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THE PAR VALUE OF SHARES: AN IRRELEVANT CONCEPT IN MODERN COMPANY LAW

The par value regime has always been accepted as one of the cornerstones of our company law. The functions of the par value of shares are to fix the maximum liability of a shareholder and to protect the creditors of a company. However, the regime also entails many shortcomings, which have prompted many law commissions to suggest for its abolishment. Australia is the latest country that has done away with the par value regime. This article reviews the problems posed by the par value regime and evaluates the alternative regime.

I. INTRODUCTION

UNDER section 22(1)(c) of the Companies Act[1] (hereinafter "the Act"), a company (other than an unlimited company) is required to state in its memorandum "the amount of share capital (if any) with which the company proposes to be registered and the division thereof into shares of a *fixed amount*".(Emphasis added.)

This section states in unequivocal words that all companies limited by shares must have their shares defined by a fixed dollar amount. This is the par value of shares and henceforth will be called the par value regime. This par value regime is part of Singapore's inheritance from the British rule that is taken from the nineteenth century English model.[2] It was not until 1855 that England allowed limited liabilities to be made available to the shareholders in business and manufacturing companies[3] and thus ushered in a new paradigm in organisational structure for business. In appraising this par value regime, we have on our hands almost 144 years of proven history in the development of company law.

1 Cap 50, 1994 Rev Ed.

2 The New Zealand and Australian Corporation models are also built on the similar foundation. This is expressed in the New Zealand Law Commission Company Law Reform and Restatement, New Zealand, Report No 9, para 376 and the Australian Companies and Securities Law Review Committee Report No 11, *Shares of No Par Value and Partly-paid Shares*, para 2.

3 Wildman, JR & Powell, W, *Capital Stock Without Par Value* (reprinted 1980), at 19.

The organisational structure of business is continuously evolving. For example, Singapore has recently introduced legislation to allow companies to buy back their shares.[4] In the continuous evolution of business organisational structure, one school of thought would suggest that no practice is so sacred as to be untouchable to changes but unfortunately established practices may remain unchanged even if they do not serve any useful purposes anymore. It is argued that the par value regime happens to be one of these established practices.

It is important therefore to set out the evaluation model for such an entrenched regime or mode of commercial practice. The evaluation model must provide sufficient reasons to suggest that such a regime is totally out of touch with reality, and has substantial shortcomings so blatant that the regime becomes a stumbling block to the continuous evolution of modern companies.[5] On the other hand, the proposed new regime must be capable of overcoming the weaknesses of the present regime and yet retains most if not all the original intentions and protections accorded by the present regime. Moreover, the proposed new regime must be implemented and maintained at a cost acceptable to all parties affected.[6]

This paper first considers the creation and functions of the par value regime and evaluates its usefulness in the light of history of modern corporate development. Secondly, this paper seeks to evaluate critically the shortcomings of this regime. Thirdly, this paper evaluates the proposed regime that will replace the par value regime. Finally, the paper briefly discusses some of the issues that require considerations if the proposed regime is to be implemented.

4 Companies (Amendment) Act 38/98. This amendment Act, *inter alia*, adds the new sections 76B to 76G which allow three types of buy-back of shares by companies. For a brief synopsis of the amendment Act, see Tan Cheng Han, "Reflections on Companies (Amendment) Bill No 36 of 1998" (1998) 10 SAcLJ 287.

5 Dwight Frederick in his article, "The Par Value of Stock" (1907) 16 Yale Law Journal 247, at 247, lamented that "the truth of the matters seems (*sic*) to be that corporations, like all other human institutions representing a growth, have had a tendency to preserve in crystallised form, elements which have lost their usefulness or are even positively harmful."

6 For example, to regulate against insider trading, the government can resort to demand complete disclosure of financial and non-financial information to the minute details. This may prevent insider trading but at a prohibitive costs.

II. The Par Value Regime

The relationship between a company and its members was once perceived as between a trustee and *cestuis que trust*.[7] As such the ownership in the corporation is divided into shares and members' interest in the company is represented by the amount of shares they hold. A par value was subsequently given to each share to indicate an amount equal to that represented by the face value of the shares that had been contributed by each member.[8] The par value idea was slowly and quietly accepted as a corporate incident and had far reaching consequences in company law.[9] Par value was accepted in case law as serving two important functions as early as 1892.[10] First, the par value of shares "fixed the maximum amount that a shareholder in a company limited by shares would have to pay by way of statutory liability."[11] Therefore, "the statutory liability of each shareholder is the difference between the amount fixed by the memorandum and the sum which has actually been paid upon his shares."[12] However, the shareholders may under contract be liable for additional amount payable by way of premium. Secondly, "the capital (*product of the number of shares issued and the par value of the shares*) is fixed and certain, and every creditor of the company is entitled to look to that capital as his security."[13] (Emphasis added.) This certainty "was originally seen as assisting creditors to assess whether a company has adequate capital."[14]

There are several significant implications arising from the functions of the par value of shares. First, the creditor is entitled, by reference to the documents at the relevant registrar of companies, to ascertain "how much

7 The Lord Chancellor (Lord Macclesfield) in *Child* v *Hudson's Bay Company* (1723) 2 P Wms 207 said "the legal interest of all the stock is in the company, who are the trustees for the several members."

