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## The Bill of Rights Debate in Australia – A Study in Constitutional Disengagement

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### Abstract

The Commonwealth (federal) government of Australia has launched a National Human Rights Consultation process to determine whether human rights in Australia are protected adequately and, if not, what measures should be taken to enhance human rights protection. The Australian Constitution protects only a few rights and contains no comprehensive Bill of Rights. The current debate is anti-theoretical and has been characterised by absolute faith in democracy and a misunderstanding of the nature of a Bill of Rights and what effect it would have on the relationship between the courts and the legislature. The public's lack of knowledge about constitutional matters has been exploited by elements of the conservative press who oppose enhanced rights protection. The conclusion is that ultimately progress in relation to human rights depends on improved civics education.

**Keywords:** Rights, Liberties, Australia, Constitution, Law, Democracy, Civics

### 1. Introduction

On 10 December 2008 – World Human Rights Day - the Commonwealth government of Australia announced that it would initiate a National Human Rights Consultation (NHRC) process. (Note 1) That process has now begun. According to the Consultation's Terms of Reference, its purpose is to consult widely with the public and to ascertain its views on the following questions:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

After receiving the report, the government will determine what, if any, legislative changes should be made to human rights law. The purpose of this article is to comment on the state of the human rights debate in Australia and on its implications for legislative reform. Part 2 of the article explains the constitutional background against which the NHRC process is taking place. Part 3 examines current protection of human rights, while Part 4 considers the attempts that have been made to incorporate a Bill of Rights into the Constitution, culminating in the establishment of the NHRC. Part 5 examines the way the human rights debate has been conducted in Australia, focussing in particular on its anti-theoretical nature and the role played by the conservative press, against the background of a public which is poorly informed about constitutional matters. The article concludes with Part 6, which offers some predictions as to what the outcome of the NHRC process might be and, irrespective of that outcome, what lessons the process has to offer in relation to civics education in Australia.

### 2. The constitutional background

The Commonwealth Constitution forms the Schedule to the *Commonwealth of Australia Constitution Act 1900* (UK), and came into force on 1 January 1901. The Constitution established a federal system. As originally conceived, Australia's federation was to be like that of the United States, with the powers of the federal government defined, and thus limited (Joseph and Castan, 2006, p.12). Reserve powers were to remain with the six former colonies that became States in the new federation. (Note 2) Seats in the lower house of the Australian Parliament, the House of Representatives, are allocated to the States in proportion to their populations, while seats in the Senate are allocated equally to each State. (Note 3) The Constitution makes it clear that the Senate is as powerful as the House of Representatives, and it can block any legislation, including financial legislation. (Note 4) Aside from the six States, Australia has numerous Territories, over which the Commonwealth Parliament has plenary legislative power. (Note 5) Most of these are external to continental Australia, but the two most significant are the continental Territories – the Northern Territory (NT) and the Australian Capital Territory (ACT), both of which have been granted self-government and have their own elected Legislative Assemblies, whose laws are vulnerable to Commonwealth over-ride. (Note 6) Both the NT and the ACT are also represented in the House of Representatives and the Senate.

Amendment of the Constitution is governed by s 128, which requires that after being passed by Parliament, amendments receive the approval of a majority of voters nationwide, plus a majority in a majority of States – which means in four of the six States. (Note 7) Constitutional amendment has proved to be extremely difficult. Of 44 amendments proposed since 1901, only eight have been successful, and most of these have been of a minor, technical nature. Widespread lack of knowledge about the Constitution has made them profoundly suspicious of change, and history shows that amendments are doomed to failure unless they are uncontroversial and are supported by both the main political parties – Liberal and Labor. (Note 8)

The topics over which the Commonwealth Parliament has legislative capacity are mostly specified in s 51 of the Constitution, which enumerates thirty-nine heads of power (hence they are usually referred to as the ‘enumerated powers’). In addition, Commonwealth legislative powers are specified haphazardly in several other sections of the Constitution. (Note 9) Of the Commonwealth’s legislative powers, only a few are exclusive – in other words, are matters upon which the States cannot legislate. (Note 10) The vast majority are thus concurrent, and the States may use the plenary powers they enjoy under their Constitutions to enact laws on matters upon which the Commonwealth has legislative competence. Only if the Commonwealth has enacted a law on a topic lying within its legislative competence, and that law is inconsistent with a law of a State, will the State law be over-ridden by virtue of the inconsistency provision contained in s109 of the Constitution.

However, although this may be the theory, in practice the constitutional balance has swung increasingly in favour of the Commonwealth. The start of this process was the decision by the High Court (which lies at the apex of the Australian judicial system and is the ultimate court of appeal on both Commonwealth and State matters) in *Amalgamated Society of Engineers v Commonwealth* (Note 11) in which the court abandoned its interpretative approach based on the reserve powers doctrine, and announced that it would instead interpret Commonwealth legislative powers with the full amplitude of meaning that they could bear. This fundamental change in the interpretation of the Constitution is usually explained as a consequence of the changing personnel of the court, most of the initial Justices who had been members of the court at its inception no longer being on the bench by 1920 (Hanks, Keyzer and Clarke, 2004, p. 570-578). Broad interpretation of Commonwealth powers over taxation (which, the court held, can be used to induce or deter behaviour) (Note 12) and over corporations (any aspect of the activities of which, including labour relations, can be legislated on by the Commonwealth) (Note 13) has led to the situation where there is much less activity that is beyond the reach of the Commonwealth (and thus from which the States cannot be expelled) than the drafters of the Constitution envisaged. In addition to this, the apparently beneficial power that the Commonwealth has under s 96 of the Constitution to make grants to the States is subject to the rider that grants can be subject to any terms the Commonwealth sees fit, and this has been used by the Commonwealth to induce the States to do things that are beyond the legislative capacity of the Commonwealth. This is made possible by the fact that there is severe fiscal imbalance within the federation, as the Commonwealth monopolises income tax and the States are prohibited by s 90 of the Constitution from imposing taxes on goods, with the result that, as an aggregate, the States depend on Commonwealth grants for 44% of their income (Harris, 2002, p. 136).

### 3. Human rights protection

So far as human rights are concerned, protection could best be described as patchy. Australia has no Bill of Rights. The Commonwealth Constitution protects a handful of express rights to a jury trial for indictable Commonwealth offences (s 80), to freedom of inter-State trade, commerce and intercourse (s 92), to freedom of religion under Commonwealth law (s 116), to non-discrimination on grounds of residence in a State (s 117) and to just terms compensation when property is acquired (s 51(xxxi)). All of these reflected particular social and political concerns on the part of the six colonies at the time of federation. They were obviously not an attempt to draft a Bill of Rights. Apart from the express rights, the High Court has recognised an implied freedom of political communication, (Note 14) an implied right to vote (Note 15) and a right not to be deprived of personal liberty without due process. (Note 16)

State Parliaments have the capacity to impose procedural restraints on themselves, (Note 17) and so could enact entrenched Bills of Rights, however none has done so. Some protection of human rights is afforded by (unentrenched) State and Territory anti-discrimination laws. However, these laws obviously protect only one right - that to equality - and are subject to legislative over-ride by subsequent inconsistent legislation by virtue of the common law doctrine of parliamentary sovereignty.

The Commonwealth too has enacted laws prohibiting discrimination on grounds of race, gender and disability. (Note 18) However, none of these is entrenched and indeed could not be without amendment of the Constitution, as ss 1, 23, 40 and 51 of the Constitution prevent the Commonwealth Parliament from placing restraints, either procedural or substantive, on its own legislative power. Thus, s 10(1) of the *Racial Discrimination Act 1975* (Cth), which states that all legislation, including subsequent legislation, is invalid to the extent that it is inconsistent with the Act, is not entrenched and can be over-ridden by express legislation to the contrary, as indeed happened recently when the Commonwealth enacted legislation imposing controls on Indigenous communities in the Northern Territory. (Note 19)

The closest any Australian jurisdictions has come to the enactment of a document affording comprehensive protection to human rights are those enacted by the Australian Capital Territory and by Victoria - the *Human Rights Act 2004* (ACT) and the *Charter of Rights and Responsibilities Act 2006* (Vic). In essence, these documents are an interpretative aid, requiring the courts to interpret legislation consistently with the document where possible, (Note 20) expressly stating that where this is not possible the legislation must be applied, (Note 21) while allowing the courts to make a declaration of incompatibility where that is the case. (Note 22) Although public authorities are bound to respect human rights, that obligation succumbs in the face of legislation which cannot be interpreted consistently with the human rights statutes. (Note 23) Furthermore, the right to recover damages for breaches of rights by public authorities in those instances where statutes are able to be interpreted consistently with human rights, is specifically excluded. (Note 24)

#### **4. Previous attempts at enhanced human rights protection**

As mentioned above, constitutional reform has had an unsuccessful history in Australia. The last occasion in which the Constitution was amended in such a way as to affect fundamental rights was in 1967, when the power to make laws 'for people of any race' in s 51(xxvi) was amended so as to remove a limitation on the powers of the Commonwealth Parliament which had permitted the States to block the extension of franchise rights to Aboriginal people.

In 1988 a major inquiry into the Australian Constitution recommended that a Bill of Rights be incorporated into the Constitution (Constitutional Commission, 1988, paras 9.13, 9.75 and 9.139). Very few of the Commission's recommendations were acted upon, but a referendum was held in 1988 in which voters were asked to approve relatively minor extensions to existing Constitutional rights so as to broaden the circumstances in which trial by jury is required, to extend the right to freedom of religion so as to govern State and Territory law and to broaden the scope of the right to compensation when property is acquired so as to cover acquisitions by the States and Territories. These propositions were comprehensively rejected.

In 2000, separate Bills were introduced into Parliament by the (now defunct) Australian Democrats party and by an independent MP to enact the International Covenant on Civil and Political Rights (Note 25) into domestic law. Both Bills failed.

The current Labor government, elected in 2007, has manifested greater interest in constitutional reform than its predecessors of either party. In June 2008 the House of Representatives Standing Committee on Legal and Constitutional Affairs held a round-table discussion of constitutional academics to receive input on potential areas of constitutional reform (Parliament of the Commonwealth of Australia, 2008, para 6.28).

The NHRC process now under way stems from an election commitment by the government to hold public consultation on the issue of the protection of human rights in Australia. (Note 26) Whether this process leads to the enhancement of human rights protection depends on whether there is shown to be sufficient public support for reform. To address that question one needs to examine the nature of the human rights debate in Australia.

#### **5. The nature of the human rights debate**

The reasons why the Commonwealth of Australia has not seen the enactment of a Bill of Rights during its 108-year history will be examined in turn.

##### *5.1 Lack of knowledge about constitutional matters*

First, Australians are disengaged from their Constitution, broadly unaware how it works and therefore, perhaps inevitably, fearful of changing what they do not understand. Numerous surveys have confirmed a general lack of knowledge about the Constitution: As Campbell (2001, p. 624) notes:

A survey conducted on behalf of the Constitutional Commission in April 1987 indicated that only 53.9 per cent of those surveyed (approximately 1 100) knew that there is a written federal Constitution. The survey showed that the respondents most aware of the existence and significance of this Constitution were males over the age of 35 years who had left school at 17 years of age or over and who were in full-time employment as white-collar workers. Nearly 70 per cent of the respondents in the 18-24 age group were not even aware of the existence of a written Constitution.

Similarly, a survey taken in 1992 indicated that 33% of those surveyed were not even aware that a federal Constitution existed, and that this proportion increased to 45% among those aged between 18 and 24 (Muller, 1992 and Galligan, 1995, p. 129).

##### *5.2 An anti-theoretical approach*

Undoubtedly linked to disengagement from constitutional matters, the next striking feature of the debate is its anti-theoretical nature, and the absence of consideration of the issues from a jurisprudential perspective. Proponents of either statutory or constitutional (Note 27) protection of human rights have based their case primarily on pragmatic arguments, such as the need to restrain the 'elective dictatorships' which they (correctly) argue that governments have become in the absence of effective parliamentary control, or on the need to address specific human rights abuses,

particularly those that have occurred in relation to migration law. (Note 28) Valid as these arguments are, they fail to address the fundamental philosophical question of why people are entitled to human rights. Similarly, opponents of a Bill of Rights confine their arguments to pragmatics, such as the question of whether increased protection of human rights would alter the balance between the legislature and the judiciary (Craven, 2004, p. 181-188). Yet valid answers on the question of whether human rights are adequately protected can be reached only if participants in the debate understand the rationale for human rights protection in the first place. Indeed, once that is achieved, pragmatic questions such as what constitutional structures are required to give effect to that rationale are far more easily answered.

There is, of course, a vast array of modern theories of jurisprudence to choose from that offer justifications for a Bill of Rights. Some are sufficiently uncomplicated as to be useable in general public discourse. Perhaps the most useful of these is Rawls' theory of justice (Rawls, 1972, pp. 17-22 and 136-162; Rawls, 1993, pp. 5-7). His hypothesis of what people in what he termed the original position, behind a veil of ignorance, and unaware of what their status would be in the society whose rules they were creating, has the appeal of simplicity and also elicits in those exposed to it an appreciation of the need for law to cater to the uncertainties of life and the situation of the socially vulnerable. (Note 29) Yet proponents of a Bill of Rights have not ventured even to discuss this relatively straightforward school of thought, perhaps because they believe that the Australian public is unfamiliar with theoretical discourse.

Aside from jurisprudential arguments, a principled argument that can be made in favour of a Bill of Rights is the need for Australia to apply domestically what it preaches internationally. Australia has adopted the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social and Economic Rights (ICESR), as well as a host of other human rights documents. By so doing, it has accepted the philosophy underlying the post-World War II human rights movement which, following the proceedings of the Nuremberg and other war crimes courts, as well as those of domestic courts in Germany, rejected the positivist idea that law depended solely on effectiveness for its validity, and instead affirmed that conformity with respect for human dignity and the rights it implies is also required. This body of human rights law forms an international *ius commune*, from which countries are not exempt simply because they are democracies, yet Australia has failed to enact into its own law the values which, by ratifying these documents, it has prescribed for the rest of the world. Again, these are telling, principled arguments, yet they are rarely articulated in the debate in Australia. The reason for this may in part be that, where law reform is concerned, Australians are not noted internationalists. Thus, arguments based on the need to conform to international law (even international law that Australia has itself helped shape) may result in a backlash against what is seen as an attempt to institutionalise external interference in Australian affairs.

### 5.3 Absolute faith in democracy

If the debate in Australia has not been about principles, what has it been about? Essentially, it has been about democracy and, in particular, the supposed primacy of democracy as a constitutional value and the threat posed to democracy by a Bill of Rights.

The Australian Constitution was the product of conventions attended by elected delegates from each of the colonies. The conventions eventually led to the drafting of the Constitution, which was subsequently enacted by the United Kingdom and approved in each colony by referendum. Convention delegates manifested an aversion to the inclusion of a Bill of Rights into the Constitution for fear that it might be used as a device for intruding upon State legislative power (House of Representatives Standing Committee on Legal and Constitutional Affairs, 2008, para 6.28) and, more relevant in relation to present-day debate, because of a belief that so long as a government was elected democratically, fundamental freedoms would be safe – an idea which of course owed much to the colonists' British heritage (Joseph and Castan, 2006, p. 27).

It is this uncritical faith in democracy that has been the hallmark of the current debate on human rights. Those who oppose a Bill of Rights base their arguments on the proposition that protection of our rights ultimately rests on democracy and that therefore the democratic will should not be subject to control by the judiciary applying a Bill of Rights (Campbell, 2006). Not only is this to misunderstand the nature of rights, but it also exposes a misunderstanding of democracy: Characterising democracy as the supreme value in the legal system logically depends on a more fundamental claim that people have a 'right' to be governed democratically. But what is the source of that right? Obviously, it has to derive from a rights theory superior to democracy itself. In other words, those who claim that democracy is superior to human rights are sawing off the branch upon which their argument hangs. If one does not accept the primacy of rights, then one has no touchstone to which to refer to justify why oligarchy, aristocracy, or dictatorship should be rejected as forms of government. In short, democracy depends on the protection of freedom rather than freedom depending on democracy.

A major plank in the argument against a Bill of Rights has been the claim that by protecting the full range of human rights, excessive power would be given to an unelected judiciary over the elected Parliament and thus, by extension, over the people (Craven, 2004, pp. 184-187). The flaw in this argument is that it falsely portrays the power relationship established by a Bill of Rights as one which vests power in the judiciary to over-ride the will of the people as

represented by the legislature. In reality, what a Bill of Rights would do is to vest in the individual the power to challenge the majority as represented by the legislature, with the courts acting as neutral umpire between the individual and the majority.

The next argument is that enhancing human rights protection would require the courts to balance competing social interests, which they are ill equipped to do. This ignores the fact that courts in Australia, like courts all over the common law world, apply such tests in many areas of law – for example, in the law of torts – as a matter of course. In other words, the balancing of social interests has been a core function of the judiciary throughout the history of the common law. Furthermore, such tests have been applied by Australian courts in relation to human rights since the case of *Adelaide Company of Jehovah's Witnesses v Commonwealth* (Note 30) decided in 1943, in which Starke J explicitly stated that given that such rights as are protected by the Constitution are not absolute, courts must inevitably balance them against countervailing legislation.

This leads to the final argument made by opponents of a Bill of Rights, which is that it would vest the courts with extensive new powers to strike down laws. Manifestly this is not correct in view of the fact that Parliament was born subject to the provisions of the Constitution, and has thus always been subject to the power of the courts to declare unconstitutional legislation invalid, including legislation which disproportionately limits such express and implied freedoms as it does protect (discussed in Part 3 above). At most, what a Bill of Rights would do is increase the *scope*, but certainly not the *nature*, of the functions discharged by the judicial branch.

There is significant irony in the fact that Australians' suspicion of a Bill of Rights, and their aversion to the granting of review powers to the courts, goes hand in hand with a profound suspicion of politicians, who are held in wide disdain, something which became particularly evident towards the end of the life of the Howard Liberal government, whose Ministers were accused of misleading the public on major issues, particularly in relation to the war in Iraq. (Note 31) It is also widely acknowledged that Australia's system of responsible government is dysfunctional: Australia does not use proportional representation for elections to the House of Representatives. This means that politics is dominated by the Liberal-National coalition and the Labor party, who alternate in power and use their Parliamentary majorities to support malfeasant Ministers (Patience, 2002, p. 10). Even the Senate, which is elected using a system of proportional representation, and where minority parties usually hold the balance of power, is ineffectual in ensuring adequate scrutiny of the government. Although the Senate committee system is vibrant, and opposition and minor party use their power on committees to probe the actions of public servants and ministers, (Note 32) and also to set up select (that is, *ad hoc*) committees to investigate specific controversies, the political reality is that the system is useful only up to a point: Ministers frequently refuse requests by Senate committees to appear before them, and instruct public servants not to do so. The rules of parliamentary privilege require that the whole Senate, and not just a committee thereof, needs to agree to a finding of contempt. (Note 33) This means that the minor parties alone do not have the ability to sanction ministers for defying the Senate – they need the support of one or other of the major parties. Unfortunately this has had the consequence that even when the minor parties and the major opposition party has had a majority in the Senate, the major opposition party has refused to join in a sanctioning of a minister of the governing party in the House of Representatives (where governments are formed) for fear that the precedent will be used against them when they are in power. (Note 34) The net result is, as several observers have commented, that Australia is, in effect, an elective dictatorship (Hamer, 1994, pp. 174-181). This makes Australian's unqualified faith in democracy all the more puzzling. Why is it, in the face of such overwhelming legislative and executive power, that they do not welcome the prospect of an expansion of justiciable rights?

#### 5.4 *The role of the conservative press*

I would suggest that there are two reasons for this – the first, as stated above, is Australian's lack of knowledge of their Constitution, and consequent fear of change. The second is a skilful campaign by the conservative News Limited press, which takes advantage of these circumstances to foster opposition to a Bill of Rights or indeed any enhancement of human rights protection and diminution of governmental power. News Limited newspapers enjoy a dominant share of the newspaper market in Australia, publishing the leading east coast broadsheet and tabloid newspapers (*The Australian* and the *Daily Telegraph* respectively). Their leading columnists on the issue take a stance which is both pugnacious and one-sided, making claims about the Constitution and the effect of a Bill of Rights which are fundamentally erroneous. (Note 35) Prominent among these are the arguments addressed above – the allegation that a Bill of Rights would diminish popular power, that it would give the judiciary with tasks that it cannot discharge and that it would vest the judiciary with novel powers, all of which betray a misunderstanding of the current constitutional situation. This is not to deny that there are not voices which support a Bill of Rights. (Note 36) An important voice has been that of former High Court Justice Michael Kirby, who has spoken and written in support of the incorporation of international human rights norms into domestic law (Kirby, 1999) and the enactment of a charter of rights (Kirby, 2008). The problem is that when significant institutions of the press, with significant power to influence the public with emotive, simplistic and inaccurate argument, are dominant, more reasoned and complex arguments tend to be sidelined.



## 6. Possible outcomes and lessons for civics education

What then is the likely outcome of the NHRC process? The terms of reference of the NHRC expressly states that the recommendations it produces 'should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights'. Strictly speaking, the Commonwealth Parliament is not sovereign (in the way that the State Parliaments are), because its capacity is restricted to those legislative topics allocated to it by the Constitution, and subject to the express and implied rights already protected by the Constitution. It is however true that subjecting Parliament to any new rights and freedoms would require constitutional amendment, as ss 1, 23, 40 and 51 of the Constitution prevent the Commonwealth Parliament from placing restraints, either procedural or substantive, on its own legislative power. Thus what the terms of reference do is restrict the NHRC process from recommending any method of rights protection which would require constitutional amendment.

This does however leave open a range of options. As stated above, the Australian Capital Territory's *Human Rights Act 2004* (ACT) and Victoria's *Charter of Rights and Responsibilities Act 2006* (Vic) provide modest protection for human rights in so far as they mandate the courts to interpret statutes in accordance with human rights, where possible. (Note 37) However, these documents are not justiciable in the sense of empowering the courts to strike down legislation which is inconsistent with human rights – indeed, the courts are expressly required to apply legislation notwithstanding its incompatibility. (Note 38)

Far more promising is the model provided by s 10(1) of the Commonwealth's *Racial Discrimination Act 1975* (Cth), which in essence states that the Act will apply notwithstanding the provisions of any law which discriminates contrary to the Act. Section 10(1) is constitutional, because the Commonwealth Parliament could simply repeal s 10(1), and can declare it not to be applicable to specific pieces of legislation. (Note 39) The point is, however, that Parliament has to bear the political cost of declaring that it is excluding the operation of the Act.

In this respect, the *Racial Discrimination Act 1975* (Cth) is similar in operation to the Canadian Charter of Rights and Freedoms, as laws inconsistent with the Charter can be declared invalid by the courts, (Note 40) but Parliament can over-ride the Charter by declaring that it intends to do so. (Note 41) This is the best model that the NHRC would be able to recommend, in light of its terms of reference. Although this model ultimately cannot prevent over-ride of rights, it has the strength that it requires politicians to risk the opprobrium that would accompany the required admission that the legislation they are enacting denies fundamental human rights.

Finally, but by no means least importantly, an examination of the human rights debate in Australia reveals the need to enhance civics education, both in schools and in the broader community. Currently, civics education takes a mechanical, rather than a values-based, approach to education about the Constitution. (Note 42) School students are explained the workings of the Constitution, but without being exposed to a critical understanding of democracy, its rationale and its shortcomings. This means that, having no theoretical point of reference against which to evaluate the Constitution as it stands, they are ill-equipped to debate the pros and cons of constitutional reform. (Note 43) It is therefore no surprise that adults are no better informed, as little civics education takes place through the public media. It is therefore clear that, irrespective of the outcome of the current NHRC process, Australia must address the deficit in civics knowledge that it has highlighted, which has provided such fertile ground for constitutional misinformation.

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## Notes

Note 1. See the NHRC website at

<http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Home>

Note 2. Section 106 of the Commonwealth Constitution preserves the existence of the State (formerly colonial) Constitutions, while s 107 says that, subject to the Constitution, the State Parliaments continue to enjoy the same legislative powers they had prior to federation.

Note 3. Note, however, that this is subject to each of the original six States (and no more have been created) having a guaranteed minimum representation of five seats.

Note 4. Commonwealth Constitution, s 53.

Note 5. Section 122.

Note 6. Under the *Northern Territory Self-Government Act 1978* (Cth) and the *Australian Capital Territory Self-Government Act 1988* (Cth) respectively.

Note 7. Voters in the Territories are counted for national majority purposes but are irrelevant to the 'majority in a majority of States' requirement.

Note 8. Joseph, S., and Castan, M. (2006). *Federal Constitutional Law – A Contemporary View*, 2<sup>nd</sup> ed, Lawbook Co: Pyrmont, p. 26.

Note 9. Sections 52, 90 and 122.

Note 10. The exclusive powers of the Commonwealth relate to laws relating to Commonwealth places (s 52(i)), the Commonwealth public service (s 52(ii)), defence (s 114), and coinage (s 115).

Note 11. (1920) 128 CLR 129.

Note 12. See, for example, *Fairfax v Commissioner of Taxation* (1965) 114 CLR 1 and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

Note 13. *New South Wales v Commonwealth (Work Choices Case)* (2006) 229 CLR 1.

Note 14. *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106.

Note 15. *Roach v Electoral Commissioner* (2007) 223 CLR 162.

Note 16. Derived from s 75(v) of the Constitution, as interpreted in *Chu Kheng Lim v Minister for Immigration and Multicultural Affairs* (1992) 176 CLR 1.

Note 17. *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 395.

Note 18. *Sex Discrimination Act 1974* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth).

Note 19. *Northern Territory National Emergency Response Act 2007* (Cth), s 132.

Note 20. Section 30 (ACT), s 32 (Vic).

Note 21. Section 32(3) (ACT), s 36(5) (Vic).

Note 22. Section 32(2) (ACT), s 32(2) (Vic).

Note 23. Section 40B (ACT), s 38 (Vic).

Note 24. Section 40C(4) (ACT), s 39(3) (Vic).

Note 25. G.A. Res. 2200 A (XXI), 16 December 1966.

Note 26. See the statement by the Attorney-General at

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who\\_AMessagefromtheAttorney-GeneraltheHonRobertMcClelland](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Who_AMessagefromtheAttorney-GeneraltheHonRobertMcClelland)

Note 27. It should be noted that the NHRC's Terms of Reference specifically exclude the option of a 'constitutionally entrenched bill of rights (see

[http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms\\_of\\_Reference\)](http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference)).

Note 28. For example, the cases of Vivian Alvarez Solon, deported from Australia by purely administrative process, and of Cornelia Rau, held in immigration detention, again through executive action without any statutory requirement of judicial approval, highlighted the need for the better protection of procedural rights when a person is deprived of liberty.

Note 29. Rawls postulated what fundamental rules a group of people would draft if in what he called the original position', behind a 'veil of ignorance' - that is, unaware of what their race, gender, ethnicity, social or financial position would be in the society they were drafting rules for. Rawls' conclusion was that this rational process would lead to the adoption of two key principles: (i) that each person should have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others and (ii) that social and economic inequalities should be arranged in such a way as to be of the greatest benefit to the least-advantaged members of society.

Note 30. (1943) 67 CLR 116.

Note 31. An opinion poll conducted in 2003 found that 70% of Australians believed that the then government had misled the public on intelligence justifications for the war (Riley, 2004, p. 15).

Note 32. Particularly important in this regard are the biennial 'estimates hearings' by the standing committees which have responsibility for oversight of various portfolio areas. These hearings are nominally conducted for the purpose of reviewing the effectiveness and efficiency of government expenditure, but the committees consider themselves at large to inquire into any aspect of departmental or ministerial conduct, since this all depends on a vote of money by Parliament.

Note 33. *Hamsher v Swift* (1992) 33 FCR 545 at 563-64, *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA) at 528, 536 and 540; *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) at 9.

Note 34. The most striking example of this occurred in 2002, when it became clear that a minister in the then Liberal government had lied about when he was informed by defence force personnel that the government's allegation that refugees had thrown their children off rafts in order to be allowed to land in Australia (the 'Children Overboard' affair). The opposition Labor party refused to join the minor parties in a motion to summons the minister to appear before the committee and to sanction him if he did not - see Oakes (2002, p. 17); Kingston (2002a, and 2002b) and Stephen (2002 p. 24).

Note 35. For frequent and vigorous criticism of a Bill of Rights in the press see articles by Janet Albrechtsen, for example Albrechtsen (2004, p.15) and Albrechtsen (2009, p.12).

Note 36. See for example Robertson (2009).

Note 37. Section 30 (ACT), s 32 (Vic).

Note 38. Section 32(3) (ACT), s 36(5) (Vic).

Note 39. As indeed was done in controversial circumstances when, in enacting laws giving the government power *inter alia* to manage welfare income received by Aboriginal people in a manner differently from welfare received by non-Aboriginal people, Parliament expressly excluded the operation of s 10(1) of the *Racial Discrimination Act* in relation to those laws (see the *Northern Territory National Emergency Response Act 2007* (Cth), s 132).

Note 40. Section 24.

Note 41. Section 33(1).

Note 42. See Harris (2006).

Note 43. See, generally, Pascoe (1999) and, with specific reference to the debate on human rights, Davis (2003).



## Commercial Equity: The *Quistclose* Trust and Asset Recovery

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### Abstract

This paper examines the impact of equitable principles on the sphere of commercial law. It will make particular reference to the effect of the incursion of equity on ordinary creditors with regard to obtaining priorities in cases of insolvency. It will analyze the *Quistclose* trust and show how this type of trust may be used to obtain an advantage by those who would otherwise be ordinary creditors. It will refer to the use of equitable tracing to recover assets in a money-laundering scheme. The paper will suggest that judicial acceptance of the concept of the remedial constructive trusts has enhanced the development of proprietary restitutionary remedies in commercial transactions where no proprietary remedy would have previously existed.

**Keywords:** *Quistclose*, Trust, Creditors, Remedies, Commercial, Law, Remedial, Constructive

Steve Hedley once described a school of thought which suggested that such a vague conception as equity, with its 'oddly moralistic concepts' and refusal to 'fit itself into neat categories' deserved to be put out of its misery. He said: 'If some say that equity is dying, then the fact must be admitted – but so is the common law. The great legal innovations today are statutory, not common law; when new law is needed, it is made by the legislature....' (Note 1) He concluded his observations by saying that while the common law is still with us equity is needed, although how long the common law would be with us was anyone's guess.

This way of looking at equity sees it as having a corrective function, interjecting its doctrines in places where the common law is found to be lacking. But although equity may have begun in that way, through ancient Chancellors dispensing equity's justice in the face of a defective common law system, today's equity has taken on a larger role and recently has seemed to be making incursions into a hitherto restricted zone. Equity is being utilized for the imposition of equitable principles in commercial situations and we are witnessing the judicial use of those principles to support decisions where fiduciary relationships are imposed upon people linked by contract, and trust concepts protect funds for the benefit of unsecured lenders in the face of obligations owed by debtors to their ordinary creditors. This paper looks at what is being done in the name of equity by the judiciary to change the nature of relationships in the commercial world and at the protection of the interests of unsecured transferees of property to the detriment of the creditors of insolvent transferees.

