, however, the enactment of a uniform civil code remains an aspiration and has not been secured through legislation. The Supreme Court of India has, time and again, in 1985,⁵⁷ 1995,⁵⁸ and 2003,⁵⁹ lamented the country’s failure to adopt a uniform civil code as enjoined by Article 44. The 1985 *Shah Bano* case is one of the prominent cases on the point; an elderly, deserted Muslim woman sought maintenance under section 125 of Criminal Procedure Code, 1973, which is a secular law. As soon as she filed her maintenance petition, her husband divorced her by pronouncing *talaq*.⁶⁰ While granting her maintenance, even after

⁵⁵ MEN’S LAWS AND WOMEN’S LIVES, *supra* note 51, at 338.

⁵⁶ B. Sivaramaya, *Gender Justice*, in INDIAN LAW INSTITUTE (ed), FIFTY YEARS OF THE SUPREME COURT OF INDIA 313 (2000).

⁵⁷ *Mohd Ahmed Khan v. Shah Bano*, A.I.R. 1985 S.C. 945 (India).

⁵⁸ *Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531 (India).

⁵⁹ *John Vallamattom v. Union of India*, A.I.R. 2003 S.C. 2902 (India).

⁶⁰ *Talaq* in Muslim Law denotes the absolute power of the husband to dissolve the marriage without assigning any reasons.

the *iddat*⁶¹ period provided under the secular law, the apex court came out strongly in favor of the enactment of a uniform civil code. Thereafter, the nation witnessed an uproar by Muslim fundamentalists, which erupted in the wake of this decision, compelling the then Prime Minister Rajiv Gandhi's government to overrule the decision by enacting the Muslim Women (Protection on Divorce) Act, 1985, effectively barring Muslim women from claiming maintenance under secular law.⁶²

In the *Sarla Mudgal* case of 1995, a Hindu husband, after embracing Islam, contracted a second marriage with a Muslim girl without dissolving the first Hindu marriage. While holding the husband liable for bigamy, the Supreme Court advocated a uniform civil code and observed that

the rulers of the day are not in a mood to retrieve Article 44 from the cold storage where it has been lying since 1950. The governments, which have come and gone, have so far failed to make any effort towards a unified personal law for all Indians. When more than 80% of the citizens have already been brought under the codified community laws, there is no justification whatsoever to keep in abeyance, any more, the introduction of a 'uniform civil code' for all citizens in the territory of India.⁶³

In the 2003 *Vallamattom* case, involving the constitutionality of Section 118 of the Indian Succession Act, which prevents Christians from willing property for charitable and religious purposes, the Supreme Court again opined that

we would like to state that Article 44 provides that the state shall endeavour to secure for all citizens a uniform civil code throughout the territory of India.... It is a matter of great regret that Article 44 of the Constitution has not been given effect. Parliament has still to step in to frame a common civil code in the country.”

The Supreme Court, however, refused to entertain⁶⁴ a Public

⁶¹ In Muslim Law, on dissolution of marriage, a woman has to observe a period of seclusion called *iddat*, which normally is of three months. Muslim Law enjoins the husband to maintain the wife during the period of *iddat*.

⁶² *Daniel Latiffe v. Union of India*, (2001) 7 SCC 740 (India).

⁶³ Later in one of the seminars, Justice Kuldip Singh, the author of the judgment, clarified that he had only made an observation and not issued a directive for the enforcement of principle contained in Article 44 of the Constitution of India.

⁶⁴ THE ECONOMIC TIMES, Oct. 18, 2008.

Interest Litigation seeking a direction to Parliament to enact a legislation on a uniform civil code. “There is no power with us to give such a direction,... It is the prerogative of Parliament to enact a legislation. Direction cannot be given to it,” said the Supreme Court while dismissing the petition. Recently, the High Court of Delhi also refused to entertain⁶⁵ a Public Interest Litigation asking for time-bound implementation of the Supreme Court’s judgment to provide a uniform civil code applicable throughout the country.

The enactment of a gender-sensitive civil code for all Indians would, in fact, only be a fulfillment of the constitutional goal. The issue, however, has become deeply politicized, subject to the pressures of party politics rather than governed by the principles of gender justice or the ideals of the Indian Constitution.

Keywords

Constitution of India, Supreme Court of India, Gender Justice, Gender Equality, Law and Women, Protective Discrimination, Personal Laws, Uniform Civil Code, Right to Dignity, Right to Work, Right to Religion

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⁶⁵ THE ECONOMIC TIMES, June 5, 2014.

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ARTICLES

FOR THE WORLD'S MORE FULL OF WEeping: RETROACTIVELY ABOLISHING SOUTH KOREA'S CIVIL AND CRIMINAL STATUTES OF LIMITATIONS FOR ILLEGAL INTERNATIONAL ADOPTIONS*

Daniel A. Edelson**

ABSTRACT

In the decades following the Korean War, South Korea may have sent up to 200,000 children overseas for adoption. Some adoptees, well after becoming adults, suspect that their adoption may have been illegal and wish to pursue civil litigation in the South Korean courts against the adoption agencies and the South Korean government. Others also want the South Korean government to prosecute criminally those they believe were responsible for orchestrating their adoptions.

But rigid application of South Korea's statutes of limitation precludes both civil and criminal cases in connection with international adoptions. This Article proposes, based on principles from other jurisdictions and South Korean precedent, that the South Korean courts and its National Assembly should provide an exception so that illegal international adoption cases can proceed on

* "Come away, O human child!/To the waters and the wild/With the faery hand in hand/For the world's more full of weeping than you can understand." YEATS, W.B., *THE STOLEN CHILD* (1889), available at <http://www.theotherpages.org/poems/yeats01.html>.

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their merits. In the alternative, the Article proposes that South Korea should establish a Truth and Reconciliation Commission to conduct a thorough examination of the process that sent so many children abroad.

The Article concludes that South Korea should not dismiss as untimely claims that the state and the adoption agencies engaged in illegal practices. Whether through the courts or through a neutral truth finding commission, allegations in connection with international adoptions deserve a serious and meaningful response.

I. INTRODUCTION

In the 60 years following the Korean War, South Korea sent up to 200,000 children to adoptive parents in other countries. South Korea enjoys widespread appeal among adoptive parents who generally view South Korea as a safe, efficient, and trustworthy country from which to adopt. But some adoptees from South Korea, well after becoming adults, question the circumstances and legality of their adoption.

On June 25, 2014, the author met with a group of men and women in Seoul, South Korea, all of whom were born in Korea and adopted by parents overseas before the age of six. The meeting, which took place at a modest guesthouse in Seoul, was sponsored by the Truth and Reconciliation for the Adoption Community in Korea (TRACK), a South Korean advocacy group that, among other things, calls on South Korea to reform its adoption laws and policies.

Some of the men and women who attended the meeting now lived in South Korea, and others were visiting from Europe and the United States. They returned to a country that they could not possibly remember from their childhoods. Even an adoptee with vague memories of her birth country would be unlikely to recognize modern South Korea, which experienced dramatic economic, social, and political change in the decades since the Korean War.

Many of the attendees at the meeting came to South Korea to better understand the circumstances of their adoption. Some suspected that their adoption might have been a crime – that they were sent overseas under fraudulent circumstances. A number of adoptees expressed concern over the confusing, contradictory, and apparently falsified records of their adoption.

Critics allege that South Korean adoption agencies, among other abuses, improperly pressured women to relinquish their children, accepted children for international adoption without the consent of both parents, and classified children as orphans using falsified documents. A number of commentators believe that South Korea's former military dictatorships promoted and facilitated the illegal international adoptions for economic reasons and that the adoption agencies in South Korea acted as their agents.

Despite South Korea's use of truth commissions to investigate other historical events, South Korea has never formally investigated its international adoption practices and whether these adoptions may have violated South Korean law. Some adults who were adopted from South Korea, frustrated at the lack of disclosure from the government and adoption agencies, and based on conclusions from their own investigations, wish to pursue civil litigation in the South Korean courts against the adoption agencies and the South Korean government. Others also want the government to prosecute criminally those they allege were responsible for orchestrating allegedly illegal adoptions.

But, rigid application of South Korea's statutes of limitations time bars both civil cases brought by adoptees and criminal cases against defendants allegedly responsible for illegal international adoptions. This article discusses grounds upon which South Korea's legislature or its courts (if given the discretion) could rely to retroactively abolish, toll, or significantly extend civil and criminal statutes of limitations to enable the South Korean judiciary to decide illegal international adoption cases on their merits.

The article is in five parts. Part I discusses the allegedly abusive practices that infect the international adoption industry and accusations of corruption in connection with South Korea's international adoption practices. This part also explains how South Korean statutes of limitations, if rigidly applied, will prevent South Korean courts from reaching the merits of illegal adoption cases.

In Part II, the article briefly discusses how common law and civil jurisdictions apply statutes of limitations to bar untimely claims. Part II also presents criticisms of statutes of limitations, especially where courts dismiss otherwise meritorious claims.

Part III explains why different jurisdictions throughout the world, including South Korea, abolish, extend, or toll statutes of limitations where principles of fairness and justice militate against their rigid application. For example, jurisdictions typically relax their application of civil statutes of limitations where plaintiffs were unable, through no fault of their own, to commence a timely litigation. Also, states sometimes relax their rigid application of criminal statutes of limitations where a prior government was unable or unwilling to prosecute persons who committed crimes on behalf of the state or where defendants committed especially serious crimes.

In Part IV, the article applies the principles discussed in Parts II and III to allegations of illegal international adoption in South Korea. The article concludes that the principles in Parts II and III, on balance, favor South Korea retroactively abolishing statutes of limitations applicable to illegal international adoptions, thereby reviving claims that may have already expired.

Part V summarizes the article's conclusions and briefly discusses a truth and reconciliation commission as an alternative to judicial proceedings. Critics and defenders of South Korea's adoption practices might agree that courts are not the best place to resolve this controversial issue, and that a more healing outcome may result from an unbiased inquiry into South Korea's adoption policies.

Regardless of whether South Korea, a modern liberal democracy, chooses to address allegedly illegal international adoptions through its judicial system or through a neutral truth-finding commission, the claims of adults who believe they were illegally adopted as children should not be ignored on grounds that the claims are untimely. To paraphrase the poem that inspired the title to this article, a South Korean adoptee may have departed from a nation more full of weeping than she could understand, but, having returned as an adult, her allegations merit a meaningful and serious response.

II. INTERNATIONAL ADOPTION, CHILD-LAUNDERING, AND SOUTH KOREA

A. The Business of International Adoption and Allegations of Corruption

In the decades following the Korean War, international adoption, which originated as a charitable movement, became a private industry.¹ The adoption industry is lucrative – prospective parents are willing to pay tens of thousands of dollars to adopt a child from a country other than their own.² To meet this demand,

¹ SCHUSTER INSTITUTE FOR INVESTIGATIVE JOURNALISM AT BRANDEIS UNIVERSITY, CAPSULE HISTORY OF INTERNATIONAL ADOPTION, ADOPTION LAW: A HISTORY OF FICTIONS (2011), available at <http://www.brandeis.edu/investigate/adoption/history.html> (“Between 1955 ... and 2006, adoption transformed from a charitable endeavor to a private industry”); Tobias Hübinette, *Comforting an Orphaned Nation: Representations of International Adoption and Adopted Koreans in Koreans Popular Culture* 17 (2005) (unpublished Ph.D. dissertation, Stockholm University Department of Oriental Languages), available at <http://su.diva-portal.org/smash/record.jsf?pid=diva2:197367> (noting studies which “regard the adoption of Korean children to the US as a goal displacement in the sense that the original intention as a way of solving immediate humanitarian issues after the Korean War for a long time has been replaced by its perfunctory continuance serving different interests, and, above all, the maintenance of a highly profitable adoption industry”). See Recommendation 1443 on International Adoption: Respecting Children’s Rights, EUR. PAR. DOC. (Parliamentary Assembly of the Council of Europe) [hereinafter Recommendation 1443] ¶ 2 (2000) (“fiercely” condemning “the current transformation of international adoption into nothing short of a market”). For a discussion of how international adoption between South Korea and the United States took hold in the 1950s and 1960s, see Catherine Ceniza Choy, *Institutionalizing International Adoption: The Historical Origins of Korean Adoption in the United States*, in INTERNATIONAL KOREAN ADOPTION: A FIFTY-YEAR HISTORY OF POLICY AND PRACTICE (Kindle Location 784) (Kathleen Ja Sook Berquist et al. eds., Kindle Version 2013) [hereinafter INTERNATIONAL KOREAN ADOPTION]. Transnational adoptive parents may have different motivations to adopt internationally, including, but not limited to, a preference for children from other countries, a belief that there is an orphan crisis in overseas countries, and/or a wish to religiously indoctrinate children from other countries. See KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION*, Kindle Locations 135, 976 (Kindle ed., 2013).

² See Veronica Dagher, *Adopting? Prepare to be Surprised*, WALL ST. J., Feb. 23, 2013, available at <http://online.wsj.com/article/SB10001424127887323452204578287961483250712.html> (reporting that adoptions from China can cost prospective parents up to fifty thousand U.S. dollars); Caryn Fisher, *Baby Exporter: Taking a Closer Look at Korean Adoptions* (Feb. 8, 2012), available at <http://blog.keia.org/2012/02/baby-exporter-taking-a-closer-look-at-korean-adoption> (estimating that adopting a South Korean child can cost as much as sixteen thousand U.S. dollars, up from ten thousand dollars in 2000 and five thousand dollars in 1988); see also Matthew Rothschild, *Babies for Sale: South*

adoption agencies operate in countries around the world from which they send thousands of children every year (“sending countries”) to adoptive families in other countries, primarily the United States, Canada, and nations in western Europe (“receiving countries”).³

Both supporters and opponents of international adoption agree that governments and adoption agencies in sending countries sometimes engage in improper conduct, although commentators disagree over the frequency and severity of the misconduct.⁴ Critics of international adoption argue that in many cases, purported orphans are actually children who were purchased, cajoled, stole, or otherwise fraudulently procured from one or both parents.⁵ Through a process sometimes referred to as “child laundering,” adoption agencies – allegedly in collusion with government officials – furnish children with false documents attesting that they are orphans so that parents overseas will adopt them.⁶ When certain sending countries more strictly regulate

Koreans Make Them, Americans Buy Them, THE PROGRESSIVE (1988), available at http://www.adopteesolidarity.org/bbs/board.cgi?id=docs&action=view&gul=93&page=1&go_cnt=0&category=Documents.

³ See National Council for Adoption, Adoption Advocate No. 44 (listing top receiving countries world-wide), available at <https://www.adoptioncouncil.org/publications/adoption-advocate-no-44.html>.

⁴ See, e.g., Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 178-79, 185-87 (2007) (disputing claims of widespread abuse in international adoptions and also arguing that international adoption, even if flawed, is in the best interests of children who may otherwise be subject to poor conditions or maltreatment in their country of birth); Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y. SCH. L. REV. 733, 765-66 (2010/2011) (“the problem of corruption [in international adoptions] is not that bad”); see also Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y.L. SCH. L. REV. 781 (2010/11).

⁵ See, e.g., David Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentives the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006); see also Recommendation 1443, *supra* note 1, at ¶¶ 2-3 (“roundly condemn[ing] all crimes committed in order to facilitate adoption, as well as the commercial tendencies and practices that include the use of psychological or financial pressure on vulnerable families ...” and warning “that, sadly, international adoption can lead to the disregard of children’s rights and that it does not necessarily serve their best interests”).

⁶ Professor David Smolin uses this term to describe the process whereby children are falsely represented to be orphans for purposes of international adoption, just as money from illegitimate enterprises is “laundered” to appear to come from legitimate sources. See David Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 445 (2010).

international adoption to prevent such abusive practices, critics believe that adoption agencies shift their operations to countries with more lax supervision to meet the demand for children in receiving countries.⁷

Advocates contend that illegally exporting babies for profit (or for other motivations) harms both the child and the child's family of origin.⁸ Illegally adopted children may, among other things, suffer psychological despair, knowing that they were improperly displaced from their birth families and that their birth identities were erased.⁹

Illegal international adoptions may violate children's human rights, as reflected in such international documents as the United Nations Convention on the Rights of the Child.¹⁰ In fact, some critics argue that in the form that it is practiced today, international adoption is a form of child trafficking.¹¹ The United Nations

⁷ See JOYCE, *supra* note 1, at Kindle Locations 2893-905 (describing adoption agencies that shifted to Ethiopia – “a new market” – after Guatemala cracked down on illegal international adoption); Karen Rotabi, *From Guatemala to Ethiopia: Shifts in Inter-country Adoption Leave Ethiopia Vulnerable for Child Sales and other Unethical Practices*, SOC MAG (June 8, 2010), available at <http://www.socmag.net/?p=615> (same).

⁸ See generally, Michelle Goodwin, *The Free Market Approach to Baby Adoption*, 26 B.C. THIRD WORLD L.J. 61 (2006).

⁹ See David Smolin & Desiree Smolin, *The Aftermath of Abuses in the Lives of Adoption Triad Members: Responding to Adoption Triad Members Victimized by Abusive Adoption Practices*, Plenary Presentation, Annual Symposium, Joint Council on International Children's Services, New York, New York (Apr. 2012), available at http://works.bepress.com/david_smolin/12.

¹⁰ United Nations Convention on the Rights of the Child, 1588 UNTS 530 art. 21 (a)-(d) (entered into force Jan. 16 1991) (providing that “the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians;” requiring that nations “[e]nsure that the child concerned by intercountry adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; [and] take all appropriate measures to ensure that, in intercountry adoption, the placement does not result in improper financial gain for those involved in it”); see generally Council of Europe Commissioner on Human Rights, *Adoption and Children: A Human Rights Perspective* (2011), available at www.commissioner.coe.int.

¹¹ See Siobahn Clair, The University of Queensland Human Trafficking Working Group, *Child Trafficking and Australia's Intercountry Adoption System 3* (2012), available at <http://www.law.uq.edu.au/documents/humantrafficking> (explaining that “The term ‘trafficking in children’ has long been linked with transnational adoption”); see David Smolin, *Adoption as Child Trafficking*, 39 Val. U. L. Rev. 281, 323 (2004) (“If my argument is correct, then those who label intercountry adoption as a form of child trafficking are largely correct, at least under current circumstances and contexts.”). *But see* Bartholet, *supra* note

General Assembly provides some support for this argument as it identified “false adoption” as a form of human trafficking.¹²

Although this article focuses on South Korea, which experts believe alone has sent at least 160,000¹³ and as many as 200,000 children overseas for adoption,¹⁴ illegal international adoptions are not limited to any single country.¹⁵ In particular, commentators point to abusive practices in countries including, but not limited to, Cambodia,¹⁶ Haiti,¹⁷ India,¹⁸ and Guatemala.¹⁹

4, at 187 (“[Y]et there is no evidence that even when inter-national adoption involves some illegality it results in the kind of exploitation of children that these other ‘trafficking’ practices systematically do. Any fair minded observer of international adoption would have to admit that the children overwhelmingly end up in adoptive families where they are loved and nurtured, and that they grow up doing as well as most children raised in those same receiving countries.”).

¹² *Report of the Secretary-General on Traffic of Women and Girls*, ¶8, G.A. Res. 49/166, U.N. Doc. A/50/369 (Aug. 24, 1995).

¹³ According to Tobias Hübinette, advocate and lecturer at Södertörn University in Sweden, the South Korean Ministry of Health and Welfare calculated that between 1953 and 2004 there were 158,343 international adoptions. See http://www.tobiashubinette.se/korean_adoptions.pdf. Jane Jeong Trenka, co-founder of Truth and Reconciliation for the Adoption Community of Korea (TRACK²) believes that by 2012 the official number of international adoptions from South Korea was around 166,565. E-mail from Jane Jeong Trenka, Founder of TRACK, to Daniel Edelson, Attorney (Nov. 3, 2013, 11:00 AM) (on file with author). TRACK is a South Korean organization that, among other things, advocates for adoption reform in South Korea. On its website (www.adoptionjustice.com), TRACK explains that it “advocate[es] full knowledge of past and present Korean adoption practices to protect the human rights of adult adoptees, children, and families.”

¹⁴ Commentators believe that the real number of adoptees might be closer to two hundred thousand because some children were adopted overseas without any records. See Shawna O’Reilly, *Korean Adoption Program Changes are Examined by Korean Adoptee*, EXAMINER.COM (Feb. 28, 2013), available at <http://www.examiner.com/article/korea-adoption-program-changes-are-analyzed-by-korean-adoptee>.

¹⁵ See Smolin, *supra* note 5, at 125. Illegal adoptions also usually violate the laws of receiving countries although criminal prosecution in a receiving country would be challenging. For a discussion of possible criminal violations and potential remedies, see Katie Rasor et al., *Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States*, 55 N.Y.L. SCH. L. REV. 801, 802 (2010).

¹⁶ See SHUSTER INSTITUTE OF INVESTIGATIVE JOURNALISM AT BRANDEIS UNIVERSITY (collecting articles about international adoption from Cambodia), available at <http://www.brandeis.edu/investigate/adoption/CambodiaNews.html>. Cambodia halted all international adoptions in 2009 in response to widespread abuses. See Denise Hubry, *Cambodia tries to Solve its Baby-Stealing Problem*, GLOBAL POST, Sept. 12, 2012, available at <http://www.globalpost.com/dispatch/news/regions/asia-pacific/cambodia/120912/international-adoptions-cambodian-orphans>. Although Cambodia has since lifted its ban, the United States does not allow adoptions from Cambodia because of persistent trafficking abuses. U.S. State Department, *Inter-country Adoption, Alerts & Notices*, available at http://adoption.state.gov/country_information/country_

B. Allegations of Illegal International Adoptions in South Korea

South Korea attracts adoptive parents for a number of reasons, including its reputation as an ethical, safe, and efficient country from which to adopt.²⁰ In fact, among both critics and advocates of international adoption, South Korea may have the best reputation for reputable practices of any sending country.²¹ China, at one point, shared South Korea's sterling reputation, but numerous reports exposed corruption in Chinese adoption practices.²²

specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=cambodia_5.