8 Note, "Shares Without Par Value" (1921) 21 Columbia Law Review 278.

9 Rice, Raymond F and Harno, Albert J, "Shares With No Par Value" (1921) 5 Minnesota Law Review 493, at 494.

10 *Ooregum Gold Mining Company of India* v *Roper* [1892] AC 125. In this landmark case, a company purported to issue £1 preference shares credited with 15 shillings paid up, leaving only five shillings to be paid on allotment, *ie*, the shares were issued at a discount to the par value. The House of Lord held that there was no power under the Companies Acts to do this, that it was *ultra vires* and the allottees were liable to pay the full amount on their shares.

11 Australian Companies and Securities Law Review Committee, Discussion Paper No 10, *Shares of No Par Value and Partly-Paid Shares*, (March 1990), at 3.

12 *Supra*, note 10, at 136, *per* Lord Watson.

13 *Ibid*, at 133, *per* Lord Halsbury LC.

14 *Supra*, note 11, at 3.

of the liability on the shares which does not remain undischarged has been discharged by cash payment, and how much in some other way."[15] Therefore the first fundamental outcome is that a company generally[16] cannot return its capital to shareholders while it is a going concern except in the form of dividends paid out of available profits. The Act allows a company, under certain specific circumstances,[17] to reduce its share capital, but not without first going through "proper authorisation", namely a special resolution passed in the general meeting and confirmation by the court. This elaborate procedure is for the purpose of prevention of fraud against the creditors because the creditors are entitled to believe that there are no changes in the capital contributed by the shareholders.[18] On the other hand, the changes in the business environment have resulted in the changes in company law that allow share buy back in many countries[19] and the most recent country being Singapore.[20]

Secondly, with respect to shareholders, it will be a fraud against the present shareholders and creditors to issue shares at a discount (*ie*, below the par value) unless under specially provided circumstances. Issuing shares at a discount has the effect of assigning a lower than par value to the shares thus lowering the statutory liability of the new shareholders (*ie*, the creditors have a smaller pool of capital to look to and the existing shareholders are "subsidising" the new shareholders). This rule is incorporated under section 68 of the Act which provides the procedure in which a company could issue shares at a discount.

15 *Supra*, note 10, at 140, *per* Lord Halsbury LC.

16 Other than express exemptions provided by the Act, such as the cancellation of shares that have not been taken up or which have been forfeited (s 71(1)(e)), the application of the share premium account in writing off the preliminary expenses of the company or the expenses of the share issue (s 69(2)(e)), the application of the share premium account in providing for the premium payable on redemption of redeemable preference shares (s 69(2)(f)), the cancellation of shares consequent on a purchase of those shares by the company by virtue of an order of court under s 76(13)(c) or s 216(2)(d), and the recent share buy-back scheme under ss 76B to 76G (s 73(12)).

17 Section 73 of the Act allows a company to extinguish or reduce the liability on any of its shares in respect of share capital not paid up, cancel any paid-up capital which is lost or unrepresented by available assets, or pay off any paid-up share capital which is in excess of the needs of the company.

18 *Guiness* v *Land Corporation of Ireland* (1882) 22 Ch D 349 at 375, *per* Cotton LJ; *Re Exchange Banking Co* (*Flitcroff's case*) (1882) 21 Ch D 519 at 533-4, *per* Jessel, MR: "The creditor has no debtor but that impalpable thing the corporation ... The creditor, ..., gives credit to that capital ... and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders."

19 Examples from the commonwealth countries are New Zealand, Australia, United Kingdom, *etc*, although the exact share buy-back schemes may differ from country to country.

20 *Supra*, note 4.

A share was therefore meant to represent the aliquot part of the corporate asset owned by the shareholders. The purpose of the par value is not to reflect the market value of the enterprise that is constantly shifting and which therefore cannot be set by the face value of the share certificates.[21] Instead the main purpose of the par value "is to indicate the capital that shareholders have agreed to contribute, which is a matter of history and which is therefore fixed."[22] Through time the par value concept has assumed many other functions that are characteristics of modern companies.

From the above discussion, it can be seen that there arose two cardinal restrictions on modern companies with regard to their share capital. They are the restrictions on companies from reducing their share capitals and the restrictions on companies in issuing shares below the par value. These two cardinal restrictions are enshrined in the Act and the Act prescribes very stringent and specific conditions and procedures for allowing companies to reduce their share capital and issue shares below par. Interestingly, developments in modern company law have resulted in the amendments of the Companies Act to allow the reduction in share capital arguing from the basis of business expediency without compromising on the protections accorded to shareholders and creditors.[23] We will therefore argue that the shortcomings of the par value regime and business expediencies justify the abolishment of par value of shares in the next section.

III. Shortcomings of the Par Value Regime

The no par value regime was introduced in the US in 1912 in the state of New York and subsequently almost every state has adopted this new regime. Interestingly, the US has never made it a mandatory regime as companies are given a choice between the two regimes. Numerous commissions and company law review committees had been set up in other countries to examine the replacement of the par value regime with a no par value regime.[24] A number of Commonwealth countries have already

[21] See Bonbright James C, "The Dangers of Shares Without Par Value" (1924) 16 Columbia Law Review 449, at 450. This point was discussed at length in an earlier article by the same author in "Earning Power as a Basis of Corporate Capitalisation" (1921) 35 QJE 482.