There are two avenues I wish to explore through the medium of this paper, which may appear at first sight to be disparate threads of enquiry. Yet I believe, and I hope to show, that the two are linked. I am referring to the increasing use that is being made of the so-called *Quistclose* trust (Note 2) and the implementation of the proprietary remedy which in New Zealand is known as the remedial constructive trust. I also wish to discuss the differences between making judicial rulings based on principle, or the balance of competing rights, and rulings based on policy considerations. In using these two strategies, the *Quistclose* trust and the remedial constructive trust, the courts are able to discover proprietary interests in commercial transactions. If I were analysing the decisions in a jurisprudential sense I would call upon Dworkin's theory of judicial interpretation. Dworkin would tell us that the judiciary is either establishing one party's rights to be greater than another's based on principle or else they are making decisions to redistribute property based on some policy consideration. Dworkin would also say that this latter process of grounding decisions in policy lies outside the purview of the judiciary in any case. Either way, what the judges are doing is broadening the application of equity and changing the way property is held in an area of law dominated by statute, somewhat giving the lie to Mr. Hedley's idea that change is the province of parliament through legislation.

*Barclays Bank Ltd v Quistclose Investments Ltd* (Note 3) (hereafter *Quistclose*) was based on a line of cases that formed a precedent for the proposal that when property was transferred to a debtor for the repayment of that debt the property should be returned to the transferor if the debt was not repaid. As early as 1806, in the case of *Hassall v Smithers* (Note 4) money was provided for payment of specific bills. The debtor died intestate without paying the bills and the provider of the money, together with those bill holders, was able to compel the intestate's personal representatives to use the money provided for the specific purpose (Note 5). By the middle of the 19<sup>th</sup> century a slightly broader had become established. Where money had been lent to a debtor to pay off his pressing creditors and it was made clear that the money could not

be used for any other purpose, the money lent for that purpose became 'clothed with a specific trust' (Note 6). This was the judgment of Abbott CJ in 1819 in the case of *Toovey v Milne*. It was decided that, if, before the money was paid to creditors, the debtor became bankrupt, that money had to be repaid to the lender. The trustee in bankruptcy would be bound by an 'implied stipulation' (Note 7) to return it and the money would not become part of the debtor's assets. This reasoning was applied in *Edwards v Glyn* (Note 8) in 1859 and became a well established principle in cases involving personal bankruptcy. Lindley LJ in *Re Rogers* (Note 9) went so far as saying:

'I entertain no doubt that [the lender] could have obtained an injunction to restrain the bankrupt from using that money for any purpose except that of paying his pressing creditors.

That being the case the money could not vest in his trustee as part of his assets as the debtor never had the beneficial interest in the money.

It was not until *Quistclose* in 1970 that the House of Lords applied this line of authorities in the context of corporate insolvency. Now we have a situation where lenders use the *Quistclose* trust to protect themselves against the risks inherent in their borrowers becoming insolvent and thus absolving themselves from the necessity of taking security for their loans. In examining the concept behind the doctrine, several questions arise as to the nature of the *Quistclose* trust. It may be a type of proprietary remedy, and if that is the case we will be able to show an express trust to have been created so that the transferee may be said to have never enjoyed the beneficial interest in the transferred property.

It may be a type of purpose trust which for some reason is not declared void for want of certainty of object. Perhaps it is analogous with the doctrine spelt out in *Re Denley* (Note 10) which was a purpose trust that would have been void for lack of beneficiaries but was saved by being found to be for the benefit of individuals. I will come back to this idea. Another possibility is that the *Quistclose* is a constructive trust and if it is what sort of constructive trust could perform its functions. Again, I shall return to the idea of a constructive trust being at the heart of the doctrine found in *Quistclose*.

The case itself is fascinating and it's one I use to stir up enthusiasm for equity and trusts in my classes. I use it as an example of what a trust can accomplish, even when we are not sure if it is in fact a trust. I use it as an example of how the devious and well informed can overcome the ordinary shareholders, workers and ordinary creditors of a firm that continued trading even though its managing director ought to have known it had long since passed the brink of bankruptcy. The man behind the company is also fascinating in the way he was able to get away with so much for so long.

As you will know, the *Quistclose* case was brought by Barclays Bank who wanted to use money they held in an account for a company called Rolls Razor to offset an unauthorised overdraft amount. In June 4 1964 Rolls Razor owed Barclays Bank 484,000 pounds whereas its overdraft limit was set at 250,000 pounds. Barclays Bank was actually in the best position of all as it had taken a security against the plant and factory valued at 4 million pounds. In May 1964 the managing Director of the company, John Bloom, persuaded his Board to declare a generous dividend at a time when the company's accounts showed a loss of 179,000 pounds for the first three months of 1964. It has been suggested that even this figure does not represent the true amount of the deficit. A subsidiary electronics firm was close to collapse. The Board was for the most part in a state of denial as far as the financial position of the company was concerned. The paperwork was in a state of chaos but they knew that a cash injection was needed and it was suggested by one director, Jack Jacobs, that unless money was forthcoming the board should recommend liquidation. In order to meet the payment of the dividend Bloom approached Sir Isaac Wolfson, who was referred to mysteriously as Mr X in the Court of Appeal judgment of Harman LJ. Sir Isaac Wolfson had a vested interest in keeping Rolls Razor going. The firm was manufacturing and selling washing machines. Wolfson's finance company was providing the Hire Purchase finance which enabled ordinary people to buy the new washing machines which were sold door to door at heavily discounted prices. They were very popular and while people entered hire purchase agreement, Wolfson was making money. The figure suggested was one million pounds which was to come from Wolfson's company, General Guarantee Corporation. However the money was transferred to Quistclose Investments Ltd by Bloom himself. It was a shell company and the source of the money has never been properly documented. Most people believed it was Wolfson, through General Guarantee Corporation, others say it was Barclays Bank, although this was unlikely. Whatever the source Bloom's confidence soared and he was convinced that a financial hurdle had been overcome.

At this point I want to elaborate on something Robert Stevens said, in his chapter entitled 'Rolls Razor Ltd' (Note 11) in 'The Quistclose Trust: Critical Essays' that John Bloom went to the school 'labelled by some sections of the press as the worst school in Britain'. While it is true that the school that now occupies the site of Bloom's old school on the edge of Hackney Downs was closed in 1995, having been shown to be an educational disaster, that school was not the one Bloom attended. John Bloom went to the Grammar School which was originally on the site. It was known locally as The Grocers' School and was in fact inaugurated by the Worshipful Company of Grocers in 1876. Entry was by examination only and only the brightest of students could attend. It was a hugely successful School with an enviable reputation and alumni that includes playwright, Harold Pinter; writer and actor, Steven Berkoff; physicist, Cyril Domb

and world darts champion Eric Bristow. Sir Michael Caine also attended the school for a while in the 1940s, as did my cousin Professor Gough who is at the University of Cambridge. John Bloom wasn't the wild boy from the East End of London some sources try to portray, instead he was intelligent and had entrepreneurial skills for which, for some time, he was respected.

In July 1964 Quistclose Investments Ltd wrote a cheque in favour of Rolls Razor for nearly 210,000 pounds. When the cheque was sent to Barclays Bank it was accompanied by a note. The instruction to the bank was that the money should be paid into a separate account and held for Rolls Razor for the purpose of paying the declared dividend. It is believed that during the negotiations with Sir Isaac Wolfson a stipulation was raised that the loan was conditional on the dividend being paid. The payment into the Rolls Razor account was sufficient to boost Bloom's confidence that all would be well to the stage where he felt comfortable taking a holiday in Bulgaria where his yacht was moored. Arranging holidays in Bulgaria was another of Bloom's entrepreneurial schemes, called Rolls tours, and it must be admitted that, as terrible as the holidays sounded, with hours of coach travel through communist countries, they were the start of the modern package holiday.

This of course was a terrible mistake. Without their charismatic managing director to guide them, the board accepted the advice of a financial adviser (who had been very well paid in advance for his services) that the company should be immediately wound up voluntarily on the grounds that it was hopelessly insolvent. When Bloom returned from Bulgaria three days later he had no choice but to accept what had been decided in his absence. It was at this point that Barclays informed Rolls Razor that it intended to exercise its power and combine the overdrawn account with the share dividend account and the *Quistclose* case as we know it began.

I have gone into a lot of background detail to illustrate the point that if indeed a trust was being created by this sequence of events the company which would benefit from the trust is Quistclose Investments Ltd which was a shell company, under the control of John Bloom, who supplied the money that was lent to Rolls Razor. The reason for the elaborate arrangement to ensure the dividend was paid was not altruistic regard for the shareholders, but rather was part of a larger scheme to ensure that financial support was forthcoming from a party who was intimately concerned for the continuation of Rolls Razor to ensure his own profits did not diminish. The immediate effect of the loan was to make the company appear to be solvent, when it clearly was not. All of these factors are inherently repugnant to equity yet none of this was discussed by the House of Lords. Nor was the issue raised as to why the shareholders were no longer represented by the time the case was heard by the Lords.

Unlike the earlier nineteenth century cases the concern was not for the fulfilment of the purpose of the loan but instead the protection of the lender. The House of Lords was persuaded that the financial arrangements surrounding the transfer of the funds clothed the funds in a trust and imposed a fiduciary obligation on the one who held the money (Barclays Bank) to return the funds to the transferor (Quistclose). Usually a trust will be declared with the consent of the parties unless the trust is imposed as the result of circumstances. (Note 12) Although a chose in action can undoubtedly serve as the subject matter of a trust the problem remains as to the identities of the settlor, trustee and beneficiary.

If we say that Quistclose Investments Ltd was the settlor we may say that Rolls Razor acted as trustee and the chose in action was created when Rolls Razor deposited the money into the Barclays account which Rolls had received from Quistclose. However Lord Wilberforce disagrees with this analysis, preferring Barclays Bank in the role of trustee. He asks (Note 13) whether Barclays Bank has notice of the terms upon which the loan was made. This is a difficult point to overcome if we are to accept the arrangement as a trust since one cannot be a trustee of money that is owed to another and in its relationship with Rolls Razor the bank merely holds the money under a contractual duty to the depositor, not as trustee. If on the other hand Rolls Razor is the trustee, we must look for a declaration of trust by Quistclose which showed an intention to vest rights in Rolls Razor as trustee, rather than as outright owner. The only indication we have of any restriction is the note that accompanied the deposit, saying that the fund was to be used for the payment of the dividend. But that note came from Rolls Razor, not Quistclose, although Lord Wilberforce appears to ascribe the same intention to Quistclose Investments Ltd. (Note 14), although the proviso was never declared by that company.

Whoever expressed the intention, and whether or not it can be ascribed to Quistclose Investments Ltd, there still remains the problem that by stipulating where and how the funds should be applied is not the same as creating a trust. There are many examples of cases where a transfer encumbered with a condition for its use was declared not to constitute a trust. (Note 15) The stated purpose can only serve to define the subject matter of the trust or show the motive behind the transfer; it does not of itself create a purpose trust. Even if it was capable of creating a purpose trust there are huge obstacles to overcome to avoid the purpose trust from being declared void for lack of a human beneficiary. This is a topic to which I shall return.

The issue of keeping the transferred funds in a separate account has been identified in some cases as crucial to the finding of a *Quistclose* trust (Note 16), but Quistclose Investments did not impose any duty of segregation over the money. The bank was advised by Rolls Razor to keep the money in a separate account but this stipulation did not come from Quistclose Investments. One may ask whether the absence of such a stipulation from the lender allowed the

borrower to take the benefit of the transfer absolutely. A larger issue is that of identifying a beneficiary of any trust that may exist.

Peter Millett wrote about the issue prior to his elevation to the Bench in 'The Quistclose Trust: Who Can Enforce It?' (Note 17) in which he found the result to be 'simple and orthodox'. (Note 18) He saw the *Quistclose* arrangement as a bare trust accompanied by a mandate to use the money for a specified purpose. When the purpose of the mandate failed (to pay the dividend) the express trust protected the rights of the lender and ensured that the money was returned to him. So for Peter Millett the *Quistclose* trust is not remedial, there is no need for a resulting trust nor should a constructive trust arise. The *Quistclose* trust merely gives effect to the wishes of the settlor, Quistclose Investments Ltd. This view has certainly been adopted in New Zealand by the Court of Appeal in *General Communications Ltd v Development Finance* (Note 19) and in Australia in the High Court: in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* (1978) (Note 20) Gibbs ACJ, with whom the other two members of the majority of the court agreed, said at page 353 that Quistclose:

"is authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, there will be implied (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust."

The analysis appears to be very neat, but it is not without some inherent difficulties.

In comparison to *General Communications* (above) where the money was transferred for the purchase of equipment, *Templeton Insurance Ltd v Pennington Solicitors LLP* (Note 21) was a case concerning the transfer of funds for the purchase of specific land. When the purchase was not completed Lewison J considered that there was a *Quistclose* trust but the beneficial ownership was to remain with the transferor. The trust was analysed as a resulting trust accompanied by a power to use the money for a purpose. Lewison J did not consider it necessary for there to be crystal clarity as to the restricted purpose intended by the settlor, as long as it could be shown that the money was not intended to be at the free disposal of the recipient.

There is some confusion as to whether it is crucial that the settlor attaches clear stipulations to the funds that are being transferred. In *EVTR* (Note 22) Dillon LJ accepted 'that nobody gave a conscious thought' to the proposition that the purpose for which the money was being advanced (to purchase equipment) might not be fulfilled. Still, despite this, Dillon LJ found there to be a proprietary interest in the lender's favour. My question would be: how could any settlor intend to create a trust if he gave no thought to it? There are other, wider issues. One such is whether the obligation borne by the borrower in that case should be any more than a personal obligation to return the money. Furthermore where did the proprietary interest originate? But for me the biggest consideration is how a court could infer an intention to create a trust when the lenders themselves did not recognise the importance of reserving a proprietary right over the money to protect them from the possibility that the borrower might become bankrupt, which in turn would expose the lender to risks.

For Dillon LJ these considerations constituted no barriers to his findings. He said,

'A constructive trust most normally arises by implication of law when circumstances happen to which the parties had not addressed their minds.'

This leaves me to wonder whether Peter Millett's earlier analysis was abandoned by *EVTR* since Millett's theory was concerned with express trusts, not resulting or constructive trusts. However the two positions are linked since it is probable that a resulting trust will arise when an express trust fails. However I come back to my main objection to the analysis of the position in *EVTR* in that it is absurd to talk of inferring an express trust from a loan arrangement when the lender had not given any consideration at all to the advantages that an express trust would bring. In the express trust analysis the lender seems to somehow mysteriously acquire all the powers of a beneficiary under an ordinary express trust. If this were the case the lender would have acquired the power to revoke the loan and bring it to an end whether or not there was any default under the ordinary common law powers of a beneficiary who is sui juris and in control of the whole beneficial interest. This power would go far beyond the power to restrain the borrower from making unauthorised use of the money.

It would appear to make more sense if the analysis of Dillon LJ were viewed as the creation of a remedial constructive trust. This proprietary remedy has become increasingly popular in New Zealand. In New Zealand we have embraced the notion of fusion between law and equity more readily than in England or Australia and the courts are more likely to be ready to find a remedial constructive trust in order to give a remedy when principles of justice and good conscience require it. The remedial constructive trust is a very attractive device. Lord Browne-Wilkinson has hinted that the way forward for English law may involve the recognition of remedial constructive trusts and in the *Westdeutsche* case (Note 23) he went so far as to explain the difference between the institutional and remedial constructive trusts. The main difference is that in the circumstances of the institutional constructive trust the proprietary interest exists before the



plaintiff comes to court and the court just gives effect to a trust which arose out of specific circumstances. However, the remedial constructive trust gives rise to a previously non-existent proprietary interest at the discretion of the court to reverse some injustice.

As early as 1949 Sir Alfred Denning (as he then was) gave the first Hamlyn Lecture in which he identified the challenge facing the court as being to develop 'new and up-to-date machinery'. In his judgment of the previous year, *Nelson v Larholt* (Note 24) he said,

"It is no longer appropriate, however, to draw a distinction between law and equity .... Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the Court orders restitution, if the justice of the case so requires" (Note 25)

In 1972 during Lord Denning's term as Master of the Rolls, in his judgment in *Hussey v Palmer* (Note 26) Lord Denning made the remark that the resulting trust and the constructive trust 'run together'. 'By whatever name it is described,' he said, 'it is a trust imposed by law whenever justice or good conscience require it.' He went on to say, 'It is a liberal process, founded upon large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone'.

In 1990 *Aquaculture Corp v NZ Green Mussel Co Ltd* (Note 27) was decided by the New Zealand Court of Appeal and in this case the court formulated the 'basket of remedies' approach. The aim was to make as full a range of remedies available as possible so that a remedy might be chosen because it is appropriate without having to consider whether its origin was in common law, equity or statute. This decision signalled the New Zealand Court of Appeal's willingness to focus on the outcome of a particular case rather than the theoretical foundations of the remedy so the remedy could be chosen on the basis that it provides the best outcome not because the antecedents of the remedy arose out of equity or the common law or even indeed from statute.

Parties who considered themselves to be in a contractual, non-fiduciary, relationship may find they are bound to undertake all the rigorous duties that are demanded of a trustee and money they regarded as profit becomes the subject matter of a hitherto unsuspected trust. For example in the case of *Dickie v Torbay Pharmacy* (1986) (Note 28) in 1995, a fiduciary relationship was found to exist between potential joint venturers. When a breach of the fiduciary duty occasioned the finding of a proprietary remedy, the remedial constructive trust was applied. Hammond J considered the nature of a constructive trust and concluded that 'functionally constructive trusts can, and do, serve a variety of purposes'. He came to the conclusion that abstract theory should give way to the circumstances of a given case, the nature of the wrong and whether proprietary relief is appropriate. Equity affords the judge the opportunity to protect property by way of a constructive trust and force the disgorgement of money to the party who has been wrongly denied it. In New Zealand it makes no difference whether the parties were engaged in a commercial enterprise which would normally have been governed by a contractual relationship, the equitable remedy is available.

So if we were to apply the remedial constructive trust to the *Quistclose* trust it would work in the following way. The money advanced by Quistclose Investments Ltd would have been impressed by a trust by way of the intended use to which the funds were to be put. If the intended purpose was not and could not be fulfilled it would be unconscionable for Rolls Razor to keep the funds (albeit that they were in the hands of Barclays Bank) and it could even be seen as an unjust enrichment on the part of Rolls Razor if the funds were not returned. One huge disadvantage of this analysis is the fact that by appealing to a court in equity all the maxims of equity come into play. The remedy is discretionary and depends upon, amongst other things, the equitable nature of the lender's claim. If the lender has a vested interest in deceiving the public as to the true financial position of the borrower and if the borrower were to be shown as trading while insolvent, it is very unlikely that equity will look very kindly on either the lender or the borrower to the extent of applying an equitable remedy.

Perhaps there is another possible analysis of the case. Perhaps the *Quistclose* arrangement might be seen as being a particular kind of express trust which falls outside the requirement to show certainty of object, that is to say to show that there is a human beneficiary rather than just a purpose to which the money should be used. In *Quistclose* the emphasis is placed on the purpose which has been impressed upon the transferred money and I think it is easy to overlook the problem of discovering who the beneficiaries of the trust are. If the shareholders are identified as the beneficiaries of an express trust then the answer is clear – simply find the company's list of shareholders and distribute the money. However that is said to be impossible since the company no longer exists. A trust needs beneficiaries who can enforce the trust as against the trustees. If the shareholders are not the beneficiaries then it is a purpose trust and, not being a charitable trust, it should be declared void. The whole idea of a resulting trust coming into play when an express trust fails will only work if there is an express trust to begin with.

There was an attempt in *Giles v Westminster Savings Credit Union* (Note 29) in the British Columbia Supreme Court where Sigurdson J tried to clothe a *Quistclose* – like arrangement with the three certainties required for the

establishment of an express trust. This attempt was doomed to failure as an express trust requires certainty of intention and it was impossible to show a clear intention by the parties that the beneficial interest was to remain in the lender.

Another approach to the issue of where the beneficial interest lies in the *Quistclose* trust comes from an Australian case, *Australian Elizabethan Theatre Trust* (Note 30) in which Gummow J said that, while the borrowers remain solvent, they hold the interest for the benefit of the creditors. Once the borrowers are insolvent the property returns to the lender by way of a gift over. This analysis is hard to accept because if the creditors have the beneficial interest in the property it is difficult to see how this is terminated on the insolvency of the borrowers.

If there is no certainty of object or certainty of beneficiary there can be no trust unless we can bring the *Quistclose* trust in line with a case from 1969 called *Re Denley's Trust Deed* (Note 31) (hereafter *Denley*). The settlor in *Denley* wanted to provide sports and recreation facilities for his employees and their families and friends. He transferred funds to trustees with the instructions as to their duties. The trust was challenged as being a non-charitable purpose trust and therefore void for not having human beneficiaries. Goff J overcame the problem by taking the approach that the *Denley* trust lay outside the mischief of the beneficiary rule. In other words this was an exception to which the beneficiary rule need not be applied. In any case the court found that there was in fact a trust for persons, simply expressed as a trust for a purpose. If we could apply that reasoning to *Quistclose* we may be able to overcome some of the problems inherent in finding a valid trust if we simply say the case falls outside the mischief envisaged by the beneficiary rule requirements. This was the conclusion reached by Ho and Smart. (Note 32)

In this way *Quistclose* would simply step into the anomalous class of extraordinary trusts that are not void for lack of a beneficiary. Trusts for the upkeep of tombs and graveyards fall into this class as do trusts for the maintenance of packs of hunting hounds and stables of racehorses. If the purpose fails then a resulting trust is imposed and the subject matter of the trust returns to the transferor. In *Re Westar Mining Ltd* (Note 33) it was assumed by the court that the *Quistclose* trust is a purpose trust, in fact the two were treated as being synonymous. Mutual intention to create a trust was found to exist so that money in a bank account was found to be impressed with the trust and not available to the mine's creditors. The issue of lack of certainty of beneficiaries was not discussed. It was assumed that this type of trust was outside the mischief for which the rule relating to beneficiaries was created.

However it is a rather large step to take from the accepted exceptions to the beneficiary principle which enable the courts to allow trusts for tombs or beagles, to the *Quistclose* trust which allows funds in a bankrupt's bank account to be shielded from the claims of creditors. Even if we proceed via *Denley* it seems to be stretching the bounds of reasoning by analogy. In *Denley* there were humans who would benefit from the trust, in *Quistclose* the shareholders cannot benefit from a company that is no longer trading. In *Denley* there is no doubt about who are the trustees and there is no doubt about the settlor's intentions. In *Quistclose* the restrictions on the use of the money did not come from the settlor but from another party. It cannot be said that the settlor made its intentions clear. There is also doubt about who the court thought was the trustee, Rolls Razor or Barclays Bank. My final objection to analysing *Quistclose* as a *Denley* type trust is that in *Quistclose* the trust concept is being used to disgorge money in a kind of action for restitution.

If we reject the purpose trust analysis then we may favour the interpretation of Potter LJ in *Twinsectra v Yardley* (Note 34) where he described the arrangement as an 'express purpose trust'. Adopting an analysis of Peter Gibson J in *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* (Note 35) Potter LJ said, 'as long as the primary purpose trust continues, the beneficial interest in the monies lent is "in suspense" until applied for that purpose.' (Note 36) There are several examples of cases where that approach seems to have been applied. From the Alberta Court of Queen's Bench in 2003 comes the case of *Reed v Toronto-Dominion Bank*. (Note 37) Master Funduk was trying to resolve the issue of what happened to \$75,000 that Reed gave to purchase certain shares. In answering a question as to whether the money was the subject matter of a trust, Master Funduk responded

'If money is given to be used only for a specific purpose it is today called a Quistclose trust.' (Note 38)

And having thus established the trust he went on to make two of the defendants liable in knowing assistance in the breach of the trust because the shares were not bought with the trust money. Master Funduk had no difficulty with the notion that the beneficial interest could be held in suspense in this way and if not applied for the specified purpose would crystallise in favour of the plaintiff.

In another Canadian case, this time from the British Columbia Supreme Court in 2004 Mr Zhou met Ms Wang in a massage parlour and was so taken with her that he gave her some money to pay off her husband. She said she was in an arranged marriage for the purpose of acquiring Canadian residence and was indebted to her husband. This money was said by the court to be under a trust following *Quistclose*, as the money was advanced for a special purpose and thus became impressed with a trust for the purpose. (Note 39) Ms Wang did not enjoy the beneficial ownership of the money and when the money was not used for the purpose of paying off her husband the beneficial interest that had been in suspense vested once more in Mr Zhou.

It would appear that, whatever its theoretical basis, the *Quistclose* trust is being applied on the broad jurisdiction of equity in many common law countries. The questions with regard to the difficulty in adhering to the beneficiary principle seem to have been forgotten.

During later years it would appear that the original reasoning in *Quistclose* has been expanded. It is not clear exactly when this happened but certainly in 1988 there is evidence that the *Quistclose* principle remained limited to its original parameters. For example in *Re Miles; Ex parte National Australia Bank Ltd v Official Receiver in Bankruptcy* which was heard in the Federal Court of Australia (Note 40) it was held that the principle in *Quistclose* is limited to situations where money is paid to the payee for the purpose of discharging debts and that purpose fails.

This original version of the principle expounded in *Quistclose* was correctly supported by precedent from the nineteenth century. However by 2002, in the words of Lord Millett in *Twinsectra*. (Note 41)

‘Money advanced by way of a loan normally becomes the property of the borrower.....But it is well established that a loan to a borrower for a specific purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors, or some of them, but the principle is not limited to such cases’.

The expanded version is now being relied upon to enable transferred property to be returned to the transferor in many varied situations without the benefit of a sound basis of precedent or conceptual certainty. The situations vary from case to case but all of the instances are based on the words of Lord Millett cited above. For example there was the case of a Greek wife who managed to reclaim her lottery winnings of 2 billion drachmas after her husband had taken it out of their joint account to set up a foreign exchange margin account in the UK on the basis that when she placed the money in the account it was impressed with a *Quistclose* trust. Accordingly the proceeds could be traced into the new, US dollar bank account and members of the bank’s staff were found to be liable for knowingly assisting the husband in breach of the trust. (Note 42)

Whereas in *Miles* (above) the court found that there was no trust over a bankrupt’s funds, in 2002, *Kennedy v Bohnet* (Note 43) when in a bankrupt held a deposit in his account for the purchase of a golf course, the court found there to be ‘an express *Quistclose* trust... The \$ 400,000 was to be used for a specific purpose only and if it was not used for that purpose it was to be returned.’ The *Quistclose* trust has been used as the equitable interest forming the basis upon which to lodge a caveat (Note 44) but for the most part the greatest use has been in the area of insolvency. For example the case of *Glen Eight Pty v Home Building Pty Ltd* (Note 45) concerned a transfer of funds into a mixed bank account. The court was able to discern that the funds paid in by the defendant were impressed with the purpose of paying the contractors and that was sufficient to merit the imposition of the *Quistclose* trust.

In the same court, in the same year the Supreme Court of New South Wales appears to have come to its own definition of the *Quistclose* trust in *Frontier Touring Co Pty Ltd v Rodgers (as liquidator of Kidz.net Services Pty Ltd (in liq))* (Note 46) where it was stated:

‘It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract....In the present case, as I have already said, the relationship of the plaintiff and Kidz.net was not that of lender and borrower. In conceptual terms, the plaintiff may be regarded as having settled funds on Kidz.net so that Kidz.net might apply them in the manner stated. This, to my mind, reinforces the applicability of the resulting trust principles referred to in *Twinsectra*. The plaintiff paid money to Kidz.net (and Kidz.net accepted it from the plaintiff) for a stated purpose, so that Kidz.net came to hold the money upon trust to apply it for that purpose and, in default, to hold it for the plaintiff. Clearly implicit in the trust was a duty on the part of Kidz.net not to apply the money otherwise than in fulfilment of the stated purpose. That duty was accordingly a fiduciary duty.’

I think this is a most comprehensive analysis with, I believe, all the elements from the different ways of explaining the *Quistclose* trust. We have the unconscionability of the remedial constructive trust, the plaintiff as settlor of funds, and a resulting trust. We have the element of the purpose trust with a trust crystallising in the event of default and a fiduciary duty not to misapply the funds. This analysis adheres most closely with the fundamental principles of the trust, created by the Court of Equity to work on the conscience of the transferee and in my view is the best way of looking at the *Quistclose* trust.

Flexibility has always been prized by Equity but the note of caution is often sounded that too much flexibility leads to uncertainty and too much discretion is judicial anarchy. However, if a wrong is identified where no remedy as yet would give relief it seems that it is the very essence of equity that all available sources should be used to find a remedy.

Even in criminal cases, for example involving money laundering, principles of equity are being called upon to recover funds. For example *PBM (HK) Ltd v Tang & Ors* (Note 47) was a case an employee who utilised accounts of his employer’s clients to engage in money laundering practices. The profits from his illegal activities were passed to his girl friend, with whom he was living, and placed in her bank account. Although she did not take part in the money

laundering it was held by the court that she ‘must have known’ that her boyfriend could not have come by such large amounts of money legally. Plus she knew that her boyfriend had a slavish lifestyle which he could not have maintained on his salary. These facts, said the court, were enough to trigger the equitable principle of tracing. She was not prosecuted, and her own dishonesty was not proven, just that of her boyfriend. The court assumed her knowledge of the dishonest activities of Tang and was prepared to use equitable principles to disgorge the money from her account.

Equity is commonly used in this pragmatic way to provide the courts with a remedy that perhaps otherwise would not be available. So it is with the *Quistclose* trust. While the roots of the conceptual analysis of *Quistclose* remain open to debate, in many courts the practical ramifications of that conceptual uncertainty are being eroded, particularly in commercial cases. Perhaps it is sometimes felt necessary to impart some sense of morality into cases involving businessmen or sometimes the reason is pragmatic, simply to find the most suitable remedy for the situation.

## References and Notes

Ex parte Holland and Hannen. (1891). 8 Morr 243 at 248.

A-G for Hong Kong v Reid. (1994). 1 AC 324 is a good example of a constructive trust that has been imposed as a result of circumstances.

Reinterpreting the Quistclose Trust; *a Critique of Chambers’ Analysis Oxford Journal of Legal Studies*. (2001). 21(2) 267

## Notes

Note 1. S Hedley, ‘Rival Taxonomies Within Obligations: Is There a Problem?’ in S Degeling & J Edelman (Eds) *Equity in Commercial Law* (Lawbook Co., Sydney, 2005)

Note 2. From Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567

Note 3. Above n 2

Note 4. (1806) 12 Ves 119

Note 5. In 1884 North J referred to these principles as ‘very well known law’. He said, in *Gibert v Gonard*, ‘It is very well known law that is one person makes a payment to another for a certain purpose, he must apply it to the purpose for which it was given.’

Note 6. *Toovey v Milne* (1819) 2 B & Ald 683 at 683.

Note 7. *ibid*

Note 8. (1859) 2 E & E 29

Note 9. Ex parte Holland and Hannen (1891) 8 Morr 243 at 248

Note 10. *Re Denley’s Trust Deed* [1969] 1 Ch 373

Note 11. In W Swadling (Ed) *The Quistclose Trust: Critical Essays*, (Hart Publishing, Oxford, 2004) at 1.

Note 12. A-G for Hong Kong v Reid [1994] 1 AC 324 is a good example of a constructive trust that has been imposed as a result of circumstances.

Note 13. [1970] AC 567, 579, 582.

Note 14. *Ibid* at 579-580.

Note 15. For example: *Re Lipinski* [1976] Ch 235, *Re Osoba* [1979] 1 WLR 247.