¹⁷ See Rasor et al., *supra* note 15, at 802 (describing “regrettably common” schemes to “manufacture ‘orphans’” for financial gain, including an incident in Haiti where, in the aftermath of a serious earthquake, U.S. missionaries allegedly offered money to parents to relinquish their children and misled the parents into believing that they could visit their children at any time).

¹⁸ See Arun Dohle, *Inside Story of an Adoption Scandal*, 39 CUMB. L. REV. 131, 147-48 (2009) (describing, among other things, adoption agencies in India that held children under abysmal conditions while charging exorbitant amounts for international adoptions – some children were offered to prospective parents even before becoming legally eligible for adoption).

¹⁹ See Smolin, *supra* note 6, at 477-78 (explaining that adoptions from Guatemala were so “corrupt, money-driven, and rife with child trafficking” that by 2007 the U.S. State Department posted warnings on its adoption website against adopting Guatemalan children).

²⁰ Kristi Brian, *Marketing Korea: Marketing “Multiculturalism” to Choosy Adopters*, in INTERNATIONAL KOREAN ADOPTION Kindle Location 1563, *supra* note 1 (explaining that, among its other attractions for potential adoptive parents, South Korea does not require adoptive parents to travel to the birth country to retrieve the child). For an interesting historical perspective on how international adoption agencies commenced operations in South Korea and promoted international adoption from South Korea in the United States, see Choy, *supra* note 1, at Kindle Location 784.

²¹ See Carlson, *supra* note 4, at 766 (commenting that South Korea “seems to have avoided the corruption” of Cambodia and India). Smolin, *supra* note 5, at 134 (noting that South Korea, despite sending large numbers of children for international adoption “has been accompanied by a relative lack of corruption and laundering”).

²² See, e.g., Patricia Meier & Xiaole Xhang, *Sold into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 87-89 (2009) (describing how Chinese orphanages placed hundreds or perhaps one thousand trafficked children up for adoption just between 2002 and 2005; in one incident, the police arrested a retirement home and orphanage director who purchased babies from traffickers and then sold the babies for adoption); Charlie Custer, *Kidnapped and Sold: Inside the Dark World of Child Trafficking in China*, THE ATLANTIC, July 25, 2013, available at <http://www.theatlantic.com/china/archive/2013/07/kidnapped-and-sold-inside-the-dark-world-of-child-trafficking-in-china/278107/> (describing how in China – touted by adoption agencies as virtually corruption

But some advocates believe that South Korea's reputation for corruption-free international adoptions is undeserved.²³ South Korean adoption law, both before and after its recent amendment, requires that parents, if living, consent to the child's placement in adoption.²⁴ Advocates believe that numerous international adoptions were illegal under South Korean law and inconsistent with international norms because:²⁵

- the parent did not relinquish under the parent's name, only one parent relinquished the child, or a person other than the parent relinquished;
- the child was relinquished for domestic but not international adoption;
- the signature on the relinquishment form was forged;
- single mothers were improperly pressured to relinquish their children, told by adoption agencies that it would be impossible for them to raise a child as a single mother in South Korea;²⁶ and

free – kidnapped children are furnished with fake identifications and sold to international adoption agencies).

²³ See Jane Jeong Trenka, *My Adoption File*, JANE'S BLOG, <http://jitreka.wordpress.com/about/adoption-file> ("South Korea has been called the 'Cadillac' of international adoption for its ethics and legality. Many reformists who criticize sending countries such as Guatemala and Cambodia maintain that if only those programs would be up to the gold standard of South Korea, the practice of international adoption would be fair, ethical, legal, in the best interests of the child, and dignified and respectful toward the birth family. I am interested in posting my own adoption papers here online in order to publicly document what has *really* happened in South Korea.") (emphasis in original). The author does not know whether Ms. Trenka or other critics of South Korea's historical practices in connection with international adoption will ultimately prevail in court, but he believes that South Korea should allow them to litigate their cases on the merits or establish a truth finding commission.

²⁴ See South Korea Act on Adoption, art. 6 and the South Korea Special Adoption Act, art. 9(b). The law was recently amended in response to abuses in the South Korean adoption system. Ibyang teukrye beop [Act on Special Cases Concerning Adoption], Act No. 2977, Dec. 31, 1976, *amended by* Act. No. 11007, Aug. 4, 2011, art. 9(2) (S. Kor.).

²⁵ The following seven bullet points are based on examples discussed in the TRACK's REPORT TO THE OMBUDSMAN OF KOREA 10-11 (2008) (hereinafter TRACK REPORT) (file on copy with the author). TRACK is discussed in greater detail, *supra* note 13.

²⁶ Commentators, including both detractors and supporters of international adoption, seem to agree that pressure on single mothers was the primary cause for South Korean women to relinquish their children. Adoption agencies in South Korea had financial incentives to encourage mothers to relinquish their children for overseas adoption. See JOYCE, *supra* note 1, at Kindle Location 5702 (describing how "orphanages had become dependent on foreign aid and institutions needed to maintain high numbers of children in their care in order

- one side of the family, typically the child's paternal grandmother, orchestrated the adoption.²⁷

According to advocates, the case of Mr. Yong-moon Kang, who was adopted from South Korea by a U.S. couple in 1983, is illustrative. Unlike most Korean adoptees in recent times who are adopted at age twelve to twenty-four months,²⁸ Yong-moon's father relinquished Yong-Moon to an adoption agency when the child was six.²⁹ Yong-moon's parents were married at the time and Yong-moon was not an orphan.³⁰

As with other South Korean citizens at that time, Yong-Moon's name at birth was recorded on his father's family

to justify continuing aid. Sponsors, after all, weren't interested in supporting 'orphans' in their families' homes but rather in orphanages or on their way to being adopted." See also Brian, *supra* note 20, at Kindle Locations 1586-611 (describing how prospective adoptive parents in the United States are told that South Korean single mothers must send their children overseas because children of unwed mothers will be ostracized). Brian quotes one adoption "facilitator" who explained to potential clients that "Korea is brave for participating in international adoption. Over all these years she has been saving her children. These are children born out of wedlock, so they would have that stigma to live with, so it's better they are adopted. The mothers are brave because they have not chosen abortion but adoption. How wonderful for these kids." *Id.* at Kindle Location 1613.

²⁷ Some of the practices described above are consistent with information the author of this article received from a woman who worked for one of South Korea's major international adoption agencies in the 1980s. To protect her confidentiality the article refers to her as "AE." AE recalls that adoption agencies competed to find children for international adoption. Employees of adoption agencies told her that their agencies paid obstetricians and midwives who notified their agencies when there were children available for adoption. She believes that financial incentives motivated adoption agencies to, at times, not act in the best interests of children and their birth mothers.

²⁸ Based on information provided by Holt International Child Services (an international adoption agency) on its website at <http://www.holtinternational.org/adoption/criteria.php>.

²⁹ JANE JEONG TRENKA, DRAFT REPORT ON SOUTH KOREAN INTERNATIONAL ADOPTION 2-3 (Aug. 2013) (file on copy with the author); see also Sang Youn-Joo, *Fears of Unintended Consequences as Adoption Tightened*, THE KOREA HERALD, Oct. 10, 2012, available at http://www.koreaherald.com/common_prog/newsprint.php?ud=20121010000746&dt=2.

³⁰ TRENKA, *supra* note 29, at 2. There is no internationally accepted single definition of "orphan." UNICEF defines orphans as children who lost one or both parents. Press Release, UNICEF Press Centre (May 25, 2012), available at http://www.unicef.org/media/media_45279.html. UNICEF believes that by its definition of orphan, the "evidence clearly shows that the vast majority of orphans are living with a surviving parent, grandparent, or other family member." *Id.*

registry (in Korean, a *Hojeok Deungbon*, hereinafter *Hojeok*).³¹ The *Hojeok* was kept with the municipal office in his father's hometown.

At the adoption agency's request, the municipal office in the capital city of Seoul created an "Orphan *Hojeok Deungbon*" stating that Yong-moon was an orphan. Yong-moon's Orphan *Hojeok Deungbon* was allegedly a fabrication as both of Yong-moon's parents were alive and his mother did not authorize his adoption.³²

Advocates argue that Yong-moon's allegedly fraudulent documentation was not unusual. According to TRACK, adoption files consistently demonstrate that the orphans were furnished with fabricated orphan *Hojeoks*.³³

³¹ Until recently, family registries in Korea were called *Hojeok Deungbon*. The registries were kept at municipal offices. The names were usually written in Chinese ideographic characters. Wives were placed on their husband's family registries as were their children. Orphans were assigned special *Hojeok Deungbon* on which only their names appeared with neither parent or other ancestry listed. Under the Korean system, child laundering allegedly depends on falsifying documents to create a fake orphan *Hojeok Deungbon*. In Yong-moon's case, his name was rendered on a *Hojeok Deungbon* with different Chinese ideographic characters but read phonetically the same as his birth name. TRENKA, *supra* note 29, at 2-3. South Korea recently abolished the family registry with its archaic placement of the father as the head of the household. See Press Release, South Korea Ministry of Gender and Equality, Thinking about the Abolition of Hojuje (Mar. 4, 2005), available at http://english.mogef.go.kr/sub03/sub03_21.jsp?menuID=euc0200&id=euc0200&cate=&key=&search=&order=&desc=asc&year=&month=&sdate=&eyear=&emonth=&edate=&deptcode=&menuID=euc0200&pg=4&mode=view&idx=3597. For a more detailed discussion, see Sanghui Nam, *The Women's Movement and the Transformation of the Family Law in South Korea: Interactions between Local, National, and Global Structures*, 9 EUR. J. E. ASIAN STUD. 67-86 (2010).

³² TRENKA, *supra* note 29, at 2.

³³ TRACK REPORT, *supra* note 25, at 11. As Jane Jeong Trenka explains: "The Orphan *Hojeok Deungbon*, which most Koreans do not know exists and have never seen, shows what it means to be an 'orphan' in Korea – a child who has no family connections whatsoever and who is completely alone on a document which for other people shows parents, siblings, offspring, and marriages. Although Yong-moon was adopted together with two siblings, under Korean law, all three children became orphans and were legally the only people in their family." AE (*supra* note 27), a former employee of a major international adoption agency in South Korea, confirmed that it was standard practice for international adoption agencies to furnish adoptees with documentation that erased any mention of their birth family. Based on her discussions with knowledgeable sources, AE believes that in many cases agencies eliminated references to birth families to protect the anonymity of mothers, particularly unmarried women who feared that they would be ostracized for having children out of marriage. But, AE is also aware of circumstances where agencies created orphan *Hojeok Deungbon* for children who would otherwise not be eligible for international adoption. At least one commentator argues that fraudulent

C. The Alleged Role of the South Korean Government in Illegal International Adoptions

Critics allege that the South Korean government shares responsibility for illegal international adoptions. In a major piece published in 1988, Matthew Rothschild described the four adoption agencies that then operated in South Korea as quasi-government institutions.³⁴ Critics allege that the South Korean military governments directed, approved, and promoted a policy of exporting children for profit.³⁵ Some commentators believe that the autocratic South Korean regimes in the 1970s and 1980s, which were focused on economic expansion, relied on “baby exports” by the international adoption agencies to reduce social costs and earn U.S. dollars.³⁶

documentation may be excusable, in cases of urgent need. Carlson, *supra* note 4, at 765 (“The creation of forged documents might also be a way of cutting corners for an otherwise well-intended adoption.”). The author of this article suggests that in cases where an adoptee was furnished with fraudulent documentation, it may be appropriate for the burden of proof to fall on the adoption agency to prove that the adoption was otherwise legitimate, as opposed to the burden of proof falling on the adoptee to prove that the adoption was illegal.

³⁴ Rothschild, *supra* note 2, (“The Korean government closely regulates the adoption agencies. Indeed, they are quasi-governmental institutions. The government approves their budgets, scrutinizes each adoption application, sets informal quotas on the number of children to be adopted through each agency, and helps select the heads of the three largest agencies. Foreign adoptions serve many purposes for the government.”). The number of adoption agencies operating in Korea was limited to four (and had to be Korean institutions) pursuant to reforms in the mid-1970s at the direction of military dictator, President Park Chung Hee. Following President Park’s assassination, the military regime of President Chun Doo Hwan promoted international adoption and allowed the four international agencies to compete with each other to export children. See Hübinette, *supra* note 1, at 71. AE (*supra* note 27) is aware that in the early 1980s an individual associated with the government was appointed director of a major international adoption agency and that the new director brought with him about thirty employees, most of whom were given newly created positions at a supervisory level.

³⁵ See Rothschild, *supra* note 34; JOYCE, *supra* note 1, at Kindle Location 5720; Bong Joo Lee, *Recent Trends in Child Welfare and Adoption in Korea: Challenges and Future Directions*, in INTERNATIONAL KOREAN ADOPTION, *supra* note 1, at Kindle Locations 4113-15.

³⁶ See Do-Hyun Kim, *Overseas Adoption: Child Welfare or Abuse?*, KOREA TIMES, Dec. 30, 2011, available at http://www.koreatimes.co.kr/www/news/opinion/2012/02/198_101917.htm; Rothschild, *supra* note 2; JOYCE, *supra* note 1, at Kindle Location 5697 (“[International adoption] became a form of population control in a growing island nation, a way to ‘regulate, control, and discipline women’s reproduction’ at a time when women were no longer living the traditional, home-centered lives of their mothers.” (quoting Tobias Hübinette)). Joyce also describes how international adoption enables South

As South Korea began democratizing in the late 1980s and world-wide attention focused on the country in advance of the 1988 Seoul Olympics, some South Korean children's rights advocates and newspapers publicly criticized the government's role in making the country the world's leading "baby exporter."³⁷ Many South Koreans viewed the number of children sent overseas as a national embarrassment.³⁸ A decade later, on October 31, 1998, President Dae Jung Kim apologized to adoptees.³⁹

Yet more than twenty years after establishing a democracy and emerging as one of the world's stronger economies, South Korea remained a leading sending country, causing many commentators to question why a modern industrialized country sent so many children overseas.⁴⁰ In addition, despite South Korea's proliferate use of truth commissions to investigate and document past abuses,⁴¹ there was never an investigation into

Korea to "outsource its child welfare problem while ignoring the larger social issues at its root." *Id.* at Kindle Location 5711. It is difficult to imagine the South Korean government as anything other than actively endorsing international adoptions given the large number of adoptions that took place.

³⁷ See Hübinette, *supra* note 1, at 87 [citing the KOREA TIMES, Oct. 13, 1989] ("The sharp rise in the shameful export of children largely abandoned by irresponsible parents is attributable to the lack of responsibility on the part of our government which is to be criticized for its virtual connivance at reckless commercialized activities by domestic adoption-arranging agents for foreign adopters.").

³⁸ See Dong Soo Kim, *A Country Divided: Contextualizing Adoption from a Korean Perspective*, in INTERNATIONAL KOREAN ADOPTION, *supra* note 1, at Kindle Location 369 or Kindle Location 618.

³⁹ Elena Kim, *Remembering Loss: The Koreanness of Overseas Koreans*, Kindle Location 2487, INTERNATIONAL KOREAN ADOPTION, *supra* note 1, at Kindle Location 2487 or Kindle Locations 2536-37 (explaining that President Kim "invited twenty-nine overseas adopted Koreans to the presidential residence and offered them an unprecedented public apology"). For an interesting discussion of President Kim and his concern regarding South Korean adoptees, see Tobias Hübinette, *President Kim Dae Jung and the Adoption Issue* (2003), available at http://www.tobiashubinet.se/kim_dae_jung_and_adoption.pdf.

⁴⁰ JOYCE, *supra* note 1, at Kindle Location 5723 (explaining that financial incentives drove South Korea to dominate "all international adoption programs" almost every year through the 1980s and 1990s" and as of 2012 remained a "top five" sending country even though it is G-20 member and "among the most technologically advanced nations in the world"); Hübinette, *supra* note 1, at 17 ("The most common research question posed by Korean scholars which fits well with the domestic agenda of disposing of a bad and humiliating image, is why the country is still sending children abroad for international adoption as the only OECD member doing so.").

⁴¹ See Andrew Wolman, *Looking Back While Moving Forward: The Evolution of Truth Commissions in Korea*, 27 ASIAN-PAC. L. & POL'Y J. 27, 51 (2013) discussing the "extraordinarily wide and comprehensive range of issues that have been addressed with a truth commission model, encompassing various types of human rights abuses, collaborationist activities, and massacres from

international adoption practices.⁴² Nor has there ever been any investigation into the role that the government played in facilitating adoptions by, among other things, directing the international adoption agencies and approving documents such as orphan *Hojeoks* and travel visas.⁴³

D. South Korean Adoptees and Their Search for the Truth

Some South Korean adoptees return to South Korea to learn more about the facts and circumstances underlying their relinquishment and adoption. In the course of their investigations, some adoptees report that adoption agencies and government

the turn of the twentieth century until the democratic transition of 1987. On occasion, truth commissions even investigated positive elements of the past, one example being ... contributions of overseas Koreans to Korea's national prestige, which included reports lauding the positive contributions of taekwondo and Korean miners and nurses in Germany.”)

⁴² Jane Jeong Trenka, *Internationally Adopted Koreans and the Movement to Revise the Korean Adoption Law*, 2 EWHA J. GENDER & L. 136, 153 (2011).

⁴³ *Id.* Australia offers an interesting comparison. In 2010, the Australian Senate authorized the Community Affairs References Committee to investigate the role of the Australian Commonwealth in coercing women to relinquish their children for adoption between the 1940s and the 1980s. The report, issued on February 10, 2012, unsparingly identified the government and other institutions' roles in pressuring women – often young unwed women – to relinquish their children for adoption. See Australian Senate Community Affairs References Committee, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* [hereinafter Australian Senate Report] (2012), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/commcontribformerforcedadoption/rep ort/index. The Australian Senate Report, almost three hundred pages long, recommends, among other things, that the Australian government deliver a full and unflinching apology to mothers, adoptees, and fathers. See Australian Senate Report at 9.58 and 9.76. In addition, the report recommends that Australia's federal and local governments discuss financial reparations (11.36), establish grievance committees to hear complaints, and “where evidence is established of wrongdoing, ensure redress is available. Accessing grievance mechanisms should not be conditional on waiving any right to legal action.” Australian Senate Report at 11.43. The Report also concludes that “In cases where illegality is alleged in the adoption process the prosecution of those responsible should not be hindered by statutes of limitation ... [t]he committee does not want people who have been damaged by their experience of forced adoption to be damaged further by having to endure a long and bruising legal journey that may ultimately be unsuccessful due to a legal technicality.” Australian Senate Report at 11.50. On March 21, 2013, the Australian government delivered an apology to birth mothers, their children, and the children's fathers. The transcript of the apology can be found on Australia's Department of the Prime Minister and Cabinet's website, available at <http://pmtranscripts.dpmc.gov.au>.

officials do not provide assistance and frustrate their efforts to discover the truth.⁴⁴

Until 2011, there was no legal framework that guaranteed the right of the adoptee to access his or her birth information. In response to efforts by organizations such as TRACK,⁴⁵ South Korea recently amended the Special Law on Adoption Promotion and Procedure (the Special Adoption Law).⁴⁶ The Special Adoption Law nominally allows adoptees to gain access to their birth information from adoption agencies through the Korean Adoption Services (KAS), a government entity intended to function as a central authority on all adoptions in South Korea.⁴⁷ Despite the amended legislation, many adoptees report that they do not receive adequate and timely responses to requests for information related to their birth and adoption from KAS.⁴⁸

Adoptees who cannot gain access to their birth records from KAS have few options. The law does not provide any recourse to compel the agency to comply with requests for information.⁴⁹ Moreover, adoption agencies have refused to turn over information to KAS without any repercussions.⁵⁰ For adoptees, it

⁴⁴ Jane Jeong Trenka, *Over Two Years after the Special Adoption Law was Amended, Adoptees still Waiting for Enforcement: How can the Hague Convention be Ratified without Enforcing the Special Adoption Law?* (2013) (on file with the author) (explaining that, although new legislation is intended to require South Korea to provide adoptees with access to their birth records, results have been almost uniformly disappointing).

⁴⁵ TRACK is described at *supra* note 15.

⁴⁶ *Ibyang teukrye beop* [Act on Special Cases Concerning Adoption], Act No. 2977, Dec. 31, 1976, amended by Act No. 11007, Aug. 4, 2011 (S. Kor.).

⁴⁷ KAS is the new name of the government agency, KCARE (Korean Central Adoption Resources), established in 2009. KCARE replaced South Korea's earlier central adoption resource agency, GAIPS (Global Adoption Information and Post Adoption Services, established by the adoption agencies). Under South Korean law, the Ministry of Health and Welfare established and operates KAS "for the sake of the promotion of domestic adoption and post-adoption services." *Ibyang teukrye beop* [Act on Special Cases Concerning Adoption], Act No. 2977, Dec. 31, 1976, amended by Act No. 11007, Aug. 4, 2011, art. 26.1 (S. Kor.).

⁴⁸ Trenka, *supra* note 44, at 3-7.

⁴⁹ *Id.* at 2. Among other things, TRACK describes KAS as understaffed and its employees as often unwilling or unable to assist adoptees. *Id.* at 3-7.