[22] *Ibid*.

[23] One good example is the share buy-back provisions introduced in 1998, see *supra*, note 4.

[24] For instance, the Companies and Securities Law Review Committee, *Shares of No Par Value and Partly Paid Shares*, 1991 (Australia); New Zealand Law Commission Report No 9, *Law Reform and Restatement*, June 1989 (New Zealand); *Proposals for a New Business Corporations Law*, (Dickerson Committee), 1971(Canada); Commission of Enquiry of the Companies Act (1970) (Van Wyk de Vries Commission) (South Africa); Report of the Jenkins Committee, 1962, Comd 1749 (United Kingdom); Report of the Committee on

adopted the no par value regime either partially or totally.[25] Australia has recently followed the pack.[26] In this section, we shall look at some of the shortcomings of the par value regime.

A. *Meaningless*

At the inception of a company, shareholders will usually subscribe for the shares of the company at their par value. This par value often represents the actual amount of capital invested by the shareholders, or the net asset value of the company. On the other hand, this may not necessarily be the case because at times the par value is arbitrary,[27] especially when the shares are exchanged for property and not cash. In other words, the actual value of the property may not be the same as, or at times be even less than, the par value.[28] In addition, although the par value of the shares may represent accurately the value of capital contributed at the *inception* of the company, such "capital" will not remain stable due to the exigencies of the company over time and the effect of inflation.[29] Practical experience has shown that it is quite impossible to maintain a constant equilibrium between the nominal capitalisation of a company and its assets.[30] Therefore, such nominal amount of the capital of a company rarely indicates the amount of actual or the amount originally contributed by its shareholders[31] and should be abolished.

Shares of No Par Value (Gedge Committee) 1954, Comd 9112 (United Kingdom); Report of the Committee on an Uniform Incorporation Act (1920) (USA); and the Reports of New York State Bar Association (1911) vol 34 (USA).

25 In Canada, shares are required to be issued as no par value shares (*eg*, Canada Business Corporations Act, s 24(10); Ontario Business Corporations Act, 1982, s 22(1)). In South Africa, companies have the option to issue shares with a nominal value or as no par value shares. In New Zealand, the New Zealand Companies Act has been amended and shares are now to be issued without par value (s 38, New Zealand Companies Act 1993). It is interesting that England has held on to the par value regime despite having no less than two law committees (Gedge Committee, 1954 and the Jenkins Committee, 1962, *ibid*) to look into the issue and recommending the abolishing of the par value regime.

26 The Australian Corporations Law has recently been amended via the Company Law Review Act 1998 which introduced the no par value concept (see s 254C).

27 *Supra*, note 9, at 494.

28 The practice of issuing share at par to over-valued property is stock watering and it is considered a great evil in modern corporations as such practice inflates the assets of a company and mislead creditors. Having so said, stock watering has been the general practice rather than the exception, at least in the flotation of large issues for public consumption, see *supra*, note 21, at 452.

29 *Supra*, note 11, at 4.

30 *Supra*, note 8.

31 Morawitz, Victor, "Shares Without Nominal or Par Value", (1913) 26 Harvard Law Review 729, at 730.

It can thus be said that the par value of the share is a fiction that is devoid of meaning. Although the par value of a share may possibly represent the net worth of the company at its inception, it will be a mere chance for the par value to represent the net worth of the company at any other point in time. In essence, the par value of shares reflects nothing of the true value of the company other than its "historical importance".[32] Such a historical importance does not warrant a significant place in modern company law.

B. *Misleading*

Not only is the par value of shares devoid of meaning, it can also be misleading as unsuspecting investors may perceive it as representing the money value of a corporation's capital.[33] Moreover, unscrupulous promoters sometimes promote the returns of shares as a certain percentage of the par value. This percentage will mislead unsuspecting investors. This kind of misrepresentation can lead to distrust amongst people that the company has been dishonest[34] and therefore affect public confidence in the equity market.

The par value can also cause creditors to put undue reliance upon this figure. On the other hand, it has been argued that creditors are business people endowed with business sense to see through such "misrepresentation".[35] It was well said that "corporations do not in fact get credit on any such theory; and money lenders have proved themselves to be much too hard headed to act on such legal fiction."[36] This argument in fact goes to show that the par value of shares has no bearing upon the lending decisions of creditors[37] and does not provide any sense of protection or security as in its original intention.

It is submitted that the corporate world can do without this illusive par value even though few investors or creditors will ever be misled by it. To make investment in shares attractive to the average Singaporean, the confusion between the par value and the real value of shares should be eliminated.[38]

[32] *Supra*, note 11, at 4.

[33] Goodbar, Joseph E, "No-Par Stock – Its Nature and Use" (1948) 3 Miami Law Quarterly 1 at 7. The Australian report also suggests that "unknowledgeable person who contemplates investing in shares may be misled into thinking that the nominal (*par*) value is the real value of the share", *supra*, note 11, at 4.