Note 16. See *Re Farepack Food & Gifts Ltd (In administration)* [2006] EWHC 3272 (Ch) (Companies Court)

Note 17. (1985) 101 LQR 269

Note 18. *Ibid* at 284

Note 19. [1990] 3 NCLR 406

Note 20. 141 CLR 335

Note 21. [2006] EWHC 685 (Ch)

Note 22. [1987] BCLC 646

Note 23. *Westdeutsche Landesbank Girozentrale v Islington Borough Council* [1996] AC 669.

The former arises as at the date of the circumstances that give rise to it. The court merely acknowledges that the constructive trust has come into existence. On the other hand the latter is a judicial remedy which gives rise to an equitable obligation. It is at the discretion of the court and if the remedial constructive trust acts to the prejudice of third parties, this also is at the discretion of the courts.

- Note 24. [1948] 1 KB 339.
- Note 25. Ibid at 343.
- Note 26. 1972] 3 All ER 744
- Note 27. [1990] 3 NZLR 299
- Note 28. [1995] 3 NZLR 429
- Note 29. [2006] ACWSJ Lexis 662
- Note 30. (1981) 102 ALR 681 (Fed Ct).
- Note 31. Above n. 10.
- Note 32. Reinterpreting the Quistclose Trust; a Critique of Chambers' Analysis Oxford Journal of Legal Studies (2001) 21(2) 267
- Note 33. [2003] BCCA 11
- Note 34. [1999] Lloyds Banking Rep 438
- Note 35. [1985] Ch 207
- Note 36. [1999] Lloyds Banking Rep 438, 456.
- Note 37. [2003] A.J. No. 348
- Note 38. Ibid para 15
- Note 39. Zhou v Wang [2004] ACWSJ Lexis 5773 at para 113
- Note 40. (1988) 85 ALR 216
- Note 41. Twinsectra Ltd v Yardley [2002] 2 All ER 377
- Note 42. Papamichael v National Westminster Bank Plc 2003] 1 Lloyd's Rep 341
- Note 43. Kennedy v. Bohnet [2002] ACWSJ LEXIS 2263
- Note 44. Hepler v Rosenblum [2005] NSWSC 179
- Note 45. [2005] NSWSC 309
- Note 46. [2005] NSWSC 668
- Note 47. [2002] HCA 12138/1997 (High Court)



## On the Regulation of Advertising Law on the Bid Ranking of Search Engine

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### Abstract

In the virtual network world in information age, the legal authority is being faced with constant challenges. While operation model of bid ranking of search engine not only creates enormous economic benefit, but also makes the authenticity and fairness of information searching be increasingly questioned, which requires to be regulated by law objectively. According to the China's existing laws, the application of law is still blank in this regard. Whether the bid ranking of search engine should be regulated and how the legal relationships should be regulated by Advertising Law still remain open. Taking the Baidu search engine for an example, the authors will explore relevant legal regulations and put forward some proposal to regulate the bid ranking under the perspective of Advertising Law.

**Keywords:** Search Engine, Bid Ranking, Advertising Law, Regulation

With the growing up and development of Internet media, more and more problems related to internet have emerged. The infringement reports of bid ranking and false advertising promotion by Baidu illustrated some gaps in legal regulation. From the perspective of the regulations of Advertising Law, the authors try to analyse the relevant questions with hope to improve the legislation, judicial administration and legal enforcement.

### 1. The Commercial Purpose and Negative Effect of Bid Ranking of Search Engine

#### *1.1 The Commercial Purpose of Bid Ranking of Search Engine*

Bid ranking refers to a pay-for-performance network promotion introduced by the search companies. Its specific approach is based upon a principle as following: after buying this kind of service, the advertiser will register a certain number of keywords, then the website of those advertisers who buy the same keywords will be ranked by the fee paid to the search engine, the bidder who pay the highest to buy the same keywords could be ranked top so that its web page could be seen by consumer earliest. It is the search engines that order this rank, which will be illustrated in the searching outcome of consumer.

Bid ranking plays a key role in the course of Baidu's service for the enterprises and consumers. First, as to the enterprises, they could advertise their products and services by making use of search engine, namely, they bid for the ranking and make their information showed to the consumers first. Through this man-made way, the justice and fairness order of the search engine is undermined by people, however, on which there is no express provision in China Advertising Law. Just like what the manager of Baidu company said in 2003, Bid Ranking already became the best tool for their promotion and marketing. It is true that more and more medium and small enterprises have benefited from Baidu's bid ranking model and have relied on it gradually. Much domestic enterprises use search engine to seize the market and create a brilliant performance, for example, the click-through rate of Taobao website exceeds Yiqu website within one year through purchase the bid ranking service in Baidu.(Ma Xiaolong,2003,38) Another example is Medicine for All website, after buying the service offered by Baidu, the click-through rate of its website---Medicine for All had ranked top one for a long time. In this circumstance, the possibility of being searched of other enterprises who did not purchase the bid ranking service in the same industry will be reduced greatly. It is held that fairness and efficiency were measured by money and the justice value of search engines is belittled by the interests. Second, as for Baidu Company, bid ranking mode could bring about economic benefit, which is the original dynamica of this operation model. According to the third quarter financial disclosure of 2008, the operation income of Baidu Company is approximate 919.1million yuan, up 85.1% compared with the same quarter of last year. Among that, the network

marketing income is approximate 918.2 million yuan, most of which came from bid ranking. Furthermore, to the consumers, when clicking on Baidu search engine to find a merchant by the keyword, they can quickly browse the website link of the business, but it is possible that they could not find their demandable information in the first few pages on website because of the impact of bid ranking.

Among the three civil parties of Baidu Company, the enterprise and the consumer exists two legal relationships separately, and from which we can identify the legal status of Baidu Company. Baidu company entered into a synallagmatic contract with one enterprise, which is the first legal relationship; all the relevant information Baidu company provides to consumers is based on consumers' clicking, which is the second legal relationship. The two contracts are independent, namely, being equal, fair and having no bad influence on each other.

### *1.2 The Negative Effect of Bid Ranking of Search Engine*

In practice, bid ranking mode of search engine will produce some bad effects as followings:

First, the ranking is based on the business services by purchasing keywords so as to give buyer's website link preference, which ignores those links which contained the keywords' real meaning. We can survey the situation by put into different keywords in Baidu's search bar.

Second, the search engine companies that take the bid ranking mode are profit-oriented and neglect the interests of consumers

Search engine should provide information to consumers veritably and quickly. As one of search engines takes the bid ranking mode, Baidu makes the advertising links preferentially flack, reducing the overall efficiency of user searching. Iprospect, a well-known search engine marketing company, has revealed that: in the United States, more than 80% of Internet users do not view the search results page after the third page. More importantly, people tend to trust the companies ranked preceding more because these companies look more strength and vitality in business. (Hou Lijuan, 2006, 56) However, when consumers are searching on web pages, the links as of advertising resources will break the integration of resources, which will make a search order reflect much more commercialization. The advertising information transmitted to the users this way will dilute and sacrifice some consumers' interests.

Third, intervened manually, the search pages' pattern made up by the ranking links would impact corporate reputation.

In Sanlu milk powder incident, at the beginning, there were not the report that many infants and young children got sick to death for drinking Sanlu milk powder broadly, which is proved to be interrelated with the shielding of the search website. Although Baidu company denied their shielding the negative news about Sanlu milk powder, that the links could intervene the corporate reputation manually caused a widely discussion.

The ways to impact corporate reputation could be classified as two types: One is that when a company has negative news, search engine could protect this company by deleting the negative news in time according to the contract or transferring the negative news into the second page or farther of search results so as to reduce the probability of exposure. Another way is that to put the positive news on top at all time to protect the company who already paid for that. In such a profitable model, on the one hand the enterprises advertised their product and service, on the other hand, they controlled the main information to avoid issuing the negative reports and to show their advantaged reputation. Thus, bid ranking mode became an artificial channel providing information for publicity, and search engines can be profitable by manipulating corporate reputation as a media.

## **2. The regulation basis of advertising Law on search engine**

China's Advertising Law mainly regulates on commercial advertising. Commercial advertising refers to those advertising for profits, which show to public for selling products or services. Whether Baidu's bid ranking service is belong to advertising service or not will depend on the provision of article 2 of China's Advertising Law.

### *2.1 To Analyze the Application Basis of Advertising Law through the Relationship of Search Engine and Business*

From the perspective of civil subject, as a qualified legal person, Baidu Company may advertise. Objectively speaking, since the existing law does not regulate the advertising behavior of search engine, so let's make a judgment at first: whether the displayed links containing the keywords sold by Baidu is just the merchandise or services that the enterprises purchased to promote? We could make a deduction according to existing information: first, bid ranking mode could bring commercial interests to search engines, and we can not expect Baidu, a commercial subject and market player, to give up its profits. Second, used by the public directly, search engines provide information to the people what the public require, it is a information media people concerned. Third, on this platform, enterprise can strive for more opportunities to be approached. Thus, we may get a conclusion: through the behavior of purchasing those keywords, bidders obtained a preferable position, which means purchasing more opportunities to advertise their products and services. For example, when you search "Bluebird" in Baidu, in three pages of the first four pages only four links are foreign to the training institutes named "BeiDa Bluebird". Based on strong market share, Baidu has led the promotion of business links to meet the purpose of the enterprises promotion, through the pre-generated contract

getting the reward according to clicking rate. Clearly, the arrangement and propagandizing behavior of Baidu is just the services the bidders need, the rights and obligations between them is equivalent, and the services provided in the contract aims at the social benefits of advertising.

So, the authors hold that Baidu manipulating the information sources publicize the links is a behavior of advertising. Notably, the links in the right side of Baidu search pages has already been recognized as advertising. Therefore, the search engines promoting advertisements should be regulated by Advertising Law. However, as for the advertisements located in the left side of Baidu search page, they should be categorized into stealth advertising for its possibility of being searched, which is averse to those advertisements marked obviously. For example, the sponsor's logos and the products what the enterprises supplied appeared in the film scene, those sponsors' information in the Spring Festival evening party and so on. The keywords in website we search always have characteristics of real-time and relate to each other. But at present, China's Advertising Law does not regulate stealth advertising, so we also suggest when Advertising Law is revised, stealth advertising shall be added in the new law, and the identical criteria also should be taken.

### *2.2 To Analyze the regulation basis of Advertising Law through the Impact of the Bid Ranking on Third-party*

From analyzation mentioned above, it can be followed that Baidu's promoting the rank for those companies that entered into contract with Baidu is an advertising behavior. Bid ranking is related to the results of enterprise sales, while the sales results necessarily involve the interests of the third-party. It is by clicking rate that the search engine companies determine the advertising fee; it is according to the money from more to less the bidders spent on advertising that the search engine rank the links. Seemingly, Baidu only changes the position of these links, but actually, this position could influence publicity directly and greatly. Without bid ranking mode, the search engines is generally dependent on the natural ranking in ordinary searching, namely the links ranking is based on equal information status among the searched words and phrases and on the consumer's click-through rate. But after bid ranking, a problem of priority among the information comes into being, no longer considering people's need at first. Priority is an effective means to antagonize an equal position. Information with a priority may have a priority in people's consciousness. Baidu, as a controller of the information sources, initiates this consciousness revolution to impact those operators including not only the customers but also those companies, which is just the reason that the company chose Baidu to promote them.

Enterprises have to advertise for their publicity, while Baidu, a search engine, should have served the searchers. However, Baidu potentially transfer the equitable selection right about information of consumers by taking the duty of promulgating advertisements to reap profits because its interests is linked closely with those enterprises. Therefore, Baidu should be regulated by Advertising Law and should bear the corresponding legal liability for his helping behavior of taking advantage of links to issue stealth advertising under Advertising Law.

## **3. The Obligation and Liability under Advertising law**

According to current Advertising Law, search engines should follow the following advertising criterion when issuing the advertisements.

### *3.1 Advertisement should not belittle other producers and operators' goods and service, and the authenticity and legitimacy of the index of links should be guaranteed*

According to article 12 of Advertising Law, the advertisement can't belittle other producers and operators' goods and service. In the advertising service through the keywords, links in search engines' pages should show objective information, so does the titles, which should be in conformity with the regulations about reality and legality under Advertising Law. In the case of Baidu company Vs. Jinde Company for violating its reputation, the plaintiff accused that when the users put the keywords about "Jinde", there were lots of information which contained "Jinde Swindler" on top of the pages, which constitutes disrepute. (Li Jinghua, 2008) This kind of case is rather common. the principle of the regulation about market transactions According to Anti-Unfair Competition Law of the People's Republic of China, the principle of market transaction is to prohibit mendacious propaganda, whose characteristics is by using of the mass media to create public opinion for goods or services in order to misleading people to make false declaration of intention. According to Article 21 of Advertising Law, advertisers, advertising operators and advertisement publishers should not assume any unfair competition. The authors hold that Baidu should assume the obligation of noticing whether there are baleful bidders by purchasing the keywords to top other operators' advertisement or not, and should avoid infringe interests of other merchants and consumers. Otherwise, Baidu company should take joint liability with the baleful bidders.

Advertising Law stipulates that the advertisement must be true. The service provided by Baidu and other search engines which are operated by bid ranking mode just belong to advertising service. According to law, advertisement publishers should bear the responsibility to assure the reality of the linked object. According to a investigation about "Do you have been cheated by false websites just because using Baidu search engine" in Sina portals. The number revealed that: 1. "yes" accounting for 72 percent, 19,864 votes; 2. "no" accounting for 20 percent, 5404 votes; 3. "Do not know"



accounting for 8 percent, 2301 votes.(Li Yanhong,2008)Being faced with such data, Baidu CEO Robin Li said that the law does not require search engine to be responsible for the release of information. .(Qin Chuan and Jin Lin,2008) As to this, we disagree. The statistics show that user's scale of using search engine has already risen to 170 million by July of 2008 in China. (Qin Chuan and Jin Lin,2008) With so many internet people, the market order, social order even economic development and society progress will not go on wheels if the authenticity of network information can't be ensured. It is undoubtedly important to confirm legitimacy of the advertising service of the search engine so as to guarantee the authenticity of website's chaining.

According to Advertising Law, the legitimacy of both the pages whose interfaces load advertisements and the pages of chaining which contain advertisements provided by search engines should be ensured. The legality of advertising contains both the content and form of advertisement and correlative behavior. The legitimacy of advertising content and form refers to the legitimacy of the title and content of the link, while both the content and the form should not damage the country and social public interests, and the advertisements should not conceal illegal purpose by legal chaining. For example, in cases of trademark infringement involving Baidu, Google, and other search engines were all caused by searching keywords. When consumers search keywords related to the information the links lead them to the false website, these search engines should take tortuous responsibility. These tortious act of Baidu and Google originated from not having done the formal examination previously. We thought that the legality of advertising action should follow the regulations of China's Anti-Unfair Competition Law and Consumer Protection Act. For example, in the link situation, mandatory link resembles to the compulsory enforcement of goods tie-ins and should be prohibited. After the contract is completed, even if the companies or individuals no longer pay the advertising fee, Baidu, as a search engine, still should ensure that the search on its website of the corporate site link is true and unobstructed by normal ranking, which is concerning the performance of post-contract obligations, subjected to regulation of Contract Law.

### *3.2The Identifiability of the Advertisement and Consumers' Right to Know*

According to Article 13 of Advertising Law, advertising should be identifiable and should enable consumers to identify it as advertising. Meanwhile, according to Article 8 of China's Consumer Protection Law, the consumers have the right to know the truth. CNNIC statistics in 2008 shows that In the world of Internet, 25.3 million people are China's Internet users, at least 60% users use search engine, and they are definitely consumers. In accordance with Consumer Protection Law, the right to know is the basic right of consumers. Internet users can not be infringed the right to know. Search engine users search keywords depending upon the trust, but the links are retrieved along with a series of advertisements; Baidu makes full use of the trust interests of consumers, but consumers have to continue to consume such a search service with flaws because advertising links page can not be retrieved with identification and with inefficient searching result. It followed from the reports of Baidu promoting the false hospital information and fake medicine reported by the CCTV program that Baidu holds an irresponsible attitude for consumers, which not only undermined the trust interests of the majority of consumers, but also, as an information releaser, induced the consumption groups.

We do believe two points need to be put forward: one is how to distinguish advertisement, another is the authenticity of the information is not easy to identify. The key to solve the two problems is to ensure the advertisement in that pages can be identified and the equity of the search results.

According to Advertising Law, Baidu's specific advertisement should be identifiable rather than cohabitating with a large number of text links, the latter is prone to make consumers misrecognize. In contrast, as to Google search engine, although the essence of the "Sponsored Links" is the same as bid ranking, the differences between bidding companies' search links (on the middle of the page) and non-bidding companies' search links (on the left of the page) make the Internet users understand them at ease. In practice, bid ranking mode was completely abandoned by the search industry as early as 2002 in United States. (LiuJun,2008) As the mouthpiece of the Internet, search engines are not regulated clearly by current law and they donnot guarantee the authenticity of the information, so in this situation its social consequences, especially in special industries such as medical, pharmaceutical, agricultural supplies and other industries will be unimaginable. Baidu should take more corporate social responsibility when filtering information, not only reviewing the legality and the authenticity of the information, but also ensuring the identifiability of the advertisements when ordering the links. In order to ensure the fairness of the search results, Baidu and other search engines can consider controlling the ratio of advertisements in the search page and developing new supporting technical methods to solve the social problems as soon as possible.

According to Article 13 of Advertising Law, published advertisements through the mass media should have advertising tags to distinguish from other non-advertising information so that consumers may not be misled. Therefore, Baidu should, accord to keywords' information, employs the laying out of page, or special logo, colors, text, etc. to inform consumers that which links are artificially intervened by bidding ranking and which links are screened out by computer in accordance with the rules of natural links. At the same time, the number of search links by human intervention should be restricted. All those measures will help to build a fair and equitable search order and to enhance the efficiency of the vast number consumers.

### 3.3 Improve the Reviewing Obligations of Search Engine

With the nature of public law, Advertising Law belongs to economic law reflecting social management functions to the advertisement of our country. Therefore, when negotiating with enterprises to enter into a contract, Baidu should not only obey laws to carry out the necessary review but also should submit for approval to complete special approval process in the special industry.

First, the search engine should review the qualification of the bidding business. According to Article 24 of Advertising Law, advertisers on its own or entrust to design, product, issue advertisements should provide real, legitimate and effective documentary evidence. Documentary evidences contain business license, certificate of the operation, and so on. The search engine should review advertisers in advance and bear the responsibility to provide the real legitimate merchandise and service for consumers. The operators who provided false or incomplete documents could not design, product, act as an agent, and the promulgator are not allowed to publish the advertisement. Otherwise, the search engine should bear the negative responsibility. According to Article 38, of Advertising Law, advertising operators, the publisher who knew or should know the advertisements are false but still design, product, and issue should bear the joint liability. Advertising operators and advertising publishers can not provide real name, address of advertisers should take full civil liability. Baidu promoted the false medical information of medicine business whose name and address were false, and consumers basing on the trust interests believed the false advertising and purchased their goods or services which caused damage, therefore, Baidu should take the joint liability with the advertisers. If Baidu had not reviewed enterprises' qualification and could not put forward the name and address of the advertisers, when dispute occurs, Baidu have to take the full civil liability.

Secondly, search engine should review the qualification of enterprise in special industry. Baidu's CEO Robin Li confessed that pharmaceutical industry's advertising is an important source of income for Baidu. The pharmaceutical industry, one of seven categories of providing special commodity stipulated in China's Advertising Law, have a direct impact on people's physical health, so there should have much more rigorous restrictions and reviewing standards for them. The other six special goods include medical devices, pesticides, tobacco, alcohol, food and cosmetics. Owing to the seriousness of the hazards of these particular goods, following the basic previewing, the advertisements concerning these special goods need obtaining the health authorities' health permission in accordance with China's Advertising Law. At the same time, under Article 34 of Advertising Law, the relevant administrative departments should review the content of advertising before the advertisements are published in accordance with the relevant laws and administrative regulations; without censoring, these advertisements must not be published. The authors hold that the relevant administrative departments also need to make some special obligatory term for the education review, the training departments without qualification could not be issued license.

### 4. Conclusion

In complicated cyberspace, critical reviewing in advance reflects companies' social responsibility for consumer. However, due to the specificity of the internet, the function of searching information ranks top one in search engines' functions, with advertising issuing less important than information searching. Therefore, the search engines should not only mark ranking links by the bid logo but also do a more rigorous review to the bid ranking information, and should actively carry out the regulations of Advertising Law for specific industries by taking the supervisory obligation of substantive examination and reviewing advertisers' qualifications strictly. Otherwise, when the event of infringing consumers' right cases occurs, search engines should bear joint liability with advertisers.

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## Legal Analysis on Malaysian Construction Contract: Conditional versus Unconditional Performance Bond

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### Abstract

In Malaysia, the question of whether the performance bond in a construction contract is a conditional or an unconditional guarantee is still one of the issues relating to performance bond. Therefore, the objective of this research is to determine the phrase(s) in the Performance Bond in a construction contract that determine whether the performance bond is a conditional or unconditional on demand guarantee. In order to achieve this objective, the research was conducted by analyzing relevant court cases. From the findings, it can be concluded that unless an undisputed meaning of the words in the performance bond to make the performance bond to be purely conditional or unconditional 'on-demand' bond, most court interpreted performance bond to be an on-demand performance bond which is only conditional upon the beneficiary asserting the basis of the claim upon the issuer of the bond contending that there has been breach of contract.

**Keywords:** Performance Bond, Guarantee, Conditional Bond, Unconditional on-demand Bond, Court Cases, Construction Contract, Malaysia

### 1. Introduction

A performance bond is a bond giving security for the carrying out of a contract, where a bond is a deed by which one person (the obligator) commits himself to another (the obligee) to do something or refrain from doing something (Martin, 2003). In construction contracts, a 'performance bond' is a bond taken out by the contractor, usually with a bank or insurance company (in return for payment of a premium), for the benefit of and at the request of the employer, in a stipulated maximum sum of liability and enforceable by the employer in the event of the contractor's default, repudiation or insolvency (Robinson et al. 1996). These relationships can be illustrated in Figure 1.

In Malaysia, most of the need of a performance bond is made through an agreement between the Government, the contractor and a third party (usually a bank or insurance company), whereby the third party agrees to pay a sum of money to the Government, in the event of non-performance of the construction contract by the contractor (Abdul-Rashid, 2004). It is provided in Clause 37(a) of the *P.W.D. Form 203A (Rev. 10/83) Standard Form of Contract to be Used Where Bills of Quantities Form Part of the Contract* that the Contractor shall either deposit with the Government a performance bond in cash or alternatively by way of a Treasury's Deposit or Banker's Draft or approved Banker's or Insurance Guarantee equal to 5% of the Contract Sum as a condition precedent to the commencement of work. In other words, the Contractor is not permitted to carry out any work under the Contract unless and until the performance bond is given. The failure of the Contractor to give the performance bond may amount to a fundamental breach of contract entitling the Government to discharge the Contract and sue the Contractor for damages accordingly (Fong, 2004a).

The validity period of the performance bond is as indicated in Figure 2 below. By clause 37(b), the performance bond is required to be maintained for such period as provided in the PWD Bond, i.e. until 6 months after the expiry of the Defects Liability Period stated in the Contract calculated from the date of completion of the Works or any authorized extension thereto or if the contract is determined, until one year after the date of determination (Fong, 2004a).

There are two types of performance bonds, as set out below (Robinson et al. 1996).

- *Conditional bond or default bond.* A default bond is a contract of guarantee whereby the surety accepts 'joint and several' responsibility for the performance of the contractor's obligations under the building contract: the contractor remains primarily liable for his performance and not protected by the bond.
- *Unconditional bond or on-demand bond.* An on-demand bond is a covenant by the surety (usually a bank) to indemnify the employer following contractor's default, subject to stated terms and up to a sum commonly between 10 and 20% of the main contract sum. The contractor is not a party to this arrangement (under on-demand bond in Malaysia, subject to stated terms and up to a sum commonly 5% of the main contract sum).

The main distinction between the two types of bond is with respect to the requirements for making call on the bond. In conditional performance bond, the beneficiary must comply with conditions precedent for calling the bond. In on demand performance bond, on the other hands, the only condition precedent for calling the bond is a written notice to the guarantor.

Thus, in order to determine the types of performance bond applicable in a contract, a thorough understanding of the content of the bond is required. The Court of Appeal in the famous *Teknik Cekap Sdn Bhd v Public Bank Berhad* [1995] 3 MLJ 449 held that:

*Therefore a performance bond is nothing more than a written guarantee, and in order to interpret the obligations of the bank, one need only to look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wording of the bond itself.*

However, in Malaysia, for the past 20 years and since the famous *Teknik Cekap Sdn Bhd v Public Bank Berhad* [1995] 3 MLJ 449 to the recent *Suharta Development Sdn Bhd v United Overseas Bank (M) Bhd & Anor* [2005] 2 MLJ 762, the question of whether the performance bond in a construction contract is a conditional or an unconditional guarantees is still one of the issues relating to performance bond that been discussed.

In *Suharta Development Sdn Bhd v United Overseas Bank (M) Bhd & Anor* [2005] 2 MLJ 762, Abdul Wahab Said Ahmad JC stated that:

*A performance bond or guarantee is in fact a written contract to guarantee due performance in the event of breach or non performance of the contract. In determining whether it is conditional or otherwise, the court is concerned with the contractual construction or interpretation of the bond or guarantee itself. A great deal depends on the wording of the guarantee itself to discover the intention of the parties.*

*The defendant contended that the terms of the guarantee is conditional and cited Teknik Cekap Sdn Bhd v Public Bank Bhd [1995] 3 MLJ 449 whilst the plaintiff relied on LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor [2000] 3 MLJ 339. In both the cases the terms of the bond are similar to that in the case before me. The Court of Appeal in Teknik Cekap Sdn Bhd held the bond to be conditional but in LEC Contractors (M) Sdn Bhd held it is an on demand bond.*

*In LEC Contractors (M) Sdn Bhd Mokhtar Sidin JCA distinguished the case of Teknik Cekap and at p 358 said:*

*That is the position of an on demand performance bond. It is clear to us that the bank guarantee in the present appeal is a performance bond. From the wordings of the guarantee it is clear to us that it is 'on demand' performance bond as stated in Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd: 'All that was required to trigger them was a demand in writing'; or in the words of Mohamed Dzaidin FCJ in the case of China Airlines Ltd v Maltran AirCorp Sdn Bhd: 'the guarantor will become liable merely when demand is made upon the beneficiary with no necessity for the beneficiary to prove any default by the principal in performance of the principal contract'.*

*The appellant claimed that the bank guarantee is a conditional bond. To support this contention learned counsel for the appellant referred to the case of Teknik Cekap, a decision of this court where the court held that a performance bond was a conditional bond. It was held by the court that because the bond began the words: 'If the subcontractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay'. Apparently this is the case in Malaysia where similar wordings has been used where the court has held that it was a conditional bond.*

From the above case, therefore, it is important to determine the content of the performance bond: whether the client can call upon the bond in the case of non-performance of the contractor or can the bank restraint the client from calling the bond among other. So, the phrase(s) in the bond shall be the issue of discussion.

This phrase(s) should also be in written form. A clear written phrase(s) that make up the content of the performance bond can clear the distinction between conditional and unconditional on demand guarantee.

Hence it is important and necessary to understand the circumstances in performance bond, which will be available to the parties to a building contract. And from that, the parties involved will clearly defined their rights and liability against

bonds and guarantee to assist the respective party in construction contract (Ismail, 2007).

As such, this research has the objective to determine the phrase(s) in the Performance Bond in a construction contract that determine whether the performance bond is a conditional or an unconditional on demand guarantee. By clearing this issue, it is hoped that no more dispute will arise under the interpretation of the content of the Performance Bond especially in a construction contract.

## 2. Performance Bond

The success of a construction project is measured by its timely completion to specification within the budget allocated. However, in the execution of any engineering project there is invariably an element of risk involved (Radhakrishnan, 1999): that is to say, construction is a highly risky business, where the level of risk is considered much higher than in other types of economic activities (Abdul-Rashid, 2004). Furthermore, projects involve commercial risks and they involve people (Murdoch and Hughes, 2000).

All parties take some form of risk when they enter into construction contract. The acceptance of an obligation brings with it the acceptance of a commensurate risk, i.e. the risk of being unable to fulfill the obligation because one's own inadequacy, incapacity, inadvertence or error, or because of interference from outside sources or supervening events (Robinson et al. 1996).

The following examples summarize many of the risks (Murdoch and Hughes, 2000). Some of them are contractor's risks (for example: payments; price fluctuation; etc.) and some are employer's risks (for example: workmanship; materials and goods; insolvency; etc.):

- **Physical works** – ground conditions; artificial obstructions; defective materials or workmanship; tests and samples; weather; site preparation; inadequacy of staff, labour, plant, materials, time or finance.
- **Delay and disputes** – possession of site; late supply of information; inefficient execution of work; delay outside both parties' control; layout disputes.
- **Direction and supervision** – greed; incompetence; inefficiency; unreasonableness; partiality; poor communication; mistakes in documents; defective designs; compliance with requirements; unclear requirements; inappropriate consultants or contractors; changes in requirements.
- **Damage and injury to persons and property** – negligence or breach of warranty; uninsurable matters; accidents; uninsurable risks; consequential losses; exclusions, gaps and time limits in insurance cover.
- **External factors** – government policy on taxes, labour, safety or other laws; planning approvals; financial constraints; energy or pay restraints; cost of war or civil commotion; malicious damage; intimidation; industrial disputes.
- **Payment** – delay in settling claims and certifying; delay in payment; legal limits on recovery of interest; insolvency; funding constraints; shortcomings in the measure and value process; exchange rates; inflation.
- **Law and arbitration** – delay in resolving disputes; injustice; uncertainty due to lack of records or ambiguity of contract; cost of obtaining decision; enforcing decisions; changes in statutes; new interpretations of common law.

Risks are inevitable and cannot be eliminated. They can, however, be transferred (Murdoch and Hughes, 2000). One of the main roles of a contract is to distribute risks between the parties. Standard forms of contracts contained express risks distributing provisions. Risk transferring contracts commonly exist between the various parties concerned in construction (Robinson et al. 1996).

In the context of public infrastructure work in Malaysia, one major risk to the Government is non-performance of construction contracts by the contractors (Abdul-Rashid, 2004). A performance bond is a legal and management instrument used by employers to manage risk with respect to contractor's nonperformance.

### 2.1 Nature of Performance Bond

A bond or guarantee is an arrangement under which the performance of a contractual duty owed by one person (A) to another (B) is backed up by a third party (C). What happens is that C promises to pay B a sum of money if A fails to fulfill the relevant duty. In this context A is commonly known as the principal debtor or simply principal; B is called the beneficiary; and C is called the bondsman, surety or guarantor (Murdoch and Hughes, 2000).

In a construction contract, performance bond is also a three-party instrument between bondsman, the employer and the contractor. The agreement, however, binds the contractor to comply with the terms of a contract. If the contractor fails to perform the contract, the bondsman assumes the responsibility to indemnify the employer up to the maximum amount of the bond. The Bondsman's obligation to pay is now arises when called upon to do so by the employer.

The obligation to pay is, however, independent of the underlying contract. This is due to the fact that the performance bond is like a letter of credit and designed to release 'no quibble' cash to the beneficiary in the event the call on the bond.