⁵⁰ *Id.* at 2. South Korea's failure to provide information to adoptees is not a new development. Adoptees and commentators explained for years that KCARE – the predecessor to KAS – failed to provide information to adoptees and did not receive full and complete information from Korea's four main adoption agencies. See Shinwoo Kang (translator, original author unidentified), *South Korea's Central Authority on Adoption Lacks Information*, THE HANKYOREH, Apr. 10, 2009, available at http://english.hani.co.kr/arti/english_edition/e_national/367603.html (explaining that KCARE, the predecessor of KAS, failed to provide information to adoptees and had no authority to compel South

may take years of effort to piece together how their identities were allegedly erased so that they could be sent overseas for adoption.⁵¹

E. Recent Reforms in South Korea

This past decade, particularly between 2004 and 2009, South Korea took steps to restrict international adoption and promote domestic adoption.⁵² During those years, adoption from South Korea to the United States dropped from an average range of 1,500 - 2000 to approximately 1,000 children yearly.⁵³ However, as of 2011 the number of adoptions remained steady and South Korea still ranked as one of the top senders of adopted children to the United States.⁵⁴

On May 24, 2013, South Korea signed the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (the Hague Convention).⁵⁵ Although not yet ratified by the South Korean government, the Hague Convention establishes standardized regulations in the international adoption process intended to prevent abuses such as abduction and fraud.⁵⁶ Among other things, the Hague Convention requires that a central authority oversee the adoption process⁵⁷ in a sending country to prevent improper financial gain. The Hague Convention also requires that each sending country ensures that adopted children are eligible for adoption under that sending country's laws, mandates record keeping, and requires

Korea's four adoption agencies to furnish information regarding international adoptions). These are the same criticisms adoptees have with respect to KAS.

⁵¹ See, e.g., Jane Jeong Trenka, *My Adoption File*, JANE'S BLOG (undated), <http://jitreka.wordpress.com/about/adoption-file/>.

⁵² Smolin, *supra* note 6, at 481.

⁵³ *Id.*

⁵⁴ Law Library of Congress [citing Bureau of Consular Affairs, U.S. Department of State, FY 2011, Annual Report on Intercountry Adoption, Nov. 2011], available at http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402898_text.

⁵⁵ *Adoption Notice: The Republic of Korea Signs the Hague Adoption Convention*, in UNITED STATES DEPARTMENT OF STATE, INTERCOUNTRY ADOPTION, May 28, 2013, available at http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=south_korea_2.

⁵⁶ Smolin, *supra* note 6, at 451-52. Professor Smolin argues that the Hague Convention is not comprehensive "but is primarily an anti-trafficking treaty, and a very incomplete anti-trafficking treaty at that." *Id.* at 452.

⁵⁷ Commentators believe that KAS (*supra* note 47) is likely to be designated the central authority.

sending countries to create a process to lodge complaints against adoption agencies that violate the convention.⁵⁸

In addition, the Special Adoption Law⁵⁹ addresses abuses in South Korea's adoption system by mandating that every international adoption receive approval from a Korean family court⁶⁰ requiring efforts to place children first domestically, not internationally,⁶¹ and providing adoptees with better access to their birth records.⁶² The law imposes criminal penalties on persons that arrange adoptions without accreditation.⁶³

F. South Korea's Statutes of Limitation Preclude Cases Against Parties Allegedly Responsible for Illegal International Adoptions

Some adults adopted from South Korea who allege that their adoption was illegal – including adoptees with whom the author met as described in this article's introduction – wish to pursue civil litigation in the South Korean courts against the adoption agencies and the South Korean government. Others also want the government to criminally prosecute those they allege were responsible for orchestrating their allegedly illegal adoptions

However, South Korea's statutes of limitations effectively prohibit any civil or criminal cases in connection with allegedly illegal international adoptions. Article 766 of the Civil Code requires a civil action for money damages to be brought within three years of discovery of the injury and no later than ten years from the date of the injury.⁶⁴ The Civil Code provides an

⁵⁸ See Elizabeth Long, *Where are they Coming From, Where are they Going: Demanding Accountability in International Adoption*, 18 CARDOZO J.L. & GENDER 827, 835-37 (2012) (summarizing provisions of the Hague Convention).

⁵⁹ *Supra* note 46.

⁶⁰ *Id.* art. 19.1 (“In case the head of an adoption agency is requested by a foreign national residing overseas to arrange the adoption of a Korean child and wishes to proceed with the overseas adoption, he or she shall file a petition with the Family Court for an adoption order with a letter of emigration order for the child issued by the Minister of Health and Welfare attached to the petition letter.”).

⁶¹ *Id.* arts. 7-8.

⁶² *Id.* art. 36. See art. 36.1 (“A person who is adopted under this Act may request the release of their adoption records held by the KAS or adoption agencies. In case a request for information disclosure is made by a minor adoptee, his or her birth parents' prior consent shall be obtained.”).

⁶³ *Id.* art. 41.

⁶⁴ See *Minsa sosong beop* [Civil Procedure Act], Act. No. 547, Apr. 4, 1960, amended by Act. No. 10859, July 18, 2011, art. 766 (S. Kor.).

exception for minors who may commence an action six months from the time they turn nineteen.⁶⁵

Realistically, no one would expect an adoptee to commence a lawsuit within the limitations period imposed by the Civil Code. By way of example, consider Yong-moon, who was sent to the United States when he was six years old (which is older than many other adoptees). To bring a timely civil lawsuit under Article 766, he needed to initiate his case in a South Korean court before his seventeenth birthday.⁶⁶ Although the Civil Code extended the statute of limitations to six months after his nineteenth birthday to file a timely lawsuit, Young-moon needed to initiate a lawsuit in South Korea while still a teenager living in a foreign country.

Criminal statutes of limitations, codified in South Korea's Criminal Procedure Act, would also time bar prosecution of most illegal international adoption cases. The applicable statute of limitations to prosecute persons who, for example, falsify documents or commit criminal fraud is seven years.⁶⁷ No exceptions apply under the Criminal Procedure Act – even murder cases, which are subject to the death penalty, must be prosecuted within twenty-five years.⁶⁸

Assuming that a seven-year criminal statute of limitations applied to an illegal adoption case, only the most recent illegal international adoptions could possibly be subject to criminal prosecution. Thus, South Korea's statutes of limitation preclude both civil and criminal illegal international adoption cases from being decided on their merits.

⁶⁵ Minsa sosong beop [Civil Procedure Act], Act. No. 547, Apr. 4, 1960, amended by Act. No. 10859, July 18, 2011, art. 179 (S. Kor.).

⁶⁶ *Id.* This article does not address potential litigation on behalf of birth parents who may believe that they were victimized by the adoption process.

⁶⁷ See Hyeongsa sosong beop [Criminal Procedure Act], Act. No. 341, Sept. 23, 1954, amended by Act. No. 12899, Dec. 30, 2014, art. 225 and 347 (S. Kor.).

⁶⁸ Hyeongsa sosong beop [Criminal Procedure Act], Act. No. 341, Sept. 23, 1954, amended by Act. No. 12899, Dec. 30, 2014, art. 249(1) (S. Kor.).

III. STATUTES OF LIMITATIONS: WHY SOME CLAIMS ARE TIME-BARRED

A. Statues of Limitations and Their Application

As a general rule across most jurisdictions, civil and criminal cases must be brought within a certain period of time, otherwise the claims can never be brought. Laws establishing when claims expire are called statutes of limitations. They eliminate the rights of private plaintiffs to raise their grievances with a court⁶⁹ and prevent the state from prosecuting criminal cases.⁷⁰

Both common law and civil law jurisdictions impose statutes of limitations.⁷¹ In the United States, statutes of limitations for civil damages usually begin to run from the time the plaintiff discovers (or should reasonably be expected to discover) that she was injured⁷² or when the last act causing the injury is complete.⁷³

South Korea's statutes of limitation for civil actions are similar to those of Japan and Germany.⁷⁴ The time to bring an action begins to run from discovery of the injury, but there is an outside limit on when the action may be brought regardless of whether the injury is discovered (e.g., plaintiffs must bring a civil

⁶⁹ See *Kavanagh v. Noble*, 332 U.S. 535, 539 (1947).

⁷⁰ See *United States v. Marion*, 404 U.S. 307, 324 (1971); *Developments in the Law – Statutes of Limitation*, 63 HARV. L. REV. 1177, 1185 (1950) [hereinafter *Developments in the Law*] (“When the legislature prescribes time limits on the assertion of rights, it deprives one party of the opportunity, after a time, of invoking the public power in support of an otherwise valid claim.”).

⁷¹ Scholars trace statutes of limitation to Roman law, consequently, limitations are more common in civil law systems, such as Germany, than in common law systems. See Jan Arno Hessbruegge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 GEO. J. INT’L L. 335, 338 (2012).

⁷² In the United States, actions for breach of a sales contract usually must be brought within a certain number of years from the time that the contract was breached, irrespective of whether the plaintiff knew that the breach occurred. See, e.g., New York U.C.C. § 2-725(2) (1992) (For breach of a sales contract, “[a] cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach.”).

⁷³ For example, under California law and some other states, a cause of action generally accrues “upon the occurrence of the last element essential to the cause of action.” See *Neel v. Magana, Olney, Levy, Cathcart, & Gelfand*, 6 Cal.3d 176, 182-83 (1971). But, this general rule is subject to exceptions, as discussed in part III.

⁷⁴ The South Korean legal system in many respects is modeled after Germany’s and Japan’s, as a result of Japan’s colonial occupation. See Marie Seong-Hak Kim, *Customary Law and Colonial Jurisprudence in Korea*, 57 AM. J. COMP. L. 205, 210-12 (2009); Sang-Hyun Song, *Legal Education in Korea and the Asian Region*, 51 J. LEGAL EDUC. 398, 401 (2001).

action within three years of discovering the injury, or ten years from the wrongful act, whichever period is shorter).⁷⁵

Criminal statutes of limitations in common law and civil jurisdictions typically begin to run from the time that the criminal offense was completed.⁷⁶ Unlike civil cases, where the limitations period may begin to run only upon discovery of the injury, criminal statutes of limitations begin to run regardless of when the state or the victim becomes aware of the criminal act.

B. The Policy Objectives Behind Statutes of Limitations

Scholars and courts explain that statutes of limitations are intended to:⁷⁷

- provide repose for both guilty and innocent defendants by insuring that plaintiffs and the state do not suddenly or arbitrarily revive claims from many years ago;⁷⁸

⁷⁵ See BÜRGERICHES GESETZBUCH (BGB) [CIVIL CODE] AUG. 18, 1896, REICHSGESETZBLATT [RGL] § 199(2)-(3) (Ger.) (some claims must be brought no later than thirty years after the act causing the injury while others must be brought within ten years.); *Developments in the Law*, *supra* note 70, at 1178 (explaining that German and Swiss statutes of limitation for civil actions are characterized by a short period which “begins to run when the injured party discovers the damage and the identity of the wrongdoer, but, in any event, the basic long period runs from the time of the wrong”).

⁷⁶ See, e.g., Hyeongsa sosong beop [Criminal Procedure Act], Act. No. 341, Sept. 23, 1954, *amended by* Act. No. 12899, Dec. 30, 2014, art. 252(1) (S. Kor.); see James West, *Martial Lawlessness: The Legal Aftermath of Kwangu*, 6 PAC. RIM. L. & POL’Y J. 85, 117 (1997) (discussing South Korean criminal statutes of limitation); Charles Doyle, *Statutes of Limitation in Federal Cases: An Overview*, CONGRESSIONAL RESEARCH SERVICE (2012), *available at* <http://www.fas.org/sgp/crs/misc/RL31253.pdf>; see also *Gabelli v. SEC*, 133 S.Ct. 1216, 1223-24 (2013) (discussing statutes of limitation and explaining why – unlike in civil cases brought by private persons – the U.S. courts will not extend the statute of limitations in a case brought by the government to impose civil penalties absent express authorization from the legislature).

⁷⁷ For a more comprehensive discussion, see Suzette M. Malveaux, *Statutes of Limitation: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L.R. 68, 75-82 (2005) which provides an excellent summary of the policies behind statutes of limitation. Also recommended is *Developments in the Law*, *supra* note 70. Readers may also benefit from an online report prepared by the Alberta Law Reform Institute, *available at* <http://www.law.ualberta.ca/alri/docs/fr055.pdf>, which discusses statutes of limitation, their purposes, and their history.

⁷⁸ The Supreme Court has gone so far as to praise statutes of limitations because “[t]hey provide ‘security and stability to human affairs’” and concluded that ““even wrong doers are entitled to assume that their sins may be forgotten.””

- help insure that evidence is authentic by encouraging plaintiffs and the state not to delay bringing their cases;⁷⁹
- discourage plaintiffs from strategically waiting to bring claims after defendants may have lost or discarded exculpatory evidence;⁸⁰ and
- help courts reduce costs and clear their dockets.⁸¹

Statutes of limitations primarily benefit defendants. Defendants can take comfort in knowing that they are no longer subject to civil and criminal actions and will not be required to fight a claim long after exculpatory evidence has disappeared.⁸² The statutes may also benefit courts by not burdening the court with older evidence that is difficult to authenticate and by reducing the court's caseload.

C. Criticisms of Statutes of Limitations

Some scholars criticize statutes of limitations, especially when meritorious claims are rejected on grounds that they are untimely.⁸³ Among other things, statutes of limitations, if rigidly applied:

- deprive plaintiffs of their right to access courts;⁸⁴
- prevent courts from resolving claims on their merits;⁸⁵
- may unfairly and disproportionately affect disenfranchised persons who rely on the courts to protect their human and civil rights, especially where other branches of

Gabelli, 133 S.Ct. at 1221, quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879) and *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

⁷⁹ Malveaux, *supra* note 77 at 75-82.

⁸⁰ *Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944) (stating that statutes of limitation “promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared”). More recently, the Supreme Court stated that the goals of limitations periods are “repose, elimination of stale claims, and certainty about a plaintiff’s opportunity for recovery and a defendant’s potential liabilities.” *Gabelli*, 133 S.Ct. at 1221, quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000).

⁸¹ *Malveaux*, *supra* note 77, at 82-86 (2005) (providing a comprehensive analysis of why rigid application of statutes of limitation deprive plaintiffs and victims of their right to access the courts and other undesirable consequences).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

governments, such as the legislature, are unresponsive;⁸⁶
and

- deny courts the opportunity to develop and articulate public values by rendering decisions on the merits in connection with important cases of national interest.⁸⁷

Jurisdictions typically try to balance the reasonable purposes that statutes of limitations serve against the harm that can result when courts apply limitations inflexibly.

IV. EXCEPTIONS TO THE RIGID APPLICATION OF STATUTES OF LIMITATION

Although sometimes rigidly applied, courts and legislatures abolish, extend, or toll⁸⁸ statutes of limitations where their strict application would unfairly deny victims their right to access courts or would be inconsistent with the state's obligation to prosecute crimes. The parts below discuss circumstances where legislatures and courts in different jurisdictions, including South Korea, apply such exceptions.

A. South Korea: Where the State Violates Its Obligation to Act in Good Faith and Cases of National Interest

1. *Sinuichik*: Civil Cases and the State's Breach of Its Duty to Act in Good Faith

In two civil cases discussed below, South Korean courts held that the principle of *Sinuichik* –which requires the state to act in good faith, as set forth in Article 2 of the South Korean Civil Code,⁸⁹ –prohibits the South Korean government from relying on a statute of limitations defense when the state betrays the people's trust.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ To toll the statute of limitations is to delay the date from when the limitations period begins to run.

⁸⁹ Minbeop [Civil Act], Act. No. 471, Feb. 22, 1958, *amended by* Act. No. 12777, Oct. 15, 2014, art. 2 (S. Kor.). (“1. The exercise of rights and the performance of duties shall be in accordance with the principle of trust and good faith. 2. No abuse of rights shall be permitted.”).

(A) *The Suzy Kim Case*

In 1987, a woman known as “Suzy Kim” was murdered by her husband who then falsely claimed that Ms. Kim was a North Korean spy.⁹⁰ Notwithstanding its knowledge that this was a lie, the South Korean government refused to prosecute the husband, insisted that Ms. Kim was a spy, and stated that her death was not a crime.⁹¹

Years after the statute of limitations expired, Suzy Kim’s family sued the South Korean government in a civil case. Finding that the government could not rely on a statute of limitations defense, a Seoul district court (trial level) in 2003 awarded Ms. Kim’s family 4.2 billion Korean won.⁹²

In reaching its decision, the court reasoned that when the government breaches its duty to act in good faith towards the public, the statute of limitations is tolled.⁹³ By deceiving Suzy Kim’s family and concealing the true circumstances of her death, the government prevented the family from bringing a civil case. As this deception was a breach of the duty of good faith owed to the South Korean people, the court suspended the statute of limitations from running during the period that defendants deceived the plaintiffs.⁹⁴

(B) *The Jong-Gil Choi Case*

In 2006, the Seoul High Court (intermediate appellate level) held that the civil statute of limitations did not apply to a lawsuit brought by the family of Professor Jong-Gil Choi, who died following his detention and torture by the South Korean intelligence agency.⁹⁵ The Court heard the case on appeal, after a lower court declined to hear the case on its merits and disposed of it on grounds that the case was time-barred.⁹⁶

⁹⁰ *Suzy Kim Case*, Seoul District Court [Dist. Ct.], 2002 Ga-Hap 32467, Aug. 14, 2003 (S. Kor.); Kuk Cho, *Transitional Justice in Korea*, in *LAW AND SOCIETY IN KOREA* 189, 194 (Hyunah Yang, ed., 2013).

⁹¹ *Suzy Kim*, 2002 Ga-Hap 32467.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* See In Sup Han, *Dealing with Wrongful Trials under the Authoritarian Regime*, 46 *SEOUL NAT’L U. L. REV.* 84 (2005).

⁹⁵ *Jong-Gil Choi*, Seoul High Court [Seoul High Ct.], 2005 Na 27906, Feb. 14, 2006 (S. Kor.).

⁹⁶ *Id.*

Reversing the lower court, the Seoul High Court held that the South Korean government could not rely on a statute of limitations defense for several reasons. First, the court explained that the South Korean intelligence agency concealed facts from Professor Choi's family by, among other things, fabricating a false document concerning the circumstances of his death.⁹⁷ Second, the family was unable to acquire the facts necessary to initiate a lawsuit until after a truth commission (the Presidential Truth Commission on Suspicious Deaths) completed its investigation.⁹⁸ Third, relying on the same principle of *Sinuichik* as the Seoul District Court in the Suzy Kim case, the court held that by (i) committing a serious crime against the victim, (ii) concealing the truth from the victim's family, and (iii) failing to investigate and prosecute the crime, the government breached its duty of good faith to the people. Having breached its duty of good faith, the South Korean government could not rely on a statute of limitations defense.⁹⁹

2. Retroactive Criminal Prosecutions

At least twice, South Korea's democratic governments enacted legislation to punish activity committed under prior regimes. In both instances, South Korea's Constitutional Court subjected the legislation to judicial review. Whether the state can prosecute criminal cases after the statute of limitations expired remains subject to dispute.

(A) *South Korea's Seizure of Collaborators' Property*

South Korea's Special Law on the Return of Pro-Japanese Anti-National Persons' Property¹⁰⁰ provided for the confiscation of property acquired by Korean collaborators during Japan's colonial occupation.¹⁰¹ This law was challenged on grounds that, among other things, the state may not retroactively punish conduct

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* See Pyeong Woo Kim, *Somyeolsihyo hangbyeon-gwa Sinuichik [Demurrer Based on the Statute of Limitations and the Principle of Good Faith]*, 8 SOGANG BEOPHAK [SOGANG U. J.L.] 175 (2006).

¹⁰⁰ Chinil banminjok haengwija jaesan-ui gukgaguisok-e gwanhan teukbyeol beop [Special Act on Asset Confiscation for Pro-Japanese and Anti-National Collaborators to the State] Act. No. 7769, Dec. 29, 2005, amended by Act. No. 10646, May 19, 2011 (S. Kor.).

¹⁰¹ See Wolman, *supra* note 41, at 41.

that was legal at the time it occurred under the colonial administration.

South Korea's Constitutional Court agreed that the law applied retroactively to conduct that might have been legal at the time it occurred; however, the Court held that the seizure was constitutional because (i) collaborators could have reasonably expected that their property would eventually be confiscated; and (ii) retroactive legislation is appropriate in exceptional circumstances of national interest.¹⁰²

(B) The May 18th Democratization Movement

In 1995, South Korea enacted the Special Law on the May 18th Democratization Movement which suspended the statute of limitations from running with respect to certain state crimes committed in 1979 and 1980 “during the period in which there existed a cause preventing the nation from exercising its prosecutorial powers.”¹⁰³ Defendants challenged the Special Law in South Korea's Constitutional Court on grounds that the law violated the prohibition of ex post facto legislation¹⁰⁴ because the

¹⁰² Confiscation of Property Awarded for Pro-Japanese Collaboration During Japanese Occupation Case, Constitutional Court [Const. Ct.], 2008 Heon-Ba 141, 2009 Heon-Ba 14, 19, 36, 247 & 352, 2010 Heon-Ba 91 & 271 (consol.), Mar. 31, 2011 (S. Kor.) (“retroactive legislation may be permitted if: the people could have expected such retroactive legislation; the confidence in law to be protected is not so great due to uncertainty or confusion of legal status; the loss and damage on the parties are either nonexistent or nominal; the public interest justifying retroactive legislation is such a great one that it precedes the necessity of public confidence in law... Furthermore, whereas the loss of confidence in law by the retroactive legislation is insignificant, the importance of public interest achieved by implementing the provision is so overwhelming that retroactive legislation is permissible. Therefore, we cannot conclude that the [law] is unconstitutional only for the reason that it is retroactive legislation.” (English translation provided online at <http://search.court.go.kr/thsep/selectThsep0101List.do>)); see also Sang Wook Daniel Han, *Transitional Justice: When Justice Strikes Back – Case Studies of Delayed Justice in Argentina and South Korea*, 30 Hous. J. Int'l L. 653, 672 (2008) (discussing the retroactive effect of the confiscation); Si-Woo Park, *Seizing Wealth of Pro-Japanese Collaborators Ruled Constitutional*, KOREA TIMES, Mar. 31, 2011, available at http://www.koreatimes.co.kr/www/news/nation/2013/01/117_84250.html.