[34] Note, "A Comparison of Par and No-Par Stock, With Special Reference To The Effect of This Feature On Market Price" (1923) Harvard Business Review 108, at 109.

[35] *Supra*, note 9, at 511.

[36] Report of the Committee on an Uniform Incorporation Act (1920) (USA), at 6.

[37] Goodbar puts it crudely that such reliance were the creation of professors and judges "with no real knowledge of business practices", *supra*, note 33, at 12.

[38] This is also the opinion adopted by the Australian law reform committee, *supra*, note 11.

C. *Illusory Protection to Shareholders and Creditors*

Par value of shares was suggested to set the limit on liability for shareholders in the event of insolvency. Creditors have recourse against the shareholders to the extent of the unpaid amount of issued shares and the difference between the actual value of the property transferred in exchange for the shares on the ground that such assets had been over-valued (*ie*, stock watering) and the shares have been fraudulently classified as "fully paid and non accessible". However, such recourse against shareholders is unlikely to succeed because it is difficult for creditors to produce clear "proof of over-valuation and the court will be disposed to give the promoter the benefit of a doubt".[39]

Under the rule of equitable contribution, existing shareholders must not be disadvantaged by new issues of shares (*ie*, no stock dilution). The protection offered by the par value is illusory because if shares are offered above par value but below market value, the existing shareholders are disadvantaged even though with reference to the par value of the shares, they are protected. At most, the par value of shares can offer limited protection if the market value is below the par value. On the other hand if this situation arises, the company will have to apply to the court for permission[40] to issue shares at a discount and such issues will be subjected to the pre-emptive rights[41] of existing shareholders. Such share issues in many situations will be to the advantage of the present shareholders. However, to attract the existing shareholders to invest further sums in a financially strapped company, the issue may need to be deeply discounted *vis-à-vis* the market value. This may defeat the benefits of raising funds through equity, especially if the company could have issued the new shares at a smaller discount if they were to be offered directly to the public.

Therefore in the final analysis, the par value of the shares offers little protection for both the creditors and shareholders.

D. *Financial Inflexibility*

As mentioned earlier, a company cannot issue shares at a discount unless with the approval of the court. This is especially critical in a financial crisis where companies want to strengthen their financial base but the market price has gone below the par value of the shares. The par value regime creates unnecessary administrative cost when the company decides to raise additional capital but can only do so by issuing shares at a discount. One

[39] *Supra*, note 21, at 453.
[40] S 68(1) of the Act.
[41] S 68(4) of the Act.

way for companies to circumvent this technical rigidity is to issue new preference shares but this may cause a conflict between factions concerning their precedence over the new issue[42] and result in further delay.[43] On the other hand, companies can issue debts in place of equity. Yet such issues again can complicate the capital structure of the company and furthermore the company debt covenants may prevent it from taking this course of action. Bonbright accurately captured the arguments in stating that "such excessive issue (*debts or bonds*) has been responsible for much that is unsound in the financial structure of American corporations".[44] (Emphasis added.) Finally the company can choose to issue shares of different par value such that it will unlikely to be caught by this legal technicality. This will again create unnecessary complications to the capital structure of the company. Another way of changing the par value of shares is to have a share split that effectively exchange shares with higher par value with shares with lower par value.

As a result of the par value regime, a company wishing to issue shares at a discount has to seek confirmation of the court. This has caused unnecessary litigation in Australia[45] and the judges on these cases had held that "the issue of shares at a discount [had] a legitimate commercial justification and it [was] not likely to operate to the prejudice of either the shareholders or the creditors".[46] Both academics and lawyers agreed that doing away with par value of shares will allow the share price to be determined by the board of directors and the market making financing highly flexible and not to be obstructed by a fictitious concept.[47]

This financial inflexibility is most obvious in times of business depression when new capital is needed for legitimate survival but the law puts a restriction on issuing shares at a discount and borrowing through the issue or sale of notes and bonds must be resorted to and this may become a problem to the entire business enterprise if the company defaults.[48]

Moreover, it must be taken into consideration that shares that are issued at a discount will have some kind of "psychological connotation" to the

[42] *Supra*, note 33, at 18.

[43] This problem is somewhat resolved under the s 74(6) of the Act which provides that new issue of preference shares ranking *pari passu* with existing preference shares is deemed to be a variation of the latter's rights unless the new issue was authorised, *inter alia*, by the articles of association of the company.

[44] *Supra*, note 21, at 456.

[45] *Re Mallina Holdings Ltd* (1989) 15 ACLR 493; *Re "Air North West" Pty Ltd* (1988) 6 ACLC 1143; *Re Jarass Pty Ltd* (1988) 6 ACLC 767. All these cases involved the company concerned seeking court confirmation to issue shares at a discount to the par value.

[46] *Re Mallina Holdings Ltd* (1989) 15 ACLR 493, at 499, *per* Seaman J. This was a full trial.

[47] *Supra*, note 33, at 18.