This is agreed by what Lord Denning MR said in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159, [1978] 1 All ER 976, [1977] 3 WLR 764, [1978] 1 Lloyd's Rep 166, 6 Build LR 1, 10 Legal Decisions Affecting Bankers 50 that:

*A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit, with which of course we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit.*

## 2.2 Purpose of Performance Bond

Rekhraj J in the case of *Lotterworld Engineering & Construction Sdn Bhd v Castle Inn Sdn Bhd & Anor* [1998] 7 MLJ 105 stated that the purpose of performance bond is as follows:

*It is to be understood that the purpose of the performance bond in the construction industry is to perform the role of an effective safeguards against non-performance, inadequate performance or delayed performance and its production provides a security as readily available to be realized, when the prescribed event occurs, viz a viz simply failing to complete the work which had been contracted to carry out.*

The purpose of a bond is therefore to provide the employer with some financial security in the form of a cash payable by the bank for the contractor's failure to perform his obligation under the construction contract.

## 2.3 Performance Bond in Construction Contract

Other than Clause 37(a) of the *P.W.D. Form 203A (Rev. 10/83) Standard Form of Contract to be Used Where Bills of Quantities Form Part of the Contract*, Clause 10 of the Conditions of Tendering in the *Form of Tender (PWD 203B Rev. 1/82)* states that “

*The successful tenderer ..... shall so soon as it practicable but before the commencement of the Works deposit with the Superintending Officer ..... Performance Bond amounting to 5% of the Contract Sum; .....*

Another place where the requirement of performance bond is mandatory before commencement of contractor's works is under Clause 4 of the *Letter of Acceptance (PWD 203D – Rev. 1/82)*, which states:

*I wish to draw your attention to the Conditions of Tendering whereby as conditions precedent to the commencement of the Works, you are required to deposit with the Government or the Superintending Officer ..... Performance Bond amounting ..... (being 5% of the Contract Sum) in cash or in the form of Treasury's Deposit, Banker's Draft or an approved banker's or Insurance Guarantee. ....*

It is also unusual for private projects to require the contract to provide performance bond. Performance Bond, however, is the precondition for:

- *Taking possession of site*

By Clause 38(a) of the *P.W.D. Form 203A (Rev. 10/83) Standard Form of Contract to be Used Where Bills of Quantities Form Part of the Contract* it is made clear that even if possession of the Site has been given, the Contractor cannot commence work unless and until the performance bond and the insurance policies required under the Contract have been deposited with the Government or the Superintending Officer. Thus if the Contractor delays in depositing the performance bond or insurance, he does so at his own peril as the time available for the execution of the Works under the Contract would be ticking away (Fong, 2004a).

- *Advance payment*

The advance payment is paid to the Contractor upon application from him together with a bank or insurance guarantee for the amount of advance to be paid, and provided that he has returned the Letter of Acceptance duly signed and witnessed, and submitted the Performance Bond and the requisite insurance policies required by the Contract (Jabatan Kerja Raya, 1988).

- *First interim payment*

It is further provided that, other than for the first Interim Certificate, the Superintending Officer need not issue further Interim Certificates unless and until the Contractor has returned to the Government the Letter of Acceptance of Tender duly signed by the Contractor, and has deposited with him or the Government the insurance policies and performance bond required under clauses 33, 34, 36 and 37 of these Conditions in the *P.W.D. Form 203A (Rev. 10/83) Standard Form of Contract to be Used Where Bills of Quantities Form Part of the Contract* respectively (Fong, 2004).

## 2.4 Construction of Performance Bond

In order to determine the construction of a performance bond, Sir Denys Buckley stipulated in the case of *IE Contractors Ltd v Lloyds Bank PLC, and Rafidain Bank* [1990] 2 Lloyd's Rep 496, SI Build LR 1 that:

*I am in entire agreement with the proposition that to discover what the parties intended should trigger the indemnity under the bond involves a straightforward exercise of construction, or interpretation, of the bond to discover the intention of the parties in that respect.*

The Malaysian Superior courts have referred to and approved this approach in a number of cases. One of the case that the Superior Court approval of the above *IE Contractors Ltd v Lloyds Bank PLC, and Rafidain Bank* [1990] 2 Lloyd's Rep 496, SI Build LR 1 judgment is *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149. Peh Swee Chin FCJ in delivering the grounds of judgment of the court said that "*That the real issue of a performance bond is one of contractual interpretation was the unanimous view of three judges in the Court of Appeal in IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496; (1991) 51 BLR 1."

### 3. Method and Data Analysis

By using the words 'Performance Bond', 67 cases for the past 20 years were downloaded from the Malayan Law Journal to be analyzed further. From the first reading and screening of the above cases, the judge of 25 cases did interpret the distinction between 'conditional' and 'unconditional' Performance Bond. Further screening was done from the 25 cases whereby only cases which the judge discussed on the wordings or phrase(s) of the Performance Bond will be further analyzed. From this, 15 cases were identified, as in summary in Table 1, to be further consumed as follows:

#### 3.1 Law Cases No.1

In *Suharta Development Sdn Bhd v United Overseas Bank (M) Bhd & Anor* [2005] 2 MLJ 762, Abdul Wahab Said Ahmad JC followed *LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339, and hold this guarantee is an unconditional on demand guarantee.

#### 3.2 Law Cases No.2

In *Daewoo Engineering & Construction Co Ltd v The Titular Roman Catholic Archbishop of Kuala Lumpur* [2004] 7 MLJ 136, Abdul Wahab Said Ahmad JC stated that "*I agree with the learned defendant's counsel that the Letter of Guarantee seen in isolation is payable on demand because of the presence of the no contestation clause, i.e. 'notwithstanding any contestation or protest by the contractor or by the guarantor or by any third party.'*"

#### 3.3 Law Cases No.3

In *Sime Engineering Sdn Bhd & Anor v Public Bank Berhad* [2004] 7 MLJ 475, Vincent Ng J stated that "*The area of law concerning bank guarantees is well established; in the absence of fraud, the bank is obliged to pay on the guarantee promptly on demand.*"

#### 3.4 Law Cases No.4

In *Danaharta Managers Sdn Bhd v Huang Ee Hoe & Ors* [2002] 2 MLJ 424, Kang Hwee Gee J impliedly followed Mohamed Dzaiddin FCJ (as he then was) in *Government of Malaysia v South East Asia Insurance Bhd* [2000] 3 MLJ 625, held at p 636B that "*In our judgment, on its true construction this Gerenti Pelaksanaan is and unconditional bond or an on demand bond and all that is required to activate it is a written demand (Easal).*"

#### 3.5 Law Cases No.5

As the previous case, in *Government of Malaysia v South East Asia Insurance Bhd* [2000] 3 MLJ 625, Mohamed Dzaiddin FCJ, following Ackner LJ in *Easal (Commodities) Ltd v Oriental Credit Ltd; Banque Du Caire SA v Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546, further stated that "*Paragraph 1 is so drafted that the guarantor shall become liable merely when demand is made by the Government notwithstanding any contestation or protest by the contractor or the guarantor or by any third party. .... Therefore, on its true construction this Insurance Guarantee is an on demand performance bond.*"

#### 3.6 Law Cases No.6

In *LEC Contractors (M) Sdn Bhd (formerly known as Lotterworld Engineering & Construction Sdn Bhd) v Castle Inn Sdn Bhd & Anor* [2000] 3 MLJ 339, Mokhtar Sidin JCA referred to several cases (*Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449, *Damatar Paints (P) Ltd v Indian Oil Corp* AIR 1982 Delhi 57, *Pesticides India v State Chemicals & Pharmaceuticals Corp of India* AIR 1982 Delhi 78, *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd)* and another appeal [1996] 2 MLJ 517, *Esal (Commodities) Ltd and Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd*), and therefore stated that "*From the authorities we have referred earlier it is clear to us that to determine whether a performance bond is a conditional or unconditional bond, the court should not be concerned whether there was actual breach being committed or not. .... The bank has no choice but to pay the amount demanded. The first defendant is entitled to that sum not under the contract but under the performance bond.*"

### 3.7 Law Cases No.7

In *Fasda Heights Sdn Bhd v Soon Ee Sing Construction Sdn Bhd & Anor* [1999] 4 MLJ 199, Steve Shim J, while referring to *Bocotra Construction Pte Ltd v A-G (No 2)* [1995] 2 SLR 733 (CA). *Esal (Commodities) Ltd & Reltor Ltd v Oriental Credit Ltd & Wells Fargo Bank NA* [1985] 2 AC 546, *IE Contractors Ltd v Lloyd's Bank plc & Rafidain Bank* and *Teknik Cekap*, stated that “In the circumstances, it was wrong for the second defendant to withhold or refuse to pay the monies to the plaintiff when the demand was made on the bank guarantee at the material time.”

### 3.8 Law Cases No.8

In *Lotterworld Engineering & Construction Sdn Bhd v Castle Inn Sdn Bhd & Anor* [1998] 7 MLJ 165, Rekhraj J referred to *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor* [1978] QB 159 and *Re Esal (Commodities) Ltd* [1985] BCLC 450 stated that “This court will not therefore attribute an intention contrary to the plain meaning of the words used to attach liability towards payment upon demand.”

### 3.9 Law Cases No.9

In *Ramal Properties Sdn Bhd v East West-Umi Insurance Sdn Bhd* [1998] 5 MLJ 233, Kamalanathan Ratnam JC, in referring *Esal (Commodities) Ltd v Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546, *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449 and *Esso Petroleum*, stated that “... There was nothing there that could suggest that the demand was not proper, and for complying with the simple words there of making a claim by 'a demand in writing', the said letter was sufficiently compliant even though it was verbose.”

### 3.10 Law Cases No.10

In *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and Another Appeal* [1996] 2 MLJ 517, Mohamed Dzaiddin FCJ (delivering the grounds of judgment of the court), after considering the cases of *Esal (Commodities) Ltd*, *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159 and *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1978] 1 QB 146, stated that “In her grounds of judgment, the learned judge recognized that AC4 is an 'on demand guarantee'.”

### 3.11 Law Cases No.11

In *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149, Peh Swee Chin FCJ (delivering the grounds of judgment of the court) following the case of *IE Contractors* [1989] 2 Lloyd's Rep 205 stated that “On the type of such pure on demand performance bonds, the issuer should unquestionably pay on demand except in the case of fraud.”

### 3.12 Law Cases No.12

In *Nik Sharifuddin Bin Nik Kadir v Mohaiyani Securities Sdn Bhd* [1994] 3 MLJ 551, Zakaria Yatim J, with the help of *IE Contractors* 51 BLR 5, *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd (In Liquidation) & Ors* (1978) 141 CLR 335, *Jowitt v Callaghan* (1938) 38 SR (NSW) 512 and *Re Conley* [1938] 2 All ER 127, stated that “In my opinion, the banker's guarantee is not an unconditional guarantee.”

### 3.13 Law Cases No.13

In *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198, Zakaria Yatim J stated that “It is clear that the above document is a guarantee given by *Jerneh Insurance Corp Sdn Bhd* on behalf of the plaintiff for the due performance of the contract dated 3 October 1985. The guarantee is an 'on-demand' guarantee.”

### 3.14 Law Cases No.14

In *Patel Holdings Sdn Bhd v Estet Pekebun Kecil & Anor* [1989] 1 MLJ 190, Wan Adnan J stated followed *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 that “The bank must pay according to its guarantee, on demand, if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice.”

### 3.15 Law Cases No.15

In *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 3 MLJ 449, in also referred to several cases (*IE Contractors Ltd v Lloyds Bank plc and Rafidain Bank* (1990) 51 BLR 1, *Edward Owen Engineering Ltd v Barclays Bank International Ltd & Anor* [1978] 1 All ER 976; [1977] 3 WLR 764, *Kirames Sdn Bhd v Federal Land Development Authority* [1991] 2 MLJ 198, *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 and *Esal (Commodities) and Relton v Oriental Credit and Wells Fargo Bank NA* [1985] 2 Lloyd's Rep 546), Shaik Daud JCA stated that “If the sub-contractor (unless relieved from the performance of any clause of the contract or by statute or by the decision of a tribunal of competent jurisdiction) shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay to the contractor up to and not exceeding the sum of RM422,000



(Malaysian Ringgit four hundred twenty two thousand) only representing 10% of the contract value or such part thereof on the contractor's demand notwithstanding any contestation or protest by the sub-contractor or by the guarantor or by any other third party, provided always that the total of all partial demands so made shall not exceed the sum of RM422,000 (Malaysian Ringgit four hundred twenty two thousand) only and that the guarantor's liability to pay the contractor as aforesaid shall correspondingly be reduced proportionate to any partial demand having been made as aforesaid.

#### 4. Conclusion

The judgment of fifteen law cases had been analysed to differentiate the conditionality of the performance bond by its wordings. Some of the cases held that the performance bonds were conditional performance bond and some of them held the performance bond to be unconditional 'on-demand' performance bond. From Table 1, it seems that most of the judges referred to the surrounding five law cases which were discussed below to interpret whether the wording of the performance bonds are conditional or unconditional 'on-demand' bonds. However, some interesting conclusion can be made from the words in the performance bond.

The first and mostly referred is *Easal (Commodities) Ltd & Reltor Ltd v Oriental Credit Ltd & Wells Fargo Bank NA* [1985] 2 AC 546 which gives the conclusion that there are three possible meanings for the words used in the performance bond, i.e. no more a written demand is required; the demand must assert a failure to perform the contract; and there must in fact have been a failure to perform. However, most of the judge rejected the last possible meaning of the words used.

In interpreting the words of the performance bond, the second case of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 referred the third case of *IE Contractors Ltd v Lloyd's bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 296, which a conclusion can be made that there was a bias or presumption in favour of the construction that performance bond was to be conditioned upon documents rather than facts.

The fourth case is also the famous Malaysian case of *Teknik Cekap Sdn Bhd v Public Bank Bhd* [1995] 2 Lloyd's Rep 296 which held that because the performance bond because the bond began with the words 'if the subcontractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay ...', the bond was a conditional bond.

Last but not least, the case of *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] 1 QB 159 stressed the general nature of a performance bond that a bank is not concerned in the least with the relations between the supplier and the customer nor with the question whether the supplier has performed his contractual obligation or not, nor with the question whether the supplier is in default or not, the only exception being where there is clear evidence both of fraud and of the bank's knowledge of that fraud.

However, Steve Shin J in *Fasda Heights Sdn Bhd v Soon Ee Sing Construction Sdn Bhd & Anor* [1999] 4 MLJ 199 made quite good critics as to the wordings of the performance bond. He said that there are two 'conditions' that the bank must adhere to. The first is that the demand is in writing. It has been said that such a 'condition' is merely to regulate the right to call on the guarantee and is therefore purely a procedural matter. It does not render a guarantee conditional in the true sense. The second is that the contractor fails to execute the works and/or in breach of the contract. Three possible meanings for the words used: (i) that no more than a written demand was required; (ii) that the demand must assert a failure to perform the contract; or (iii) that there must in fact have been a failure to perform. Most of the courts unanimously rejected the third solution.

Kamalanathan Ratnam JC in *Ramal Properties Sdn Bhd v East West-Umi Insurance Sdn Bhd* [1998] 5 MLJ 233 also made quite interesting statements towards the meaning of the words in the performance bond. He said that the wordings of 'If the contractor ... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder; then the guarantor will indemnify and pay the principal ...' renders the performance bond to be an on-demand performance bond which is only conditional upon the beneficiary asserting the basis of the claim upon the issuer of the bond contending that there has been a breach of contract.

Lastly, to be an undisputed meaning of the words in the performance bond, the performance bond itself should be either purely conditional or purely unconditional 'on-demand' bond. The best examples for this are in the cases of *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149 and *IE Contractors Ltd v Lloyd's bank plc and Rafidain Bank* [1990] 2 Lloyd's Rep 296 which respectively as follows:

"... we hereby unconditionally and irrevocably guarantee the payment to EPMI"

"We undertake to pay you, unconditionally, the said amount on demand, being your claim for damages brought about by the abovenamed principal."

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Table 1. Summary of Law Case Analysis

Cases Referred	Analysed Law Cases															
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	Total
Australian Conference Assoc. Ltd v Mainline Constructions Pty Ltd												1				1
Banque Du Caire SA v Wells Fargo Bank NA					1											1
Bocotra Construction Pte Ltd v A-G (No. 2)							1									1
China Airlines Ltd v Maltran Air Corp S/B						1										1
Damatar Paints (P) Ltd v Indian Oil Corp						1										1
Easal (Commodities) Ltd v Oriental Credit Ltd				1	1	1	1	1	1	1					1	8
Edward Owen Eng. Ltd v Barclays Bank (I) Ltd								1		1				1	1	4
Esso Petroleum Malaysia v Kago Petroleum S/B						1			1	1					1	4
Government of Malaysia v S. E. A. Insurance Bhd				1												1
IE Contractors Ltd v Lloyd's Bank plc							1				1				1	3
Jowitt v Callaghan												1				1
Kirames S/B v Federal land Dev Authority															1	1
LEC Contractors (M) S/B v Castle Inn S/B	1															1
Pesticides India v State Chemicals of India						1										1
RD Harbottle Ltd v Nat. Westminster Bank Ltd										1						1
Re Conley												1				1
Teknik Cekap S/B v Public Bank Bhd						1	1		1							3
<b>Judgment</b>																
Conditional												1			1	2
Unconditional	1	1	1	1	1	1	1	1	1	1	1		1	1		13

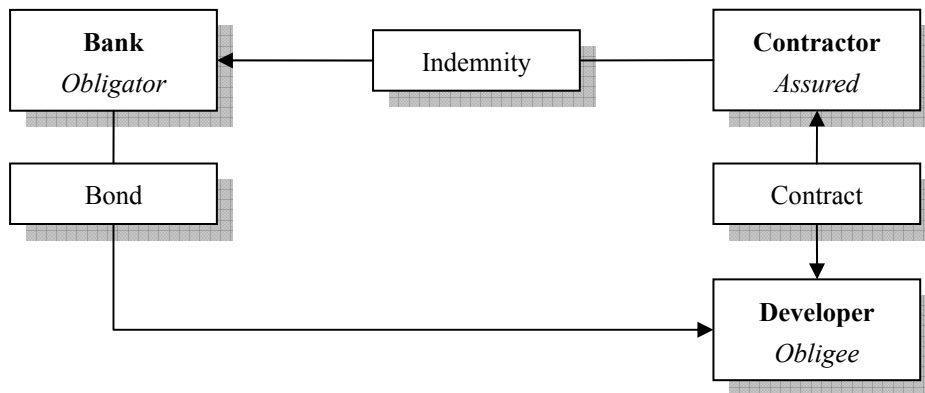


Figure 1. Relationships of Parties to a Bond and the Underlying Contract  
(Source: Fong, 2004b)

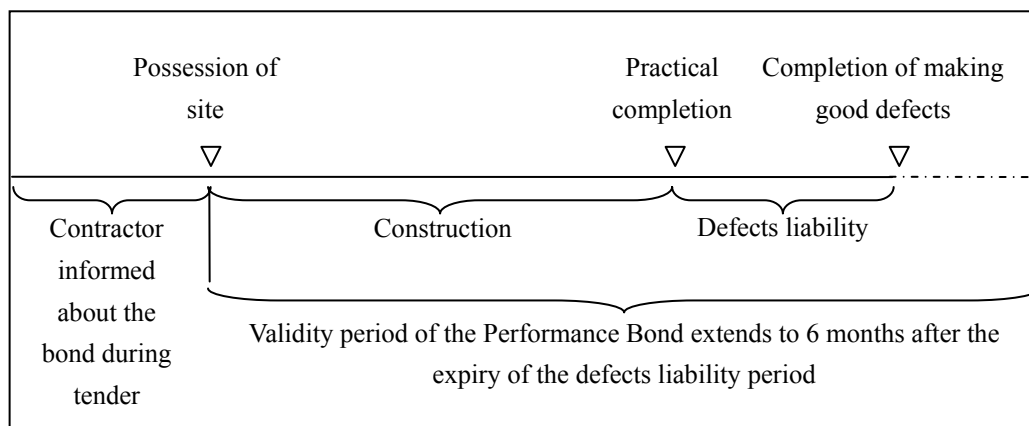


Figure 2. Time line indicating the validity period of the performance bond  
(Source: Abdul-Rashid, 2004)



## The Anomaly of the Weimar Republic's Semi-Presidential Constitution

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### Abstract

In the research about semi-presidentialism, the Weimar Republic's constitution always has been thought to be an important historical case. However, when we compare its constitutional substance more narrowly, we can find a basic difference between the Weimar Constitution and most other semi-presidential constitutions, including that of the French Fifth Republic as well as of those of Eastern and Central European countries. This paper will compare the different types of these constitutions, especially with regard to the role of the president and its most notable institutional characteristic, their dual executive. The authors are going to distinguish between two types of semi-presidentialism and are demonstrating the reasons for it. Their basic question runs: What marks the constitutional difference between Weimar's semi-presidentialism and that of other countries the world around?

**Keywords:** Weimar Republic, Semi-presidentialism, Dual executive, Substance of a constitution

### 1. Weimar Republic and Semi-presidentialism

As, in recent times, democratization spread in East and Central Europe, semi-presidentialism has become a concept paid more and more attention to when constitutional issues were discussed. In fact, there are also many other countries with a semi-presidential constitution outside of Europe as, for instance, in Taiwan, South Korea and Mongolia in Asia or Niger and Madagascar in Africa. Almost all of them are in line with the definition of semi-presidentialism by Maurice Duverger. However, when we compare the different substance of these constitutions, can we really say that they all belong to the same type of a semi-presidential regime?

In most of the literature, including that of Maurice Duverger, who was the first and most important scholar to having presented a coherent concept of semi-presidentialism, the Weimar Republic's constitution, in force from 1919 – 1939, is treated as a semi-presidential one and, by some, considered even as the first one. But at the same time, this constitution has been declared by not few as a failed experiment. However, when we review the German literature about the Weimar Constitution, even after the concept of semi-presidentialism had been defined by Maurice Duverger in 1978, there is almost no scholar, who has classified the Weimar Republic as having had a semi-presidential regime. If semi-presidentialism is a meaningful classification, in the same way as presidential and parliamentary system, then the question arises, whether the Weimar Republic belongs to it, at all.

There are two different ways to deal with the question to what kind of constitution the Weimar Republic has belonged to. First, if the Weimar Republic is considered to have been a semi-presidential regime, then, as we will see, the term needs an extension and specification of its meaning. Second, if, on the other hand, the Weimar Republic's constitution cannot be classified as a semi-presidential one, then we would need a quite new term to define it, because it is obvious that it can be called neither a presidential nor a parliamentary one. What, then, is the term to elucidate best what the Weimar Republic constitutional has represented?

Hence, it seems meaningful, having in mind the Weimar Constitution, to test the term semi-presidentialism once again, in order to find out, whether it can be applied to that constitution also, or whether a new term has to be discovered, in order to define, so far, just one historical case. We hope that by our correlative research the knowledge of both, that of the Weimar Republic as well as that of semi-presidentialism, will be enriched.

The most striking difference between the Weimar Republic and many other, later semi-presidential regimes is the very structure of their dual executive, the most important characteristic of a semi-presidential constitution. In the following we will, first, analyze some relevant literature about the term of semi-presidentialism; then, second, we will turn to the specific substance of the Weimar Constitution; compare it, third, with other regimes of the same kind; before coming to the conclusion, in which we will sum up our findings.

### 2. The Definition of Semi-Presidentialism

Academic research about semi-presidentialism has been initiated by Maurice Duverger. His definition has been widely discussed and is being quoted very often. However, academic treatises about semi-presidentialism were rather rare, before this type of a constitutional system became the favourite one in Eastern and Central Europe, after the demise of

the Soviet Union. And even now they are sparse. Moreover, its research mostly follows Duverger's trail. There exist, up to now, very little systematic studies about this form of government (Elgie, 2007:1). The research about the term can be roughly classified by turning to three scholars.

According to the definition of Duverger, a political regime can be considered to be a semi-presidential one, if it combines three elements (Duverger, 1980: 166):

The president of the republic is elected by universal suffrage;

He possesses quite considerable political powers; and

Beside him, there exist a prime minister and ministers, who possess also executive and governmental power but depend on the support of a parliament's majority.

Duverger's definition is adopted by almost all scholars. However, among them there are two, who altered the wording of Duverger's definition and the application of his concept. The one is Giovanni Sartori, who has argued that a political system would be a semi-presidential one, if it would have five characteristics (Sartori, 1997: 131).

The head of state (the president) is elected by popular vote (directly or indirectly) for a fixed term of office.

The head of state shares the executive power with a prime minister, thus founding a dual authority structure whose three defining criteria are:

The president is independent from parliament, but is not entitled to govern himself alone or directly and therefore his will must be conveyed and processed via his government.

Conversely, the prime minister and his cabinet are president-independent in that they are parliament-dependent: they are subject to either parliamentary confidence or no-confidence, and in either case need the full support of a parliamentary majority.

The dual authority structure of semi-presidentialism allows for different balances and also for shifting prevalence of power within the executive, under the strict condition that the 'autonomy potential' of each component unit of the executive does subsist.

Sartori's definition is more detailed than Duverger's, especially with regard to the power sharing between the president and the prime minister. Basically Sartori's definition can be considered as being an evolution, based on Duverger's definition. On the other hand, Robert Elgie has tried to eliminate the confusion due to the somewhat mysterious powers of the president by having proposed the following definition (Elgie, 2007: 6):

Semi-presidentialism is where a popularly elected fixed-term president exists alongside a prime minister and a cabinet, who are responsible to the legislature. (Note 2)

Elgie's definition excludes all references to the specific powers of presidents and prime ministers from his definition of a semi-presidential regime. He wants to leave the bewilderment about the kind and dimension of the presidential power to the "real world". Indeed, on the basis of his definition one needs only to read the constitution of a country in order to know whether it is or is not a semi-presidential one (Elgie, 2007: 6). However, if we are going to compare these countries more in detail, then it proves that his definition is encompassing all the countries, irrespectively if they have powerful or powerless presidents. But just that, the determination of the president's power vis-à-vis the prime minister's power, is the crunch point of a semi-presidential regime. All depends, if they are willing to cooperate and thereby to work together in the interest of their country; or if they are inclined to fight against each other and thereby harm the interest of their country. And there is, not to forget, still another point to have in mind: Can that regime still claim to be a semi-presidential one, in which the president and the prime minister share the executive power, but in which the constitution rules that they exercise them at different times? To this special case we will turn now.

### **3. The Substance of the Weimar Constitution**

Normally a new constitution is made in times of crisis, and, thus, it is regarded as a prescription. The Weimar Constitution, being no exception from this rule, was made at a time of domestic revolt and foreign threat. According to the objective background of Germany at the end of the First World War, a parliamentary democracy was the only choice that would be accepted by the Allies (Note 3) as well as was favored by the then setting the trend German parties. Domestically, a social and democratic revolution had shaken the country. After a short period of civil war, a parliamentary democratic republic was established by the cooperation of the Social Democratic Party (SPD) and the high military command. (Note 4) Under these circumstances a powerful president was thought necessary by the great majority of the then active politicians, in order to manage the dangerous predicaments concerning the domestic and international affairs of the new republic (Mauersberg, 1991: 73-76). On the other hand it was the strong believe of the new constitution's drafter, Hugo Preuß, (Note 5) that a new constitution should be designed as a mixed form between a parliamentary system like the French Third Republic and a presidential system like that in the United States.

The Constitution of the new republic was drafted and adopted on 31 July 1919 by a vote of 262 to 75 in the city of

Weimar, Thuringia, about three hundred kilometers south of Berlin, because the German capital at that time had been a revolutionary trouble spot. (Note 6) That is the reason, why the new republic and its constitution colloquially was called the Weimar Republic and the Weimar Constitution. The Constitution was divided into two parts: into the composition and task of the newly established political institutions and into the basic power and task of the German people. Let us discuss here the structure of the government, especially the relationship between the president (Reichspräsident), the parliament (Reichstag) and the chancellor (Reichskanzler).

### 3.1 The Reichspräsident

Constitutionally the president of the Weimar Republic was not only the head of state, but also a political leader, a moderator of legislative and executive power, and a defender of the constitution. But he played these roles on different occasions at different times. He was elected directly by the people to be a representative of the whole nation, and thus played a role independent of parliament. According to art. 41 and 43, the president was chosen by a general popular vote for a term of seven years. (Note 7) But according to the philosophy of the Weimar Constitution, the president played his role as a reserved political leader in reserve, when political quarrels and crises paralyzed the parliamentary track of governing. The intention of Hugo Preuß was that the president, as the representative of the people, in such an occasion should be able to intervene, in order to prevent parliamentary absolutism and to enable government's decision making. Let us turn now to the designing principle of the president's main powers.

By the Weimar Constitution, the president was equipped with many important political powers. In this respect, one of his most disputed powers was art. 48. By it he got, under specific circumstance, dictatorial power. Hugo Preuß and others were quite explicit in desiring such emergency powers for the chief executive, in order to supplement or even supersede the ordinary legislative regulation in matters of national concern (Friedrich, 1933: 197). Art. 48 gave the president the authority to rule for a limited period without recourse to the parliament in the event of major disruption or threat to public safety and order (Heiber, 1993: 32). The text of art. 48 reads as follows:

If a Land (a member of the federal state) fails to fulfill the duties incumbent upon it according to the Constitution or the laws of the Reich, the president can force it to do so with the help of the armed forces.

The president may, if the public safety and order in the German Reich are considerably disturbed or endangered, take such measures as are necessary to restore public safety and order. If necessary he may intervene with the help of the armed forces. For this purpose he may temporarily suspend, either partially or wholly, the Fundamental Rights established in Art. 114, 115, 117, 118, 123, 124 and 153.

The president shall inform the Reichstag without delay of all measures taken under Paragraph 1 or Paragraph 2 of this Article. On demand by the Reichstag the measures shall be repealed.

In case of imminent danger the government of any Land may take preliminary measures of the nature described in Paragraph 2 for its own territory. The measures are to be revoked upon the demand of the President or the Reichstag.

Details will be regulated by a Reich law. (Note 8)

With reference to this article, the president could not only decree administrative orders without majority support of the Reichstag, but he could suspend also some of the human rights guaranteed by the constitution. He could even exercise this power with the help of the armed forces. In fact, this article can be looked at as a mirror. It reflected the stability and instability of the Weimar Republic: In the beginning of the Republic, from 1919 to 1925, art. 48 was exercised 136 times. During the stable days of the Republic, from 1925 to 1930, this article was exercised only nine times. Finally, during the last years of the Republic, from 1930 to 1932, it was exercised 109 times (Gusy, 1991: 50-51). Acting on behalf of art. 48 the assemblage days of the Reichstag decreased, while the laws not legislated by the Reichstag increased. Indeed, in a state of emergency the Reichspräsident was constitutionally enabled to act according to his own will, hampered by nothing.

However, there existed also strong restrictions in applying this article. Firstly, this article could be exercised only in the event of a major disruption or threat to public safety and order, i.e. in a state of emergency. Secondly, the president could suspend only part of the human rights for a certain period of time, but was not allowed to enact laws which would change the basic essence of the constitution, i.e. he could change neither the framework of the constitution nor the system of the state (Gusy, 1991: 70). Finally, the Reichstag could demand the president to stop the measures which he had taken. This meant that the Reichstag could keep balance and maintain equilibrium between legislative and executive power, whenever it was able and willing to do so. Later, art. 48 has been regarded as the origin of dictatorship, because Hitler succeeded in making the state of emergency permanent by a vote of the Reichstag (Sellin, 1994: 88).