¹⁰³ See West, *supra* note 76, at 121-22 (“Such suspension is considered justified because during that interval there was, as a practical matter, no possibility that junta members would be prosecuted for crimes committed in the course of their seizure of power.”).

¹⁰⁴ In most jurisdictions, prohibition of ex post facto laws prevents a state from either (i) retroactively criminalizing conduct that was once legal or (ii) retroactively increasing the punishment for a crime after it has been committed. This principle is set forth in Article 13(1) of the South Korean Constitution

Special Law retroactively revived a criminal case against perpetrators of the “Gwangju massacre” (in which pro-democracy activists were killed) that otherwise would have expired under the statute of limitations.¹⁰⁵

Five justices of the Constitutional Court agreed that the law unconstitutionally deprived defendants of their reliance interest in the expiration of the statute of limitations; however, the justices lacked a supermajority needed to render the law unconstitutional.¹⁰⁶ Four justices held that the law was constitutional because the public interest in meting out justice for those who violated human rights, delayed South Korea’s transition to democracy, and suppressed individual freedoms outweighed any reliance interest of the defendants.¹⁰⁷

(C) Statutes of Limitation and Transitional Justice

Scholars note that the Special Law on the May 18th Democratization Movement and the Constitutional Court’s decision illustrate the conflict between statutes of limitation and transitional justice.¹⁰⁸ Although there is no single definition,¹⁰⁹ transitional justice refers to the manner in which a nation that undergoes a political transformation from a repressive to a less

which provides, in relevant part, “No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed...” DAEHANMINGUK HEONBEOP [HEONBEOP] [CONSTITUTION] art. 13(1) (S. Kor.). The author shall refer to the prohibition of ex post facto laws as the ex post facto doctrine.

¹⁰⁵ See Davie M. Waters, *Korean Constitutionalism and the ‘Special Act’ to Prosecute Former Presidents Chun Doo-Hwan and Roh Tae-Woo*, 10 COLUM. J. ASIAN L. 461, 469 (1996).

¹⁰⁶ Yi-Li Yee, *The Korean Constitutional Court and the Kwangju Massacre: Note on the Special Act Concerning the May Democratization Movement*, 4 NAT’L TAIWAN U. L. REV. 227, 239 (2009), available at <http://www.law.ntu.edu.tw/ntulawreview/articles/4-2/8Full%20Text.pdf>; Waters, *supra* note 105, at 474.

¹⁰⁷ May 18 Pro-Democracy Movement Case, Constitutional Court [Const. Ct.], 96 Heon-Ga 2, 96 Heon-Ba 7 & 13 (consol.), Feb. 16, 1996 (S. Kor.); Waters, *supra* note 105, at 474; Han, *supra* note 102, at 672; Kuk Cho, *Transitional Justice in Korea: Legally Coping With Past Wrongs After Democratization*, 16 PAC. RIM L. & POLICY J. 579, 584 (2007); Yi-Li Yee, *supra* note 106, at 239.

¹⁰⁸ See, e.g., Han, *supra* note 102, at 672; Cho, *supra* note 107 at 584; Yi-Li Yee, *supra* note 106, at 239.

¹⁰⁹ See TRICIA D. OLSEN ET AL., TRANSITIONAL JUSTICE IN BALANCE Kindle Location 2621 (Kindle ed., 2013) (“multiple and often conflicting definitions” of transitional justice.).

repressive form of government addresses crimes committed by the prior regime.¹¹⁰

Some commentators argue that during the transitional period when an authoritarian regime is replaced by a less autocratic government, statutes of limitation should not shield members of the prior regime that committed serious crimes.¹¹¹ Statutes of limitations presuppose that there exists a realistic possibility of prosecution when defendants committed their crimes. Some scholars argue that limitations periods should not immunize state actors who commit human rights violations because when they committed their offenses there was no reasonable possibility that the state would prosecute them.¹¹² These scholars believe that when a nation transitions to democracy statutes of limitation for serious crimes committed under the prior regime should be tolled.¹¹³

3. South Korea May Relax Civil Statutes of Limitation in Exceptional Cases

The Suzy Kim and Professor Choi cases support the proposition that the South Korean government may not rely on statute of limitations defense in a *civil* case where the government betrayed the duty of good faith that it owes South Korean citizens, such as when it deceives the public and helps to cover up a crime.¹¹⁴ However, as reflected in the constitutional dispute over

¹¹⁰ See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 3 (2000).

¹¹¹ See Cho, *supra* note 107, at 588 (“The principle [prohibiting ex post fact laws] must not be taken advantage of by state authority officials or agents who blocked investigation and prosecution against their own crimes. To prevent prosecution because of the lapse of statute of limitations would hurt the popular sense of justice. For that reason, retrospective application of an amended limitation period to time-barred prosecution should be allowed under very limited and special circumstances.”).

¹¹² See Human Rights Watch, *Legal Opinion Submitted to the Ministry of Turkey: Lifting the Statute of Limitations for Violations of the Right to Life and Torture by Suspected State Perpetrators* (Jan. 2013) [hereinafter HRW Opinion], available at <http://www.hrw.org/news/2013/03/25/january-2013-legal-opinion-submitted-minister-justice-turkey>.

¹¹³ Han, *supra* note 102, at 691 (“A statute of limitations ought to be viewed as procedural rather than substantive, especially in circumstances where victims’ and society’s requests for justice are still loud, offenders are nonrepentant, and decisions of when and whom to prosecute are not solely a matter of judicial arbitrary discretion but a matter under detailed public scrutiny. In this regard, a domestic statute of limitations provides little obstacle to obtaining legal justice later under a Delayed Justice mechanism.”); see Cho, *supra* note 107, at 588.

¹¹⁴ See *Suzy Kim* 2002 Ga-Hap 32467; *Jong-Gil Choi* 2005 Na 27906.

the Special Laws on the return of collaborators' property and the May 18th Democratization Movement, South Korea's courts will hesitate to allow the state to prosecute a *criminal* case once the applicable statute of limitations expires.¹¹⁵

B. Equitable and Statutory Exceptions Applied in Common Law Jurisdictions to Statutes of Limitation in Civil Cases

This article next discusses equitable and statutory exceptions that common law jurisdictions typically apply to extend or toll statutes of limitation in civil cases.

1. The Discovery Rule

Since the eighteenth century, common law jurisdictions, including the United States, have applied the discovery rule (sometimes called the delayed discovery rule) to civil actions where the plaintiff does not know that he has been injured. The discovery rule provides that the statute of limitations does not begin to run until the plaintiff learns (or should have learned) of the injury.¹¹⁶

Fraud cases frequently implicate the discovery rule because a plaintiff typically does not know that he was deceived at the time the deception occurred. The United States Supreme Court recently explained that the doctrine arose “based on the recognition that ‘something different was needed in the case of fraud, where a defendant’s deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded.’”¹¹⁷ Without the discovery doctrine, a statute of limitations could expire on a plaintiff who “has been injured by fraud and ‘remains in ignorance of it without any fault or want of diligence or care on his part.’”¹¹⁸ The discovery rule, once an equitable doctrine applied by the courts, has been codified in many jurisdictions so that the statute

¹¹⁵ *Supra* notes 100-07 and accompanying text.

¹¹⁶ *See Gabelli*, 133 S.Ct. at 1221.

¹¹⁷ *Id.* quoting *Merck & Co. v. Reynolds*, 130 S.Ct. 1784, 1793 (2010) (emphasis in original).

¹¹⁸ *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946). Courts also apply the discovery rule in cases that do not involve fraud. For example, if a surgeon leaves a foreign object in a plaintiff causing a latent injury or a plaintiff was unaware of latent defects in construction, the statute of limitations might not begin to run until the plaintiff becomes aware (or should have been aware) that he was harmed. *See Smith v. Johnston*, 591 P.2d 1260 (Okla. 1978).

of limitations does not run from the time of the injury, but only when the plaintiff should have been aware that he has been injured.¹¹⁹

2. Equitable Tolling and Equitable Estoppel

Two other doctrines that extend the time for plaintiffs to file a civil lawsuit are equitable tolling and equitable estoppel (equitable estoppel is sometimes referred to as fraudulent concealment).¹²⁰ Equitable tolling refers to circumstances where a plaintiff knows of his injury but despite his diligence cannot acquire the facts necessary to bring a claim before the statute of limitations expires. The court may toll the statute of limitations – meaning the statute of limitations does not begin to run – during the period in which the plaintiff could not acquire these necessary facts.¹²¹

A plaintiff may rely on equitable estoppel where a defendant prevents a plaintiff from filing a claim by (i) deliberately concealing facts from the plaintiff or (ii) threatening or deceiving the plaintiff.¹²² As with the discovery rule, many jurisdictions in the United States have now codified principles of equitable estoppel.¹²³

Commentators explain that these equitable doctrines are particularly important in cases involving human rights

¹¹⁹ See, e.g., N.Y. C.P.L.R. § 214-c (2003).

¹²⁰ Some courts in the United States use these terms interchangeably and readers should be mindful that these terms are sometimes defined differently depending on the jurisdiction. See *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990); *Pearl v. City of Long Beach*, 296 F.3d 76 (2d Cir. 2002) (discussing different usage of “equitable estoppel” and “equitable tolling”).

¹²¹ *Id.*

¹²² *Id.* By way of example, if an employer fires a woman but tells her she was fired because there was not enough work rather than because of her gender, there may be grounds to argue that the company has fraudulently concealed that she has a potential lawsuit based on discrimination. Likewise, if the company promises her that the company will not rely on the statute of limitations if she delays her lawsuit for a few years while they negotiate a settlement, a court might find that the company may not raise a limitations defense.

¹²³ For example, Connecticut codified the doctrine of fraudulent concealment to provide that, where a defendant knowingly conceals the facts necessary for a plaintiff to commence his lawsuit, the statute of limitations does not begin to run until the plaintiff learns that he has a cause of action against the defendant. “If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence.” (CON. GEN. STAT § 52-595 (2010)).

violations.¹²⁴ For example, in *Bodner v. Banque Paribas*, defendant French banks argued that the plaintiffs' lawsuit to recover assets stolen by the Nazis and subsequently converted by the banks in the years following World War II was barred by the statute of limitations.¹²⁵ Rejecting this defense on several grounds, the court found that the statute of limitations should not run against plaintiffs where the defendants allegedly engaged in a "policy of systematic and historical denial and misrepresentation concerning the custody of the looted assets to plaintiffs and the public at large."¹²⁶

Similarly, in *Rosner v. United States*, a federal court held that a claim to recover property stolen by Hungary's pro-Nazi government¹²⁷ and then seized by the U.S. Army was timely because plaintiffs were not aware of all of the facts necessary to bring their claim until an investigative body released its report on these events in 1999.¹²⁸ The Court found that that plaintiffs were not at fault for failing to bring their case earlier because the truth was concealed from them for almost sixty years.¹²⁹

3. The Continuing Violations Doctrine

Courts may apply the continuing violations doctrine if a defendant commits a series of wrongful acts where the earlier acts fell outside the limitations period but the latter acts occurred within the limitations period.¹³⁰ Pursuant to this doctrine, the court treats the violations as a single continuous act, all falling within the limitations period.¹³¹

¹²⁴ Morris Ratner, *Factors Impacting the Selection and Positioning of Human Rights Class Action in United States Courts: A Practical Overview*, 58 N.Y.U ANN. SUR. AM. L. 623, 626-27 (2003) (discussing how in the absence of legislative interference, plaintiffs in cases involving human rights must rely on equitable doctrines of tolling or estoppel to prevent defendants from invoking a statute of limitations defense); Malveaux, *supra* note 77, at 104-07 (discussing equitable reasons to toll the statute of limitations).

¹²⁵ *Bodner v. Banque Paribas*, 114 F.Supp.2d 117, 135 (E.D.N.Y. 2003); *see also* Ratner, *supra* note 124, at 626-27; Malveaux, *supra* note 77, at 104-07.

¹²⁶ *Bodner*, 114 F.Supp.2d at 135; *see also* Ratner, *supra* note 124, at 627.

¹²⁷ Frequently referred to as the Hungarian Gold Train.

¹²⁸ *Rosner v. United States*, 231 F.Supp.2d 1202, 1205 (S.D. Fla. 2002); *see Malveaux*, *supra* note 77, at 105. This reasoning is also consistent with the decision of the Seoul High Court in the Professor Choi case, *supra* notes 95-98 and accompanying text.

¹²⁹ *Rosner*, 231 F.Supp.2d at 1205.

¹³⁰ *Malveaux*, *supra* note 77, at 88; *Bodner*, 114 F. Supp. 2d at 134-36.

¹³¹ *Id.*

As with equitable tolling and equitable estoppel, the continuing violations doctrine may apply to claims in connection with human rights abuses.¹³² In *Bodner*, the court found that, by (i) continuing to deny the existence of looted assets and (ii) failing to return the assets to their rightful owners, the banks' alleged actions were a continuing violation that fell within the limitations period.¹³³

C. Serious Offenses and Human Right Violations

This article next discusses examples where countries do not apply statutes of limitations to serious crimes, including sexual crimes against children, and to major human rights violations.

1. Serious Crimes

Many jurisdictions provide that statutes of limitations do not apply to serious crimes. Canada and the United Kingdom have no statute of limitation for any felony. Germany,¹³⁴ Japan,¹³⁵ and all jurisdictions in the United States¹³⁶ do not impose statutes of

¹³² Ratner, *supra* note 124, at 626-27.

¹³³ *Bodner*, 114 F. Supp. 2d at 134-35 (“The nature of plaintiffs claim is such that the continued denial of their assets, as well as facts and information relating thereto, if proven, constitutes a continuing violation of international law reasonably within the exceptions to the ordinary laws of accrual. Furthermore, plaintiffs could hardly have been expected to bring these claims at the end of World War II, and claim they have been consistently thwarted in their attempts to recover funds and information from defendant banks.”).

¹³⁴ StPO, German Crim. Code Ch. 5 § 78, para 2. Germany abolished its statute of limitations because it would have rendered the German state incapable of prosecuting persons responsible for genocide during the Holocaust. Urging the German Parliament to not allow the limitations period to expire, one parliamentarian explained “[T]he sense of a justice of an entire people would be corrupted in an unbearable manner if there was no retribution for murder, even though retribution would be possible.” Hessbruegge, *supra* note 71, at 336 (quoting Ernst Benda).

¹³⁵ See Zach Zagger, *Japan Abolishes its Statute of Limitations for Murder*, JURIST (Apr. 28, 2010), available at <http://jurist.org/paperchase/2010/04/done---japan-abolishes-statute-of-limitations-for-murder.php>.

¹³⁶ A growing number of states in the United States do not have a statute of limitations for the crime of rape. For example, recently Kansas joined around twenty other states by abolishing its statute of limitations for rape. LJ WORLD, *Rape Survivor Works to Change Law, Abolish the Statute of Limitations in Rape Case*, Mar. 3, 2013, available at <http://www2.ljworld.com/news/2013/mar/03/rqe-victim/>; see also CONN. GEN. STAT. §54-193 (2012) (classifying rape as a type of crime which can be prosecuted at any time); N.Y. CRIM. PROC. § 30.10 (2013) (same). Among those states that do have a limitations period for prosecution of rape, many provide an exception in cases where there is DNA

limitation for murder. South Korea, which recently extended its statutes of limitations for murder, has considered following suit and abolishing the limitations period altogether.¹³⁷

2. Abolishing Civil and Criminal Statutes of Limitation for Sexual Crimes Against Children

These principles – the discovery rule, equitable tolling/equitable estoppel, and abolishing statutes of limitation for serious crimes – are consistent with a growing movement around the world to abolish criminal and civil statutes of limitations for sexual crimes committed against children.

Children frequently do not know that they are the victims of crimes and are often unable or unwilling to report the crimes committed against them.¹³⁸ In the United States, and elsewhere in the world, children's rights advocates, courts, and legislatures have made inroads against the rigid application of statutes of limitation

evidence of the crime and allow prosecution at any time. *See, e.g.*, COLO. REV. STAT. § 16-5-401 (2009).

¹³⁷ HUMAN RIGHTS MONITOR SOUTH KOREA, *Legislating the Abolition of Statute of Limitations on Homicide*, June 26, 2012, available at <http://www.cga.ct.gov/2009/pub/chap966.htm>; <http://www.humanrightskorea.org/2012/legislating-the-abolition-of-statute-of-limitations-on-homicide/>.

¹³⁸ Jessica Mindlin, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 189 (1990) ("Perpetrators of child sexual abuse escape prosecution for their acts when the abuser uses threats and coercion to prevent the victim from reporting the offense until after the statute of limitation has expired, or when the victim is too young to report the abuse within the statutory period."). Experts explain that child victims of sexual abuse frequently do not acknowledge or report the abuse for many years for the following reasons: the perpetrators are family members and victims do not want to hurt their own family; the victims feel shame and embarrassment from the abuse, causing depression, drug or alcohol addiction, and suicidal tendencies, which might not manifest themselves until years after the abuse ended; the victim is so preoccupied dealing with the negative effects of the abuse (such as depression) that she may not have the inclination to file a lawsuit; and the abuser intentionally shames or threatens the child victim into silence. Gregory Gordon, *Adult Survivors of Child Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Discovery Rule*, 20 PEPP. L. REV. 1359, 1364-65 (1993), citing Kelli L. Nabors, *The Statute of Limitations: A Procedural Stumbling Block in Civil Incestuous Abuse Suits*, 14 LAW & PSYCH. L. REV. 153, 159 (1990); Jenna Miller, *The Constitutionality of and Need for Retroactive Civil Legislation Related to Sexual Abuse*, 17 CARDOZO J. L. & GENDER 599, 603-04 (2011); Marci A. Hamilton & Paul R. Verkuil, *Facts About Childhood Sexual Abuse*, Statute of Limitations Reform (undated) at 4, available at <http://sol-reform.com/images/FactsAboutCSA.pdf>.

in both civil and criminal cases involving sexual crimes against children.¹³⁹

Beginning in the late 1980s and 1990s, before there were any legislative efforts, courts began extending the time for adults who were sexually abused as children to sue their abusers.¹⁴⁰ In the 1990s many jurisdictions in the United States passed laws tolling the statute of limitations for civil lawsuits against abusers. For example, California and Delaware enacted laws that applied retroactively, thereby reviving civil claims that had already expired.¹⁴¹

But, advocates urge lawmakers to go further and completely abolish statutes of limitations in civil and criminal cases.¹⁴² More than half of the states in the United States do not impose criminal statutes of limitation in child sexual abuse cases, and children's rights advocates are working to expand that number.¹⁴³

¹³⁹ Despite lobbying efforts by their opponents, advocacy groups continue to urge jurisdictions to expand or abolish statutes of limitation so that victims may seek restitution and persons who exploited children may be punished for their crimes.

¹⁴⁰ Gordon, *supra* note 138, at 1379-80. In these cases, where a statute of limitations would otherwise apply, victims asked that the statute of limitations be tolled under a number of theories, including the discovery rule and estoppel. *Id.* Of these theories, the discovery rule was the most widely accepted. *Id.*; see generally, Russell Donaldson, Annotation, *Running of Limitations against Action for Civil Damages for Sexual Abuse of Child*, 5 A.L.R. 5th 321 (1993) (collecting cases). For example, in an early case from 1990, a California appellate court held that a trial court, rigidly applying California's then three-year statute of limitation, improperly dismissed a civil lawsuit by plaintiffs against their alleged abusers without allowing the plaintiffs to replead. *Evans v. Eckelman*, 216 Cal.App.3d 1609, 1620 (Cal. Ct. App. 1990). In holding that plaintiffs should be allowed to replead to allege facts showing why the discovery rule should apply to toll the statute of limitations, the court reasoned that the discovery rule should apply "in actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach of the resulting injuries" and where there is a "confidential or fiduciary relationship" between the plaintiff and the defendant. *Id.* at 1614-15. Some courts held that defendants should be equitably estopped from relying on a statute of limitations defense or that the limitations period should be tolled pursuant to a doctrine of fraudulent concealment. See *Hildebrand v. Hildebrand*, 73 F. Supp. 1512 (S.D. Ind. 1990); *Hammer v. Hammer*, 142 Wis.2d 257 (Wis. Ct. App. 1987).

¹⁴¹ CAL. CIV. PROC. CODE § 340.1 (1999); DEL. CODE ANN tit. 10 § 8145(b) (2010); see Miller, *supra* note 138, at 607-11.

¹⁴² NJ TODAY, *Bill to Eliminate Civil Statute on Sex Abuse Cases Clears Judiciary Panel*, June 22, 2012, available at http://www.abolishsexabuse.org/index.php?option=com_content&view=article&id=1608:bill-to-eliminate-civil-statute-of-limitations-on-sex-abuse-cases-clears-judiciary-panel&catid=54:lates-t-news&Itemid=179.