[48] Clay, Cassius M, "Shares Without Par Value" (1925) 13 Kentucky Law Journal 275, at 277.

subscribers that the company is not doing well. Such unnecessary "psychological connotation" will hardly help one to have a fair and true assessment of the market value of the shares and this can be considered unhealthy in the security market. Of course, companies can pre-empt this problem by setting the par value of shares at a notional minimal value.

Therefore, the par value regime does put an artificial restraint on the flexibility of the company to raise equity when the market value of shares is below the par value.

E. *Complications in Adjustments of Share Capital*

The Australian report highlights the following criticism[49] that is not found in reports of other countries with regards to the par value regime. The problem arises when prosperous companies desire to capitalise their profits. Under the par value regime, such capitalisation must entail a fresh issue of shares. The preparation of a prospectus and other administrative work associated with a share issue will be avoided if the shares have no par value because the profits would be simply capitalised without any share issue.

From the discussion thus far, it can be seen that not only is the par value of shares meaningless, it is also misleading to the unsuspecting investors to the point of giving them a false sense of protection concerning the actual worth of the company. Moreover, the present day corporate financing could be stifled by this fictitious concept. Therefore, based on the merits of the above analysis, the removal of the par value regime will be commendable, as it no longer serves any useful purpose.[50]

IV. The No Par Value Regime

As mentioned earlier, the evaluation model proposes not only to reveal the shortcomings of the old regime but also to appraise the strengths of the proposed new regime. A no par value regime would mean that a share is not given any arbitrary par value and the directors or promoters can issue the shares at its market price or at a price that they deem fit or reasonable. The following discussions cover the strengths of the no par value regime.

[49] *Supra*, note 11, at 4.

[50] Bonbright, a critic of the no par value regime, nevertheless supports the abolishment of the par value, *supra*, note 21, at 467.

A. *Truthful Representation*

The adoption of a no par value regime would mean the amendment of section 63(1) of the Act. The company no longer needs in its return of allotments to the Registrar state the nominal amounts of the shares. The use of no par value shares promotes truthful representation as a share claims to be nothing more than the proportionate part of the total shares without par value.[51] Each share represents an aliquot part of the corporate assets[52] and the total money value of the assets changes according to exigencies. Therefore a no par value share simply represents the proportion of the ownership of the pool of net assets without placing any money value on it knowing that whatever money value placed on such interest, it will be meaningless by the passage of time. It was also held that shares without par value have the cardinal principle of accuracy. It makes no claims other than a participation in the company.[53] The best argument for truthful representation is as follows:

> Perhaps the most forceful and convincing argument in favour of the innovation (*no par value share*) is that it gives expression to a fundamental principle of the law of corporations, namely, that a certificate of stock is not a promise to pay to the holder thereof the amount expressed on its face or a reasonable rate of interest thereon, nor is it even evidence that such a sum or its equivalent has been received by the corporation from the original holder; but that, on the contrary, it is a mere participation certificate entitling the owner to share, ratably with the other shareholders, in the net profits of the corporation, if any, and in the event of its dissolution to share similarly in the assets of the corporation remaining after payment of its debts and any preferences to which the other shareholders may be entitled.[54] (Emphasis added.)

B. *Principle of Caveat Emptor*

Flowing from the above arguments, since the no par value shares do not purport to make any representation as to the money value of the capital of the company, the responsibility to find out the true worth of the company rests upon the potential investors and creditors. In fact commentators have

[51] Roche, John J, "No Par Value Stock" (1923) 7 Marquette Law Review 76, at 78.
[52] Pou, James H, "Shares of Stock Without Par Value" (1922) 1 North Carolina Law Review 26, at 28.
[53] House Documents, vol 139, 62nd Congress, 2nd Session, 1911-1912 (USA).
[54] *Supra*, note 9, at 506-7.

called this the "stop, look and listen" sign[55] placing upon the ignorant or the heedless the duty of investigating the company which they are to invest in. Bonbright questioned how the investors could discover the "real value" of the shares.[56] He felt that applying the principle of caveat emptor is unreasonable because the assets in the balance sheet could be a false representation of the true worth of the company and that it is almost impossible for ordinary investors to find out the "real value" of the share. On the one hand, the argument is appealing because the application of the caveat emptor principle may have the unintended effect of restricting investors to those that are sophisticated and have the ability to understand the financial statements prepared by the directors. On the other hand, the argument is flawed because by resorting to half-truth or even fiction like par value, it will not suffice to remedy the situation. As has been pointed out, the par value of a share is *not* a gauge of the real value of the share at any given time after its issuance. The solution must then lie in statute where a company is required to publish financial statements that are "true and fair"[57] and directors will be held responsible for fraud or misrepresentation.[58]

The main advantage claimed by advocates of no par value shares, under this heading, is that investors are put "on notice" to determine the value for themselves,[59] rather than to be misled by a fictitious par value as a starting point.