The relationship between the Reichspräsident and the Reichstag is also a remarkable characteristic of semi-presidentialism. According to art. 25, the President was endowed with the power to curb the Reichstag. He could dissolve the Reichstag without being demanded to do so by the Chancellor or by other provisos. Obviously Hugo Preuß had hoped that a President endowed with such a power could avoid absolute parliamentarianism, like that which had

existed before 1914 in France (Rödter, 1999: 14; Mauersberg, 1991: 73). This is also the biggest difference between the constitutions of America and France compared with that of the Weimar Constitution (Nolte, 2006: 68). That meant that the President could also be a moderator, using his constitutional powers in order to mediate between the government and the legislative power. Preuß thought that the President should be able to dissolve the Reichstag and call for a new election, when there was a conflict or a deadlock between the executive and legislative power. (Note 9) Therefore, this power can be regarded as the president's passive, defensive, and preventive power in contrast to that of art. 48.

Furthermore, although the Reichspräsident had to appoint, due to art. 53, the Chancellor, he and his ministers needed a vote of confidence to be installed in their offices as well as a vote of no-confidence of the Reichstag to leave their offices. Thus, although the formation of government was formally independent of the Reichstag (Preuß, 1926: 387-388), in practice the government needed the confidence of the Reichstag, in order to being able to govern act. The President's power of appointing the Reichskanzler was thought to counterbalance the almost supreme power of the Reichstag. In addition to the emergency power and to his formal right to appoint the Chancellor, the President had still another important constitutional power: he could order a referendum. It was Preuß's original intention that the President be able to call for a referendum, as an implement to solve a conflict or deadlock between the cabinet and the Reichstag (Preuß, 1926: 388-389). Art. 73 and 74 regulated the law of plebiscite, including the implementing rules for an initiative and a referendum.

From the comments above, we can conclude that the Reichspräsident could play, due to the Weimar Constitution, a strong role as a political leader and even agitator in the time of political crises and, especially, in a state of emergency. In normal times, however, when the the government and the legislature cooperated more or less in harmony, then the role of the Reichspräsident was diminished more or less to a power in reserve, at the most to be a moderator. That is why Preuß has stressed so emphatically that the basic principle of the Weimar Constitution has been parliamentarianism (Preuß, 1926: 426).

Concerning Hugo Preuß, he was inspired by the experience of the Third French Republic with a paralyzing parliamentarism, which he was eager to avoid in the first German Republic. (Note 10) By no means he favored a presidential dictatorship. On the contrary, he thought that the Reichspräsident must be strong, in order to defend a functioning parliamentary government. That is why, in general, he diminished the President's constitutional powers making him a passive, defensive, and preventive political actor. Only in abnormal times he should be constitutionally made capable to master extraordinary situations.

Thus, we can say that the Weimar Constitution has constructed a quite special kind of a dual executive: In normal times the Chancellor governed, based on the majority of the Reichstag, while the President had to live in the shadow. However, in abnormal times, when the Chancellor's government was paralyzed, then the Reichspräsident was enabled to take over all powers, in order to lead the country back to normality, making the Chancellor his henchman.

### *3.2 The Reichstag and the Reichskanzler*

According to the Weimar Constitution, the Parliament and the Chancellor were the other two important organs. Parliamentary democracy was the path chosen for the new republic by Hugo Preuß. Although the Chancellor formally was appointed by the President, the government, which was led by the Chancellor, was responsible, due to art. 54, to the Reichstag. Thus, the President was not actually free in his choice of the Chancellor, but had to take into account the party constellation in the Reichstag (Blachly and Oatman, 1928: 107). The President was in quite the same situation as the Queen in Great Britain: she appoints the Prime Minister, but as a rule in line with the majority relations in Parliament. Furthermore, the Weimar Constitution had also incorporated the law of countersignature. The ambit of countersignature included even the armed forces. That meant that the Chancellor and his ministers had, due to art. 50, to countersign any act of the president, in order to become legally binding. By it the political preponderance of the government was assured, as long as it was backed by Parliament.

The relationship of the president and the cabinet included both cooperation and a reciprocal balance and control of powers. For normal times the Weimar Constitution had established a genuine parliamentary system. The President played a decisive political role only, when there was gridlock between the cabinet and parliament or when the country was in an emergency situation. Concerning the relationship between the Reichstag and the President, there existed a balance of the same kind. The President could dissolve the Reichstag and call for a new election, in order to get over a deadlock of the government caused by the parliament. But at the same time the Reichstag could check the power of the President also. The Reichstag could use its constitutional power to impeach or even to depose the President. According to art. 43, the President could be deposed before the end of his term by a vote of the people upon the proposal of the Reichstag. A refusal by the people to depose the President had the effect of the dissolution of the Reichstag and of a new election. Thus, we can see that letting the whole people decide about the fate of the acting President as well as about the duration of the sitting Parliament (Haungs, 1968: 30; finger, 1923: 316) has been an essential part of the Weimar Constitution. Both, the Reichspräsident and the Reichstag, had the right to resort to the judgment of the people.



Carl Schmitt, one of the most important political philosophers in the time of the Weimar Republic, had claimed, that the Reichspräsident in a constitutional crisis should act as the defender of its constitution (Schmitt, 1931: 137). Although that would have been well in line with the idea of Hugo Preuß, the father of the Weimar Constitution, the then acting President, Paul von Hindenburg, did not make use of his powers in a state of emergency, but accepted, in line with Preuß's constitution, the vote of the Reichstag to declare the state of emergency permanent for four years and to give the acting Reichskanzler free hand to use extraordinary powers without the consent of the Reichstag. (Note 11) Thereby, the Reichspräsident Hindenburg gave up his responsibility for protecting the republic to the constitutional majority of the Reichstag. (Huber, 1984: 1279). Hitler's political rise began, in line with the Weimar Constitution, with the elimination of the Reichstag as well as of the Reichspräsident, making use of the extraordinary rights of the Reichspräsident, reserved for him exclusively in a state of emergency. Then Hitler succeeded in being authorized to use the President's extraordinary powers permanently for at least four years. That he succeeded to make permanent. (Note 12)

Next, we will compare similarities and dissimilarities between the Weimar Constitution and other semi-presidential systems, especially with regard to the role of the president.

#### **4. The Special Case of the Weimar Constitution**

If a horizontal dual executive is considered to be a subtype of semi-presidentialism, then a vertical dual executive is another one. The comments above give rise to assume that the structure of the Weimar Constitution has been in favor of a vertical dual executive. Although the President and the Chancellor both owned important constitutional powers, they were designed not to be used at the same time. What we have in mind, distinguishing between a vertical and an horizontal dual executive is exactly, that the executive power is exercised in both cases by the President and the Chancellor, but that in a horizontal dual executive both actors can make use of their powers at the same time, while in a vertical dual executive both actors can make use of their powers only alternatively, at different times. In short, according to the Weimar Constitution, in normal times governs the Reichskanzler, in abnormal times governs, for a limited time only, the Reichspräsident. Let us try now to find out, to which of both these different types of dual executive other semi-presidential regimes do belong to.

When we are going to analyze a constitution in respect to its concept of semi-presidentialism, then we have to look, first of all, to the paradigm of this constitutional regime, the French Fifth Republic. On paper as well as in practice, the president and the prime minister of the nowadays French Republic are both powerful political actors, in normal times as well as in times of crises. In so far the drafters of its constitution did not follow, as it is sometimes told, the model of the Weimar Republic. This difference was facilitated, as it seems, by two factors. First, the crisis in Algeria provided Charles de Gaulle with the opportunity to wield himself extraordinary presidential powers. Second, many of de Gaulle's institutional maneuvers were possible only because of his unique charismatic authority (Keeler and Schain, 1997: 90). Thus, the substance of the French Fifth Republic is characterized by a twin-headed executive, straight from the start. The essence of the new constitution is twofold. First, it establishes the conditions for a strong executive. Secondly, within the executive it provides both the president and the prime minister with a set of constitutionally defined powers. We can say that the 1958 constitution establishes a framework for executive dominance parliament (Elgie, 1997: 75). Hence, the president of the French Fifth Republic, unlike the President of the Weimar Republic, is modelled to be a political leader all the time, not for a definite time only.

Most post-communist countries in Eastern and Central Europe have followed, in designing their new constitutions, the example of France. (Note 13) In all of them, it was held necessary to adopt a semi-presidential regime with a strong president, in order to successfully master the transition period from a communist to a democratic regime and to ensure political stability. Only a powerful president, so it was assumed, would be able to unite the nation on divisive issues (Bunce, 1997: 169). In some countries, charismatic political leaders, like de Gaulle in France, came to power. These included e.g. Lech Wałęsa in Poland and Vytautas Landsbergis in Lithuania. Therefore, in most post-communist countries Presidents nowadays play a decisive role as political leaders, just as the French presidents following de Gaulle. Moreover, in some countries the character of the relationship between the president and parliament is in so far strained as they compete about the control of the government, like, for instance, in the Ukraine and in Poland (Papadoulis, 2004: 547). In all of these countries, the president is not only the head of state, but all the time also a powerful and influential actor in the political arena. This is the biggest difference between the substance of Weimar Republic's constitution and that of the French Fifth Republic's one as well as that of the constitutions of most post-communist countries.

In addition, let us check the experience of Finland, in order to observe quite another historical case of semi-presidentialism. Like the Weimar Republic, Finland adopted its constitution in 1919, during an existential crisis of the country. Originally the President of Finland was designed as a national leader, especially in international affairs. According to that constitution, the President could appoint governments, present bills to parliament, ratify measures, appoint senior officials, convene extraordinary sessions of parliament, open and close Eduskunta sessions, and headed the armed forces. Art. 33 of the constitution had stated expressly that the relations of Finland with foreign powers shall

be determined by the president (Arter, 1999: 53). But, interesting enough, in the meantime that has changed. By the new constitution, enacted in 2000, the Finish President's powers are dramatically reduced and those of the Prime Minister and government accordingly multiplied. (Note 14) Thus, while the constitutional position of the Finish President up to recently was to compare only with that of the French President nowadays, namely as a strong political leader; his status now is to compare only with that of the President of the German Federal Republic. He is at best a moderator in a genuine parliamentary regime. Nevertheless, constitutionally the Finish regime is still treated as a semi-presidential one.

There are also some countries that have adopted a semi-presidential constitution, where the president plays a role as a political judge or moderator, like in the Weimar Republic in normal times. In Austria, the constitution was adopted in 1919 also. The president was not empowered with so many powers as in the Weimar Republic in times of emergency. There the mothers and fathers of the constitution, different from those in neighbouring Germany, were afraid that the president would get the status of the former monarch. Nevertheless, distrust of democratic procedure and extra-parliamentary pressure left their mark on the constitutional reform of 1919 in Austria, also. It introduced the direct election of the president and gave him the power to appoint and dismiss the government and to dissolve parliament (Müller, 1999: 25). (Note 15) Like in the Weimar Republic, he was looked upon as the defender of the constitution and, therefore, accordingly equipped with power. However, after World War II, when Austrian politics entered calmer sea, the president plays, although still elected by a universal election, more and more in the political shadow, has become a political actor in reserve (Welan, 1992: 47). But in substance Austria's constitution is up to now very much like that of the Weimar Republic.

Summing up, it looks as if a semi-presidential constitution is designed especially in order to master crisis situations. Therefore, for the president, beside the prime minister, there are reserved some extraordinary powers to overcome predicaments in a state of emergency. Generally speaking, a semi-presidential constitution is adopted because of three reasons: First, when a new democracy has to define the head of state during the process of democratization, in order to guarantee stability. Second, when a country faces a state of emergency and tries to secure its existence. Third, when constitutional designers favor a parliamentary regime, but are afraid that it won't work. – If that is true, then the question arises: What to do with a political system like the semi-presidential one, which is constructed for bad weather conditions, in times of good weather?

Then, practicing a dual executive becomes a problem. In case, that both the leaders of the twin-headed executive work together harmoniously, one of them is superfluous. In case, that they fight each other, one of them is even more superfluous, because they damage the legal capacity to act. Thus, semi-presidentialism might become detrimental even to the acceptance and realization of democracy. But as we know, once a semi-presidential system is adopted, it is hard to change it again. (Note 16) What supports its survival is the fact that in order to abolish it, it first has to break down. But just in that case, a semi-presidential regime is favored by many. It looks as if it is very difficult to get rid of it, once it has been institutionalized. The best way to avoid its negative consequences seems to be to go on with it but not to practice it.

## **5. Conclusion: What Weimar's Semi-Presidentialism Has to Teach Us?**

When semi-presidentialism had become a popular topic in constitutional studies, due to the transformation of East and Central European countries, there has been launched more and more research projects that look into the relationship between semi-presidentialism and the democratization process. In this context, the Weimar Republic also has become a subject of interest, once again, not the least because its constitution was considered to be a failed historical experience. However, if we want to take into account also the experience of the Weimar Republic, then we must know, first of all, the special quality of the Weimar Constitution. In this paper we have tried to do just this by defining two different types of the dual executive in semi-presidentialism.

We think that it is very important to become aware of the quite different substance of semi-presidential constitutions, adopted once, on the one hand, by the Weimar Republic and later on, on the other hand, by many other countries. Because of their different substance, as we have demonstrated, quite different consequences in implementing it have been the result. And moreover, we might get a key to find out, which type of semi-presidentialism is better equipped to promote democratic consolidation and stability in normal times.

In our view, the substance of the Weimar Republic's Constitution can be summed up as follows: First, there is a difference between the dual executive of the Weimar Republic and of other countries. Although all of these countries have the same characteristics of semi-presidentialism: Their presidents are elected by a universal vote of their respective people. They are equipped with some extraordinary powers. They cooperate with a prime minister, who leads the government and is responsible to parliament. However, they distinguish themselves by one decisive difference in applying their dual executive: The one is applied horizontally, the other is applied vertically. While in the first, horizontal subtype of dual executive the president cooperates with the prime minister all the time on a higher or lower eye level, in the second, vertical subtype the president comes to the fore as a leader only in times of crisis, in a state of

emergency, all the other time it is up to the prime minister, and to him alone, to exercise the executive.

Second, the consequence of an horizontal division of the semi-presidential dual executive is, that both the owners of the executive power will be in a permanent competition with each other, which, as a rule, is detrimental for the nation's interest. The consequence of a vertical division of the semi-presidential dual executive is, that in normal times the prime minister alone is the leader of the government, responsible to the parliament, but that in a time of crisis the president can intervene and exercise extraordinary power. In the first case, the powers of both owners of the dual executive are inextricable mixed, in the second case they are clearly separated.

Third, there is a tendency to observe that in recent time, at least in two countries, belonging to the semi-presidential regime, the presidents have lost their extraordinary powers and have become rather moderators than political actors, while the prime ministers and their cabinets have become the only owners of the executive. That has happened in Finland and Austria. (Note 17) That can be an indicator that the vertical division of the dual executive is advancing, while the horizontal division is retreating, meaning that in two countries, which have a long experience with a dual executive, the vertical division has prevailed. In both of them the still by a general vote elected presidents have become more or less moderators between their respective governments and parliaments, instead of being political leaders by virtue of their general election.

Fourth, the cause of the break down of the Weimar Republic has not been the Weimar Constitution, but its abuse. The in its art. 48 being included authorization to wield extraordinary powers, intended to master a short-lived state of emergency, was used by Hitler and his followers to install a permanent dictatorship, giving his seizure of power the appearance of legality.

The dual executive is the main characteristic, by which a semi-presidential system differs from a presidential as well as from a parliamentary system. The main result of this research work, we consider to be, is the proof that it is meaningful to distinguish between two subtypes of the dual executive, the horizontal and the vertical one. By the application of this new paradigm, we are sure, semi-presidentialism can better be understood and more profoundly be analyzed.

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## Notes

Note 1. Cf. Pasquino, 2007; Skach, 2005.

Note 2. Cindy Skach has used the same definition in her research comparing the Weimar Republic with the French Fifth Republic. See Skach, 2005: 13.

Note 3. World War I dealt a fatal blow to the empire of the German Reich. The following revolutions in autumn 1918 put an end to both the Hohenzollern monarchy in Germany and the Habsburg monarchy in Austria. See Holzer, 2002: 10.

Note 4. On the evening of November 10, 1918, General Groener (then the military leader) telephoned Friedrich Ebert (then the leader of the SPD) and assured him that the army would support him, if he joined the struggle against Bolshevism. The army's intervention is considered to be a key reason for the fact that the new Republic was built as a parliamentary democracy and led by the SPD and not, as a Soviet Republic, led by radical leaders of Spartacus.. For details about the so-called "Ebert-Gröner Pact" see Robinson, 1996: 231.

Note 5. Preuß was appointed as the drafter of the new constitution for two reasons. First, he was at that time the left's most learned scholar of law in Germany, although he was not a member of the SPD. Second, by appointing him, Ebert sought to bridge the divide between his Social Democrats and the middle class. By it he hoped to mollify bourgeois fears of a social revolutionary dictatorship. See Weber, 2001: 35.

Note 6. Please see Winkler, 2005: 105.

Note 7. The law of presidential election regulates that any presidential candidate, who receives more than one-half of the votes, is elected. When no majority appears, a second election is held, during which the candidate receiving the greatest number of votes is elected. For details see Anschütz, 1960: 247-248.

Note 8. It was translated by Paul Bookbinder. Please see Bookbinder, 1996: 243.

Note 9. The President could also call for a referendum to solve the deadlock. These two constitutional powers were treated as the President's implements to solve a conflict or a deadlock between the executive and legislative power. See

Haungs, 1968: 28, or Preuß, 1926: 388-389.

Note 10. Please see Preuß, 1926: 387 and 417.

Note 11. There are some scholars, who believe that Hindenburg did not protect actively the democratic republic, due to the powers given to him by art. 48, but he was in favor of changing the basic order of the republic, since 1926. In 1930, he appointed Brüning as Reichskanzler without the consent of the Reichstag. That already had changed the substance of the Weimar Constitution. From then on, the essence of the Weimar Constitution was changed. And in 1933, Hindenburg had accepted the passing and implementation of the President's extraordinary powers by the Reichstag and the Reichsregierung. He even accepted the enabling law "Ermächtigungsgesetz". The Weimar Republic and the democratic republic was in name only. These scholars are such as Gusy, 1997; Bracher, 1987; Huber, 1984.

Note 12. The Reichstag and the Reichsrat passed the enabling law (Ermächtigungsgesetz) in 24. March 1933. According to this law, the Reichskanzler could take measures without overseeing by parliament. Hitler became a real leader and dictatorship from that time on.

Note 13. There are some countries, such as the Czech Republic, Hungary, Bulgaria and Slovakia, in which constitutions it is stated that their parliament is the supreme organ of the state. In fact, only one of them, Bulgaria, can be called a semi-presidential regime by definition. The other three countries are classified to have parliamentary regimes. See Stepan and Skach, 1993: 4.

Note 14. Please see Paloheimo, 2003, or Raunio, 2004.

Note 15. In fact, the president used these new powers only once in 1930. President Wilhelm Miklas dissolved the parliament because of the expected victory of the party, which he favoured, in a new election. However, because they lost more seats, and Miklas's prestige was heavily diminished. After that, the right to dissolve parliament was never used again. It also became an important constitutional lesson that the president does not intervene in government forming and in politics. See Müller, 1999: 25-26.

Note 16. Of course, we can not say that parliamentary or presidential system is certainly better than semi-presidential system. An applicable constitution to a new democracy is therefore always a critical problem. Semi-presidential constitution is like a reversible knife. It can also be operated well just like in Austria or in Finland after 2000. Constitution is a rule. But who and how to play this rule are also the important variables.

Note 17. The experience of Austria can see Welan, 1992: 47-49 or Müller, 1997: 22-47. About Finland after 2000 can see Raunio, 2004 or Paloheimo, 2003.



## The Domestic Application of WTO Laws

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### Abstract

On 1 January 1995 a new international economic organization came into being. The WTO is either a modest enhancement of the GATT or a watershed moment for the institutions of world economic relations reflected in the Bretton Woods system. Indeed, the WTO Agreement, including all its elaborate Annexes, is probably fully understood by no nation that has accepted it, including some of the richest and most powerful trading nations that are members. And for a long time we just focus on the agreements on the global levels but how about the actually domestic application of treaties? This article will try to analysis the basic domestic application of WTO treaties and take American as a typical example. Then try to get tentative conclusion about the elements that effect the domestic application of WTO agreements.

**Keywords:** WTO, Domestic application, Treaty

### 1. The basic sources of WTO laws

There are 2 levels of WTO's operation including the global level and the international level. In order to take part in WTO the applicant countries need to experience a tough process of multilateral negotiation with other member countries. Therefore the sources of WTO laws not only include the GATT\GATS\TRIPS and some other global wide treaties but also include a series of multilateral treaties. Most of the time people pay a lot attention to the treaties on the global level. But they ignore the treaties on the multilateral levels. It is necessary for us to treat the global and international treaties as one whole entity. The key point during the participation and the operation of WTO is the domestic application of WTO laws. Although it is important to carry out the global level supervision of the performance situation of the member countries' WTO obligation, the performance of the international treaties is the root.

### 2. The theories of the domestic application of international and global treaty

There is no doubt that the WTO laws have strict binding effects on member countries compared with other kinds of international and global laws. Can we say that the respective applications of WTO laws in different countries are the same? Once you dig deeply, it would not be hard for you to realize that due to the different internal situations of different countries, the application principles for the WTO laws are different. Generally speaking there are 3 kinds of theories referring to the domestic application of the international and global laws. They are monistical theory, dualistic theory and the third theory.

#### 2.1 Monistical theory

According to the monistical theory, all the laws are unitary entities which are composed by the binding rules. Therefore the internal and international laws are two relative parts of a single legal structure. The nature of monistical theory is that once the treaties were signed by the constitutional law, it would become parts of internal laws directly. But in most cases it is necessary to experience legislation to convert international and global laws into parts of domestic laws. And the laws without experiencing the legislation are called self-executing treaties.

#### 2.2 dualistic theory

Dualistic theory insists that internal laws and international laws are two different separated law entities. Moreover the internal and international laws have a lot of differences on the legal subjects and the sources. The legal subjects of the internal laws are individuals but the subjects of the international and global laws are the sovereignties. The sources of the internal laws root in the intentions of the internal legislators while the sources of the international laws root in the

common intentions of different countries. Neither the internal laws nor the international laws can directly change or confirm the counterpart's legal order. Hence, the fully or partly application of international and global laws in specified judicial districts is the expression of internal laws' prestige. This theory converts the international and global laws into internal laws for application. Then the international treaties are applied as the internal laws rather than the international or global laws. Once the judges come across the conflicts between internal laws and international laws, they choose to apply the internal laws.

Although these theories are helpful in explaining the relationship between internal laws and international laws, courts and some other legal institutions merely get conclusion about the regular problems according to the sole application of monistical theory, dualistic theory or some other theories. Conversely, most of the time courts base on the constitutional rules and principles to judge the cases with the application of internal laws. In this respect, the constitutional rules of different countries are different. And it is common that both theories are simultaneously applied by some countries. But in some countries the courts just adopt one theory exclusively. For example, Switzerland exclusively adopts the unitary theory and England is the representative of most developed binary theory. There are many compromised forms between these two extreme forms.

### *2.3 Mixed theory*

In recently years, people began to pay attention to the third theory. Gerald Fitzmaurice believes that the arguments between the unitary theory and binary theory are illusive and not realistic because the argued subjects are not existed. There aren't two different legal rules that absolutely matched with their respective regulated scope. According to his theory, these two legal systems don't conflict with each other due to the different regulated scope. Although international and global laws are operated on the world stage, the domestic courts view internal laws as the uppermost rules. Although the application of internal laws will lead to the international obligation of the countries, at the time when international laws conflict with the internal laws, internal laws should be treated as the upmost. Therefore it is necessary for us to focus on the practical operation in the domestic courts.

## **3. Take American as an example**

### *3.1 The basic types of treaties in American*

According to American constitutional law there is only one type of treaty. Americans call these international contracts treaty. And there is only one sanction method which is called "advice and consent". The treaty require a 2/3 majority of senate votes in favor for it to be passed. But there is another existing international treaty in American which is called executive agreements. Although the American constitutional law never mentioned it, most of the treaties signed by the American are executive agreements. The American Supreme Court precedents and some academic compositions agree with the theory that the executive agreements belong to one sort of treaty in American.

### *3.2 Some problems referring to the domestic application of treaty in American*

#### *3.2.1 The direct application of statute-like law treaty*

First of all, we must make one problem clear. Can the domestic courts view valid treaties as the binding domestic laws? The courts are set up according to the domestic constitutional law. Therefore the courts get the responsibility to obey domestic constitutional law. It is possible that the constitutional law expressly provide the measures of fixing the status of treaties. But it is also possible that the constitutional law doesn't expressly mention any measure of fixing the status of treaties. Under this kind of context, courts can operate according to implied instruction. And these implied instructions can be deduced from some others interpretation sources.

American courts adopt the mixed attitude on the problem if the courts have the obligation to perform the treaty. The courts make the decision on whether adopt the treaties according to the specific situations of different cases. In some cases the international treaties can fully be applied but in some cases the international treaties are partly applied.

#### *3.2.2 The invocability*

Although the specified international treaties or parts of them can be treated as the statute-like laws, there is another important question. Do the parties have the right to invoke the international treaties in the legal proceedings? In other words, invocability means if the international treaties could be directly executed, would the parties in the specified cases use these treaties as laws? According to the analysis of relevant precedents, when the American courts are discussing the invocability, they will not separate invocability from self-executing. However, in some cases it is obviously that the courts separate the concept of invocability from the concept of self-executing. Take *Smith v. Canadian Pacific Airways Ltd* precedent for example. In this case, although court admitted the self-executive nature of Warsaw treaty, court denied the parties' adoption of this treaty due to the federal jurisdiction. The court held to the belief that because of the specified situation in this case there is no need to adopt the Warsaw treaty to bring an action for claims. Moreover, in the *Dreyfus v. Von Vinck* case, court also separated self-executing from invocability.

### 3.2.3 The legal hierarchy of rules

Under the self-executive principle, it is possible that the conflicts will appear between international treaties which are adopted by parties and domestic rules. Under this context, court must make the decision about which rule should prevail others. That is the legal hierarchy of conflicted rules. Once we came across the conflicted situations the following steps could be taken to make sure which rules should be adopted.

First of all, we should find out whether there are void rules in the conflicted rules. Under this condition, the court will adopt the valid rules. When the conflicted rules are all applied to the specific case and it is impossible to get harmonization or coexistence among them, the court is facing the difficulties of adoption. In America, in order to resolve this problem, court need to analyze the type of international treaties and the constitutional law.

Secondly, it is possible to harmonize the conflicted rules. If all the conflicted rules are international treaties, the court would try its best to interpret these rules in one kind of harmonious way. If one of the conflicted rules was international rule, American court would interpret the domestic rules in the way of avoiding conflicts with international obligations. If this didn't work, court got the discretion to decide which rule should be preferred adopted.

### 3.3 American courts' interpretation of international treaty

For the purpose to interpret the international treat, the American courts will take into account travaux préparatoires, foreign precedents, state practice and some other elements which are helpful in interpreting the treaty.

Most of the countries interpret the international literally and view the attentions of treaties as subsidiary elements. But American courts take totally different measures. The usual concept of the words in the treaties is subsidiary element. American courts interpret the treaty according to the real attention of contractual parties. Moreover American courts tend to refuse to interpret the international treaty literally. Except this, American courts accept the rule of liberal interpretation to make the contractual parties' attention clear. If American court still could not get proper interpretation of international treaty after used up all the mentioned measures, the court would turn to domestic law terms for help. But most of the time, these domestic law terms are not the *lex fori*. However, the adoption of American law concept is another problem. American adopts the Charming Best rule as one important rule in domestic law interpretation. The interpretation of domestic laws should consistent with American's international obligation despite the root of obligation.

### 3.4 The domestic application of WTO laws in American

Historically, American courts granted trade treaties the self-executing status. But the latest ratified trade treaties including the WTO laws exclude self-executing. This obviously acts against American's constitutional tradition, which grants the direct application to treaties.

If the WTO laws conflicted with the American domestic laws, American domestic laws would get the priority and the WTO laws would be viewed as void. No domestic laws can be declared void due to its conflicts with rules of URA.

Compared with the previous positive laws and international treaty, according to the later-in-time-rule, the later made laws get priority. If the positive laws were ambiguous and there is no specific provision about the adoption of URA, the administrative agency would against the WTO obligation. If the interpretations were reasonable, according to the Chevron rule, American courts would respect administrative agency's interpretation of the positive laws. In the American administrative declaration, it is said that American positive laws don't mean to conflict with TRIPS but once the conflicts were unavoidable, American courts would be binding by the later created laws. American supreme court insists that the legislature enjoys the legislative authority and has the right to make laws that are different from previous ones in spite of the possibility that the later made laws will turn American to be perfidious.

In the predictable future we can't get any track about the direct application of WTO laws in American. Denying the direct application of WTO laws in American will inspire the domestic interest group to seek for the application of laws and administrative rules which are against the WTO laws. In the trade review field, American is lack of valid and efficient judicial review mechanism.

## 4. Conclusion

There are many elements effect the domestic application of WTO laws including the political sensitivities, state practice, member countries' domestic legal environment, legal techniques, international relationships, domestic interest groups and so on. Different countries' domestic applications of WTO laws are different. From some countries' attitude toward the domestic application of WTO laws, we can find out that they want to protect their domestic laws from the threat of WTO laws. In this way, the priority of domestic laws can be sustained in their own country. The WTO legal system is a very big and complex mechanism. No member country, even the most developed country, can fully understand its countless details. In order to realize the aim of global free trade market we still have a long way to go. During this process all the countries should work together and discard prejudice as well as discrimination.



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## Accountability from the Perspective of Malaysian Governance

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### Abstract

Generally, accountability is often associated with a concept of answerability, responsibility, blameworthiness, liability etc. Commonly, the concept of accountability from the perspective of governance is the means to control the public administration in democratic countries. The classification of public accountability is normally seen in terms of external and internal mechanisms. Hence, this paper shall discuss both mechanisms with special reference to Malaysia. The discussion also focuses on the limitation of each mechanism which rendered some problems to the concept of accountability in Malaysia.

**Keywords:** Accountability, Governance, Public administration,

### 1. Introduction

Accountability is often associated with such concepts as answerability, responsibility, blameworthiness, liability and other terms associated with the expectation of accounting (Note 1). An individual who is accountable will be on his own commit to do or implement something if he feels that an occurrence or the result of the occurrence is important. It also involves effective reporting or program impact done to see the results and changes experienced from the aspect of knowledge and behaviour. In politics, especially in the representative democratic system, accountability is a crucial factor in determining good governance, and hence the legitimacy of power. The election of state representatives requires a responsible attitude to the public (Abd Aziz, 2003:68) (Note 2). Therefore, every action that has been taken needs to be explained to the public or the local community. According to Tantuico (1994), the ex-Chairman of the Philippines Audit Commission, accountability is the foundation to integrity and is the actual portrayal of the ruling government regardless of the form of ruling system which is used.

The Malaysian Constitution also speaks, directly and indirectly, on the accountability especially when it involves public property. Auditing is a form of 'check and balance' process which is important to determine whether a monetary transaction of an institution is running well (Abdullah 2004). The Constitution and the National Audit Act provide certain powers to increase the level of auditing and further on the level of accountability especially in public sector. This can be seen in Article 106 and 107 from the Constitution which explains the role and responsibility of the OAG to audit the budget and expenditure at all governmental levels.