¹⁴³ Marci Hamilton, *Summary of Statutes of Limitation Reform across the United States as of June 28, 2013*, available at http://sol-reform.com/SNAPSHOT_OF

Efforts to repeal statutes of limitation in child sexual abuse cases are not limited to the United States. In Switzerland, advocates successfully spearheaded a movement to abolish criminal statutes of limitation in response to child sexual abuse.¹⁴⁴ South Korea has also abolished its criminal statute of limitations with respect to serious sexual crimes against children under the age of 13.¹⁴⁵ Similarly, in 2011, Germany responded to widespread sexual abuse of children by extending the statute of limitations in civil cases to thirty years after the victim's twenty-first birthday.¹⁴⁶

3. Imprescriptibility and Human Rights Abuses that are not Core Crimes Against Humanity

Under customary international law, core crimes against humanity, such as genocide and torture, are imprescriptible, meaning states must criminally prosecute these crimes without

SOL_STATUTES_AND_2013_PENDING_BILLS_ACROSS_THE_US.pdf. For example, in 2010, overcoming lobbying efforts by the Catholic Church, Florida abolished its criminal statute of limitations for most sexual crimes against children. TAMPA BAY TIMES, *House and Senate Vote to Eliminate Statute of Limitation on Children*, Apr. 26, 2010, available at <http://www.tampabay.com/news/courts/civil/house-and-senate-eliminate-statute-of-limitations-on-sex-crimes-against/1090508>.

¹⁴⁴ These efforts culminated in a nationwide referendum in 2008 in which the Swiss voted to abolish the statute of limitations for criminal prosecution of acts of child abuse against children under the age of 12. SWISSINFO.CH, *Child Abusers Face Life-Long Prosecution*, Jan. 2, 2013, available at http://www.swissinfo.ch/eng/swiss_news/Child_abusers_face_life-long_prosecution.html?cid=34557754.

¹⁴⁵ Adong, cheongsonyeon-ui seongboho-e gwanhan beomnyul [Act on the Protection of Children and Juveniles from Sexual Abuse], Act. No. 6261, Feb. 3, 2000, amended by Act. No. 12361, Jan. 28, 2014 (S. Kor.).

¹⁴⁶ SEATTLE TIMES, *Germany Extends Statute of Limitations on Abuse*, March 23, 2011, available at http://seattletimes.com/html/nationworld/2014574303_apeu_germanychurchabuse.html. Similarly, the Council of Europe recognized that children sexually abused by tourists from countries other than their own are often unable to come forward and identify offenders before the statute of limitations expire in the offender's home jurisdiction. For that reason, the Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Abuse requires that the statute of limitations in each ratifying country "continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority and which is commensurate with the gravity of the crime in question." Council of Europe's Convention on the Protection of Children against Sexual Exploitation and Abuse, Cot. 25, 2007, C.E.T.S. No. 201, art. 33 (emphasis added); Karen Fredette, *International Legislative Efforts to Combat Child Sex Tourism: Evaluating the Council of Europe Convention on Commercial Child Sexual Exploitation*, 32 B.C. INT'L & COMP. L. REV. 1, 38 (2009).

regard to statutes of limitations.¹⁴⁷ In the past two decades, international courts have consistently held that statutes of limitations do not apply to serious violations of human rights.¹⁴⁸ This principle applies retroactively: even if a claim expired under a nation's domestic statute of limitation, the state must prosecute the defendant.¹⁴⁹

A number of commentators believe that the principle of imprescriptibility should also apply to human rights claims that do not arise to the level of core crimes against humanity.¹⁵⁰ This position finds support in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,¹⁵¹ which provides

¹⁴⁷ See generally Hessbruegge, *supra* note 71; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (Nov. 11, 1970).

¹⁴⁸ See *Barrios Altos v. Peru*, Inter-Am. Ct. H.R., No. 75, ¶ 41 (March 14, 2001), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf. In the Czech Republic, Germany, and Poland, serious crimes committed during the communist-era were deemed imprescriptible. See TEITEL, *supra* note 110, at 40-41. Some experts believe that international treaty law also renders statutes of limitation inapplicable to civil claims by victims of human rights abuses. Hessbruegge, *supra* note 71, at 373-74.

¹⁴⁹ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. No. 18 U.N. Doc. A/7218 at 40 (Nov. 11, 1970). Consistent with this principle, the Human Rights and Equal Opportunity Commission of Australia recommended that compensation for aboriginals forcibly removed from their families should not be subject to a civil statute of limitations. Hessbruegge, *supra* note 71, at 374, citing HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES 270-75 (1997). In addition, the Committee against Racial Discrimination criticized Japan for dismissing claims brought by "comfort women" based on the statute of limitations. *Id.* at 375 (citing the UN Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations, Japan, 38th Sess., Apr. 30-May 18, 2007 ¶ 12, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 3, 2007)).

¹⁵⁰ Hessbruegge, *supra* note 71, at 356 ("a number of human rights treaties, as interpreted by their principal oversight mechanisms, obligate states to remove statutes of limitations for the prosecution and punishment of human rights crimes that do not amount to crimes against humanity, genocide, or war crimes. A duty to that effect is also gradually emerging under international customary law. State practice, as of yet, does not amount to a customary international law of prohibiting defendants from relying on statutes of limitation as a defense to civil claims for reparations"). Crimes against humanity other than genocide include torture, deportation, and forced disappearances. See, e.g., Rome Statute of the International Criminal Court art. 7, July 1, 2002, 2187 U.N.T.S. 90.

¹⁵¹ G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

that where violations do not rise to the level of core crimes against humanity “domestic statutes of limitations . . . including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.”¹⁵²

IV. RETROACTIVELY ABOLISHING SOUTH KOREA’S CIVIL AND CRIMINAL STATUTES OF LIMITATIONS APPLICABLE TO ILLEGAL INTERNATIONAL ADOPTIONS

The principles set forth above in parts II and III, on balance, favor South Korea abolishing, tolling, or at a minimum significantly extending its civil and criminal statutes of limitation in connection with international adoptions.

A. South Korean Precedent and the Principle of *Sinuichik*

Adoptees may argue, by analogy, that the South Korean government breached its duty of good faith to the South Korean people in connection with illegal international adoptions, just as the government breached its duty of good faith in the Suzy Kim and Professor Choi cases.¹⁵³ According to the South Korean Civil Code, the government must perform its duties in good faith.¹⁵⁴ In the Suzy Kim and Professor Choi cases, the South Korean courts recognized that statutes of limitations should not apply to civil claims against the government where the state betrays its obligation of good faith owed to the public, fails to investigate and prosecute its own crimes, and prevents plaintiffs from filing timely lawsuits.¹⁵⁵

Advocates believe that the South Korean state and its agents – the international adoption agencies – violated the trust of the South Korea people by engaging in illegal adoption practices.¹⁵⁶ Moreover, they allege that the state continues to withhold information from adoptees about the circumstances of their adoption and that the state has failed to investigate the role of prior

¹⁵² *Id.* at ¶IV(7).

¹⁵³ *Supra* notes 89-99 and accompanying text.

¹⁵⁴ *Supra* note 89 and accompanying text.

¹⁵⁵ *Supra* notes 89-99 and accompanying text.

¹⁵⁶ *Supra* notes 34-43 and accompanying text.

administrations in illegal international adoptions.¹⁵⁷ If South Korean courts conclude that an analogy to the Suzy Kim and Professor Choi cases is persuasive, then the courts might hold that the principle of *Sinuichik* precludes both the government and its agents from relying on a limitations defense in civil cases.¹⁵⁸

Defendants would be sure to argue that the Suzy Kim and Professor Choi cases were exceptional circumstances involving documented, serious crimes by the South Korean government against its own people. But, South Korean courts could reasonably conclude that the analogy holds. Up to two hundred thousand children sent overseas may be grounds to find that the former South Korean administrations and their agents engaged in systematic and widespread violations of their duty of good faith to the South Korean people.

B. Equitable Principles and Civil Lawsuits

The equitable principles discussed in Part III(B), if adopted by South Korea's courts or enacted by its legislature, weigh against rigid application of South Korea's civil statutes of limitation.

1. Application of the Discovery Rule to Adoptees' Civil Lawsuits

The discovery rule protects plaintiffs who though diligent are unaware that defendants injured them.¹⁵⁹ Victims of illegal adoption fit precisely within this category. Illegally adopted children may not understand the circumstances of their adoption or appreciate their injuries until much later in life, well after the limit to bring civil actions under South Korean law expired.¹⁶⁰ Adoptees could reasonably argue that this principle, if applied by South Korean courts, should allow them to prosecute their claims.

¹⁵⁷ *Supra* notes 41-51 and accompanying text.

¹⁵⁸ *Id.*

¹⁵⁹ *Supra* notes 116-19 and accompanying text.

¹⁶⁰ *See id.*; *supra* notes 83-87 and accompanying text.

2. Application of Equitable Tolling and Equitable Estoppel to Adoptees' Civil Lawsuits

Objectively viewed, even the most diligent adoptees could not possibly bring an action within the time limits prescribed by South Korea's statutes of limitations.¹⁶¹ Adoptees from South Korea are typically under two years old and cannot be expected to initiate a timely action themselves, nor is there anyone who could feasibly bring an action in their name.¹⁶² In addition, it may take years for an adoptee to understand the circumstances of her adoption because, among other things, an adoptee will have to locate her family's authentic *Hojeok* or family registration documents and uncover evidence regarding how her orphan *Hojeok* was prepared.¹⁶³ If South Korea were to apply the principle of equitable tolling, the courts could conclude that it would be unfair to deny adoptees access to the courts.

Similarly, principles of equitable estoppel provide that when a defendant prevents a plaintiff from filing a claim within the limitations period he should not be allowed to benefit from the statute of limitations defense.¹⁶⁴ International adoptees, sent overseas by the defendants, were rendered incapable of bringing their claims in South Korean courts within the limitations period. Furthermore, adoptees argue that they have had a difficult struggle to gain access to information concerning their adoption from KAS (and its predecessors) and from adoption agencies.¹⁶⁵

In fact, South Korea implicitly recognized that adoption authorities withheld critical information from adoptees when it enacted the Special Adoption Law, which provides for greater access to birth records by adoptees.¹⁶⁶ However, even today, some advocates allege that adoption agencies continue to withhold information with impunity.¹⁶⁷ Based on these circumstances, plaintiff adoptees could reasonably argue that defendants' own actions caused any delay and defendants should be estopped from relying on a statute of limitations defense.

¹⁶¹ *Id.*

¹⁶² *Supra* notes 120-22 and accompanying text.

¹⁶³ *Supra* notes 44-51 and accompanying text.

¹⁶⁴ *Supra* notes 123-24 and accompanying text.

¹⁶⁵ *Supra* notes 44-51 and accompanying text.

¹⁶⁶ *Supra* notes 46-47 and accompanying text.

¹⁶⁷ *Id.*

3. Application of the Continuing Violations Doctrine to Adoptees' Civil Lawsuits

The doctrine of continuing violations also militates against rigid application of South Korea's statute of limitations to adoptee lawsuits. Although the initial wrongful acts may have occurred outside the limitation period, adoptees can argue that the wrongful acts are ongoing because adoption agencies continue to withhold vital information regarding their birth, relinquishment, and adoption.¹⁶⁸ If South Korea were to adopt the continuing violations doctrine, the courts could deem all of defendants' actions as falling within the limitations period.¹⁶⁹

C. Exceptions for Serious Crimes as Applied to Illegal International Adoption Cases

Many jurisdictions do not apply statutes of limitation to serious crimes because society's interest in punishing defendants who commit serious crimes outweighs the defendants' interest in repose.¹⁷⁰ South Korea could consider treating illegal international adoptions, which may have victimized thousands of children over the course of six decades, as a serious crime for which statutes of limitation are inappropriate.¹⁷¹

D. The Movement to Abolish Statutes of Limitation for Sexual Crimes Against Children

The world-wide movement to abolish or extend statutes of limitations with respect to sexual crimes against children may be a model for South Korea to similarly abolish, toll, or meaningfully extend its statutes of limitation with respect to illegal international adoptions.¹⁷² In both sexual crimes and illegal international adoptions, the offender committed serious crimes against a young person with potential long-term repercussions.¹⁷³ Also, just as statutes of limitation can prejudice young victims of sexual abuse and unfairly shield adult perpetrators, South Korea's statutes of

¹⁶⁸ *Supra* notes 44-51 and accompanying text.

¹⁶⁹ *Supra* notes 131-34 and accompanying text.

¹⁷⁰ *Supra* notes 134-37 and accompanying text.

¹⁷¹ *See id.*

¹⁷² *Supra* notes 138-46 and accompanying text.

¹⁷³ *See supra* note 9 and accompanying text.

limitations render those responsible for carrying out illegal international adoptions against children virtually immune from justice.¹⁷⁴

Adoptees can reasonably argue that, by rigidly enforcing the statute of limitations, South Korea victimizes the plaintiffs twice. First, defendants allegedly sent the children overseas for profit. Second, when the adoptees finally return to South Korea to seek justice, they are told their claims are untimely.

E. Statutes of Limitations, Human Rights Violations, and Illegal International Adoptions

Because illegal international adoption is not a core crime against humanity, adoptees cannot argue that under customary international law South Korea is *required* to treat illegal international adoptions as imprescriptible.¹⁷⁵ Possibly, as international law develops and the scope of illegal international adoptions becomes better understood, international law may deem statutes of limitation inapplicable to international adoption cases on grounds that illegal adoption is a human rights crime equivalent to human trafficking.¹⁷⁶

But courts and legislatures should recognize that, even if illegal international adoption is not an imprescriptible crime, it may be a violation of children's human rights, and a rigid application of statutes of limitation to these claims could be inappropriate. The Basic Principles and Guidelines provides that domestic statutes of limitations as applied to gross human rights violations should not be "unduly restrictive."¹⁷⁷ If courts believe that gross violations of the adoptees' human rights may have occurred, then consistent with these principles and guidelines, plaintiffs could argue that South Korea should allow their claims to proceed.¹⁷⁸

¹⁷⁴ See *supra* notes 83-87 and accompanying text.

¹⁷⁵ *Supra* notes 147-49 and accompanying text.

¹⁷⁶ See *supra* notes 10-12 and accompanying text.

¹⁷⁷ *Supra* notes 151-52 and accompanying text.

¹⁷⁸ *C.f.* Hessbruegge, *supra* note 71, at 385 ("[S]tates still subject reparation claims for human rights claims to the same domestic statutes of limitations as compensation claims for ordinary traffic accidents. This does not correspond to the pledge states made in adopting the Basic Principles on the Right to an Effective Remedy and Reparation for Gross Human Rights Violations. The same moral impetus that caused previous generations to abolish statutory limitations that would have barred the prosecution of Holocaust perpetrators

F. Retroactively Reviving Civil and Criminal Cases

One issue that South Korea's courts will need to address is whether reviving expired claims would violate South Korea's constitutional prohibition against ex post facto laws. Courts would likely treat civil cases differently from criminal cases.

Reviving civil cases should probably not violate South Korea's prohibition against ex post facto legislation. Most jurisdictions view civil statutes of limitations as procedural rules; therefore, civil claims may be revived without violating the constitutional guarantee against ex post facto punishment.¹⁷⁹

But, states generally do not revive criminal cases once a statute of limitations has run.¹⁸⁰ Reviving an expired criminal case in South Korea would require special legislation and, even then, it might not be constitutional, as evidenced by the majority decision of South Korea's Constitutional Court in the May 18th Democratization case.¹⁸¹ Most South Korean scholars agree that the South Korean Constitution prohibits the state from depriving defendants of their purported reliance interest in limitations periods.¹⁸² South Korean scholars, legislators, and judges should

should move the current generation of decision makers to change course and accept the principle that reparation claims for human rights crimes are imprescriptible.”).

¹⁷⁹ Most jurisdictions view civil statutes of limitation as merely procedural rules; therefore, civil claims may be revived, without violating ex post facto. See Marci Hamilton, *The Supreme Court Renders Another Decision Interpreting the Ex Post Facto Clause that Makes it more Difficult to Incarcerate Sex Offenders*, Verdict: Legal Analysis and Commentary from Justia (June. 14, 2013), available at <http://verdict.justia.com/2013/06/14/the-supreme-court-renders-another-decision-interpreting-the-ex-post-facto-clause>.

¹⁸⁰ Margarita Clarens, Documentation Center of Cambodia, *The Validity of Extending the Statute of Limitations for Cambodian National Crimes Tried before the Extraordinary Chambers and the Implications of Ex Post Facto 4* (2008), available at genocidewatch.org (explaining application of the prohibition against ex post facto laws in Germany and Hungary); *Stogner v. California*, 539 U.S. 607 (2003) (in a narrow 5-4 decision, the United States Supreme Court held that a newly enlarged criminal statute of limitation could not retroactively apply to a criminal case where the statute of limitations had already run).

¹⁸¹ *Supra* notes 105-06 and accompanying text.

¹⁸² Cho, *supra* note 107, at 586 (“[T]he majority of Korean jurisprudence maintains that retrospective application of an amended limitations period to time-barred prosecutions violates the *ex post facto* principle ... By contrast, this principle is not violated by extending a limitation period before a given prosecution is barred.” Article 13 of the South Korean Constitution provides: “(1) No citizen may be prosecuted for an act which does not constitute a crime under the law in force at the time it was committed, nor may he be placed in double jeopardy. (2) No restrictions may be imposed upon the political rights of

reconsider whether the Constitutional prohibition against ex post facto laws should apply to statutes of limitations for three reasons.

First, when a state eliminates a statute of limitation, it does not (i) retroactively criminalize conduct that was once legal nor (ii) retroactively increase the punishment for a crime after it has been committed.¹⁸³ The new statute of limitations only extends the time available for the state to prosecute its case.

Second, there is a serious dispute as to whether defendants truly have a protected reliance interest in the statute of limitations expiring. As the dissenting justices in the United States Supreme Court case, *Stogner v. California*, explained, “the reliance exists, if at all, because of the circular reason that the Court today says so; it does not exist as part of our traditions or social understanding.”¹⁸⁴

Third, the reliance interest presupposes the possibility that a prosecution was possible. Commentators note that where a regime engages in serious crimes, but prevents the police and judiciary from investigating and prosecuting such crimes, statutes of limitations unfairly render the perpetrators immune to prosecution.¹⁸⁵ As four members of South Korea’s Constitutional Court held in the May 18th Democratization case, where there are exceptional cases of national interest the doctrine of ex post facto should not shield state actors who committed serious crimes.¹⁸⁶ These arguments favor South Korea abolishing its statutes of limitations in connection with illegal international adoptions and retroactively applying this change to revive criminal cases that already expired.

In addition, although South Korea transitioned to a democracy several decades ago, there has never been a meaningful accounting with respect to South Korean children who were victims of illegal international adoptions.¹⁸⁷ Viewed in the context of transitional justice, adoptees can reasonably contend that South

any citizen, nor may any person be deprived of property rights by means of retroactive legislation.”).

¹⁸³ See *Stogner*, 539 U.S. at 633 (Kennedy, J. dissenting) “[A] law which does not alter the definition of the crime but only revives prosecution does not make the crime “greater than it was, when committed.” “Until today, a plea in bar has not been thought to form any part of the definition of the offense.”).

¹⁸⁴ *Stogner*, 539 U.S. at 633

¹⁸⁵ *Supra* notes 111-12 and accompanying text.

¹⁸⁶ *Supra* note 107 and accompanying text.

¹⁸⁷ *Supra* note 41 and accompanying text.

Korea should allow cases to proceed on their merits as part of a process to address abuses committed under prior regimes.¹⁸⁸

As one author noted, justice after a government transition might be delayed but should not be denied.¹⁸⁹ Now that the South Korean government is in the position to investigate and prosecute past crimes in connection with illegal international adoptions, it should do so.

G. Policy Objectives and Their Application to South Korea's Statutes of Limitations

Rigidly applying time limits to civil or criminal cases in connection with illegal international adoptions may not further the policy objectives of statutes of limitation (discussed in Part II) for two reasons.

First, states impose statutes of limitations to encourage plaintiffs and prosecutors to diligently prosecute their cases and to prevent them from unfairly surprising defendants.¹⁹⁰ But, statutes of limitations do not encourage adoptees to be more diligent because, at the time of the offense, they were children and they could not commence litigation until years after becoming adults. The statutes of limitations applied to cases brought by adoptees accomplish something else entirely: they make illegal international adoptions immune to civil or criminal prosecution. This does not merely grant repose to defendants; it insulates them from any possibility of answering for an alleged crime.

Second, although statutes of limitation are meant to filter cases based on stale evidence,¹⁹¹ the proof that plaintiffs and prosecutors can bring before a South Korean court today in connection with illegal international adoptions might be *more*, not less, reliable than evidence available decades ago. For years, adoptees have struggled to uncover the facts underlying their adoption overseas.¹⁹² Today, there may be witnesses, such as birth parents and adoption agency staff, who are more comfortable testifying as to what they experienced. The passage of time might

¹⁸⁸ South Korean courts could view international adoptions in the context of serious crimes that occurred under prior autocratic regimes, such as the Gwangju massacre, which could not have been prosecuted at the time that they occurred. *Supra* notes 103-07 and accompanying text.

¹⁸⁹ See generally Hessbruegge, *supra* note 71.

¹⁹⁰ *Supra* notes 77-80 and accompanying text.

¹⁹¹ *Supra* note 81-82 and accompanying text.