C. *Flexibility in Financing*

As stated earlier, section 68 of the Act prevents a company from issuing shares at a discount unless the company complies with the requirements set forth in it. It can be viewed as a creation of the par value regime that seeks to obstruct the financing flexibility of companies. Therefore a no par value regime will make such a section obsolete and removes the obstacle. Advocates of the no par value regime had viewed this obstacle as an evil that the corporate world can do without. It is said that no par value shares will no longer restrict the options of a company to increase "bonded indebtedness simply because of the impossibility of disposing of stock at its par value".[60]

55 *Supra*, note 48, at 275.
56 *Supra*, note 21, at 452.
57 S 199(1) of the Act. The authors agree that the phrase "true and fair" has its own definitional problem.
58 A director can be liable under both the Act (*eg*, s 157) and the common law principles regarding the director's duty of care towards the company.
59 *Supra*, note 34, at 110.
60 *Supra*, note 8, at 279.

Even a critic of the no par value regime hailed this advantage as one of the ways that "will encourage a more simplified and more balanced financial structure".[61]

Therefore without the need to go through the arguments again, it is submitted a no par value regime will ensure that the artificial obstacle created by the par value regime is removed.

On the other hand, it had been argued that the removal of this financial obstacle would have the weakness of legitimising stock watering. Bonbright expressed the fear that "the removal of par value [would] make it legal and proper for a company to market its stock at whatever price it can secure".[62] It must be realised that no par value regime was never meant to be a cure-all for stock watering.[63] It must also be taken into consideration that stock watering already existed in the par value regime. In fact it could be argued that the requirement of par value for shares is one of the reasons that companies are encouraged to water their stocks. The no par value regime basically removes the necessity of a company to water its stock just to ensure that the value of the stock "appears" to be equivalent to the par value of the shares for fear of being accused to have issued shares at a discount. On the whole, the no par value regime is certainly a move in the right direction and separate legislation will be needed to deal with stock watering.

Therefore it can be seen that a no par value regime will enhance flexibility in companies' financing activities. Despite the possible accusation of legitimising stock watering, the participants in the corporate world can achieve pareto optimality: some people are made much better off without anyone being made worse off. The only major consideration is that persons charged with the function of making new issues under the no par value regime should make issues only on terms that the company receives adequate consideration for the issue.[64]

D. *Simplicity*

The accounting treatment for no par value shares will be simpler than par value shares. If par value shares are issued at a premium, a share premium reserve account will have to be created in order to account for the surplus

61 *Supra*, note 21, at 457.
62 *Ibid*, at 456.
63 See for instance, Roche, *supra*, note 51, at 80; Bonbright, *supra*, note 21, at 468. This point was conceded by the critics of the no par value regime.
64 *Supra*, note 11, at 6.

of the consideration over the par value.[65] Under the present system, the capital in the share premium account can only be utilised in very specific circumstances,[66] even though it is to be treated as part of the share capital of a company for all other purposes and in relation to reduction of capital.[67] The creation of a share premium account is not only otiose but also restricts the company in the usage of its own funds. Under the no par value regime, the consideration for the issue of shares will all be placed in a single capital account rather than two accounts as illustrated in the following accounting journal entries:

Issue of Shares above par

Debit	Cash		$160,000	
	Credit	Share Capital Account		$100,000
	Credit	Share Premium Account		$60,000

(Issues 100,000 $1 par value shares at $1.60 each for cash)

Debit	Cash		$160,000	
	Credit	Share Capital Account		$160,000

(Issues 100,000 no par value shares at $1.60 each for cash)

Issue of Shares at a discount

Debit	Cash		$60,000	
Debit	Share Premium Account		$40,000	
	Credit	Share Capital Account		$100,000

(Issues 100,000 $1 par value shares at $0.60 each for cash)

Debit	Cash		$60,000	
	Credit	Share Capital Account		$60,000

(Issues 100,000 no par value shares at $0.60 each for cash)

In addition, the capital structure of a company can be simplified because there will only be one class of shares issued (namely no par value shares) rather than different kinds of shares carrying different par values. This is

[65] S 69 of the Act.

[66] S 69(2) of the Act. The confusion created by the share premium account is highlighted in the Singapore case of *Re Hume Industries (Far East) Ltd* [1972-74] SLR 562. In this case, the High Court was asked to construe the phrase "profits available for dividend" as stated in the articles of association of the company. Tan Ah Tah J held that despite its name, share premiums in the share premium account is not profits available for dividend.

[67] *Ibid*. S 69(1).

especially applicable to preference shares because it allows the issue value of the preference shares to fluctuate according to the prevailing interest rate without the fear that the issue value will be below par and thus resulting in an issue at a discount. There will be no need to issue preference shares with different par value and dividends payment.[68]

This simplified capital structure will have significant implications on the consolidation and re-organisation of companies.[69] At the very least, the no par value regime removes the complications that arise from the consolidation and re-organisation of companies with many kinds of shares under the par value regime. It also simplifies the disclosure of the capital account.[70]

E. *Pareto Optimality*

From the arguments above, it would seem that the replacement of the par value regime with the no par value regime will only make some people better off without making anyone worse off (except those with the intention of defrauding unsuspecting investors). Therefore based on the *pareto optimality* argument, the no par value regime will be more desirable than the par value regime as the total welfare of the people can only increase rather than decrease.