The development of the audit system in Malaysia depends primarily on the changes and the administrative pattern and national politics (Kulasingham: 1). A seminar paper titled "*Role of Supreme Audit Institutions in National Development*" sees the national development at four stages, namely, (a) maintenance phase - the government gives importance to legal matters and procedures apart from basic services. Emphasis is more on regulatory and compliance, (b) mobilization phase - efforts and the governmental budget is directed towards the utilization of resources by preparing incentives for the infrastructure incentives and industrial base, (c) guidance phase - industrialization and privatization in development. Budget is focused on cost and program effectiveness, and (d) co-ordination phase - economy has reached the mature level and is focused on welfare matters towards the community. Concern is directed

towards the distribution of wealth and services in a just manner. The national budget is directed towards product and the manner of provision. It takes into account effectiveness and the program impact. The theory centred upon is exact in the context of the national audit system. It is undeniable that the audit system focus has experienced a change and development slowly, beginning with control, financial flexibility, economic, effectiveness and currently accountability (Note 3). According to Abdullah Sanusi et al., (2003), two different audit parts have been identified in the public sector. Firstly, the monetary audit to evaluate the extent of the system's reliability based on the financial regulations in place. Secondly is the audit attainability. This section emphasizes on the effectiveness aspect and efficacy on the use of sources to produce a high return and the agreed objective. The legal amendment in the Audit Act 1957 also inserts accountability elements as a precondition to check on the government organizations' achievement.

## **2. The role of auditor general**

The Auditor General (AG) forms an important function in the process of national accountability. His role is wide as stated in the Constitution in Article 107; the AG is not merely the auditor to the federal government, but also to the other 13 states. The audit system that exists directly creates a relationship and a chain of accountability (Kulasingham, 1986:1). In performing his functions to audit, his roles are to (a) ensure all forms of protective means towards assets and public property, (b) maintain all accounts and records, (c) give views on the national monetary statement and government agencies, (d) inspect comprehensively all the economic methods and the level of efficacy of a particular program, and (e) report to parliament and the relevant management team (Kulasingham 1986: 3).

According to the procedure, every financial statement of the government must be submitted to the AG in seven months after year end. If he does not receive any report in the appointed time, the AG will make a report to the King of Malaysia (hereafter YDPA) and there onward to the parliament. Three months are usually a normal time frame for the processes of checking and auditing. Up till now, there is yet to be legal practice that states the limit on the time frame for checking. Nevertheless, since the late 1980s, the problem of delay in submission of reports no longer exists. This is pursuant to the government press on under the governance of the previous Prime Minister, Dr Mahathir, in implementing the surveillance and sending reminders to submit reports right on time (Abdullah Sanusi 2003 et al.: 177). Apart from that, to ensure that his function runs smoothly, the law also protects him through various ways (Kulasingham 1986: 4). For example, the Audit Act 1957 allows the AG to look at all records and government documents to be audited. All individuals may be called upon to explain to the AG if the necessity arises. According to Tan Sri Ahmad Noordin, the previous AG, the auditing process which he has been assigned to has never been disappointing (Abdullah Sanusi et al., 2003:176). All documents, even those regarded as sensitive, like the Internal Security Act and the Seditious Act are also sent for auditing. The AG can also direct any officer to undergo an inquiry and report to him thereafter. His last and most important function is to report his earnings to the parliament. Also on his discretion, he may even decide to forward the report to the YDPA instead.

Freedom to air views without being affected with the external factors like political pressure and fear of non continuance of contract poses a very heavy challenge. The AG is confronted with scandals of millions of dollars involved, sensitive and extremely confidential to certain parties because exposure may seriously jeopardize the National economy. His declaration to the public through his yearly reports frequently obtains wide interest as well as it tests his accountability and integrity (Note 4). The AG report from 1989-1992 had identified a few defects in the monetary management in various governmental departments. Amongst factors identified by Ahmad Sarji (1994), namely (a) expenditure over and above what was necessary, (b) extra allocation requested by appropriate agencies were not correctly spent, (c) auditing records were not updated, (d) stores and accounting assets were not appropriately managed, (e) internal control was insufficient where it concerned earning collection, and (f) management system towards development projects was weak. Even though the government has dealt with the defects above which were construed to incline towards financial management problems, such cases are still repeating. In such a case, the Administration and Modernization Planning Unit (MAMPU) was set up to monitor, from time to time, programs which were oriented towards control enhancement system, infrastructure development for financial management including giving recognition to the most effective agencies in managing finance, and also to ensure that equal importance was given to the modernized governance and training.

Apart from that, independence in finance management for example, staff recruitment and training must also be given. Up till now, there are still many audit institutions which need to rely on central government to recruit staff and other financial matters (Ahmad Sarji, 1994). Another issue that arises is the scope auditing powers. The AG's role which is to supervise public service performance will trigger a lot of discontent especially in the governance and administration sector. This feeling, according to Kulasingham (1986), must be pushed aside if it does not lead to confrontational relations and non-productivity. At the same time, the AG is also confronted with an auditing policy which in a way does halt the government's auditing power. Unfortunately, the government defends it on the basis of it being purely guidelines (policy matters) and it cannot be intervened with. Nevertheless, the 1985 Tokyo Declaration has specified the

“Guidelines of Public Accountability” which recognized the role of auditing as part of policy planning and strategy to achieve the objective of development (*ibid*: 5).

### 3. The role of head of federation

According to the Constitution under Article 32(1), the King of Malaysia (*Yang Di Pertuan Agung*, YDPA) is the Head of Federation for Malaysia. His Majesty takes primacy above all the rest of the people in the stated including the Queen, the second person after the YDPA, the other kings and the other heads of states (Mohamed Suffian, 1984:31). Nevertheless, this position is not a part of the Executive (Note 5). It is a symbol to the Executive (Abd Aziz, 2003:51). This symbol gives a very wide meaning in the institution of the federation ever since independence (Note 6). However, from time to time, the institution of the monarchy needs to be strengthened and revised to ensure it is still relevant with current needs which are more challenging (*NST*, 9/5/2005). Even though the Constitution has listed out the roles and functions of the YDPA, it must be understood that the document cannot be interpreted literally and formally. It cannot be seen as a normal statute. The reality is that there are some powers not elucidated in the Constitution and these powers may be used if the situation is grim (Abd Aziz 2001: 57). It cannot be denied that rooms for interpretation that exists within the spheres of the Constitution have in a way shaped the actions of the government. At this time, the institution of the Monarchy is the most unique and special platform to check and balance the accountability of the Executive (Abdullah Sanusi et al., 2003:179). At every meeting at the Parliament, for example, the Prime Minister will need to address the YDPA about related issues of the government. With his Majesty’s position which is traditionally respected, the YDPA can influence the government to act with accountability. The Constitution also allows the YDPA to obtain relevant information with regards to affairs of the states (Abd Aziz 2006:53) (Note 7).

According to Raja Nazrin (*The Star*, 30/11/2005), the monarchy system practiced in Malaysia has fundamentally contributed to the way of democracy and governmental accountability in the country. This can be seen from the non-partisan institution of the monarch, placing it in a unique status over and above the political sentiments, ideologies, ethnics, religions and others. “It is a force for moderation over extremism” (*ibid*). This status positions, His Majesty as the best symbol for authority and power. That is why he is regarded as the main protector. Further, the role of the YDPA gives an extra room to the government to rule and promote democracy. This can be seen from the function of the YDPA in Article 40 where he acts according to the advice of the cabinet members or ministers. “Acting according to the ruling government’s advice” does not portray a defect in of power but it is a manifestation of democracy (Abd Aziz: 53). It opens room for better trust of the public towards the ruling government and further validates the position of the ruling government. Also, in the context of democracy, it is wrong to place power in the hands of various persons in power for fear of power struggle leading to chaos (Note 8). The role of the YDPA and relations with the ruling government can also be explained in the context of constitutionalism and limited government. Both concepts are inter-related and emphasize the issue of governmental power that needs to be limited so the rights of the subjects are protected.

Apart from the role of the YDPA acting on advice of the government, His Majesty also has powers and other functions that can influence the actions of the government (p. 53). Article 40(2) states that the YDPA has the discretion to appoint the Prime Minister, dissolve the Parliament, and call upon the Kings’ ceremonial meetings. The term discretion in the Article can be understood to mean the right of the YDPA to choose and decide what he deems best. This power of discretion is actually functional especially when the situation is very strained like what may happen after parliament has been dissolved (p. 54). So is the situation when the YDPA refuses to dissolve the Parliament. In a country that practices parliamentary democracy, the PM is given the extraordinary choice to select a date for election. In some ways, it is not good for democracy because the YDPA cannot control this. It is in such situation hence the need for the head of federation to ensure proper control and balance of power is needed (p. 55).

### 4. The institution of parliament

One of the fundamental principles for a democratic society is that the government must have accountability towards the people. In democratic countries which practice parliamentary system, accountability can be assessed through the role played by the Parliament. The Parliament is an institution that can maintain control towards the ruler where it acts as a “supervisor, a controller and a critic against the governance and it is capable to influence the policies of the government” (M Foad, 1999). Accountability can be derived from a question-answer session and a debate where the responsible minister is required to provide answers to every question forwarded. There are also written questions that need more detailed answers (Abdullah Sanusi et al, 2003). In other words, the process and procedures that take place in Parliament include the debates of preliminary issues and postponement speeches that all require the concerns of accountability.

In Malaysia, Parliament is the highest institution protected by the powers of the YDPA. Its main role is to make, amend and repeal the laws. Parliamentary members are given full freedom to debate and discuss various different current issues in the interest of the people and the country. However, this right is only confined in the noble House of Parliament. However, certain issues related to nationality, Bumiputra rights, the Malay language, monarchy and others

are prohibited from being debated upon. These are protected essentials as enshrined in Article 63 and is part of the laws that must be adhered to by all members of the Parliament. Even though it is regarded as the most important fortress of accountability, certain questions arise as to the extent of efficacy of its functions. Many observers argue that over the years, the role of Parliament is declining and weakening. As stated by World Bank (2006), "Parliaments can play a crucial role in overseeing the actions of the Executive branch. Their power is built on the fact that they can hold state institutions accountable, represent the people at the highest level of government and exercise legislative powers..." Nonetheless, what the World Bank is suggesting here seems to be idealistic at least for Malaysia. The fact is that the executive has begun to dominate all the three organs, for instance in terms of law making sphere; Parliament seems to legitimate and not to legislate (Abd Aziz, 2001). To an important degree, the 'executive dominance' (Lim 2002b) has weakened the legislative accountability.

Shad Saleem Faruqi, the Malaysian constitution expert opines that the judicial process in Malaysia is viewed to involve the executive work rather than the parliamentary process. As evidence, 80% of drafts from 1991-1995 were passed without any amendments. From this amount, 15% were altered because of pressures imposed by the NGOs and the other 5% amended in the Parliamentary House. Its function is no more than a rubber stamp or formality to pass a particular proposition draft. This situation was even admitted by Mahathir Mohammad (1981), the fifth Prime Minister in his controversial book, *The Malay Dilemma*. For him, it is only a democratic practice that gives no meaning; in fact it gives more room to strengthen the governing party. From the aspect of conference and debate pertaining to the judicial aspect and finance, the parliament is seen as though to grant power to the minister to take a decision (Funston, 2001). This situation can create an unhealthy effect where the particular issue is only determined and dominated by a particular group only. The limitation faced by the opposition is also noteworthy in this context as Puthuchearry (1978:127) notes, "generally the Opposition is regarded at best as unnecessary and at worst as evil." Consider the observation made by Chee (1991:110) "the Standing Orders of the House have been changed, over time, to the disadvantage of the opposition." According to Lim (2002b: 175), parliamentary reforms such as reviewing restrictive standing orders and ensuring greater impartiality have been suggested by the opposition, but to this day, have been ignored. Ong (1987) describes the parliament as follows:

Its overwhelming majority in the House has meant that its control of the Standing Orders Committee has been absolute. Thus, rules to limit the number of questions MPs were allowed to ask and the banning of adjournment speeches during key meetings of the House have tended to minimize the role of Opposition. Other sources of the strained relationship between the two were the limited time provided for Opposition motions, the shortage of the time given to study important bills and the lack of quorums in the House whether deliberate or otherwise (p. 53). Ong (1987) at some length has given an overview on how Parliament to a large extent failed to exercise the check and balance over the Executive due to its domination. Public Accounts Committee (PAC) deserves special attention as well as it is one of the key aspects of Parliamentary scrutiny. The existence of PAC can promote a culture of accountability in which it ensures ex-post supervision of the financial management process (Ofosu-Amaah et al., 1999). In Britain, PAC is chaired by the leaders of the Opposition parties, a tradition in which Malaysia has yet to practice. As such, the financial checks and balances seem to be lacking. Given this condition, it is believe that the appointment from the Opposition member as a Chairperson will provide more accountability and transparency.

### **5. The doctrine of ministerial responsibility**

The doctrine of ministerial responsibility is important because it is the backbone of the cabinet system as practiced in the Parliamentary system. It has been observed as a constitution practice in the government based on the Westminster that ties the co-operation between parliamentary members so they can ensure that the current government elected constituting the people's representatives are responsible besides determining that every activity done at the ministry and department is being observed. The underlying principle is the entire governmental act, not the individual minister, is responsible. The responsibility of the minister takes two forms. Firstly, a collective responsibility that requires all ministers to be equally responsible towards all decisions of the other ministers. Secondly, the individual responsibility towards whom each minister has placed his/her portfolio in his/her roster. Every minister must be responsible upon every action taken by the public servants directly under his authority (Abd Aziz, 2006:123) or even for actions not known to him.

Even though this doctrine has been implemented since 1955, the practice is still not without faults. The direct implication of this collective doctrine is that it bounds all members of parliament to take a parallel stand with that of the party he/she represents. Even though it has the positive side of concretizing the party, it does not actually deny the autonomy against the stance of the party's members. There have in fact been some instances where actions were taken against parliamentary members who did not cohere with the party. The example is the suspension of Datuk S. Sothinathan, Deputy Minister of Natural Resources and Environment who questioned the government's stance, and issuance of warning letters to two Parliamentary members, Datuk Bung Mokhtar Radin (MP-Kinabatangan) and Datuk Mohamed Aziz (BN-Sri Gading) for supporting a motion by the opposition (*NST*, 10/5/2006). Another example

was the case of Datuk Shahrir Samad whose position as the Chairman of the Government Supporters Club was withdrawn because he supported a motion given by Lim Kit Siang, the opposition leader. According to Datuk Shahrir, his action was meant to rouse the government so that it hears the opinions of the Parliamentary members and not sideline them. He also suggested that there should be guidelines given to Parliamentary members on what they could do and couldn't do based on proper ethics and integrity and not through the law as the current practice is (*NST*, 7/3/2006).

Furthermore, in the recent years, this doctrine has been eroded in many Commonwealth countries, including Malaysia. This is because there is no particular mechanism to ensure its implementation and as a result, the doctrine has instead been used by the government to defend its position from erosion, for example, when discrepancy occurs in views and the explanation provided for an issue involves the government policy. Occasionally, there will be excuses such as "we don't know" when abuse of power occurs (*ibid*). The situation is aggravated when the masses and the media themselves give different perspectives which indirectly portray the inefficiency of the parliamentary collective role (Abd Aziz, 2003:75).

## 6. Ombudsman

Ombudsman originated from a Swedish word that means a defender or agent. It has existed in the European countries like Sweden, Finland, Denmark, France and many others. Ombudsman is also known with many other different terms like Parliamentary Commissioner, Human Rights Mediator and others. Even though the terminologies differ, the concept that is introduced is the same, which is "to observe the actions of the authorities and improve any defects in an unfair administration towards the people" (Sanusi, 2000). Ombudsman can be defined as "a department or a body instituted through the constitution or the legislative assembly or the parliament headed by a high ranking public officer who is non-partisan who can be responsible to the legislative assembly or the parliament, who accepts complaints from anyone who has grievances against any agencies, officers and employers, or those who act independently to investigate and recommend solutions to improve the situation and produce reports" (Sanusi, 2000).

In Malaysia, the suggestion to have the Ombudsman has been discussed for a very long time; in fact, it was discussed even from the time of the late Tun Abdul Razak. On 23 July 1971, the Ombudsman system in the Malaysian version, which is the Public Complaints Bureau (PCB), was set up. It was placed under the Department of the Prime Minister. The PCB has grown from time to time. It gave the opportunity to the public to complain of their dissatisfaction against all aspects of administration of the government except any issues that have been determined as the policy and underlying principles of the government (Normawati, 1997). If seen from the viewpoint of the objectives for the setting up of the system, it can actually increase the quality of administration, protect the rights of people and guarantee transparency, fairness, accountability and good governance (Sanusi, 2000). This is because the public do not have any hindrance to see, read and analyze all files, reports and decisions that are made.

Sharifudin (1992) explains that to ensure the transparency and accountability through the system of Ombudsman, it should have the following features. Firstly, it should be appointed by a legislative body and not the executive. In fact, it should be responsible to prepare reports to the legislative body. Secondly, it is set up through the constitution to ensure that it is independent and non-partisan. Thirdly, it is empowered to investigate whether or not it is based on a complaint or its own initiative. Fourthly, it is empowered to ask and see governmental documents and finally it is empowered to criticize and reprimand the concerned officer and agency, seek for corrections to be made and thereafter reveal the truth to the public.

Lately, there have also been suggestions that the ombudsman should be set up again. In fact, the PCB Board of Advisory is said to be studying this suggestion to investigate misconduct amongst the implementing agencies including the elected representatives and ministers. The issues that arise bring forth the possibility whether the PCB fails to perform its actual function. According to Lee Lam Thye (*NST*, 2006), PCB's role was only to channel complaints to a particular different channel. He adds the need of the PCB to be upgraded to the role of an ombudsman. In fact, PCB is said to be very restrictive in its powers because it is placed under the supervision of the Prime Minister's Office. Sanusi (2000) also feels that it is not able to ensure the accountability in the exact manner because it is headed by a government officer who is bound by the rules and interest of the government.

Furthermore, Ranita (*NST*, 2006) also opines that one of the most important criteria in Ombudsman is accountability where it should present a report and be involved in the Parliamentary process, so the report can be shared with the public. This is a very important procedure because it ensures that it is free from the government, free from political interests and can perform its mandate free from any disturbances. She also voices her concern with any efforts to alter the state of the PCB to an Ombudsman because this bureau is one of the governmental bodies that is empowered by a public officer. Ramon Navaratnam also opines that it is fundamentally important that the Ombudsman should be a non-partisan institution which is free from any political influences so it can maintain the public's welfare and its accountability. As he puts it, "If the Ombudsman is not given any 'teeth', it will end up being just another advisory body and public confidence will be eroded" (*NST*, 10/4/2006). It is hoped that the principle of accountability through

the Ombudsman can increase the public's confidence towards the administrative practices and also reduce the abuse of power, breach of trust and others.

## 7. Election

What is the relation between accountability and the elections? Who are the important groups in this system? And how is the accountability maintained? Cumaraswamy (1987:130) notes that democracy in essence means "government by the consent of the governed". One way to ensure this is through election. It is generally known that the election through a democratic process can actually change the foundation of a legally elected government. By having regular elections which are free and fair will open space to achieve the needed objectives. Besides that, regular elections grant a valid mandate to the government that exists. Since independence until now, elections have been held rather consistently and successfully. Nonetheless, as Lim (2002:185) notes, the practice of election in Malaysia "is not generally loose but is especially weak in the Malaysian executive dominated polity." In Malaysia, where the National Front, *Barisan Nasional* (BN) has always been in power and electoral constituencies have been gerrymandered repeatedly to their advantage making them as the sole beneficiary from the first-past-the-post system. Time and again, the BN maintained its two-thirds majority, which allows them to make Parliament as a mere 'rubber-stamp'. Even though the BN still remains as the governing party every time the elections are held, the total of mandate received always changes and adds to the integrity of the elections procedures. For political parties, it opens channels for every party to compete to draft the best formula to win comprehensively at the national level (*Berita Harian*, Feb/2002).

The election system is not merely static and totally dependant on Election Commission (EC). According to Abdul Rashid (*Berita SPR*, 2004), to view the level of achievement of elections in Malaysia, there has to be other comprehensive studies on the methodology of the Federal Constitution and also legal drafts that have shaped the climate of elections. Furthermore, socio-political factors also shape the ambiance of elections. As an example, a quasi democratic country with non-electoral laws is recognized by the chairman of the EC to hinder the principles of fairness and independence in elections that is instrumental towards a good election (Francis Lok Wah & Khoo Boo Teik, 2002: 5). Abd Aziz (2003:223) explains that other organizations are also accountable in influencing the electoral system in this country. This includes civil service, judiciary and the mass media. Thus, the relations between accountability and elections do not affect only EC but also aspects of governance that encompass the legislations of policies and laws, rights and responsibilities of citizens and political leaders, government agencies and the mass media. In other words, all these units are instrumental in creating accountable environment of healthy elections.

In the context of our modern democratic state, voting is no longer deemed a privilege but a right of every citizen. In Malaysia, voting is not made compulsory on all citizens. However, even though voting is not made compulsory on every citizen, it does not entail that an eligible candidate who chooses not to vote is released from his responsibility. Abdul Rahman (*Berita Harian*, 25/8/2006) has reprimanded the political culture especially of the Malay community who that generally, though having deep interest in politics, are not consistent in their readiness in doing their political responsibility that a voter should actually do. The Chairman of EC, Abdul Rashid said that approximately 4.5 million Malaysians, comprising 70% of the population have not registered as voters (*ibid*). Voting is perceived as the most effective power tool of the citizens; and if this trend continues, it is not impossible that the elected government does not reflect the voice of the majority of this country's population. If this happens, it will be extremely unfortunate for the democratic system in Malaysia.

Apart from the individual responsibility, EC, as enshrined in Article 113 of the Federal Constitution, is the statutory body instituted to conduct elections in the most honest, credible and unbiased manner. Based on the Reid Commission, EC is entrusted to carry out elections at parliamentary and state level and prepare and recount votes. In other words, EC is assigned with all actions taken except negligence. On the issue of appointment of SPR, it might be asked whether it is indeed non partisan. This is because this commission is appointed by the YDPA after consulting the Conference of Rulers). Nevertheless, according to the Chairman of EC, such issues do not form a major concern. What is more important is the commitment and integrity of the commission members. The Federal Constitution drafted by the Reid Commission did not specify any definite method for the appointment of EC members, instead places basic principles that are transparent and emphasizes on the confidence of the public (Abd Aziz Bari, 2003: 215). The independence of this institution is indeed maintained. The status and positions are granted to the members of the EC is analogous to the members of the bench especially in the scheme of performance and retirement (EC Act 1958).

Furthermore, questions arose too pertaining the fairness and independence of the electoral system. This is in pursuance to the commission's failure to respond to allegations of unfairness, misappropriation of public money and others. However, some of the allegations hurled at the Commission are outside the jurisdiction of EC. It is thus reiterated that all sorts of criticism, do not affect EC's functions and roles (*ibid*: 222). Doubts against the independence and integrity of EC cannot be blamed on EC alone; instead it must be viewed from the system in totality that includes other agencies like the civil service, judiciary, mass media and community. On that note, Yaacob (1978:210-215) has identified several important elements that contribute towards a healthy election:

- (a) Sentiments that portray the involvement of the civil service and civil management, thus concretizing the perception of the masses that indeed they are given the right and space to make and decide on the results of election.
- (b) An environment where the government can handle changes without chaos and bloodshed.
- (c) The existence of an independent judiciary which is crucial to adjudicate contentions with regards to the number of votes.
- (d) The existence of an administrative body that manages elections in an honest, efficient and non-partisan.
- (e) Improvement and a development in the system of political parties that provide other alternatives to voters.
- (f) Readiness by political leaders and members to accept the reality of electoral results whilst respecting rules of the games.

To ensure that elections run in an independent and fair way, the role of the Courts is extremely important. The Courts are the only authoritative body that can ensure that laws are rightly enforced whilst reducing the manipulations and diversions. Nevertheless, an electoral system which is too dependent on the courts is also discouraged. An election system must have a built-in mechanism to handle problems that occur. It is generally accepted that the court system is inclined towards technical aspects that is perceived to be able to reduce the tendency to make decisions in a democratic manner that can be accepted by all.

According to Abdul Rashid (*NST*, April 10, 2006), there is no fraud throughout the management by EC in the elections. However, he did admit that irregularities still persist especially in the aspects of management of elections. Nevertheless, this weakness does not in any way affect the principles of independence, fairness and transparency. In order to handle this problem, the EC had formed the "Election Campaign Enforcement Team". The membership of this team is as follows (Berita SPR 1, 2004):

- (a) Enforcement Officer (an official of the EC)
- (b) A Representative of the Malaysian Police Force (Royal Malaysian Police, PDRM)
- (c) A representative of the Local Council
- (d) A representative of the political party who is appointed by the delegate or the election agent

The team's function is to ensure consistent surveillance of the election activities throughout the period of campaigning until the voting is over. In general, there are two most common mistakes done by the party or the delegate:

- (1) Campaign materials that should not in any way touch the personal attributes of the delegate that may contain elements of libel, falsehood that triggers emotions of hatred, doubt and bring rise to animosity. All posters and banners must also have the names and addresses of those who produce them; and
- (2) Talks/ speeches that do not touch personal issues or derogatory remarks and further lead to hatred, angst, animosity and has no relevance whatsoever in the interest of the elections.

The latest development is during the election in Sarawak on March 2006, when the EC had introduced the new election code of conduct that has been recommended for usage in the coming elections. This code has been viewed as comprehensive and is directed at creating good actions amongst all delegates, agents and election officials that reaches beyond the day of naming of delegates, campaigning, the voting day, counting process and the total of votes including the announcement of the election results. In the aspect of the use of posters and banners during elections, until today there has not been any restrictions on them, but is suggested that the use of these two items should be reduced and monitored to save space, time and money (*Berita Harian*, 15/5/2006). Undoubtedly, many quarters have questioned the accountability of elections in Malaysia unless there is an attempt to make a reform for the electoral system. Somehow, there is no sign of changing the electoral system soon. In fact, Lim (2002:142) maintains that there is no serious attempt that is able to force the 'UMNO-led government' to reform the electoral system even though there is dissatisfaction among the Opposition and its supporters.

## 8. Non-Governmental Organizations

Pivotal, external watchdogs have become an essential tool nowadays in overseeing the government actions. In most developed countries, these groups or better known as Non-Governmental Organizations (NGOs) or Civil-Society Organizations (CSOs) play active roles in checking the activities of the government. There has been a form of a new democracy (Note 9) where the people demand a political system that is fully participative of the people, has good administration and work processes that are more transparent and democratic (Hasmy, 2001:2). These demands are usually pursued by the middle class groups that are educated and aware of the development that occurs within especially actions undertaken by the government. The non-governmental organizations, apart from the political parties and the government, are perceived as alternative institutions that are the stimulus and catalyst to the shaping of a new democratic system today.



From the philosophy of administration and governance, NGOs and the government have their own perspectives. The government sees the issue of administrative governance as a means to uphold the law and order for the sake of the people. On the other hand, NGOs from the 'pluralist polity' view see the administrative governance in its capacity to balance the executive powers and the protection of human rights. They also urge for a more open, efficient and transparent administration (Saliha & Weiss, 2003:204). The conceptual differences in the administrative governance by the government and the NGOs will inevitably influence the action of both parties which will then become a stimulus to a new political culture in the country.

In Malaysia, there were at least 12 categories of NGO organizations that made to almost 53 thousand in total (NST, February 21, 1999). From this total, it can be divided into two categories. The first category is the NGO which is registered under the Company Act. The focus and orientation of these organizations are based on various signs and expertise comprising of all sorts of areas like religion, welfare, community, sports, business societies, common interest societies, cultural, union groups, social recreation and women (refer to Table 1).

The emergence and development of the NGOs in Malaysia can be linked with the political and socio-economic development in the country. From the political side, the racial conflict that occurred on 13 May 1969 was the culmination of all the racial confrontations that had built up between the Malays and the Chinese. This incident had stopped all means of open political participation (Chandra, 1977:2). Heavy political issues that had traces of racial elements were considered sensitive. Instead, political discussions on more universal issues like consumerism, and environment were encouraged.

Apart from that, social and economic factors also contributed to the growth of the NGOs. Rapid and strong economic growth did not mean that all the relevant institutions could fulfil the needs of everyone concerned. For example, since the 1950s, political parties were seen as the most effective. However, since the last four decades, most political parties were more inclined to pursue their own racial interest. This demarcation of the political parties' interests made it easier for the NGOs to fill in the vacuum and cross over the narrow line that favours some particular races only.

According to Makmor (1998: 62), the relationship between the NGOs and the government can be understood in two ways. Firstly, it is a relationship based on the principle of cooperation. The government has acknowledged the importance of building a good rapport with the NGOs. Issues on women's rights and their roles in the community are very dominantly advocated by the women NGOs. They act as advocates in the legislative system to ensure that women rights are well protected and elevated. The same thing happened in 1991, where the Ministry of Consumerism and Commerce had been set up following the strong commitment shown by the NGOs for consumers (Hasmy, 2001).

The signs of acknowledgement by the government towards the NGOs are beginning to appear themselves. For e.g., the members of MAPEN who were selected amongst the NGO members like Chandra Muzaffar, Jomo K.S, Tan Sri Ahmad Nordin and Choon Min Sou were assigned to handle the ground policies towards the end of the NEP era. Aliran was requested by the Special Panel for the Parliament to present the proposal paper which consisted, among others, related to the amendments to the Criminal Procedure Code, and the latest related to the unity in Malaysians (*The Sun*, 24/9/05). This NGO had actually received the special award for Transparency 2006 by the State Secretary for the activities and integrity that were pursued.

Lately the women issues have been given immense attention by the government. This was after the lack of support by the women after the sacking of Anwar Ibrahim (Lai 2003: 72). It can be safely said that UMNO Women and the MCA are the champions of the women issues. The women NGOs also used this opportunity to work hand in hand with the government towards this purpose. The best example is the National Council of Women's Organizations (NCWO), which is the main organization of 80 women groups, who had successfully conducted several meetings with the government even though they were on a very different agenda and premise. The same goes for NGOs who work in line with the opposition, like those embarked by the Women's Agenda for Change(WAC) (Note 10) and Women's Candidacy Initiative (WCI) (Note 11) (Martinez 2003: 77-91). Their signs are not merely confined to women but also for the government to be fairer and more transparent. From the occupational aspect, however, the activism of the women working groups has not reached a satisfactory level. This is because of the government's pressure on its own trade union or working group which in effect also stresses them. These are the loopholes filled by the NGOs to pursue their rights and goals.

The environmental NGOs are also amongst the NGOs perceived by the local civilians as caring and sensitive instruments towards the caring and sustainable development (Note 12). Most of these NGOs are more people based rather than profit based. Their focus is not just onto activities on the environment but also touches on the preservation of the aborigines and the local people on the use and management of natural resources.

The approach adopted by the NGOs is more inclined towards discussions rather than confrontational. This is so even when they wish to channel their opinions and advise the government especially pertaining to the environmental care. The views aired are usually concrete and scientific, and hardly traced with emotions and rumours (Ramakrishnan 2003:

124). Since the last few years, the NGOs have raised several issues that have caused massive destruction to the environment produced by huge projects, including the National Forest, the Tembling Dam, Penang Hill and the Dam in Sarawak.