¹⁹² *Supra* notes 44-51 and accompanying text.

enable South Korean courts to adjudicate illegal international adoption cases based on testimonial and documentary evidence that would have been unavailable years ago.¹⁹³

Abolishing statutes of limitation in connection with illegal international adoption may also have at least two other ancillary benefits for South Korea. First, democracy thrives when its political institutions candidly address social and political issues. Allowing plaintiffs' claims to proceed provides the South Korean public and its courts with an opportunity to assess South Korea's adoption policies and why so many of the nation's children were sent overseas.

Second, commentators believe that one factor, which spurred South Korean international adoptions, was the country's attitude towards single mothers and their children.¹⁹⁴ International adoptions are inextricably linked to social issues within South Korea, such as programs to help families and children in need. Allowing international adoption cases to proceed on their merits might encourage South Korea to evaluate its policies towards mothers and children.

V. CONCLUSIONS AND ONE POSSIBLE ALTERNATIVE

Principles of fairness and precedent from jurisdictions around the world, including South Korea, support eliminating statutes of limitations in connection with illegal international adoptions. Rigid application of the statutes of limitations unfairly punishes plaintiffs who could not possibly have raised their claims in time and renders defendants immune from prosecution. South Korean courts and South Korea's National Assembly should consider reviving civil and criminal cases that otherwise expired to empower the judiciary to decide these cases on their merits.

But, as an alternative to judicial proceedings, South Korea may prefer to establish a truth and reconciliation commission and

¹⁹³ See *id.*; see Malveaux, *supra* note 77, at 106, 116-17 (explaining how in the *Bodner* and *Rosner* cases, evidence was more readily available after the passage of time, and testimonial and other evidence might be more readily obtained years after underlying events occurred).

¹⁹⁴ *Supra* note 26.

to convene hearings with respect to international adoptions.¹⁹⁵ The truth and reconciliation commission could invite people involved in the adoption process, including adoptive parents, birth parents, adoptees, adoption agencies, and government officials to relate their experiences. Hearings by the truth and reconciliation commission might result in reparations as well as meaningful reforms. A truth and reconciliation commission could promote healing in a manner that a court might not.

Whether through the court system or a fact-finding commission, South Korea should meaningfully respond to allegations from individuals who believe they were illegally adopted. These allegations should not be disregarded simply on grounds that the cases are untimely. To do so not only denies adoptees their right to be heard, but also deprives South Korea of the opportunity to assess its treatment of the most vulnerable members of society. The truth may heal a world more full of weeping than we can understand.

Keywords

Illegal International Adoption, South Korean Adoption, Child Laundering, Statute of Limitations, Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption

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¹⁹⁵ See OLSEN ET AL., *supra* note 109, Kindle Locations 631-707 (discussing the use of truth commissions instead of, or in conjunction with, other measures to address crimes committed by prior regimes).

DO WE NEED TO BOTHER ABOUT PROTECTING OUR PERSONAL DATA?: REFLECTIONS ON NEGLECTING DATA PROTECTION IN NIGERIA

Lukman Adebisi Abdulrauf*

ABSTRACT

The advent of technology comes with numerous advantages, which are widely acknowledged. It also comes with multiple challenges, which are, unfortunately, less appreciated. Challenges brought about by the proliferation of technology, especially information technology (IT), include cyber-crime, money laundering, identity thefts, and unlawful access and use of individuals' personal data. IT has made it easier for the personal data of individuals to be collected and used for commercial and other purposes, which may amount to an infringement of the right to data protection. This challenge has made many countries take concerted actions by ensuring that this violation is not left unchecked. They do this by establishing special legal frameworks for the protection of personal data. Nigeria is a country that is rapidly growing technologically. It has one of the highest populations of internet users in the world. In spite of this expanding presence of IT and its associated risks, Nigeria is yet to take issues of data protection seriously. This contribution examines the right to data protection in Nigeria. It concludes that data protection is a neglected subject in Nigerian jurisprudence in spite of its growing significance in the contemporary IT society.

I. INTRODUCTION

We now live in an information society brought about by information technology (IT)¹ and the internet. Recently, personal data has proliferated on the internet, and, as it has, so have the

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¹ Cécile de Terwangne, *Is a Global Data Protection Regulatory Model Possible?*, in *REINVENTING DATA PROTECTION?* 176 (Serge Gutwirth et al. eds., 2009).

issues and problems that surround it.² Personal data has also over time become a precious commodity with commercial value.³ It has created new markets both at the international and national scenes. It is the driver of the information economy and also subject of international trade. This makes its accumulation, use, and exchange somewhat inevitable. As a consequence, the data/information⁴ movement is unhindered, most of which includes personal data of individuals. The question, therefore, is no longer whether personal data can be obtained, but, rather, whether the data should be obtained and, where obtained, how the data should be used.⁵

This fluid nature of personal information and its increasing demand by both private and public actors have raised substantial concerns regarding privacy protection. Concerns have over time even gone beyond the scope of the traditional right to privacy because of the increasing importance attached to personal data and the data's vulnerability. The collection, use, and retention of an individual's personal data have the effect of stripping him of absolute control over what use his personal data is put to. They deprive him of the right to informational self-determination and take away his right to autonomy and dignity. The protection of personal data, therefore, speaks to the ability of individuals to control what is known about themselves.⁶

Governments have over time put in place specific legal frameworks for the protection of personal data. This is the law on

² Paul A. Bernal, *A Right to Delete?*, 2(2) EUR. J.L. TECH. 1 (2011).

³ Personal data is termed "the new oil" of the information society and new currency of the digital world. World Economic Forum (WEF), *Personal Data: The Emergence of a New Asset Class* (Aug. 11, 2014), available at http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf. See also LEE A. BYGRAVE, *DATA PRIVACY LAW: AN INTERNATIONAL PERSPECTIVE* 4 (2014).

⁴ Data and information are used in the same context in this paper. Both terms however differ conceptually. Data are unstructured facts or raw materials that need to be processed and organized to produce information. Information is an organized or structured set of facts. It is, however, difficult to maintain a distinction between both terms in practice and unnecessary to do so in a legal context. See LEE A. BYGRAVE, *DATA PROTECTION LAW: APPROACHING ITS RATIONALE, LOGIC AND LIMITS* 20 (2002).

⁵ South African Law Reform Commission (SALRC), *Privacy and Data Protection*, Project 124, vi (May 4, 2014), available at http://www.justice.gov.za/salrc/reports/r_prj124_privacy%20and%20data%20protection2009.pdf.

⁶ LORNA STEFANICK, *CONTROLLING KNOWLEDGE: FREEDOM OF INFORMATION AND PRIVACY PROTECTION IN A NETWORKED WORLD* 29 (2011). In fact, the right of an individual to control what is known about him/her has been pushed forward with the new "right to be forgotten" as amplified in the 2014 European Court of Justice's ruling in the Google Spain case. See *infra* note 69.

data protection. Dedicated legislative and institutional frameworks to ensure that this increasingly significant but endangered right is adequately protected are put in place. In fact, the trend now is a move towards the recognition and protection of personal data as a fundamental right contained in the bill of rights of some jurisdictions.⁷ A legal framework on data protection can, however, only be effective if the state takes threats to personal data seriously and the people are aware of the risks associated with unlawful processing of their personal data and the importance of their right to adequate protection of personal information. A collaborative effort between the state and the people is, therefore, necessary.

Nigeria is a country that is rapidly growing technologically and has huge potential for IT growth.⁸ It is increasingly recording a very heavy presence on the internet, having the eighth largest population of internet users in the world.⁹ The Nigerian society is slowly but rapidly moving towards an IT driven society as most services rendered in various sectors are reliant on IT. With the growth of e-commerce and the increasing security challenges within the country, the accumulation and use of personal information will be inevitable. The fundamental question is, therefore, whether the right to personal data protection is taken seriously in Nigeria.

This contribution examines the law on data protection in Nigeria with a view to showing that it is a neglected area in Nigerian jurisprudence and how such neglect could have serious consequence in recent times. The state of neglect is established by, firstly, showing that data protection is different from privacy and, hence, deserves independent attention. Secondly, contrary to the contention in some quarters, there is an upsurge in personal data

⁷ See, e.g., REGERINGSFORMEN [RF] [CONSTITUTION] 2:3 (Swed.), available at <http://www.partylaw.leidenuniv.nl/party-law/4c8b8db7-7720-480b-a535-1a017287acdc.pdf>. See also STATUUT NED. (Constitution of the Kingdom of the Netherlands 2008), art. 10 (Aug. 13, 2014), available at <http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>. The European Union's (EU) constitutional framework now recognizes protection of personal data as an independent fundamental right. See Charter of Fundamental Rights of the EU art. 8, Dec 18, 2000 O.J. (C. 364) 5.

⁸ Ayo Kusamotu, *Privacy law and technology in Nigeria: The legal framework will not meet the test of adequacy as mandated by Article 25 of European Union Directive 95/46*, 16(2) INFO. & COMM. TECH. L. 149 (June 2007).

⁹ With a total of more than 67 million internet users, Nigeria ranks after China, US, India, Japan, Brazil, Russia, and Germany as the eighth largest world internet user. See *Internet Users* (Sept. 10, 2014), available at <http://www.internetlivestats.com/internet-users/>.

processing in Nigeria, and, thirdly, the extant legal framework is insufficient to protect personal data in this digital age.

II. THE RIGHT TO PRIVACY: CONCEPTUALIZATION AND CATEGORIES

The right to data protection has always been associated with the right to privacy.¹⁰ It is usually assumed to be subsumed under the traditional right to privacy. Such contention has brought about some form of neglect on the right to data protection. Hence, it is imperative to commence this article with an understanding of the concept of privacy so as to show its relationship with the later concept of data protection.

It is common for any discourse on privacy to start with a disclaimer about the inherent difficulty or impossibility of defining the concept or of separating its various components.¹¹ This is because privacy is a contested legal concept with several understandings and more misunderstandings.¹² Privacy is also a term that changes with time and is conceived differently by different people. Advancement in IT has also brought about a dynamic understanding of privacy.¹³ As a consequence, this article does not attempt to offer a precise or watertight definition of the concept. Rather, a modest attempt to show its dynamism will be made. Theoretical and legal discourse on the relationship between technology and privacy dates back to the 1890s when Warren and Brandeis,¹⁴ obviously concerned with the advent of portable photography equipment accessible to the general population, conceived of privacy as the “right to be left alone.”¹⁵ This conception has changed over time as technology developed.¹⁶

¹⁰ Maria Tzanov, *Data Protection as a Fundamental Right Next to Privacy? ‘Reconstructing’ a not so New Right*, 3(2) INT’L DATA PRIVACY L. 88 (2013).

¹¹ Colin J. Bennett, *Privacy in the Political System: Perspectives from Political Science and Economics*, 5 (Sept. 10, 2014), available at <http://www.colinbennett.ca/wp-content/uploads/2012/06/Privacyin-the-Political-System.pdf>.

¹² Michael D. Birnhack, *The EU Data Protection Directive: An Engine of a Global Regime*, 24 COMPUTER L. & SECURITY 508 (2008).

¹³ Rachel L. Finn et al., *Seven Types of Privacy*, in EUROPEAN DATA PROTECTION: COMING OF AGE 3 (Serge Gutwirth et al. eds., 2013).

¹⁴ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, V.IV(5) HARV. L. REV. 195 (Dec. 1890).

¹⁵ See Rebecca Wong, *Privacy: Charting its Developments and Prospects*, in HUMAN RIGHTS IN THE DIGITAL AGE 147 (Mathias Klang & Andrew Murray eds., 2005).

¹⁶ *Id.*

Privacy now includes all those personal facts which a person decides should be excluded from the knowledge of outsiders.¹⁷ In this regard, privacy is the “claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others.”¹⁸ Be that as it may, the lack of a precise definition of privacy is not fatal to an understanding of data privacy. What is important to note is that privacy is a fundamental human right and a hallmark of democracy.¹⁹ At the basic level, it refers to the line drawn between the public and private spheres.²⁰ But, where the line should be drawn is both culturally specific and epoch sensitive.²¹

The importance of the right to privacy cannot be overemphasized. This is the reason why it is contained in the bill of rights of many nations.²² Hence, where the right is not expressly provided for, courts have found the right traceable to some provisions in the constitution of a nation.²³

Although attempts to proffer an acceptable definition of privacy remain elusive, there seem to be a consensus on recognition that privacy comprises multiple dimensions.²⁴ The right to privacy can, therefore, be classified into several

¹⁷ JOHANN NEETHLING ET AL., LAW OF PERSONALITY 32-33, 270 (2005).

¹⁸ ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967).

¹⁹ Birnhack, *supra* note 12, at 508.

²⁰ STEFANICK, *supra* note 6, at 30.

²¹ *Id.*

²² *See, e.g.*, CONSTITUTION OF NIGERIA (1999), § 37.

²³ In the U.S. Constitution, for example, privacy is not mentioned. However, the Supreme Court found that there are “zones of privacy” in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) where Mr. Justice Douglas held that “various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers ‘in any house...’ in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the ‘...right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides that ‘The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people...’” In India also, the right to privacy is not provided for in the constitution but the Indian Supreme Court has inferred privacy from the right to “protection of life and personal liberty” under Art. 21. TOBY MENDEL ET AL., GLOBAL SURVEY ON INTERNET PRIVACY AND FREEDOM OF EXPRESSION 78 (2012).

²⁴ Finn et al., *supra* note 13, at 6.

categories.²⁵ *Bodily privacy* or *privacy of person* concerns the right to have one's physical self or body protected from invasive procedures, such as drug testing, biometrics, and body scanners which are very common features of airports.²⁶ These procedures have the effects of intruding into our private spheres in a certain kind of way. *Privacy of communications* is the second category, and it refers to protection against monitoring telephone conversations, e-mail communications, face-to-face communications, and other communications.²⁷ Subjecting personal communications to any kind of surveillance using modern surveillance technologies constitute a violation of the right to privacy of communication. *Territorial privacy* involves the setting of limits on intrusion into our physical space and environment.²⁸ This includes domestic and other environments, such as the workplace or public space. This category of privacy is the subject of the common law tort of trespass.

The last category of privacy is *information Privacy*.²⁹ It concerns protection of our personal information against unlawful collection, retention, usage, and storage. This category of privacy is the most important in contemporary time because of the increasing need for personal information by both private and public actors. Over time, information privacy is usually taken to be one and the same thing with data protection.³⁰ It is submitted that, for reasons to be stated in the later part of this article, the right to data protection is not the same as the right to information

²⁵ Roger Clarke, *Introduction to Dataveillance and Information Privacy, Definitions of Terms* (Sep. 10, 2014), available at <http://www.rogerclarke.com/DV/Intro.html>. See also, Privacy International, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice* (Aug. 10, 2014), available at <http://gilc.org/privacy/survey/intro.html>.

²⁶ The body scanner used in airports is the subject of several legal debates and criticisms. See Yofi Tirosh & Michael D. Birnhack, *Naked in Front of the Machine: Does Airport Scanning Violate Privacy?* 74 OHIO ST. L.J. 1263 (Nov. 2013).

²⁷ Clarke, *supra* note 25.

²⁸ *Id.* Clarke lumps together territorial privacy and behavioral privacy. He notes that behavioral privacy “relates to all aspects of behaviour, but especially to sensitive matters, such as sexual preferences and habits, political activities and religious practices, both in private and in public places.” Clarke, *supra* note 25. See also Finn et al., *supra* note 13, at 7.

²⁹ Roger includes another category which is privacy of personal data. He argues that, with the close coupling that has accrued between computing and communications in recent time, privacy of communications and privacy of personal data have become so closely linked and referred to as “information privacy.” Clarke, *supra* note 25.

³⁰ Clarke, *supra* note 25.

privacy, as data privacy has a broader scope in terms of protection of personal information than information privacy. The right to data protection will now be examined in some depth.

III. THE RIGHT TO DATA PROTECTION: MEANING AND CORE PRINCIPLES

A. What is Data Protection?

The phrase “data protection” or “data privacy” is increasingly becoming very popular in policy and academic literature on contemporary issues in IT. A brief understanding of its meaning is necessary. There is some controversy regarding the appropriate terminology, “privacy” or “data protection.” This controversy stems from trans-Atlantic use of the terminologies “privacy” and “data protection.”³¹ The dominant word used in North-American literature and policy documents is “privacy” while “data protection” is essentially a European coinage.^{32,33} Though both terms basically mean the same thing in the context of protection of personal information, the trend nowadays is to adopt “data privacy” as “it better communicates the central interest(s) at stake and provides a bridge for synthesizing North American and European policy discussions.”³⁴ The term “data protection” will, however, be consistently used in this paper.

Summarizing data protection in a few lines is a difficult task.³⁵ However, it is important to attempt a workable definition for its importance to be better appreciated. De Hert and Gutwirth opine that data protection is a catch-all term for a series of ideas regarding the processing of personal data that governments apply

³¹ Alex B. Makulilo, *Privacy and Data Protection in Africa: A State of the Art*, 2(3) INT’L DATA PRIVACY L. 164 (2012).

³² In countries like the United States and Canada, “data protection” and “privacy” are taken to be one and the same thing. This means that these jurisdictions do not make any clear-cut distinctions between information privacy and data protection as discussed in the previous section of this article, especially in the context of processing personal data.

³³ DANA P. VAN DER MERWE ET AL., INFORMATION AND COMMUNICATION TECHNOLOGY LAW 313 (2008).

³⁴ Lee A. Bygrave, *Privacy and Data Protection in an International Perspective*, 56 SCANDINAVIAN STUDIES IN LAW 168 (2010). See also BYGRAVE, *supra* note 3, at 29.

³⁵ Paul De Hert & Serge Gutwirth, *Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action*, in REINVENTING DATA PROTECTION? 3 (Serge Gutwirth et al. eds., 2009).

to reconcile fundamental but conflicting values such as privacy, free flow of information, the need for government surveillance, etc.³⁶ In a more apt manner, Roos defines data protection as “a set of measures aimed at safeguarding individuals (data subjects) from harm resulting from the computerized or manual processing of their personal information by data controllers.”³⁷ She continued that these measures comprise of a group of principles on the processing of personal information.³⁸

Thus, data protection is a set of information management principles that are aimed at ensuring that personal information³⁹ of an individual or data subject⁴⁰ is being processed⁴¹ in a lawful manner by the data controllers.⁴² The real objective of the right to

³⁶ *Id.*

³⁷ VAN DER MERWE ET AL., *supra* note 33, at 313.

³⁸ *Id.*

³⁹ Personal data/information means information relating to an identifiable, living, natural person and, where it is applicable, an identifiable, existing juristic person. And, it includes information relating to an identifying number, e-mail address, physical address, religion, blood type, race, gender, biometric information, personal correspondence, etc. See Protection of Personal Information Act (POPIA) of 2013 § 1(b) (S. Afr.), available at www.gov.za/documents/download.php?f=204368. An *identifiable person* is someone who can be identified directly or indirectly by reference to an identification number or one or more other features specific to that person’s physical, physiological, mental, economic, cultural, or social identity. See European Union (EU) Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (July 30, 2014) [hereinafter EU Directive] art. 2(a), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=EN>. Personal data must be distinguished from “confidential” or “private” data. Confidential/private data are data which are secret and should be hidden from the public, for example information about an individual’s sexual life. It must be pointed out that personal data are wider than private or confidential data which do not necessarily involve data that contain secret. Information like a person’s name, address, and phone number forms part of personal data but is not necessarily confidential or secret. A data protection regime covers personal data.

⁴⁰ A data subject is a person to whom personal information relates. See POPIA, *supra* note 39, at § 1. This article will consistently make reference to the South African POPIA data privacy concept because it is one of the most recent data privacy legislations and has arguably captured most of the recent principles on data privacy. Moreover, the simple draft style makes it easily comprehensible to ordinary members of the society.

⁴¹ “Processing” means any operation, activity, or set of operations, whether or not by automatic means, concerning personal information, including collection, storage, updating, dissemination, erasure, destruction, etc. See POPIA, *supra* note 40, at § 1. See also EU Directive, *supra* note 39, art. 2 (b).

⁴² A data controller and a responsible party mean the same thing. Section 1 of POPIA defines a responsible party as a public or private body or any other person that, alone or in conjunction with others, determines the purpose of and means for processing personal information. Based on this definition, responsible data controllers will include the government, its agencies, and

personal data protection, therefore, is to protect individuals against unlawful or unjustified collection, storage, use, and dissemination of their personal information.⁴³ Data protection specifically seeks to regulate all or most stages in the processing of certain kinds of data and, accordingly, regulates the ways in which such data is gathered, registered, stored, exploited, and disseminated.⁴⁴

It is, however, important to note that regulation of data protection does not cover all categories of processing even though Kuner aptly notes that “it is difficult to conceive of any operation performed on personal data in electronic commerce which would not be covered by it.”⁴⁵ Data protection law does not include personal information processed in the course of personal activity,⁴⁶ de-identified data,⁴⁷ information collected for public interest, and information processed for journalistic and artistic purposes.⁴⁸

B. Emergence and Development of Data Protection

The emergence of the right to data protection results from a realization that the traditional right to privacy, discussed in the preceding section, cannot sufficiently protect personal data as a result of challenges brought about by emerging technologies. This article does not intend to provide a detailed historical account of the emergence and development of data protection as such has been extensively discussed elsewhere.⁴⁹ Suffice to mention that certain concerns led to the emergence and development of data privacy laws.⁵⁰ The first is the improved ability of computers to store, retrieve, and transfer information. The second is the growing concern about governments’ large data warehouses or data banks. The third concern is the rapid growth in the use of the internet and e-commerce. Unlike the first three, the fourth concern is not

private individuals who engage in any activity regarding the personal data of individuals

⁴³ Peter J. Hustinx, *Data Protection in the European Union*, 2 PRIVACY & INFORMATIE 62 (2005).

⁴⁴ BYGRAVE, *supra* note 3, at 1.