Carlos Israels, in appraising the no par value regime in 1947 after it had been introduced for 35 years in the US, commented that "by and large the differences between par value shares and those without par value are today of little practical difference."[71] Furthermore, the result of a research conducted in 1923 to compare the effect on market price of par and no par value stock in the US has provided no evidence to suggest that no par value shares have any effect on its market price.[72]

This goes to show that at the very worst, there is no difference between the par and no par value regime. But it is possible that some may benefit because the shortcomings of the par value regime can be overcome by the no par value regime.

It is therefore submitted that all the above discussion provides sufficient reasons and arguments for the viability of the no par value regime.

[68] Numerical examples were given in the report by the Jenkins Committee (1962) at para 33.

[69] It would mean also that there is no longer a need to make an exception from the application of s 69 when it comes to merger and restructuring of companies, see ss 69A-F of the Act.

[70] Wickersham, Cornelius W, "The Progress of the Law on No Par Value Stock" (1924) 37 Harvard Law Review 464.

[71] Israels, Carlos L, "Problems of Par and No-Par Shares: A Reappraisal" (1947) 47 Columbia Law Review 1279, at 1280.

[72] *Supra*, note 34, at 113.

V. Other Considerations

If the no par value regime is to be initiated, considerations need to be given to its scope and operation. The following discusses briefly some of these considerations.

A. *Preference Shares*

There is no reasonable argument to exclude preference shares from this regime.

An argument as suggested by the Gedge Committee (1954) that preference shares should be excluded because "fixed dividends must have relation to the sum on which it is paid is out of keeping with the concept of no par value"[73] is not acceptable. Moreover the Jenkins Committee (1962) which met almost ten years after the Gedge Committee (1954) recommended otherwise.[74] The contract between the subscribers and the company with regards to preference shares can specifically provide for the fixed value for both dividend payments and redemption in dollar amounts. This will easily overcome the need for par value.

B. *Treatment of Consideration*

Concerns had been raised on the accounting treatment of the consideration in share issues. The change from par value regime to no par value regime does not remove one of the cardinal principles of company law, namely a company is not to return capital to shareholders at the expense of creditors unless otherwise provided by the law. Therefore it is recommended that the total amount of consideration for shares issued should be credited to a capital account and the return of capital as provided by section 73 of the Act should continue to apply.[75] This recommendation merely amalgamates the paid-up capital and share premium reserve under the par value regime and is supported by the Canadian and New Zealand recommendations.[76]

[73] Gedge Committee (1954), para 40.

[74] Jenkins Committee (1962) para 32-33. The Canadian Dickerson Committee (para 101) and the New Zealand Law Commission Report (para 383) also found no reasons to exclude preference shares.

[75] This is in fact perpetuating the treatment of consideration received on shares issued under the par value regime because the excess over par is credited to a share premium account and it is treated as if the amount is the paid up capital of the company because of the restrictions imposed on it by s 69(1).

[76] Dickerson Committee (1971) para 105; New Zealand Law Reform Commission para 381-2.

C. *Partly Paid Shares*

Section 25(3) of the Canada Business Corporations Act prohibits the issue of partly paid shares. On the other hand, the Australian Company Law Review Act (1998) continues to allow partly paid shares under its no par value regime.[77] The authors see no reasons why partly paid shares should be prohibited. Whether shares should be paid in full or on a call schedule should be a contractual agreement between the subscribers and the issuing company. As long as the financial statements fully disclose such arrangements and the documents regarding such arrangements are lodged with the Registrar of Companies so as to be open for public inspection, there is no reason why the government should legislate on these private arrangements. The authors do not foresee any advantages to be derived by market participants by removing such partly paid shares. This view is supported by the Gedge Committee (1954).[78] Moreover, the advantage of allowing individual shareholders who have subscribed to partly paid shares to spread their payments for the shares over a period of time with the view of encouraging the greatest number of small shareholders still holds. Nevertheless, it must be agreed that the abolition of partly paid shares will lead to the removal of a lot of complex provisions from the Companies Act.[79]

D. *Selective Application of No Par Value Regime*

There is a suggestion in the American literature that "fiduciary or quasi public character"[80] organisations should be excluded because they are under the strict supervision of specific Acts (for example, banks and other financial institutions). Similarly such arguments can be advanced for public listed companies in Singapore since these companies are "closely watched" by investors and therefore the par value of shares would not deceive such investors. The authors find such an argument unconvincing and would recommend that all companies limited by shares should be included in the no par value regime whether they are private or public.

[77] Ss 254M-N, Company Law Review Act (1998). This is despite the recommendation of the Australian Companies and Securities Law Review Committee to abolish partly paid shares, see *supra*, note 11, at 10.

[78] Gedge Committee (1954) para 43.

[79] This was the view taken by the Australian Companies and Securities Law Review Committee, see *supra*, note 11, at 10-11.

[80] This should include semi-government company.

E. *Taxation Law*

Taxation laws have serious repercussions on the acceptability of the new regime because the replacement of the par value regime with the no par value regime may not be tax neutral[81] in countries where there is capital gains tax (CGT), for example, Australia. If the new regime is to be adopted and companies are to issue no par value shares in exchange for par value shares, it may be possible that all the pre-CGT shares may be re-classified as post-CGT if the exchange falls outside any roll-over provisions of tax code. For example, if the market value of the new shares immediately after they were issued is more than the market value of the original shares immediately before the redemption or cancellation, the new issues will be caught by the capital gains tax. Such uncertainties may prevent companies from changing over to the new regime. This will not be the case in countries with no capital gains tax provisions.[82]

F. *Transitional Arrangements*

Transition arrangements will depend on the approach in which the introduction of the new regime will be taken.