The role played by the NGOs has succeeded in raising awareness in the democratic practice in Malaysia. This follows the hope of the people who want a change in the system so it reflects more democracy to resolve more complex issues. It also demonstrates recognition for NGOs, where the government in the past was more autocratic is now seen more flexible to work together with the NGO leaders, whom previously were seen as too elite or worse, accused as being foreign spies.

### 9. Mass Media and Freedom of Information

In a democratic society, the media has been described as the “fourth power” or the “fourth estate” supporting the other three-branch system of government i.e., the executive, the legislative and the judiciary. Put somewhat differently, the media has a legitimate role to check on these branches (Ooi, 2000). The press has also been regarded as an informal external mechanism for public accountability keeping the government somewhat in check (Chee, 1991). Hence, to function effectively and responsibly in a democratic society, the press definitely needs to be independent (Thussu, 2005). Alexis de Tocqueville notes the following, “The more I observe the main effect of a free press, the more convinced am I that, in the modern world, freedom of press is the principal and, so to say, the constitutive element in freedom” (Schmuhl, 2000).

One must remember that the connotation of ultimate freedom for example globalization, sensational issues (like racism) and fundamental human rights are not necessarily the best model to be followed by the media practitioners. In fact on the contrary, it can jeopardize the harmony of a society and the peace of the country (ibid). Therefore, freedom per se without a responsible attitude contradicts the journalism idealism and professionalism. This premise lays the foundation for the environment of values and the coverage of a report and analysis given.

In most countries, including Malaysia, the media is considered as the leading force in disseminating information and to shape the people’s opinion. The media is also responsible to educate and survey the government’s performance and to expose any abuse of power (Abdullah Sanusi et al., 2003:188). In short, the media’s role must be viewed in a holistic way that is to create a civil society who is informed and becomes a direct tool of a check and balance to the governmental system which is still in place.

“Rooting out inefficiency and corruption is viewed as the principal objective of openness and transparency in the government. Access to information renders the processes of the government more open and makes those in power more accountable to their people” (Krishnan, 2001). This statement brings to another important mechanism for any society seeking accountability in the government, freedom of information. Only a few countries have given their citizens the right and access to a significant amount of government-related information (Ofasu-Amaah et al., 1999). Among the countries are Sweden, Canada, and Hungary. Perhaps this could be one of the reasons why these countries remain at the highest ranking of Corruption Perception Index (CPI). The countries that restrict its citizens to the access of information have a tendency to withhold the information not only for legitimate reason but also to protect themselves from any wrongdoings. In a way, Malaysia is no exception, under Official Secret Act (OSA), the classification of a document or other information classified as official secret cannot be challenged in any court of law (Jomo & Tan, 2006). Kim (2005:97) claimed that under the “protective shield of this Act, massive corruption and cronyism have flourished.”

Several quarters have called for Malaysia to have Freedom of Information Act (FOI). Somehow, for the time being, it seems hopeless as the Minister at the Prime Minister Department, Nazri Aziz had told the Parliament that the Government has no intention to revoke OSA (*The Sun*, Sept 19, 2006) as well as initiating FOI (*The Sun*, Nov 26, 2005). “...A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both” (Ransom, 1968:392). So wrote the fourth President of USA, James Madison in 1822. This quotation reflects the relationship between democracy, accountability and access to government information.

However, in Malaysia, the awards of projects to contractors are often done without clear and transparent guidelines. Cases of Pularek and the project of North-South Highway provide obvious examples. The unfinished prisons complex in Kuching also deserved an explanation. As noted by the Editorial of *NST* (April 20, 2006), “An investigation by the ACA might bring to light other irregularities.” This is why access to such information is vital as Vaughn (2000) comments that it will allow the citizen to challenge government’s actions that they do not agree, seek redress as well as a serious reminder for government officials not to be involved in any misconduct or wrongdoings i.e., corruption.

### 10. Conclusion

Accountability is an ethical concept that is universal in nature and can be applied across all borders in the form of governance. It supports the principle of good governance which is founded on constitutionalism, limited government, check and balance and others. In Malaysia, various institutions and mechanisms, both formal and informal, and both internal and external, have been instituted with the objective to check and limit the government power. This includes

several important positions in the country's governance, starting with the Head of the Nation, the Auditor General, members of the Parliament, the Parliamentary Accounts Committee and others. Lay persons represented by NGOs, trade unions, co-operative and others need to be more participative in other social activities. The same applies to the media which are seen as an important mechanism in manifesting the final objective and ambition of the government. Nonetheless, one has to admit that all these mechanisms also suffer from many limitations.

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**Notes**

Note 1. According to the Western society, the first stage of accountability emphasizes issues of management, efficiency and productivity. It is generally agreed that the public have the right to be informed on actions taken by relevant bodies entrusted with the power to implement. In this perspective accountability holds resonance to auditing which focuses on the result against costs used and the objective aimed.

Note 2. Article 39 of the Malaysian Constitution uses the term executive “authority” instead of executive “power”. Authority has a different connotation from power. It postulates from a grant of position and is legally valid. In contrast, the term “power” connotes an influence that a person may have over another to do something. It means power that does not necessitate validity.

Note 3. The accounting discipline has evolved following the rapid changes that are taking place today. Inter-dependency with other disciplines, for example, economy, has introduced the concept of social accounting that restates the importance of value, professionalism, work etiquette and others in accounting.

Note 4. Since independence, numerous cases of non-compliance and extravagance had taken place. In the 1970s, a serious case of non-compliance implicating the Defense Ministry and Education Ministry engrossing almost RM100 million was made known. This trend continued even to 1990s but was still kept under lid. In 1997 however, a serious case was again identified in the Education Ministry amounting to RM800 million, including unpaid bills by the Police Department amounting to RM70 million following insufficient allocation in 1992-1997. In 1999, the AG also realized that following hasty planning, half on the 10,000 speed control gadget units for heavy transports bought at RM10 million could not be used. In the privatization sector, a concession for a support system in government hospital was found to be overdue and breached the conditions. Further, 2 separate hardware programs for the Health Ministry and the Traffic Police Department which each used up RM8.77 and RM48.47 million also could not function.

Note 5. Refer to the Federal Constitution which explains the YDPA and the role of the executive. Though both these matters were placed under the same Article, i.e. Federation, but they are stated in different sections- YDPA in Section 1 (The Supreme Head) and Executive in Section 3. Also, the YDPA's role can be seen as the fourth entity after the executive, legislative and judiciary (*The Star*, 30/11/2005).

Note 6. Out of the 200 countries in the world, only 34 still maintain the institution of the monarchy as the head of state. Malaysia is one of them. Malaysia and Brunei are also countries with Muslims being the majority of population out of the 10 countries that retain the Sultanate tradition; a tradition from the Institution of Caliphate (UM Bulletin, 5/6/2004).

Note 7. This practice originated from Britain, but the value entrenched like the spirit of discussion and transparency is inherently good and can dispel autocracy (Abd Aziz 2001: 53).

Note 8. This theory discusses whether in the situation of anarchy, power can be passed to the people rather than the YDPA or to the courts which are perceived to be able to make better decisions. These choices are delayed and can place democracy and constitutionalism in a risky state (Abd Aziz 2001: 57).

Note 9. This new view in democracy has acceded to a higher and more positive plane – the civil society, in that it created a good relationship between the government and the masses. This view also supports pluralism by acknowledging the existence of masses units that accommodate the relationship. These units include the NGOs, political parties, media, trade unions, cooperation, religious organizations and others (Saliha & Weiss 2003). NGOs are often cited in this civil function.

Note 10. WCA is the climax of the efforts taken by the women NGOs and is the catalyst for larger movements to improve social justice. It was founded during the political chaos when an alternative government was fought for, after the sacking of Anwar Ibrahim. Among the panels are Women's Development Collective (WDC), All Women's Action Society (AWAM), Sisters in Islam and several other individuals like Ivy Josiah, Carol Yong and others.

Note 11. WCI is seen as the pursuant step towards women's rights. It is also seen as a result of disappointment due to failing to change the position of women. A very distinct example is the Domestic Violence Act. Even though the Act is passed, the legislative process took more than 2 years including the lobbying and confrontation with the women NGOs.

Note 12. Among the active ones are Malayan Nature Society, the Environmental Protection Society of Malaysia (EPSM), World Wide Fund for Nature and Sahabat Alam Malaysia.

Table 1. List of among the active NGOs and their inceptions in Malaysia

<b>Names of Malaysian NGOs</b>	<b>Year of inception</b>
Consumer Association of Penang (CAP)	1969
Persekutuan Pertubuhan Pengguna Malaysia (FOMCA)	1973
Persatuan Pertubuhan Pengguna Malaysia (EPSM)	1974
ALIRAN (Kesedaran Kebangsaan)	1977
Sahabat Alam Malaysia (SAM)	1977
Suara Rakyat Malaysia (SUARAM)	1981
Women Aid Organization (WAO)	1986
Tenaganita (Suara Wanita)	1990



## A Review of Parliament-Foreign Policy Nexus in South Africa and Namibia

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### Abstract

After a review of selected literature on foreign policy and parliament-foreign policy nexus in South Africa, this article examines the nature of 'Parliamentary diplomacy', with special focus on Parliamentary Committees on Foreign Affairs [PCFA] in South Africa and Namibia since 2000. By means of descriptive approach and content-analysis of documentary sources and conversational interviews, it further explores the extent of executive-legislative frictions over foreign affairs in both countries and the *raison d'être* for parliamentary interest in foreign affairs, which is located within the orbit of National Interest. It argues that the executive-legislature friction over foreign policies may not be resolved sooner, more so that there are other actors seeking to influence the direction of foreign policy in both countries.

**Keywords:** Parliament, Foreign Policy, South Africa, Namibia, Executive-Legislative relations, Parliamentary Committee on Foreign Affairs[PCFAs], SADC, Africa

### Conceptual & Literature Analysis

As many other political concepts foreign policy is a contested ground, but here it is defined as a framework outlining how the country will interact, relate and do business with other countries and with non-state actors in a mutually beneficial ways and within the context of a country's national interest and economic prosperity. With reference to Parliament, this is considered here as a group of individuals operating on the behalf of others in a binding and legitimate manner and making decision collectively but with formal equality. This definition of the parliament implies a set of key functions: legitimation, linkage, and decision making. A more extended list might include a range of functions such as, governmental oversight, advice and consent, recruitment, cathartic release, arena for debate, exit, patronage, lobby, socialisation, constituency services, selection of the executive, and so on and so forth. These functional and multi-purpose parliaments were the ones that resurged with the Huntingtonian third wave of democratization in the post cold war era. This wave has changed political topography significantly in the third world, at least in context, if not absolutely in content. Accompanying this transformation has been the flourish in parliamentary activism in East, Central Europe and Africa.

As Mathisen & Tjønneland [2001] noted, 'we have witnessed a significant institutionalization of legislatures in new democracies in the 1990s' Agh Atila[1995] has also noted that scholarly interest has also expanded, especially those that relates to East and Central Europe. These studies have concluded that legislatures have been important in the democratization process with profound consequences for the political systems in aforementioned regions. However, as noted by Essaiasson, P & K. Heidar[eds [2000] most studies of parliaments are still focused on the Western experience, and more particularly the experiences of just two institutions: The British House of Commons and the U.S Congress. Arguably fewer studies of parliaments in the developing South are available, compared to the Euro-American axis. In particular, studies on Parliament-foreign policy nexus in Africa can simply be described as very few, again most of these few works are in fact focused on Southern Africa, South Africa to be specific. Indeed there are a number of recent studies on South Africa's post-1994 foreign relations, and the following have been selected to represent the broad range of issues discoursed and debated within this context. This has also been further sub-divided into two groups viz; the Foreign-Policy-focused literature and the literature addressing the role of the Parliament in foreign policy.

### Literature Review

With specific reference to South Africa's foreign policy in the post-apartheid era, Philip Nel[1996] has examined the role of civil society in the promotion of human rights through the mechanisms provided by foreign policy, while William J Foltz's[1996] work on the foreign policy of the new South Africa gives a brief description of foreign policy under the apartheid regime, and then looks at the state departments and institutions under the new SA government which are and will be actors to formulate foreign policy for the future. Raymond Suttner[1996] tries to explain the

difficulty SA faces in trying to promote human rights and democracy, while simultaneously trying to build bilateral and multilateral diplomatic relations with countries known for human rights violations. The study suggests that SA may have a capacity to act as a type of role model, but that it needs to weigh decisions on a case by case basis. Another Raymond Suttner's [1996] work on Foreign policy of the new South Africa: a brief review, comments on the 'near-existence' of foreign policy in the new South Africa, and describes who the main actors in foreign policy are, how they are coordinated, the status of the multilateral relations, civil society and its organs, the problems with human rights, the question of identity, and the commitment of foreign policy to democracy in this new dispensation.

Still in the 90s Greg Mills [1997] warns about the variety of roles that SA perceives itself in and the limitations the country has to contend with in its position between the West and Africa, having an option to play an expanded role in Africa and the risk that regional involvement will detract from domestic imperatives. The study addresses the main objective of SA's foreign policy, strategies to adopt to achieve it, and the attributes needed to ensure that correct policies are adopted and followed. Again, Greg Mills [1996] in his *South African foreign policy: the year (1996) in review*, states that, since April 1994, South Africa foreign policy has attempted to steer a neutral path, and concentrated on 'universality', expanding SA representation abroad, and increasing diplomatic presence in South Africa. Greg Mills contends that the 'New South' concept may revitalize a foreign policy which lacks overall direction, is over focused (and under spent) on Africa, and has organizational difficulties causing it to have a bad name. The 1996 review further advises that foreign policy should rest in the hands of elected officials and policy professionals rather than in the hands of the Presidents advisors. In a study by Roland Henwood [1997] he divides the development of SA's foreign policy into two phases: National Party rule (1948-1994) and ANC led government (1994-), including the transition period of 1990 to 1994 which formed the foundation of post – 1994 foreign policy. The study details aspects of both periods, and continues with a brief look at foreign policy formulation and implementation, as well as SA's relations with the 'problematic' states such as Cuba, Libya, Iran, Syria and Peoples Republic of China

Greg Mills's [1997] briefly reviews the successes SA achieved in the field of foreign policy, and look at problems encountered, and the restructuring of the Department of foreign affairs (DFA). The review gives attention to the interpretation of foreign policy, identification of priorities, budget, the importance of foreign economic relations, the regional dimension, and, SA in Sub Sahara Africa

In Anthoni van Nieuwkerk's [1998] study on *South Africa's emerging Africa policy* examines the emerging Africa posture of the post-1994 South African government, focussing the discussion of foreign policy in the new South Africa around four themes: the views of foreign policy makers in Pretoria, the views of analysts and critical scholars, the fact of African reality, and, foreign policy insights gained from the discussion. Denis Venter 's [1998] *South African foreign policy in the African context* points out that South Africa's foreign policy has gone (and is still going) through a process of profound change, and that the dimensions of its relationship with Africa are likely to focus on issues such as socio-economic development, trade, technical aid, migration, resource management and ecological concerns rather than on narrow military security issues.

Greg Mills [1998] updates an earlier and abridged version of this chapter published in 1997, to identify the main foreign policy tracks followed in SA since 1994. Greg posed the following questions; what the main overriding objective of the policy is, what strategies to be followed to achieve it, what tactics to be followed to steer it towards ensuring that correct strategies are adopted and followed, and what other factors will shape the pursuit of this policy

In Greg Mills's [1999] *South African foreign policy in review*, the Asian currency crises, the 'millennium bug', proliferation of weapons, and continuing instability in parts of southern Africa were identified to have dampened the high hopes of a true African renaissance in post cold war, post apartheid Africa. Greg situates SA's foreign policy in international and regional context, and suggests that rationalization and cost cutting will be necessary, especially in view of global events.

Zondi Masiza [1999] also argues that the political parties that contested the June 1999 elections in South Africa, hardly raised foreign policy as an issue. He tries to explain the silence on foreign policy issues during the elections and asks if South African public opinion on foreign policy is strong enough to influence its direction at all. But Jakkie Cilliers [1999] provides a broad framework for reviewing South Africa's emerging foreign policy identity on the eve of the second elections in June 1999 and the turmoil that has come to characterize much of the African continent in recent years. Jakkie points out that without stability there will only be war, poverty and continued marginalization of Africa, and no chance for economic development and growth. Philip Nel [1999] conducts two separate surveys on the foreign beliefs of South Africans, based on the same questions, for 'mass opinion' on the one hand and 'elite opinion' on the other hand. The study shows that South Africans are much more concerned about domestic problems than they are about foreign policy issues. The study briefly discusses the decision by the South African government to establish full diplomatic relations with the Peoples Republic of China (PRC) and to break ties with Taiwan (ROC).

John Seiler [2000] in his *towards fresh perspectives in South Africa's foreign policy analysis*, critically assesses Francis Kornegay and Chris Landsberg's [2000] claims that South Africa's foreign policy is dominated, to its detriment, by the



old guard. Suggest a different set of assumptions to support in public analysis the formulation and carrying out of South Africa's foreign policy. Bronwen Manby [2000] sets out the inconsistencies between theory and practice in South Africa's foreign policy, in relation to issues of human rights. The study further outlines the seven principles of South Africa's foreign policy and focuses on South Africa's foreign policy in practice (human rights regime, peacekeeping, bilateral relations with East Asia, Nigeria and Lesotho, and arms sale). The study concludes that while South Africa's theoretical commitment to human rights has been fully realized, it is not the light that guides the Department of Foreign Affairs (DFA).

Audie Klotz[2000] in *Migration after apartheid: deracialising South African foreign policy*, argues that the status in South African immigration policy derives from identity politics, rather than embracing the outside world, deracialisation, xenophobia now prevails. The study concludes that the rising tide of xenophobia against the influx of fellow Africans creates a potent barrier to reforms in immigration policy. Vincent Williams[2001] also points out that bilateral, multilateral and/or regional agreement between countries in Southern African region tend to focus on cooperation in the economic and security spheres. The labour environment, however, highlights the marked discord between South Africa's pronounced foreign policy objectives and its domestic migration policy and legislation. The study discusses the efforts to draft a regional migration protocol, the suspension of the SADC Draft Protocol on Free Movement in 1999, and the White Paper on International Migration, to ask what the link is between foreign policy and migration policy.

Maxi Schoeman[2002], contends that it is South Africa's (and Africa's) position in the global political economy that is presently occupying the mind of its foreign policy makers. The study briefly looks at South Africa's foreign policy objectives, structures and strategies, the prerequisites needed to enhance its international status and then touches upon initiatives such as the renaissance idea, the NAI or MAP initiative, and drawbacks experienced.

Maxi Schoeman and Chris Alden [2003] provide an overview of South Africa's *quiet diplomacy* towards Zimbabwe. In order to understand the constraints placed on South Africa's policy actions. The study explores the role and actions of the international, mainly Western community and the foreign policy behavior of African countries. The study also deals with an analysis of the constraints on South Africa's policy making. Another example of a seminal work on post-1994 SA Foreign policy is the Chris Alden & Garth Le Pere's[2003] Adelphi Paper, which provides a succinct analysis and assesses South African foreign policy from the onset of the democratic transition to 2003 and focusing on the question of South African leadership in the context of this transition.

Chris Landsberg and David Monyae[2006] also reviews how South Africa's principal foreign policy actors define the countries international role conceptions and discusses the countries view of its global role. The study considers seven south Africa-specific international roles, namely voice, example setter, mediator-integrator and regional sub-system collaborator, the diplomat, bridge builder, activist multilateralist, and faithful ally.

**Studies on Parliament-Foreign Policy Nexus:** With reference to parliament's role in foreign policy making in SA there are very few studies in this area. Some of the available sources include *Parliament and foreign policy* by Raymond Suttner [1996] which debates the question of whether parliament should be concerned with formulation of foreign policy or not, and discusses the situation in South Africa after April 1994, where as yet no institutionalized mechanism exists whereby a creative relationship between the department and the portfolio committee concerned with foreign policy can be formed. In her work Jo-Ansie van Wyk[1997] deals with the broader context of SA's external relations in 1996. The work is organized around the activities of parliamentary bodies and instruments concerned with foreign policy issues, and the influence, if any, of these institutions on foreign policy decision making. Tim Hughes [2001] has outlined the role played by the parliamentary portfolio committee on foreign policy (PCFA), summarizing its activities for the year 2000-2001, and provides a brief evaluation of the performance of the committee. The author asks whether the committee is doing enough and concludes with recommendations for its functions in the future.

Jo-Ansie van Wyk [2001] provides a frank view of structures and procedures involved in foreign policy making in South Africa, especially from 1999 to 2 June 2000 elections. Again Tim Hughes [2005] examines the process and exercise of democracy in all the parliaments of the region. Tim Hughes tries to contribute to strengthening parliamentary democracy throughout Southern Africa and makes recommendations on how its application and implementation in each country can be improved, strengthened and sustained. Philip Nel and Jo-Ansie van Wyk[2003] examines some of the ostensible public participation deficiencies encountered in foreign policy making in South Africa. The authors argued that the citizenry of South Africa is largely excluded from decision making on public policy issues beyond the borders of their state. This contributes to their disempowerment in the face of seemingly inevitable and anonymous forces of globalization, and adds to their alienation from and apathy towards foreign policy.

In summary, there is no doubt that the selected studies under review deal extensively with the core of South Africa's foreign policy in terms of options and actions and to certain extent the role of the parliament. However, there has been no significant comparative study of at least two similar countries in southern Africa to show if the experiences of

developing or new democracies differ or are similar, and to what extent within this context, and in what way[s] can these common experiences be managed in the interest of deepening democratic practices and processes.

### **Motivation & Methodology**

As noted earlier, the most important observation or gap is that quite a number of studies on South and Southern Africa's parliament have not compared experiences of similar countries in SADC with specific reference to Parliamentary role in foreign affairs, either as a critical part or as consistent opposition to executive determined policies. Thus a comparative study of two similar post-1990 prime democracies in Southern Africa which intend to show the quality of executive-legislature cordiality [or otherwise] over foreign affairs cannot but be regarded as very significant enterprise. Therefore the overriding motivation for this study is broadly to add up to the now growing literature on parliamentary activism in Southern Africa. Specifically, the study holds the promise of graphically describing the role and relevance of South Africa and Namibia's *third wave* parliaments in foreign affairs *vis a vis* their relationship with the executive, and by extension utilising the window of opportunity it provides to measure the texture and the state of health of democratic institutions in Southern Africa. It is against this background that this study is designed to answer the following questions:

First, what is the role of PCFAs in the legislature of South Africa and Namibia, and what are the similarities as well as differences in the attitudes and practices of both PCFAs towards foreign policy issues? Second, what are the challenges that have faced, and still facing either or both parliaments, with reference to executive-legislative relations over foreign affairs? Finally, in addition to constitutional mandate, what is the other reason[s] for parliamentary interest in Foreign affairs?

With regards to sources of data and methodology, data were predominantly sourced from primary sources such as the media reports, library and personal interviews with the actors/MPs/the member of Foreign Affairs Committee in both Parliaments. This approach helps to take advantage of the benefit of current history and political process in the ways they have unfolded and interacted. Again, it has helped also to see clearly why and how parliamentarians in Namibia and South Africa have engaged or have not been involved [as they would have wanted to] in diplomatic matters and foreign affairs overtime.

### **Parliament and Foreign Policy in South Africa and Namibia**

Given the history of long struggle for liberation in both South Africa and Namibia it is not surprising to discover that both countries foreign policy objectives reflects the desire to advance the cause of peace, freedom in Africa and by extension the international community. According to Namibia Constitution[1998] article 96 highlighted the country foreign policy objectives as follows: 'The State shall endeavour to ensure that in its international relations to: [i] adopts and maintains a policy of non-alignment; [ii] promotes international peace and security; [iii] creates and maintains just and mutually beneficial relations among nations; [iv] fosters respect for international law and treaty obligations; [v] encourage the settlement of international dispute by peaceful means'. In the case of South Africa, the Foreign Policy Discussion paper[1996] which is retrievable from the government website outlines principles which serve as guidelines in the conduct of South Africa's foreign relations. These include: [i]a commitment to the promotion of human rights; [ii]a commitment to the promotion of democracy; [iii]a commitment to justice and international law in the conduct of relations between nations; [iv]a commitment to international peace and to internationally agreed-upon mechanisms for the resolution of conflicts; [v]a commitment to the interests of Africa in World Affairs; and[vi] a commitment to economic development through regional and international cooperation in an interdependent world."

Hence such critical concern such as the State's external relations is of paramount interest to all parliaments. Even then, this engagement of the legislature with foreign affairs and the whole range of activities of the legislature that criss-cross the terrain of external relations and engagement with diplomatic community, aptly described here as 'parliamentary diplomacy' is also not the job of the whole house in any representative democracy. Representation is one of the hallmarks of modern democracy and the arm/organ of the state that most illustrate this assertion is the parliaments/legislature. In South Africa and Namibia the two countries that both became independent in the 1990s have adopted bicameral legislature. The Namibian National Council consisting of 26 members is the Upper Chamber, while the National Assembly which is the lower house has 78 members. But South Africa has a total of 490 Parliamentarians, with National Assembly consisting of 400 members, while the National Council of Provinces [NCOP] has 90 members.

A division of responsibilities and competencies, with checks and balances built into the political system to prevent the abuse of executive powers, is a feature of all liberal democracies, whether parliamentary, presidential or some sort combination of the two. Thus one key role of the legislature is to check, challenge, monitor and legitimize policies undertaken in the name of the state by the executive branch of government. Indeed, it could be argued that, if there is no tension between a parliament and the executive, the former is not performing its proper role. Specifically there are Parliamentary Committees on Foreign Affairs [PCFAs] that often created to deal with issue of foreign relations and international/diplomatic affairs.

In South Africa and Namibia there are Parliamentary Committee on Foreign Affairs [PCFAs] which though vary in numerical strength and issues and concerns covered, they all took cognisance of the multi-party nature of both countries. The Parliamentary Committees on FA in both countries reflect the political parties in Parliament, but in proportion to their percentage in the whole house. This practice also applies within the context of gender-mainstreaming. In South Africa, Thirty three percent [33%] of the Joint PCFA are women, while in Namibia; Twenty seven percent [27%] are women.

**The Role of PCFAs in South Africa and Namibia:** Globally parliaments had been widely expected to decline in significance in the later part of the twentieth century, but instead they have developed new and vital political roles and have innovated in their institutional structure-most currently in newly organised or invigorated parliamentary committees, not only in a few parliaments, but across most political cultures and systems. Even as newly democratic parliaments throughout Africa experiment with elaborate committee structures, those with older highly developed committee system are reaching for more varied and flexible alternatives. In short parliamentary committees have emerged as vibrant and central institutions of democratic parliaments of today's Africa. Further in most parliaments PCFA is one of the fundamental portfolio committees, and hardly can we find any country's parliament in Africa without a PCFA. This is predicated on the nexus between national interest and foreign affairs as a major platform to advance the same. Thus in Namibia, the duty of the parliamentary standing committee on foreign affairs, defence and security is to: [i] Consider any matter it deems relevant to defence; home affairs; foreign affairs; Namibia central intelligence service (NCIS) and prisons and correctional services; [ii] Consult and liaise with such offices, ministries and agencies as necessary; [iii] Exercise oversight function with regard to Namibia's foreign policy and its relations with other states on matters of defence and security ; [iv] Investigate issues relating to the policies, standards and procedures followed by the Namibian central intelligence service; and [v] Probe issues relating to human right violations; obtain information from government or other sources regarding any real or perceived threat to the security of the republic of Namibia; enquire into and monitor international Protocols, conventions and agreements that may affect Namibia's foreign policy, defence and security, and where necessary, make recommendations to the national assembly.\_

In South Africa, Tim Hughes [2002] has argued that the PCFA is fundamentally created and tasked with maintaining oversight of:

- the exercise of national executive authority within the sphere of foreign affairs
- the implementation of legislation pertaining to the spheres of foreign affairs
- any executive organ of the State within the sphere of foreign affairs; and any other body or institution in respect of which oversight was assigned to it.

The PCFA also enjoys considerable specific powers. It may monitor, investigate and make any recommendations concerning any constitutional organ of state within its purview. The committee is granted such powers with regard to the legislative programme, the budget, rationalisation, restructuring, functioning, structure or staff and policies of any organ of state or institution. Furthermore, the committee is to consider all bills and amendments to bills referred to it. A further role unique to the PCFA is the consideration and approval of all international conventions and treaties prior to their ratification by Parliament. In the new millennium, the means of engagement and involvement remain largely the same as before and these include the following:

**Briefing and Question time:** Briefing is an age old mechanism for parliamentary involvement in foreign affairs. It also includes parliamentary sessions on debates, briefings, question time and press releases. In South Africa the first PCFA briefing session in the new millennium was held on the 3<sup>rd</sup> of February 2000. Indeed the first four PCFA sessions were primarily for briefing, which includes the [i] Briefing by P.Hain, the British Minister of State for Foreign & Commonwealth Affairs on 3<sup>rd</sup> February; [ii] Briefing by the Minister on South Africa Activities in Africa on 15 February [iii] Budget briefing on 1<sup>st</sup> March 2000 and [iv] Briefing on the Indian Ocean Rim on 8 March 2000.

Between 3<sup>rd</sup> February 2000 and 1<sup>st</sup> June 2008, there are about one hundred and ninety [190] entries with reference to documented activities or meetings of the Joint Parliamentary Committee on Foreign Affairs [PCFA]. However almost one hundred and fifteen [115] or about 57 percent of these were briefings and reporting/question time sessions. In terms of regularity the Parliamentary Committee on Foreign Affairs in South Africa is relatively active with about four meetings/ press releases per month. The subject matter seems also to weigh heavily in favour of African issues, which claims almost forty [40%] percent. This is not unconnected with South Africa's new role in Africa as political gladiators as well as a major player in Africa's new and emerging market for foreign direct investment. More so that the executive sector of government seem to be leading the African renaissance project in the wake of the transformation of OAU to AU in Durban in 2002.

But in Namibia the entries from 2004 to 2008 contains only one item that deals directly with the issue of foreign affairs. Hence it is argued that there is no better evidence to proof that there is a kind of low-level parliamentary diplomacy in Namibia. Almost all external and foreign matters were exclusively dealt with by the executive. With specific reference

to the activities of the Parliamentary Committee responsible for foreign affairs, Security and Defence, the Committee only reported on its visit to the hardship mission in March 2005. The three other reports between 2004 and 2006 were all about the defence component of the committee's responsibilities. These reports include the Report on the visit to military installation [2005], the Report on the motion on the increase in criminal activities and violence on innocent and vulnerable Namibians [November 2006], and the Report of the committee on visits to police stations/cells, prisons, border posts and military installations in the North-east and southern regions in 2006.

**Visitation/Representation/Fact-finding Missions:** This is another means by which the Parliaments particularly the PCFAs all over seek to play an active role in the monitoring of national interest that borders on foreign affairs. In Namibia the National Assembly's standing committee on foreign affairs, defence and security visited some Namibian diplomatic mission classified as 'hardship missions' in July 2007. It was reported in the [Parliament Journal, 2007] that the committee members discussed with head of heads of missions, their staff (both Namibian and locals) about the difficulties that they experience in fulfilling their duties. The committee looked at the following issues that affect Namibian hardship missions: economic situations; security situations; effectiveness of communication with the host country; water and electricity supply; education; health and accommodation.