⁴⁵ CHRISTOPHER KUNER, *EUROPEAN DATA PROTECTION LAW: CORPORATE COMPLIANCE AND REGULATION* 74 (2007).

⁴⁶ This includes information that, for example, is collected in a personal diary or mobile phone for purely personal purposes.

⁴⁷ “De-identified data” means to delete any information that identifies the subject.

See POPIA, *supra* note 39, § 1.

⁴⁸ *See, e.g.*, POPIA, *supra* note 39, § 4.

⁴⁹ *See, e.g.*, VAN DER MERWE ET AL., *supra* note 33, at 313.

⁵⁰ STEFANICK, *supra* note 6, at 42.

related to advancement in technology.⁵¹ The fourth reason results from the influence of the EU directive that restricts data transfer within a jurisdiction without adequate data protection legislations. These factors, together, brought about a proliferation of regulations on data protection. Despite the convergence of various rules and regulations, certain basic principles are common in all.

C. Data Protection Principles

Even though various jurisdictions and institutions have differing approaches to data protection, which reflects their different perspectives, they all recognize certain core principles of data protection called fair information principles (FIPs) and all their various documents contain these FIPs.⁵² The FIPs are core principles that stipulate how the processing of personal data must be carried out in a way respectful of human rights. The principles are accountability, processing limitations, purpose specifications, further processing limitations, information quality, openness, security safeguards, and data subject participation.⁵³ Some jurisdictions have added other principles such as the minimization principle, proportionality principle, right-to-know logic, etc.

The accountability principle places a responsibility on the data controller or responsible party to ensure that the FIPs and all measures are performed.⁵⁴ The processing limitation principle has four main aspects limiting the processing of personal information.⁵⁵ Firstly, the processing must be carried out lawfully and reasonably so as not to infringe on privacy right as provided in the relevant data protection regulation and other relevant laws.⁵⁶ Secondly, personal data must only be processed minimally, that is, the purpose for which it is processed must be relevant and adequate.⁵⁷ Thirdly, personal information may only be processed if the data subject has consented or the processing is justified on

⁵¹ *Id.* at 45.

⁵² *See, e.g.*, ¶¶ 7-14 of the *OECD Guidelines Governing the Protection of Privacy and Transborder Flows of Data*; EU Directive, *supra* note 39, at art. 6 & POPIA, *supra* note 39, at art. § 7-32; Birnhack, *supra* note 12, at 511.

⁵³ Johann Neethling, *Features of the Protection of Personal Information Bill, 2009 and the Law of Delict*, 75 THRHR 247 (2012).

⁵⁴ *Id.* *See also* POPIA, *supra* note 39, at § 7.

⁵⁵ VAN DER MERWE ET AL., *supra* note 33, at 372.

⁵⁶ POPIA, *supra* note 39, at § 8.

⁵⁷ VAN DER MERWE ET AL., *supra* note 33, at 372; POPIA, *supra* note 39, at § 9.

other grounds.⁵⁸ Finally, personal information must only be collected directly from the data subject.⁵⁹

The purpose specification principle stipulates that processing must be carried out for a specific purpose and the data subject must be aware of the purpose for collection. It also provides that records of personal information must not be retained once the purpose for collection is achieved. This principle is, however, not without exceptions.⁶⁰ The further processing limitation requires that, if personal information is to be further processed, it must be compatible with the specific purpose for which it was originally collected.⁶¹ The information quality principle means information collected must be of good quality. This principle places a responsibility on the data controller to take reasonable steps to ensure that data being processed are complete, accurate, not misleading, and updated, having regards to the reason for collection.⁶² The openness principle provides that the responsible party must be open and transparent so that the data subject and regulator know about the processing of personal information.⁶³ The security safeguard principle requires that personal information be protected by appropriate security safeguards.⁶⁴ The last principle ensures that data subjects participate and have access to their personal information.⁶⁵

From these principles, certain basic rights are bestowed on the data subjects and corresponding duties on the data controllers. For example, data subjects have the right to participate,⁶⁶ right to object to processing for direct-marketing purposes,⁶⁷ and right not to be subjected to automated decision-making.⁶⁸ Recent data protection regulations further provide for the right to be deleted or forgotten and right to data portability.⁶⁹

⁵⁸ This includes, for example, grounds of public interest or legitimate interest of the data subject, data processor, or third party (POPIA, *supra* note 39, at § 10).

⁵⁹ VAN DER MERWE ET AL., *supra* note 33, at 374; POPIA, *supra* note 39, at § 11.

⁶⁰ *See generally*, POPIA, *supra* note 39, at § 14. *See also*, VAN DER MERWE ET AL., *supra* note 33, at 375.

⁶¹ POPIA, *supra* note 39, at § 15.

⁶² Neethling, *supra* note 53, at 253.

⁶³ POPIA, *supra* note 39, at POPIA § 17; Neethling, *supra* note 53, at 252.

⁶⁴ POPIA, *supra* note 39, at § 16; Neethling, *supra* note 53, at 253.

⁶⁵ POPIA, *supra* note 39, at § 22.

⁶⁶ VAN DER MERWE ET AL., *supra* note 33, at 336. *See also*, EU Directive, *supra* note 39, at art. 12.

⁶⁷ VAN DER MERWE ET AL., *supra* note 33, at 337.

⁶⁸ *Id.* at 338; EU Directive, *supra* note 39, art. 15.

⁶⁹ *See* European Commission's Proposal for a Regulation of The European Parliament and of the Council on the Protection of Individuals with Regard to

A certain category of personal data, which is considered “sensitive,” is generally prohibited from processing.⁷⁰ All data protection regimes also provide for an independent institution to oversee compliance and enforce data protection principles.⁷¹ However, the nature and scope of their powers may vary considerably.⁷² This is a striking feature of data protection regimes.

IV. DISTINGUISHING THE RIGHT TO DATA PROTECTION FROM THE RIGHT TO PRIVACY

Most regulations on personal data protection provide that realizing the right to privacy is a primary objective.⁷³ Hence, it raises the issue of the relationship between both rights. The contention in some quarters is that the rights to data protection and

the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation) (Aug. 20, 2014), available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf. See also the landmark case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (submitted Feb. 27, 2012; decided May 13, 2014) (popularly referred to as the Google Spain case) where a Spanish citizen made a complaint before the Spanish data protection authority seeking the removal of a link to an article published online which made reference to certain debt he owed and had since paid. The Spanish Data Protection Agency rejected the claim but accepted a complaint against Google and ordered that Google remove the search results. Google subsequently brought an action before the Spanish high court which referred the matter to the European Court of Justice. It was the ruling of the Court that Google (a search engine) is responsible for the contents in its site and must freely consider requests made by individuals for removal. TS, May 13, 2014 (C-131/12) (Spain). However, it has been emphasized that the right is not absolute and must be decided on a case-by-case basis. See http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf. See also Ioannis Iglezakis, *The Right to be Forgotten in the Google Spain Case (case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?*, presented at the 4th International Conference on Information Law 2014 (Dec. 11, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472323.

⁷⁰ Examples are information regarding children, religious and philosophical beliefs, race, trade union membership, etc. See generally POPIA, *supra* note 39, at Part B.

⁷¹ Graham Greenleaf, *Independence of Data Privacy Authorities (Part I): International Standards*, 28 COMPUTER L. & SECURITY REV. 3-13 (2012).

⁷² For example, the Privacy Commissioner of Canada does not have enforcement powers. She serves as a mere ombudsman who can only resolve disputes amicably and issue a recommendation. This is unlike the Data Protection Officer in European Union jurisdictions that have powers to enforce and issue orders.

⁷³ For example, the second paragraph of the POPIA provides that “the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information.”

privacy are interchangeable.⁷⁴ Yet, others opine that data protection is merely a subset of the right to privacy. Distinguishing both rights is, therefore, pertinent. Privacy protects individuals' personal and private lives and makes inaccessible certain facts which a person considers personal and private. Data protection, on the other hand, is a set of measures put in place for the processing of personal information in a rights respecting manner. It lays down procedures for the lawful processing of individuals' personal data. Taken in this light, the right to privacy is more substantive in nature than the right to data protection which is procedural even though containing certain element of substantive law.

The right to data protection unlike the right to privacy is not prohibitive.⁷⁵ It does not prohibit the processing of personal information; rather, it lays down specific guidelines for such processing, thereby giving an individual an absolute right over his personal information and, by that, accentuates his fundamental right to autonomy and human dignity.

The right to data protection certainly does more than the right to privacy in terms of protection of individuals' personal data. In other words, data protection has a wider scope than the right to privacy.⁷⁶ In this regard, Gutwirth points out that data protection is both wider and more specific than the right to privacy. He further contends that it is wider because it related to other fundamental rights, such as equality and due process, and more specific in that it mainly deals with the protection of personal data. It is also broader because it protects all personal data.⁷⁷ Scharturn identifies the broader scope of data protection in terms of personal data protection as opposed to information privacy.⁷⁸ He points out that information privacy is a sub-class of the right to privacy, and it essentially entails autonomy or rather "inaccessibility" or "opacity"

⁷⁴ De Hert & Gutwirth, *supra* note 35, at 4.

⁷⁵ Paul De Hert & Eric Schreuders, *The Relevance of Convention 108*, 33, 42, *Proceedings of the Council of Europe Conference on Data Protection*, Warsaw, Nov. 19-20, 2001 (cited in *EU Study on the Legal Analysis of a Single Market for Information Society* (Sept. 1, 2014)), available at http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=833. These scholars, however, argue that data protection could also be prohibitive. For example, processing sensitive data is generally prohibited.

⁷⁶ Orla Lynskey, *Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order*, 63(2) INT'L & COMP. L.Q. 1 (June 2014).

⁷⁷ See De Hert & Gutwirth, *supra* note 35, at 9-10.

⁷⁸ Dag W. Scharturn, *Designing and formulating data protection laws*, 18(1) INT'L J.L. & INFO. TECH. 2 (2008).

of private information. However, data protection is more of an open or transparent concept that includes information privacy but covers more than that.⁷⁹ In this light, data protection does not only seek to make personal information confidential but also ensures that individuals have access to their personal information in the hands of other persons to confirm that it is adequate and to correct it if need be. This is where the right to data protection intersects with the right to freedom of information.⁸⁰

Similarly, Lynskey added that the law on data protection grants individuals more rights over more personal data than the right to privacy.⁸¹ She added that the enhanced control over personal data, which is bestowed on individuals by the right to data privacy, serves two main purposes. First, it proactively promotes individuals' rights that are threatened by the processing of their personal data, and, second, it balances the power and information asymmetries between individuals and data controllers.⁸² Data controllers are usually large organizations or the government with undue advantage over individuals in power and resources. This undue advantage brings a form of asymmetry between the data controllers and individuals. Data protection, thus, reduces these asymmetries by empowering individuals with absolute rights over the processing of their personal data.

Data protection is, consequently, not a sub-category of the right to privacy by a very close neighbor to it.⁸³ Both rights are significantly overlapping yet distinct.⁸⁴ This issue of the uncertainty between both rights appears to have been resolved by the trend in some jurisdiction to expressly provide for an autonomous fundamental right to data protection that stands independent from the right to privacy.⁸⁵ There are also efforts to separate the right to data protection from the right to privacy *stricto sensu* in regulations on data protection. For example, the proposed EU regulation makes reference to the realization of the

⁷⁹ *Id.*

⁸⁰ See generally Ian Currie, *The Protection of Personal Information Act and its Impact on Freedom of Information*, (Apr. 23, 2014), available at <http://www.opendemocracy.org.za/wp-content/uploads/2010/10/The-Protection-of-Personal-Information-Act-and-its-Impact-on-Freedom-of-Information-by-Iain-Currie.pdf>.

⁸¹ Lynskey, *supra* note 76, at 20.

⁸² *Id.*

⁸³ Birnhack, *supra* note 12, at 509.

⁸⁴ Lynskey, *supra* note 76, at 19.

⁸⁵ Rodotà Stefano, *Data Protection as a Fundamental right*, in REINVENTING DATA PROTECTION? 77 (Serge Gutwirth et al. eds., 2009).

right to data protection as a core objective instead of the right to privacy. Consequently, there is a slow but conscious move towards a truly rights-based approach to data protection.

V. NEGLECT OF THE RIGHT TO DATA PROTECTION IN NIGERIA

In order to show how the right to personal data protection is a neglected right in Nigeria, various activities of processing individuals' personal data and the legal response will be discussed in this section. The neglect is, therefore, demonstrated by the fact that, notwithstanding the upsurge of personal data processing in Nigeria, the legislative framework has not kept pace with technological developments to protect this right. The nature of the threat to data protection in Nigeria will now be examined.

A. An Overview of Threats to Personal Data in Nigeria

Nigeria is one of the biggest and fastest telecommunications markets in Africa and has enormous potential for IT market growth.⁸⁶ The population in 2014 stood at about 179 million with almost 38% internet penetration.⁸⁷ ICT and internet penetration has been on the increase across the country due to the growth of mobile phone usage and data services over the past few years.⁸⁸ This has implications for the right to personal data protection.

The level of processing activities taking place in Nigeria has provoked some commentaries.⁸⁹ It has been argued that Nigeria is not making any serious effort toward personal data protection because the number of activities of collection, storage, dissemination, and use of personal data are not so much as to generate serious concerns.⁹⁰ It is submitted that this perception is one of the reasons for the neglect of the right to personal data protection in Nigeria. Consequently, this part of the article refutes

⁸⁶ Kusamotu, *supra* note 8, at 149.

⁸⁷ *Internet Users by Country (2014)* (Aug. 23, 2014), available at <http://www.internetlivestats.com/internet-users-by-country/>.

⁸⁸ The ICT market in Nigeria has expanded considerably over the past decade with the number of licensed Internet Service Providers (ISPs) rising from 18 in 2000 to 139 by the end of 2012. *Freedom on the net (2013)* (Mar. 20, 2014), available at <http://www.freedomhouse.org/report/freedom-net/2013/nigeria>.

⁸⁹ Kusamotu, *supra* note 8, at 149-59.

⁹⁰ Kusamotu, *supra* note 8, at 157.

this claim by arguing that there are heavy processing activities in Nigeria as a result of advancement in IT and proliferation of the internet.

The increasing presence of the internet, with its great potentials to assemble, store, and transmit large amounts of personal data, comes with its own inherent challenges.⁹¹ Nigeria today is witnessing a situation where various private and public bodies (data controllers) increasingly process individuals' personal data for various purposes. It is said that "we live in a surveillance society where the creation, collection and processing of personal information by both public and private entities has become a ubiquitous phenomenon."⁹²

Credit bureaus constitute a salient private data controller in Nigeria. Credit bureaus create databases of aggregated information on the credit status and behavior of borrowers to enable Nigeria's lending industry to make informed lending decisions.⁹³ Currently, the CRC Credit Bureau Limited and XDS Credit Bureau are the major credit bureaus in Nigeria.⁹⁴ These bureaus have great capacity to gather vast information about individuals through enhanced data matching software capable of processing millions of updates per day.⁹⁵ They also possess data storage systems capable of storing millions of records.⁹⁶ And, they can deploy multi-million dollar specialized ICT infrastructure to perform their functions.⁹⁷ The information is sold to financial institutions who offer credit facilities, and decisions on creditworthiness are taken based on this information.

Banks and other financial institutions constitute another major private data controller in Nigeria. Banks, for example, carry

⁹¹ It has been rightly pointed out that the adoption of the United Nations Guidelines Concerning Computerized Personal Data Files 1990 shows that data privacy is not merely a first world western concern. Bygrave, *supra* note 34, at 185.

⁹² Abdulwasii O. A. Yusuff, *Legal Issues and Challenges in the use of Security (CCTV) Cameras in Public Places: Lessons from Canada*, 23 SRI LANKA J. INT'L L. 34 (2011).

⁹³ CRC Credit Bureau Limited, *About Us*, June 2, 2014, available at http://www.crccreditbureau.com/?page_id=4.

⁹⁴ Currently, the CRC credit bureau limited and XDS credit bureau are the major credit bureaus in Nigeria.

⁹⁵ The information is collected from several sources including commercial banks, retailers, telecoms, federal government enterprises and microfinance banks, finance houses, discount houses, merchant banks, and leasing companies. See XDS website (June 2, 2014), available at <http://www.xdscreditbureau.com/>.

⁹⁶ XDS Credit Bureau Limited, *Our Products and Services* (June 2, 2014), available at <http://www.xdscreditbureau.com/product&services.php>.

⁹⁷ *Id.*

out Know Your Customer (KYC)⁹⁸ checks on their customers and accumulate very sensitive information which if violated or compromised could result in huge financial losses to their customers.⁹⁹ Insurance agencies by their nature must also collect personal data from individuals to be insured. The insurance business is thriving in Nigeria.¹⁰⁰ Sensitive personal information is collected for medical purposes in the medical and health sectors.¹⁰¹ IT has made medical practice increasingly easier by providing platforms for collecting and updating medical records of patients. With globalization and e-commerce, retailers also accumulate information about individuals and keep large sales records in digital form which could be retrieved and used at any time. These records are being used for direct marketing without consent and permission of the customers.¹⁰² Phishing scams¹⁰³ and unsolicited commercial mails (spam)¹⁰⁴ are increasingly popular in Nigeria. The use of Closed Circuit Television (CCTV) cameras by both

⁹⁸ KYC is a process used by banks to verify the identity of their customers. The term is also used to refer to the bank regulation which governs these activities. See KYC (June 2, 2014), available at http://en.wikipedia.org/wiki/Know_your_customer.

⁹⁹ Ademola S. Adeniyi, *The Need for Data Protection Law in Nigeria* (Aug. 30, 2014), available at <http://adeadeniyi.wordpress.com/2012/07/18/the-need-for-data-protection-law-in-nigeria-2/>. See also [http://www.cenbank.org/OUT/2012/CIRCULARS/FPR/EXPOSURE%20DRAFT-THREE-TIERED%20KNOW%20YOUR%20CUSTOMER\(KYC\)%20REQUIREMENT%20PROGRAM.PDF](http://www.cenbank.org/OUT/2012/CIRCULARS/FPR/EXPOSURE%20DRAFT-THREE-TIERED%20KNOW%20YOUR%20CUSTOMER(KYC)%20REQUIREMENT%20PROGRAM.PDF).

¹⁰⁰ Oke Oyelade, *Nigeria's Insurance Industry: A Diamond in the Rough* (Aug. 30, 2014), available at <http://sagroupng.com/anev/index.php/nigeriasinsurance-industry-diamond-rough/>.

¹⁰¹ There are calls for Nigeria to adopt the Electronic Health Record (EHR) system for the whole country because of its potential benefits. Jerry S. Pantuvo & Naguib R, *Towards Implementing a Nationwide Electronic Health Record System in Nigeria* 3(1) IJHDRI (2011).

¹⁰² For various calls to intensify direct marketing practices in Nigeria, see <http://www.nigerianbestforum.com/generaltopics/direct-marketing-swallowing-conventional-marketing-%E2%80%93-idmn-registrar/>.

¹⁰³ Phishing is a new form of identity theft which occurs when scammers send e-mails posing as banks, credit card companies, or popular commercial websites asking recipients to confirm or update personal and financial information in a hyperlink to a look-alike website for the false company. Yusuf I. Arowosaiye, *The New Phenomenon of Phishing, Credit Card Fraud, Identity Theft, Internet Piracy and Nigeria Criminal Law*, presented at the 3rd Conference on Law and Technology, Faculty of Law, University Kebangsaan Malaysia and Faculty of Law, University of Tasmania, Australia (Nov. 2008).

¹⁰⁴ Emmanuel O. Kolawole, *Upgrading Nigerian Law to Effectively Combat Cybercrime: The Council of Europe Convention on Cybercrime in Perspective*, 12 U. BOTSWANA L.J. 149-50 (June 2011); Taiwo A Oriola, *Advance Fee Fraud on the Internet: Nigeria's Regulatory Response*, 21 COMPUTER L. & SECURITY REP. 237-48 (2005).

private and public bodies is a norm around Nigeria with vast storage capabilities.¹⁰⁵

Perhaps the greatest threats to personal data in Nigeria are the public data controllers which comprise the government and its agencies. Two recent activities of the government demonstrate the risks to individuals' personal data. Not too long ago, the Federal Government of Nigeria, through its Nigeria Identity Management Commission (NIMC), launched a National e-ID Card scheme.¹⁰⁶ This will involve several government agencies integrating and harmonizing all identity databases, including driver's licenses, voter registrations, health insurance, taxes, Subscriber Identity Modules (SIM), and the National Pension Commission (PENCOM) into a single, shared services platform.¹⁰⁷ Of concern to advocates of the right to personal data protection is the fact that the scheme involves a collaborative effort with MasterCard¹⁰⁸ and Assess bank.¹⁰⁹ This implies the collection and transmission of large amounts of personal data among these organisations.

Quite recently, the Nigeria Communications Commission (NCC) adopted a compulsory scheme to register all users of the SIM cards in Nigeria.¹¹⁰ This registration involves presentation of identification documents, such as e-passports, company ID cards with tax/pension numbers, student ID cards from recognized institutions, and drivers licenses from the Federal Road Safety Commission (FRSC); it also includes the capture of the subscriber's photograph and biometrics (facial photographs and fingerprints).¹¹¹ What is more, this personal data are being

¹⁰⁵ For example, on August 27, 2010, Nigeria signed an agreement with the Chinese telecommunication firm, ZTE, to install about two thousand solar powered CCTVs within the federal capital, Abuja and Lagos. These cities were selected to host the pilot projects aimed at closely monitoring and uncovering possible threats to public security through the CCTV cameras. See *Abuja: Where Are the CCTV Cameras?* (Sept. 20, 2014), available at <http://www.thisdaylive.com/articles/abuja-where-are-the-cctv-cameras-/141195/>.