(i) *Only One System to Prevail*

The transitional arrangements can take on a dramatic manner by requiring all companies to change over to the new no par value regime within a given time frame. The Gedge Committee (1954) has recommended that such a draconian approach should not be taken and companies be allowed a free choice between the two regimes.[83] On the other hand, the New Zealand

[81] Israels, Carlos had commented on the American experience that there are little differences between the two regimes and the 'advantage of one over the other merely a question of convenience and tax cost'. *Supra*, note 71, at 1280.

[82] Singapore imposed capital gain tax to curb speculative activities in the real property market in 1996. The Income Tax (Amendment) Act 1996 (No 23 of 1996) introduce two new provisions, ss 10F and 10G. S 10F mandates the taxing of any gain arising from the disposal of any real property in Singapore on or after 15th May 1996 within three years of its acquisition, whilst s 10G imposes similar restrictions on gains from transactions of shares in private real property companies. The authors are grateful to the anonymous reviewer for pointing this out. The authors would however like to add that these are very peculiar circumstances and by and large, Singapore does not have capital gain tax on general share transactions.

[83] Gedge Committee (1954), para 39.

and Canadian Law Reform Commissions recommended this mandatory change over to the no par value regime.[84] Both countries have since done so. America and South Africa have allowed both regimes to exist alongside one another by leaving the choice to the companies.[85]

The authors see wisdom in introducing the regime on an optional basis despite the fact that the par value regime has no merit. This is so because our modern companies are built upon the idea that a share of stock represents or should represent a fixed sum and such a drastic overhaul of the system may cause confusion or even adverse reaction.[86] We should heed the words of wisdom from an American source concerning such change:

> It may be, the wisest course at first to make it (*no par value regime*) permissive and thus avoid the difficulty of forcing people to conduct their business in a way which many of them may not approve in the first instance. I am confident that ... if, under a permissive provision, it once gets into operation, that you will soon see an end by voluntary action of this representation (*par value regime*) by corporation as to the value of their assets.[87] (Emphasis added.)

On the other hand, the Act can make it compulsory for all newly formed companies to only issue no par value shares while leaving the choice to those companies that already have par value shares.

(ii) *Companies to have more than one Regime in its Share Capital*

For the sake of simplicity, companies should not have more than one regime in their share capitals.[88] The number of classes of shares in a company would be further complicated if companies are allowed to have both regimes in their share capital and such law reform would only create more complexities rather than improving the system.

[84] New Zealand Law Reform Commission (1989), para 375; Dickerson Committee (1971), para 98.

[85] Model Business Corporation Act (USA), s 15; Companies Act 1973 (South Africa), s 74.

[86] Similar opinion was expressed by the American commentators in 1921 when America changed from the par value regime to no par value regime. Cook, William W, '"Watered Stock" – Commissions – "Blue Sky Laws" – Stock Without Par Value', (1921) 19 Michigan Law Review 583, at 592.

[87] Reports of New York State Bar Association (1911) vol 34 at 78.

[88] Gedge Committee (1954), para 41.

(iii) *Companies be allowed to swap from par value regime to the no par value regime*

Companies should be encouraged to switch to the no par value regime and given time and proper education it is expected that companies would voluntarily change over to the new regime. Moreover in the change over, companies should combine the share premium reserves and the paid up capital to form the capital of the company under the new regime. On the other hand, it is difficult if not impossible, for the no-par value company to split up its share capital into the share premium reserves and the paid up capital if it desires to change from the no-par value regime to the par value regime. Therefore, the authors believe that companies should only be allowed to change from the par value regime to the no par value regime and not *vice versa*.

From the above discussions, it is apparent that care should to be given to the implementation of the no par value regime lest it becomes a fiasco.

VI. Conclusion

It is submitted that the par value regime could not achieve its original functions and its continuous existence may even be detrimental to the development of the modern companies and healthy financial markets. The discussion has also highlighted the existence of a better regime that can overcome the shortcomings of the par value regime. A closer look at the no par value regime does not reveal any weakness which requires drastic statutory ramifications. On the other hand, there are considerations that need careful thought before the new regime is to be implemented.

Finally the authors concur with the remarks of American commentators who said:

> It must be conceded that the introduction of non-par value stock represents a departure from the hitherto accepted scheme of corporate capitalisation of so sweeping and revolutionary a character that its effect upon the future trend and development of the law of corporations cannot but be tremendously far reaching.[89]

[89] *Supra*, note 9, at 497.

Unfortunately, it is also true that statutes reign supreme when they are outdated and so inconsequential that it is a waste of time and money just to reform outdated statutes that nobody cares or even bother to pay any attention to. However, it is submitted that such reform is necessary for us to keep abreast with the developments in company laws in the region. This statement may therefore be outdated in view of the bold steps recently taken by New Zealand and Australia in reforming their company laws. It is high time that our par value regime be given a second look by our legislature.

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