¹⁰⁶ *President Goodluck Ebele Jonathan, GCFR Unveils National Electronic Identity (E-Id) Card in Nigeria* (Sept. 20, 2014), available at <http://www.nimc.gov.ng/?q=content/formal-launch-e-id-card-nigeria>.

¹⁰⁷ *Id.*

¹⁰⁸ MasterCard is a technology company and payments industry leader. See <http://www.mastercard.com/corporate/ourcompany/about-us.html>.

¹⁰⁹ One of Nigeria's commercial banks. See <https://www.accessbankplc.com/index.php/about-us>.

¹¹⁰ PC Obutte, *ICT Laws in Nigeria: Planning and Regulating a Societal Journey into the Future*, 17(1) POTCHEFSTROOM ELECTRONIC L.J. 438 (2014).

¹¹¹ Chukwuyere E. Iziogu, *Data Protection and Other Implications in the Ongoing SIM Card Registration Process* (Aug. 1, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597665.

collected by any person on behalf of the NCC without any serious form of legal regulations.¹¹² To enhance information sharing and facilitate the easy flow of information, private and public controllers collaborate. The Central Bank of Nigeria (CBN), NIMC, and the credit bureaus usually collaborate and gather information on individuals.

From the brief overview of activities of personal data processing in Nigeria, it is doubtful if any of these data controllers, especially the private bodies, comply with the FIPs. It is even more unlikely that affected individuals know that their personal information is being collected let alone having the opportunity to correct inadequate information based on the FIPs. This, therefore, means that personal information is collected by these data controllers without accountability. Such acts constitute a flagrant abuse of personal data of individuals and violation of the right to personal autonomy and human dignity. The important question, therefore, is what legal framework protects personal data in Nigeria and how effective is it? This will be answered in the following paragraphs.

B. Legal Regime of Personal Data Protection in Nigeria: An Evaluation

This article has presented a brief overview of the various processing activities currently taking place in Nigeria with a view to showing that there is a sufficiently heavy use of individuals' personal data by various public and private data controllers for us to take data privacy protection seriously. This section seeks to review the extant legal regime for data protection in Nigeria to show that data protection is a neglected right despite the numerous threats personal data faces in Nigeria today.

1. The Constitution of the Federal Republic of Nigeria

Section 34 of Nigeria's Constitution provides for the right to human dignity. One of the ways it seeks to guarantee this dignity is through the protection of private and family life.¹¹³ Section 37

¹¹² There is, however, a Registration of Telephone Subscribers Regulation (RTS Regulation) 2011 which is not binding. *See* Adeniyi, *supra* note 99.

¹¹³ Asuquo K.E. Allotey, Data Protection and Transborder Data Flows: Implication for Nigeria's Integration into the Global Network Economy 173

expressly recognizes the right to privacy. It provides that “the privacy of citizens, their homes, correspondence, telephone conversations, and telegraphic communications is hereby guaranteed and protected.” Section 45, however, limits this right.¹¹⁴ The African Charter on Human and Peoples’ Rights (ACHPR),¹¹⁵ which has been ratified by Nigeria, does not contain a provision protecting the right to privacy.¹¹⁶ It, however, guarantees the right to human dignity.¹¹⁷

The express reference to citizen’s correspondence and their telephone and telegraphic communications envisages an intention to protect information privacy which is but an aspect of the right to data protection. Information privacy involves protection of an individual against unlawful interference with his personal information held by others.¹¹⁸ The scope of information privacy covers collection, storage, usage, and dissemination of personal information by both public and private bodies.¹¹⁹ The constitution, therefore, partially guarantees the right to data protection by restricting the use of information regarding other persons.

Section 37 of the Constitution has, however, been criticized for guaranteeing the right to privacy of citizens of Nigeria alone.¹²⁰ This means a non-citizen cannot move the Nigerian court to have his right to privacy enforced. This could be seen from the section’s opening that provides for the “Privacy of Citizens.” The ACHPR, however, provides in Article 7 that “every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.” It can, thus, be argued that non-citizens could approach national institutions for

(2014) (unpublished LLD thesis, University of South-Africa) (on file with the author).

¹¹⁴ Privacy is protected essentially in the interest of defense, public safety, and public order, and for the purposes of protecting the rights and freedoms of other persons.

¹¹⁵ African Charter of Human and Peoples’ Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (2004).

¹¹⁶ It is contended that probably the right to privacy is not necessary for guaranteeing peace and unity in Africa which was the primary focus of the state parties at the time of adoption of the ACHPR by the Organisation of African Unity.

¹¹⁷ Article 5 provides that “every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status.”

¹¹⁸ Allotey, *supra* note 113, at 175.

¹¹⁹ *Id.*

¹²⁰ Kusamotu, *supra* note 8, at 154.

the enforcement of their right to privacy based on this provision.¹²¹ However, the Nigerian Constitution is supreme,¹²² and any law inconsistent with the constitution is null and void to the extent of its inconsistency.¹²³ Thus, personal data of non-Nigerians being processed in Nigeria are left unprotected.

Be that as it may, the difference between the rights to data protection and privacy *stricto sensu* will make the constitutional guarantee of data privacy very limited for both Nigerian and non-Nigerians. As has been stated, the law on data protection has a wider scope in terms of personal data protection than the right to privacy. The right to privacy as provided by the constitution only protects the unlawful use of an individual's personal information. It does not guarantee an individual access to and rectification of his personal data held by another party.

2. Common Law

Certain principles for the protection of personal data could also be gleaned from the common law even though there is no explicit protection against civil invasion of privacy under the common law in Nigeria. Limited protection of personal data is available especially when it involves misuse of personal information. For example, the common law remedy for breach of confidence applies in Nigeria¹²⁴ and may be relied upon for civil protection of personal data especially where the misuse of information amounts to a tort.¹²⁵ However, an action for breach of confidence will in most cases cover confidential/private

¹²¹ *Id.*

¹²² CONSTITUTION OF NIGERIAN (1999) § 1.

¹²³ *Id.* at § 3.

¹²⁴ Enyinna S. Nwauche, *The Right to Privacy in Nigeria*, 1(1) REV. NIGERIAN L. & PRACTICE 67 (2007). The common law breach of confidence only applies to private/confidential information which is far narrower than personal data/information. Nevertheless, it can be used to protect certain types of personal data which may be confidential, especially if it includes sensitive personal data.

¹²⁵ Foluke O. Loasebikan, *Privacy and Technological Development: A Comparative Analysis of South African and Nigerian Privacy and Data Protection Laws with Particular Reference to the Protection of Privacy and Data in Internet Cafes and Suggestions for Appropriate Legislation in Nigeria* 340 (2007) (unpublished Ph.D. thesis, University of Kwazulu Natal, South Africa) (on file with author). For example, where a person discloses his personal information to another person, in which a duty of confidence is imposed, and that other person discloses such information, an action could lie for breach of confidence. An example is the duty of confidentiality between patients and doctors

information and not necessarily personal data which are the main focus of the regime on data protection. In other cases, the torts of trespass,¹²⁶ defamation,¹²⁷ nuisance,¹²⁸ passing-off,¹²⁹ and intentional infliction of emotional distress could also be resorted to for common law protection of personal data.¹³⁰

Nigerian common law protects against intrusion into a person's private sphere and prevents a person from disclosure of certain private information. This means it gives an individual the right to determine the destiny of his personal information. It also helps protect his identity. These are very important aspects of the right to data protection. However, Nigerian common law jurisprudence on privacy, generally, is extremely limited in protecting individuals' personal data as it does not embrace the basic principles of data protection.¹³¹

3. Sectorial Regulations

This is the general legal framework on personal data protection in Nigeria. Several other laws provide for partial protection of data privacy. Our discourse will not consider such laws in detail as their application is limited to particular sectors of data processing activity. The Freedom of Information Act 2011 (FOIA) makes public record and information more available and provides public access to records and information.¹³² It protects public records in a way consistent with public interest and

¹²⁶ For example, where information is obtained by means of unlawful entry into a person's land or property, an action may lie in the tort of trespass. Particularly, where a person takes storage devices containing personal information of another person, and assesses and uses the information, an action could lie for trespass to property.

¹²⁷ Where the disclosure or publication of personal information causes injury to the reputation of a person, an action for the tort of defamation could lie.

¹²⁸ For example, where personal data is obtained by interference into one's peaceful enjoyment of their property that amounts to nuisance. An example is personal information obtained from a surveillance camera.

¹²⁹ Where there is misuse of business information, which involves imitation of the plaintiff's name or business idea in such a way that the public is misled into thinking the business is the same as the plaintiff's, liability for the misuse shall lie for the unlawful use of personal information.

¹³⁰ Loasebikan, *supra* note 125, at 340.

¹³¹ It is not as developed as the common law of other jurisdictions like South Africa which recognizes an independent personality right of privacy and identity under the law of delict. It is submitted that even the South African common law of privacy is limited in the protection of personal data.

¹³² Freedom of Information Act (2011), *available at* <http://www.nigeria-law.org/Legislation/LFN/2011/Freedom%20of%20Information%20Act.pdf>.

protection of personal privacy.¹³³ The FOIA protects personal data by providing that a public institution must deny an application for information that contains personal information¹³⁴ except if the individual to whom it relates consents or the information is publicly available.¹³⁵ Apart from the fact that the FOIA only applies to publicly held records,¹³⁶ it gives the right to access only publicly held records and does not provide for correction and rectification of records by individuals. This is a basic FIP.

The much anticipated Nigerian National Health Bill, which is expected to revolutionize the health sector, was recently passed into law.¹³⁷ Part III contains rights and duties of users and health care personnel. It obligates the person-in-charge of every health establishment to keep the health records of every user of the health service.¹³⁸ It also provides that all information concerning a user relating to his or her health status, treatment, or stay in a health establishment is confidential¹³⁹ and no person may disclose any information contemplated in the subsection except under certain circumstances that include consent,¹⁴⁰ order of a court,¹⁴¹ and when non-disclosure represents a serious threat to public health.¹⁴² The bill also places obligations on the person-in-charge of a health establishment, who is in possession of a user's health records, to set up control measures to prevent unauthorized access to those records and to the storage facility in which or by which they are kept.¹⁴³ It also provides for liability for failure to comply with this provision.¹⁴⁴ It is clear that this legislation does not provide for a majority of the FIPs.

¹³³ *Id.*

¹³⁴ *Id.* at § 14(1).

¹³⁵ *Id.* at §§ 14(2)(a) and (b).

¹³⁶ *Id.* at § 1. *See also* the long title to the act.

¹³⁷ On February 19, 2014, the Nigerian Senate passed the National Health Bill 2014 which is designed to "revolutionize" the health sector and focus heavily on better regulation and quality (hereinafter National Health Bill 2014). The bill is for an act to provide "A Framework for the Regulation, Development and Management of a National Health System and set Standards for Rendering Health Services in the Federation, and Other Matters Connected therewith, 2014." *See* <http://www.hanshep.org/news-and-events/nigeria-passes-national-health-bill-2014>. *See* http://www.unicef.org/nigeria/ng_publications_national_health_bill_2008.pdf (a copy of the law).

¹³⁸ National Health Bill 2014. § 25.

¹³⁹ *Id.* at § 26(1).

¹⁴⁰ *Id.* at § 26(2)(a).

¹⁴¹ *Id.* at § 26(2)(b).

¹⁴² *Id.* at § 26(2)(c).

¹⁴³ *Id.* at § 29.

¹⁴⁴ *Id.* at § 29(2)(i)-(ii).

The Nigerian Communications Act 2003 (NCA),¹⁴⁵ which is the primary law regulating the telecommunication sector, does not contain any particular provision on data protection. However, because of the reactions from the public on the effects of collecting their personal data for the purposes of SIM card registration, the NCC revised the SIM Card Registration Regulation of 2010.¹⁴⁶ The current regulation, the Registration of Telephone Subscribers Regulation (RTS Regulation) 2011, has shown more effort to regulate the processing of personal data collected by telecommunication companies and independent registration agents in view of their mandate to collate and retain data of subscribers under the regulation. Section 9 of the RTS contains data protection principles. It provides for the subscriber's right to access, update, and rectify personal data in the central database.¹⁴⁷ It also provides that subscriber information held in the central database will be held on a strictly confidential basis and no person shall be allowed access to the subscriber information except as provided by the regulation of an act of the National Assembly.¹⁴⁸ It is further provided that all precautions in accordance with international best practices must be taken to preserve the integrity of subscribers' personal information.¹⁴⁹ Personal information of subscribers must also be used solely for the specified purpose for which it was collected.¹⁵⁰ It additionally provides that subscriber information shall not be transferred outside Nigeria.¹⁵¹ Apart from the sectorial application of the NCA, regulations do not have as much binding force as an act of the National Assembly and, as such, are less effective. For example, failure to comply with the data protection provisions will only be treated as a breach of regulation with a penalty of a fine and, perhaps, forfeiture of commercial benefits.¹⁵² It does not treat it as a violation of an individual's right to data protection which is actionable at the instance of the subscriber.¹⁵³

¹⁴⁵ No. 62, Vol. 90, available at http://www.ncc.gov.ng/index.php?option=com_docman&task=doc_download&gid=128&Itemid=55.

¹⁴⁶ Adeniyi, *supra* note 99.

¹⁴⁷ NCC (Registration of Telephone Subscribers) Regulation, Vol. 98. No. 101, 2011, available at http://www.ncc.gov.ng/index.php?option=com_content&view=article&id=74&Itemid=89 § 9(1).

¹⁴⁸ *Id.* at § 9(2).

¹⁴⁹ *Id.* at § 9(4).

¹⁵⁰ *Id.* at § 9(5).

¹⁵¹ *Id.* at § 10 (4).

¹⁵² Adeniyi, *supra* note 99

¹⁵³ *Id.*

There are several other laws which contain provisions that partially protect personal data such as the Criminal Code, Evidence Act, Nigerian Postal Act; however, all of them are of extremely limited application.

4. Other Legislative Efforts

The neglect of the right to personal data protection is further seen in the Nigerian government's legislative efforts toward data protection. Several bills have been drafted which have not seen the light of day.¹⁵⁴ The current bills have been the subject of commentaries.¹⁵⁵ They have been criticized for, among other reasons, applying only to the private sector, completely excluding personal data held by the government, incorporating weaker data protection principles, lacking a regime for sensitive personal data, and lacking an institutional mechanism for the enforcement of data privacy.¹⁵⁶ The non-exclusion of the processing of personal information for journalistic and artistic purposes has also drawn criticisms.¹⁵⁷ It is, thus, contended that, if any of the bills is passed in its current state, the personal data of individuals will still be left unprotected.¹⁵⁸

The Computer Security and Critical Information Infrastructure Protection Bill, 2005 contains some data privacy principles. However, the bill in its current state is still limited as it does not set out fundamental data protection principles.¹⁵⁹ There is also the Cybersecurity and Information Protection Agency Bill, 2008 which may never see the light of day.

This is an extant legislative framework on data protection in Nigeria. It has shown that Nigeria has totally neglected the right to data protection as no specific legislative framework exists to adequately protect this right. The existing patchwork system of laws provides extremely limited protection of personal data.

¹⁵⁴ Privacy Bill (2009) and Data Protection Bill (2010), available at <http://www.nassnig.org/nass2/legislation.php>. Recently, there is also the Personal Information and Data Protection Bill (2012), (on file with the author).

¹⁵⁵ Alex B. Makulilo, *Nigeria's Data Protection Bill: Too Many Surprises*, 120 PRIVACY & BUS. L. INT'L REP. 25 (2012); Article 19, *Nigeria: Personal Information and Data Protection Bill* (2013), available at <http://www.article19.org/resources.php/resource/3683/en/nigeria:-personal-information-and-data-protection-bill>.

¹⁵⁶ Makulilo, *supra* note 155, at 25.

¹⁵⁷ Article 19, *supra* note 155, at 9.

¹⁵⁸ *Id.*

¹⁵⁹ MENDEL ET AL., *supra* note 23, at 91.

Above all, there is no provision for an independent supervisory agency which is a fundamental aspect of a data protection regime.¹⁶⁰ The next part of the paper discusses the effect of this neglect of the right to personal data protection in Nigeria.

VI. EFFECTS OF THE NEGLECT OF PERSONAL DATA PROTECTION IN NIGERIA

The neglect of the right to personal data protection by Nigeria has serious effects on the fundamental rights and freedom of individuals. It affects the autonomy and dignity of persons as it takes away their right to informational self-determination. The right to data protection is based on the philosophy that personal data are personal to an individual and it is left for him to determine if it should be disclosed and how it should be used. In this light, a person is treated as a moral, free, and independent agent capable of deciding his own path in life.¹⁶¹ The processing of personal data without following specified rules deprives a person of this freedom and strips him/her of human dignity and autonomy. It slowly transfers our personhood to the control of others, usually governments and corporations.¹⁶² Someone else decides who is depriving us of our self-control.¹⁶³ This is the human rights aspect of the debate regarding the necessity of the right to personal data protection. Unfortunately, not enough people appreciate just how little freedom regarding our personal data we have left. Now, turning away from its impact on the fundamental right of autonomy and dignity, there are several other specific effects from the neglect of the right to data privacy in Nigeria.

The seamless collection of personal data poses some specific risks. The personal data being collected are easily prone to abuse by the data controllers or responsible parties.¹⁶⁴ Personal information of individuals being processed may be inadequate, incomplete, or irrelevant; accessed or disclosed without authorization; used for a purpose other than that for which it was collected; or destroyed.¹⁶⁵ The automated processing of personal

¹⁶⁰ EU Directive, *supra* note 39, at art. 23.

¹⁶¹ Birnhack, *supra* note 12, at 509.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Anneliese Roos, *The Law of Data (Privacy) Protection: A Comparative and Theoretical Study* 6 (2003) (unpublished LL.D. thesis, Faculty of Law,

data also presents added risks because of the difficulty in assessing the contents of information systems as information is stored in a non-intelligible manner.¹⁶⁶ Automated processing also makes it easy for interception, storage, matching, sharing, mining, and organizing personal data.¹⁶⁷

The processing of personal data without regulations may bring about discrimination as decisions may be taken on behalf of individuals based on presumptions that could negatively affect an individual.¹⁶⁸ Lack of substantial data protection can lead to a country being deprived of participation in the information market, thereby losing benefits of outsourcing deals. This is because the trend among countries is to pass data protection laws requiring an equal level of data protection before permitting the transborder flow of personal information.¹⁶⁹ Thus, it is a necessity that Nigeria takes data protection issues very seriously and ensure that an appropriate mechanism is put in place to ensure that the personal information being processed by either private or public bodies is adequately protected from unlawful use.

VII. CONCLUSION

The right to personal data protection is a right that has not received the desired attention in Nigerian jurisprudence. The level of awareness of this very important right is abysmally low. This problem is further compounded by the fact that Nigerians are yet to appreciate the value of their personal information and the exact scope and nature of their right to privacy and data protection. The state of personal data protection in Nigeria is far from adequate. This could be very problematic in the digital age and information society.

This contribution makes a modest attempt to raise awareness of the neglect of a very important contemporary human right. It

University of South Africa), available at <http://uir.unisa.ac.za/handle/10500/1463>.

¹⁶⁶ VAN DER MERWE ET AL., *supra* note 33, at 314.

¹⁶⁷ *Id.*

¹⁶⁸ Lynskey, *supra* note 76, at 20. For example, a school cannot refuse to accept an applicant from a particular jurisdiction or age group.

¹⁶⁹ The adequacy requirement requires that, for there to be a transborder flow of personal data, the recipient state must have adequate regulation ensuring minimum standards for the treatment of personal data. See EU Directive, *supra* note 39, at art. 25. ROSEMARY JAY & ANGUS HAMILTON, DATA PROTECTION LAW AND PRACTICE 210-44 (2003).

tries to explain the right to data protection from the perspective of its roots in the right to privacy and has also attempted to distinguish the right to privacy *stricto sensu* from the right to data protection. It is contended that looking at data protection as an element of the right to privacy does no justice to the protection of this important right as the right to data protection has a broader scope in terms of personal data protection than the right to privacy.

The article also submits that the right to data protection is a neglected right in Nigeria. It does this by a brief review of the current activities of accumulation, storage, usage, and transmission of personal data which, even though not as prolific as in other advanced nations, is substantial enough to make the government take serious action. The neglect is further shown by a brief review of the extant patchwork system of laws that partially protect personal data. Several other legislative efforts by the government are also discussed to show the obvious neglect.

It is suggested that Nigeria should begin to think very deeply about data protection. An organized legal framework must be put in place to protect this very important right. The legislature must also be very proactive in carrying out such function as new challenges to personal data protection come as society advances. This means our laws must keep pace with technological development. New regulations are called for every time new challenges arise due to technological developments. Legislators must take into account the right to data protection in drafting new laws in various sectors that handle individuals' personal data. Data controllers must also consider data protection principles in making policies that have anything to do with processing personal information.

The neglect of the right to data privacy has dire consequences in this era of globalization and rapid advancement in IT. Nigeria cannot afford to be left behind in issues such as the recognition and protection of the right to personal data as data protection issues are among the most important regulatory and policy issues of the 21st century. *Privacy (data protection) is definitely an issue whose time has come.*¹⁷⁰

¹⁷⁰ Colin J. Bennett, *Privacy in the Political System: Perspectives from Political Science and Economics* (Sept. 23, 2014), available at <http://www.colinbennett.ca/wp-content/uploads/2012/06/Privacyin-the-Political-System.pdf>.

Keywords

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