In South Africa PCFA is regarded as a 'mobile committee', because the members of committee travel often on missions, going by the nature of its mandate. As a result there are numerous reports of visitation to other countries and fact-finding missions. However to what extent these reports are fed into executive decisions on those issues are still very hard to ascertain. Thus in the following section the article tries to explore the nature of executive-legislative friction over foreign affairs in South Africa and Namibia since the beginning of the new millennium.

#### **Evidence of Executive-Legislative Friction over Foreign Affairs**

After a series of conversational interview with a number of parliamentary actors and observers in Namibia and South Africa, it became very obvious that there is a kind of low-level legislative-executive friction over the conduct of foreign affairs in both countries. There are a number of indicators to illustrate this point and these include:

**Complaints over Budget and Foreign Policy Process:** First, the budget of the Ministry of Foreign [MFA] affairs in Namibia and Department of Foreign Affairs[DFA] in South Africa in practice do not get scrutinised by the PCFAs and the committee is seldom consulted on the same issue. This often draws the flak of the PCFAs in both countries. The crux of the friction is that the PCFA's budget remains the prerogative of the executive in both countries. With specific reference to Namibia, the PCFA do not provide opinion and the estimates submitted often get jettisoned or not considered most of the times. According to the PCFA Clerk interviewed in Windhoek, [who had worked at the National Parliament for twelve years], 'most of the times, to the surprise of the PCFA the actual allocation only gets known on the floor of the whole house or worse still on pages of newspapers'[Personal Interview, November 2007]. Secondly, anecdotal evidence suggest that the PCFA do not get to input on foreign policy both at the design stage and are often not involved at the implementation level. The Clerk interviewed further provided evidence to corroborate this point. According to the Clerk, 'I don't remember when the PCFA get invited by the Ministry of Foreign Affairs [MFA] for discussion on any foreign policy issue....no control at all and yet only PCFA is mandated to do this..'[Personal Interview, November 2007]

The Clerk of the PCFA further revealed that 'it was not until 2006 when there was a major uproar about military-related incident in the Northern part of Namibia, that the PCFA & Defence began to directly make recommendations'[Personal Interview, November 2007]. On the part of the executive the PCFA visits to Namibia embassies [hardship mission] abroad, though it relates to oversight functions of the PCFA, yet this exercise seem to have attracted serious reservations and complaints from the executive arm of government. The PCFA was perceived as interfering in the business of administering the country's foreign affairs.

**Limited Role in Envoy Nomination & Deployment:** With reference to Ambassadorial selection and posting the PCFAs in both countries feel sidelined. The PCFAs also often complain that they have very limited, if any, role in the selection and deployment of Ambassadors, High Commissioners and Consul-Generals. Evidence gathered also suggests that the PCFAs do not often have opportunity to scrutinise the credentials as well as integrity of the would-be envoys before posting. This is a profound concern, yet the PCFAs could not do much within this context, because this practice and responsibility is not regarded as a constitutional mandate. Again, apart from seeking involvement in the selection, scrutinising and ratification of South African and Namibia's envoys going abroad, the parliament should also be a major place for courtesy calls by incoming foreign diplomats soon after presentation of their letters of credence. It is further argued that because of the significant status, the legislature enjoys in any democratic governance, departing envoys should recognise this role and ensure to appreciate the need to include the parliament in their farewell tours. This seems not be a common practice as yet in Namibia and South Africa, though there are exceptions. For example, the *Parliament Journal*, 2007 recorded the farewell visit of the U.S Ambassador to Namibia, Ambassador [Mrs] Joyce Barr when she paid a courtesy visit to the Speaker of the National Assembly Hon.Dr.Theo-Ben Gurirab on 17 July 2007 to bid farewell to the Parliament.

**Limited role in the ratification of treaties, conventions and protocols:** After a rigorous content-analysis of the various Annual Reports released by the Namibia's Ministry of Foreign Affairs[MFA] and South Africa's DFA, it became obvious that it is actually in theory that both Parliaments are supposed to advise government on ratification of international treaties and conventions. With specific reference to Namibia, most of the treaties signed between 2005 and 2006, from Stockholm Convention on Persistent Organic Pollutants, to the Agreement Concerning the Treatment of War Graves of Members of the Armed Forces of the Commonwealth in the Territory of the Republic of Namibia did not enjoy any significant verification or contribution from the parliament. Rather the Attorney-General of the Republic of Namibia seemed to have been the preferred partner on these international matters. In fact, the MFA Annual Report [2006] noted that 'The Attorney-General being the principal legal adviser to government approves all the principal bilateral and multilateral agreements before they are entered into'

**Decision on strategic matters without recourse to PCFA:** In the late 1990s troops or peace-keeping force were sent from Namibia, to intervene in the DRC conflict and specifically to support the Kinshasa regime, led by Laurent Kabila, until he was assassinated by Congolese armed rebels. This action led to mild friction between the executive and the Legislature based on the argument that, the executive cannot send the military out on such a sensitive and high risk missions without the consent of the citizenry through the parliament. Another example of this limitation in the new millennium relates to the inability of the parliament to engage in debate that will lead to government position on UN Reforms: While the debate on UN reforms lasted with reference to African representation and position on the issue, the Namibia legislature did not officially discuss the issue nor were the parliamentarians able to offer any advice with reference to official government position. However, unlike the self-imposed or executively-orchestrated limitation experienced by the parliament the, executive arm of the government issued a statement on the subject-matter in September 2005. Isaak Hamata[ 2006] in his piece reported how President Hifikepunye Pohamba in his address to the 60<sup>th</sup> General Assembly of Heads of State and Government pledged Namibia's willingness to assist in the democratisation of the world body. The President further stated 'if the UN is to continue serving the interests of the world, it needed to be reformed.....we must be guided by the very principles of democracy, equity, justice and fairness for all. At the centre of this overdue exercise must be the compelling need to better serve all peoples, regardless of their race, religion or status of development'.

Documentary sources and personal interviews have established the fact that South Africa under Thabo Mbeki sought to promote economic justice and redesign a fairer global North-South relations. In the new millennium presidential diplomacy was at work when at various international forums the former president of South Africa harped on the importance of debt relief and elimination of poverty in Africa. In June 2002, it was the president that presented NEPAD to the G8 in Kananaski/Canada on behalf of Africa, and in August/September South Africa hosted the UN World Summit on Sustainable Development. By June 2003 President Mbeki had handed over the chairmanship of both the Non-Aligned Movement [NAM] and the African Union, but his government continued to devote much attention towards resolving the conflict in the Great Lakes region. Again since South Africa took up a non-permanent seat at UN Security Council, the country has tried to present and pursue the African agenda, though it has also come under intense international criticisms for voting not to take a stand against human rights abuses in Myanmar and opting for *quite diplomacy* approach towards Zimbabwe. The central argument here is that, most of the initiatives above were presidential in nature, from conceptualisation to implementation. In other words, from the NEPAD idea to how South Africa voted on the Security Council, the executive/presidency was completely in charge.

From the foregoing, as much as the parliament desires to be involved in Foreign affairs the South African and Namibian experiences have shown that 'presidential diplomacy' often supersedes 'parliamentary diplomacy'. i.e the executive arm of government have pre-eminently being in charge of the business of managing the foreign and diplomatic relations of both countries. But what informs Parliamentary interest in Foreign affairs? This question will be addressed in the next segment of this article.

### **Explaining Executive-Legislative Friction over Foreign Affairs**

In addition to constitutional requirement, why do parliamentarians seem to be interested in Foreign Affairs and how diplomatic business is conducted in any democracy? By means of conversational interview in both countries, it has come across that the idea of national interest is very central to the *raison d'être* for parliament-executive friction over Foreign Affairs. Although the term national interest is somewhat ambiguous, one can agree with Peter Shearman [1997], **who** usefully defines it *in terms of the common good of a society within the bounds of a nation-state*. That is to say, although between groups in domestic society there are conflicting interests, there exist general and common benefits to society that all members share irrespective of individual or group preferences on other issues. The basic common interests of any state are survival for itself and its population, maintaining the territorial integrity of the state, and enhancing its status and position in relation with other states. Conceptions of the national interest provided a powerful dynamic for mobilizing domestic society around specific political programmes and issues. A constant feature of

domestic politics in all types of pluralist political systems is competition between political groups to be seen as the one group that offers the best safeguard for maintaining national interests.

National interests are linked to perception of identity. Images of a nation and its place in the world can be drawn upon to mobilise what William Bloom[1990] refers to as a 'national identity dynamic' with government and opposition groups drawing upon, creating, and manipulating these images for their own ends in a struggle for political power. The assumption here is that political elites manipulate a social-psychological dynamic relating to a conception of national identity which is itself determined by the external environment. In other words conception of the national self are linked to perceptions of the external other. Without taking this socio-psychological argument too far, these idea of national identity linked to national security and perceptions of the international environment are useful for understanding the executive-legislative hassles, though at low-level, over foreign affairs in South Africa and Namibia in the new millennium.

Foreign policy and diplomacy can be viewed as the means to ensure the objective of defending national interest and, hence, simultaneously the strengthening of national identity. Foreign policy also provides, as Philip Cerny [1979] has put it: 'the specific instrument par excellence at the disposal of elites hoping to mobilise the population of a legally-recognised nation state towards legitimisation and political integration'. There are four important reasons why foreign policy and competing conceptions of national interests should be so powerful in the mobilisation of domestic society.

First, national interests are universal interest shared by all members of the society, transcending other cleavages based upon ethnicity, religion, culture, or class. Hence political groups are provided with the most potent force for mobilising the widest possible sections of the society.

Second, foreign policy provides a perfect discourse of politics that allows for escape from objective verification. Unlike specific economic or social policies, the feature of foreign policy, designed to defend the national interest, are removed from the same standards of immediate or short-term tests that can easily lead to failure.

Third, foreign policy is often more emotional as an issue affecting society, but it is often far more remote in terms of its impact on the individual. As an emotive issue the mass national public will always react favourably to policies which seem to enhance the national interest, and negatively to policies which seen as undermining it.

Fourth, foreign policy facilitates, much more readily than domestic policies, opportunities for the emergence of strong and charismatic leaders, who, rapping themselves in the national flag and the rhetoric of national identity, portray themselves as the only effective defenders of the national idea.

### Conclusion and Summary

In conclusion, the inability of the parliaments to influence the executive often on strategic diplomatic matters and the seeming second fiddle on foreign affairs may be of course due to one other reason. In addition to constitutional limitations, another reality is the multiple actors and forces exacting influence of the executives in this age of globalisation. The role of other actors, such as foreign powers, opposition political parties, the civil society/third sector and the media, are as crucial as that of national parliaments if not more. These other actors do influence the State behaviour more often than imagined and they can be extremely strong in pushing agenda through the executive arm of government. Sometimes this is being done by literally arm-twisting the executive in technical negotiations.

In summary the study has established the fact that the post-1990 broad-based and all inclusive democratic governance in Africa, with specific reference to Namibia since 1990 and South Africa in 1994, also incorporates as well a great deal of parliamentary activism. We have been able to establish that foreign policy is always a contested ground between executive and legislature, with the latter always [even in developed democracies] coming through as playing second fiddle in foreign affairs. The study located the attractiveness of foreign affairs both to the parliament and executive within the orbit of national interest, as defined by policy elite. The article further describes the parliamentary approach to participating in foreign affairs through the PCFAs. The article argues that though the PCFAs are tasked with specific oversight responsibilities relating to foreign affairs are nevertheless often find it difficult to do enough or do more. The study utilises several indicators to illustrate the PCFA/Parliament's frustration with the executive over foreign affairs administration. In conclusion, the article noted the factor of multiple actors as one reason the parliament-executive friction over foreign affairs may not be resolved soon.

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## On the Objective Orientation of Young Students' Legal Idea Cultivation

### -----Reflection on Legal Education for Chinese Young Students

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#### Abstract

Legal idea, as a kind of rational cognitive state, is the spiritual core of national laws. Traditional article- remembering legal education is either necessary or meaningful in practice. The cultivation of young students' scientific legal idea is vital for the success of national law modernization. In practice, to cultivate young students' scientific legal ideas, we should strengthen the recognition to the citizen nature of laws and the social functions, pay attention to people's desire, and emphasize on citizen rights' actualization and protection, especially the actualization of citizens' private rights.

**Keywords:** Young students, Legal idea, Objective orientation

Considering the problem of neglecting the cultivation of young students' legal ideas in the socialization of laws in China, this paper advances the important orientation for cultivating young students' legal ideas, with the hope of improving young students' legal competence, and offering guidance and helps for excluding all barriers concerning ideas and institutions in the process of legal evolvement.

#### 1. Understanding to legal ideas

The meaning of idea is extremely wide. There is not an acceptable definition up to now. According to the Encyclopedia of China (Philosophy), "idea" is a philosophical concept. It is "an ideal, eternal, and spiritual common paradigm".

In European philosophy, Immanuel Kant thinks that the idea is the concept originated from rationality, and the dream that is supposed to be pursued by rationality but never be realized (Immanuel Kant, 2004, p285). Hegel is the first man who integrates law and idea together. He thinks that "the idea of law refers to the concept of law and the actualization". "The idea of law is freedom (Hegel, 1961, p1-2)." English jurist Dennis Lloyd extremely emphasizes on the effects of legal idea. He points out that "it is undeniable that legal idea has contributed a lot to human being." "Considering the world tight situations, if civilization wants to live on, the dependence on this fundamental idea is stronger. (Dennis Lloyd, 2005, p278)"

In China, Taiwan jurist Mr. Shangkuan Shi has described the legal idea early. He thinks that "the supreme principle of laws' constitution and application is the idea of law. (Shangkuan Shi, 1984, p259-260)" "The idea of law is the directive principle of legal aims and methods. (Immanuel Kant, 2004, p285)" China mainland scholar Mr. Zuoxiang Liu agrees that "the idea of law is the actualization of legal objective orientation."

In this paper, legal idea means rational thinking and general recognition to laws' common issues and the nature. It is the substance of thoughts behind legal phenomenon, legal principles, legal system and mode, legal institutions and practices, and legal culture. It is the internal spirit of laws. Legal idea discards people's bias to laws, improving people's understandings to legal phenomenon and the nature from senses or experiences up to rational recognitions. Legal idea is extremely important for the construction of legal society, which directly impacts the foundation of modern legal system and the optimization of operation. In a sense, the legal modernization without the guidance of legal idea is blind. It will be impossible to actualize a real modernization.

#### 2. Practical meanings for cultivating young students' legal idea

Public law education for China citizens starts from the citizen law popularization movement in 80s at 20<sup>th</sup> century. The law socialization movement means to help citizens learn, understand, and master general legal knowledge. The government agrees that the law socialization movement basically realizes the popularization of legal knowledge, which makes the whole society respect and believe in laws. However, what people see and sense are far different from the fact. Many illegal activities happen sometimes. The great gap between the ideal and the fact makes it necessary to rationally

re-examine on China's legal education and popularization movement.

Young students are the main body of the future. Their thoughts and legal competence directly influence social development and state future. Young students are the group with vitality and easy to be shaped. They can accept new things easily. However, they are incapable of rethinking new things unlike the senior who has rich social experiences. How to educate them and teach them what will directly affect the effects of law socialization. As a matter of fact, what the education received by the young students is?

For a long period, all legal materials, readings, and books define the law as the sum of regulations on people's behaviors, which is made and accepted by the state based on ruling class' interests and wills, and is carried out by national forces. Apparently, laws are nothing but rules. In other words, they are legal articles. However, as people create laws, they create not only a set of complete systematic system and civilization, but more important develop unique spiritual culture, including legal values, legal spirits, and relevant ideas. Therefore, law is a kind system for social rules on one hand. On the other hand, it is a system for values, rights, and justice, offering a set of moral evaluation standard for social practice and social orders. Without any aspect, laws are imperfect. Especially as we merely take laws as a set of legal regulations, we may step into the risk that lays more stresses on law articles. Nazi Germany brings about tremendous disasters for the world in the name of "laws", which has been remembered by human being forever. So, it is easy to understand that, similar to a man with soul, law, firstly as a spirit, reflects a kind of values. Secondly, the law becomes a just, objective, and common effective standard. It is a kind of rule. However, the law popularization education starts from the second aspect. Logically, it is converse. It is time-consuming and gets less fruit.

The practice of legal socialization is not smooth, which is caused by mistakes of theoretical guidance. That is, we merely regard laws as specific legal articles and relevant legal regulations. As a result, law popularization is simplified as communicating and memorizing legal articles, neglecting to shape citizens' legal spirits and legal ideas.

Legal idea is the soul of laws. Legal rules are finally determined and restricted by legal ideas. In China, it is the government that constitutes laws. The basic frame and many details are introduced from western ideas and legal mode. These imported legal articles are not close to Chinese. In practice, Chinese do not want accept them but try every means to escape from them. The settlement of disputes depends on traditional interpersonal relationships and powers instead of laws. The escape from laws shows people's rationality of activities in real life. Therefore, in China the legal modernization can not be realized merely based on a set of specific legal articles and a group of strict juristic system. In addition, the values, ideas, psychology, and behaviors of Chinese are necessary factors. And the socialization of law in China is not only the popularization of legal articles, but concern the popularization and dissemination of culture, values, and ideas behind the articles, integrating these factors into people's personalities. The legal modernization starts from the socialization of legal ideas.

The starting point of constitutionality is to establish legal idea firstly. Contemporary and modern constitutionality is derived from the enlightenment movement of bourgeois thinkers. In a sense, without the great enlightenment movement, there is no fundamental and thorough legal reform. China ignores the cultivation of legal idea and tries to realize the socialization by popularizing legal knowledge. As a result, people may neglect the valuable judgments on social practice.

Therefore, rethinking present legal education on young students in practice, we will find that it is unnecessary and meaningless. What young students receive is nothing but cool legal rules and articles. What they learn is only to make judgments on cases according to legal articles. Surely, the socialization of legal articles is necessary in a sense. But it is only a kind of externalization of socialization of legal idea.

### **3. The objective orientation of cultivating young students' legal idea**

Legal idea, as a rational recognition state, is the spiritual core of national law. It reflects the general values of legal system. Advanced legal idea can help to delete outdated legal culture, improve citizens' legal competence, exclude all kinds of barriers concerning ideas and institutions in the process of legal evolvement, and form a modern legal environment benefiting social economic development. People, as the main body of legal system production and operation, is the most key and active factor. Young students, with their vitality and hope, are the backbone of the future. To improve young students' legal idea turns to be the key and the hope for China's legal modernization. If without the modernization of young students' thoughts and ideas, even there are developed economy, rich materials, and specific legal articles, it is impossible for the emergence of real legal modernization.

#### *3.1 To strengthen the recognition to laws' citizen nature and general social functions is the primary objective orientation of cultivating young students' legal idea.*

In socialist country, the base for proletarian dictatorship is the class struggle and confrontation, which is regarded as the motive for social progress. Accordingly, it tries to drive the progress of laws by strengthening the confrontation among people. However, as laws are merely taken as products of class struggle and confrontation, laws' relative independence and independent development law have been hid. Laws are used as tools for dictatorship. Usually, people emphasize

more on laws' effects on controlling the society and people, and neglect laws' relative independent nature and dignity. At this moment, laws are combined together with politics, being tools used by governors, without considering the attribute of guaranteeing people's rights and regulating people's behaviors. Laws' effects and values in social public functions are completely ignored.

Laws are supposed to serve all citizens. They are effective guaranties for established rights. Laws are not wills of certain class. They are not supposed to be used for only protecting certain class, party, or individual's interests. Laws are the Bible of citizen freedom (Marx. & Engels, 1964, p71). Under the condition of Chinese socialist market economy, young students should firstly get rid of outdated theories that take laws as tools for dictatorship and class conflict. If we still regard laws as wills of ruling class and tools of government, it is disputable theoretically, logically and practically.

The first lesson for young students is about the citizenship and sociality, concerning how to cultivate young students to build scientific legal idea. Laws reflect social economic relationship objectively. Any person, class, party, and organization must operate in the legal scope. If laws only embody the ruling class' wills instead of the common welfare, citizens would not like to promote and maintain laws. Even laws are constituted in detail, it will not work. Presently, as China is developing socialist economy, young students should completely accept the citizenship and sociality of laws in thoughts, which is the primary objective orientation for cultivating young students' legal idea.

*3.2 To be people-oriented is the core objective orientation of cultivating young students' legal idea. Laws should respect people's dignity, rights, and freedom. With this basis, we can re-position the legal role of people.*

As cultivating young students' legal idea, many arguments concern people's personality and integrity, class and super-class, uniqueness and commonness. The theme of these arguments is about how to treat people's status and the relationship between individual and society. At present in China, the ultimate aim of laws is to make individuals come back to individuals, and to people. The core issue of laws is the problem of people in laws. Modern legal system develops around "people". The full affirmation to humanism and the deep cares for human desire serve as the start of legal modernization. From the legislation and economic development history since the foundation of China, we know that economic and social development associate closely with human liberation.

To cultivate young students' legal idea, we should break the politics-supremacy view in practice and build a people-oriented view. In a politics-supremacy country, all citizens are regarded as political animals at the first place. National power is supreme and unlimited, and citizen right can not be protected. Therefore, all evaluations or positions on people are based on political standards. In this country, nobody has the chief status. A person is either governed by others or a tool for government. Only when in a society where the citizenship develops well and realize an effective balance between citizenship and politics, people can recover their dominating position, achieving the integration of subjectivity, sociality, and politics. The view that neglects or hides people's desire and interests in purpose, and fails to guarantee people's values and dignities is illegal in nature. A people-oriented society should emphasize on people's free development, aiming at actualizing people's values completely, ensuring interests of groups and individuals legally, and respecting individual personality and dignity fully. Everyone takes part in social development and get benefits from social development fairly. To be people-oriented is to take people's thoughts, desires, and needs as the base. The pursuit for interests is the motives for social development and progress. Individuals are the best judges for their welfare, which should be affirmed completely. Respect people's rationality in making choices, including political choices. In a sense, without re-positioning the status of people, without complete affirmation and respect for individual status, there is not right legal idea or modern legislation.

*3.3 The transformation from power-oriented to right-oriented is an important objective orientation for cultivating young students' legal idea. In fact, it is to deepen the core objective orientation for cultivating young students' legal idea.*

Citizen rights are the roots of state power. All democratic constitutional countries agree this fact ----- state power is from citizens. The ultimate aim of state power is to protect and actualize citizen right, which has already been accepted widely by all constitutional countries.

Presently the key for China's legal construction is to establish the right-oriented idea. In tradition, China lacks of this idea. For a long period, in China the power occupies the dominating position. It emphasizes that citizens should fulfill all kinds of responsibilities for the state and the government. Common people have no rights in a country represented by an empire, not mention to protect rights by laws. After the foundation of socialist China, at the planned economic time, personal interests are integrated with common interest together, which completely excludes people's personal rights. Laws are used by the government for serving the economy. In a sense, laws completely become tools for actualizing administrative powers.

Along with the construction of China's socialist market economy, the protection for personal properties turns into more direct and stronger base for people's independence. Individuals live for themselves instead of others as tools. Only when make up clear and affirmed guaranties for personal rights, will people have motives for production and economic organizations will be more active. If make a reverse on the internal logic that rights are the base for power, it will cause

an invasion and repression of power on rights.

Although young students live in the market economic environment, Chinese traditional obligation- oriented, power-oriented, and order-oriented ideas affect them deeply. These outdated ideas still exert their effects on social practice in China. Especially in governments' legal practice, they always take laws as tools for maintaining social orders purposely or not. Therefore, the original idea for legislation is how to actualize state power and how to achieve effective management, instead of offering better services. As for the relationship of public rights and private rights, the state usually gets the dominating position based on their monopoly over resources. All these social practices turn into significant barriers and difficulties for cultivating young students' legal ideas. We know that the function of market economy is to respect rights. People can do anything that is not forbidden by laws. The state and the government can not stop them as will. The government can not do the thing that is not approved by laws. As for this point, along with the final establishment of socialist market economy and the process of legislation, young students will pay attention to it more and more in practice. If an economic development overlooks the dominating position of citizen rights, it will lose vitality soon. An economic development without emphasizing rights lacks of necessary social base. Young students should remember that they are the subjects of laws, which is necessary for cultivating their legal idea.

*3.4 To build an idea of emphasizing citizen private right should serve as the specific orientation of cultivating young students' legal idea, which is necessary for transforming from the power-oriented to the right-oriented.*

As amending the Constitution in 2004, the Constitution of China clearly establishes the protection to citizens' private properties and sets regulations on the expropriation, requisition, and compensation for citizens' private properties. The state and the society pay more and more attention to the protection to citizens' private interests. However, concerning the relationship between public interests and private interests, China is under the influences of traditional legal culture for a long period. The protection to citizens' private interests is still weak.

As the west is stepping into the modernization, the spirits of private law autonomy and the ideas of private law priority occupy a more and more important position. In China, due to the ancient tradition of "combination of civil law and criminal law" and "more stresses on criminal law instead of private law", private law does not obtain a desirable position. After the foundation of new China, the attitude to the private right in civil laws is almost negative. There is not a proper environment for the growth and development of fair and independent rights. In addition, due to China's undeveloped market economy, using public legal methods to adjust private legal relationships, private laws lose the economic base.

Modern social market economy needs a set of private law system that takes civil laws and commercial laws as the base to protect market subjects, private property right, and personal right. Only when there is a private law system that focuses on civil laws and commercial laws, a free, open, independent, and effective society will be more developed, and stable, and the modernization of people will be realized really. An English jurist Henry Maine has said that to judge a country's civilization degree, we can examine the proportion of civil laws and criminal laws in the country. A semi-civilized country has less civil law but more criminal laws. A civilized country has more civil laws but less criminal law (Henry Maine, 1959). In the process of China legal modernization, it is necessary to constitute a private law system that takes civil laws and commercial laws as the core and is right for socialist market economy, in order to guarantee saint properties, free contracts, sincerity and credit, achieving the harmonious interpersonal relationship and social progresses.

Surely, as we emphasize the private law system that focuses on civil laws and commercial laws, we do not deny the public laws and their effects. We argue that the private laws should obtain the necessary position based on reforming present public law system. As young students participate in social life and face sorts of complex legal phenomenon, they should purposely study and analyze the growth mechanism of private laws, based on recognizing the division of public laws and private laws, protecting the private law system that takes civil laws and commercial laws as the core, getting rid of outdated legal ideas, and establishing the private law priority idea.

#### **4. Postscripts**

Based on studying the cultivation of young students' legal idea, this paper advances four objective orientations for cultivating young students' legal idea at present. But it does not mean that there is only the four orientations. On the contrary, according to the present condition of cultivating young students' legal idea in China, we should firstly establish the four orientations as we educate young students with socialization, such as popularizing laws among young students.

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## Global Financial Crisis and the Clamor for a New World Financial Order – An African Perspective

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### Abstract

The Bretton Woods institutions (BWIs) form the core of the world's international financial institutions (IFIs). In the light of the current financial and economic meltdown, the failure of the BWIs to forecast and cushion the impact for member countries, particularly; its graver consequences for developing countries have exposed the inherent weaknesses in the system. Consequently, there has arisen the call for a new world financial order that will be more representative of the world.

**Keywords:** Bretton Woods Institutions (BWIs), International financial institutions (IFIs), Financial and economic meltdown, World financial order, developing countries

### 1. Introduction

Since World War II (Note 1) and its aftermath, the fabric of the world's financial and economic structure has not been threatened to the point of imminent collapse as has been seen recently (Note 2). What started as a mere housing sector meltdown (Note 3) in the United States of America, soon spread the world with varying degrees of the contagion effect (Note 4). As a result of the unpreparedness of the rest of the world to the contagion effect and consequences of the financial crisis, they were hard hit by the crisis. Consequently, panic-induced measures which were hastily formulated failed to stem the tide of the titanic crisis.

Apparently, as the governments of the world economies felt 'ambushed' by the crisis, so did the international financial institutions (hereinafter IFIs), particularly, the Bretton Woods institutions (hereinafter BWIs) (Note 5). Although their mandate and charter charged them to serve as the watchdogs of the world's economic and financial developments, yet they failed to monitor and warn the world of the imminence of a crisis that is so grave and likely to cripple the entire world's economic and financial foundation (Note 6). Such failure on the part of the IFIs and the BWIs in particular, no doubt, has justifiably raised a couple of questions ranging from the utility of the BWIs to their efficacy, if any. Some have wondered also how the BWIs, mostly headquartered in the United States, could have failed to notice such a crisis brewing in their neck of the wood (Note 7). Others have used the opportunity to clamor more vociferously for a re-hauling of the Bretton Woods institutions (BWIs) as presently constituted.

From an African perspective this writer has posited elsewhere (Note 8) that the BWIs were not formed *ab initio* to serve the primary interest of developing countries in general and Africa, in particular. Such assertion can be justified by the fact that at the formation of the BWIs, most of the developing countries and indeed African countries were politically disenfranchised by colonialism (Note 9). As a result, they were not parties to the conferences which produced the BWIs. Since they were not present neither their interests nor their positions were canvassed and protected at the conferences (Note 10). Consequently, the BWIs as presently constituted are the products of mostly European and American governments while their principal offices are occupied by the representatives of those governments (Note 11).

It is in light of the foregoing that this work will attempt to join the growing army clamoring for a new world financial order that will not only be more responsive to the emerging challenges of the 21<sup>st</sup> century but will be truly representative of the 'new' world of developing countries in general, and Africa, in particular.

Part II will review the history of the IFIs, particularly the BWIs. Part III will identify and analyze the key factors which gave rise to the present financial crisis. Part IV will focus on the principal way in which most governments have responded to the crisis by taking over majority of the badly affected businesses in their countries. Here, we shall attempt to distinguish benevolent nationalization from the typical kind of nationalization. Part V will proffer some basis for the clamor of the new world financial order. Part VI will conclude with recommendations aimed at making the new BWIs to be truly representative of the developing countries.

## 2. Evolution of the Bretton Woods institutions (BWIs)

The BWIs form the core of the class of international financial institution (IFIs) whose functions and responsibilities involve the formulation, regulation and monitoring of the financial and economic policies and development projects which impact the World (Note 12). The evolution of the BWIs began as a matter of necessity in the aftermath of the World War II (Note 13). Upon the cessation of the war, the leaders of the victorious Allied Powers converged in Bretton Woods, New Hampshire, in 1944 under the auspices of the United Nations Monetary and Financial Conference. Cognizant of the vital role that discriminatory trade and economic practices played in causing the war, the leaders were resolved to fashion a comprehensive financial and monetary system that would not just forestall a re-occurrence of war, but spur economic growth.

The conference aimed at creating a tripartite system, namely, the International Monetary Fund (IMF) (Note 14), the International Bank for Reconstruction and Development (IBRD) or the World Bank (Note 15), and the International Trade Organization (ITO) (Note 16). The conference ultimately succeeded in creating the IMF and the World Bank, but failed to create the ITO. Consequently, the general agreements which had been formulated preparatory to the creation of the ITO became, by default, the tripartite system of the BWIs some years later. At subsequent conferences which spanned from 1946 to 1948, the General Agreement on Trade and Tariffs (GATT) was finalized. Conceptually, the original goal was for GATT to be an embodiment of the results of the tariff negotiations, while the ITO would serve as the organizational framework for the implementation of the GATT provisions. As a result of the failure of ITO to materialize (Note 17), under the anomalous GATT regime as both the Agreement and the organization, nation participants were creatively referred to as “contracting parties” rather than as “nations.” (Note 18)

While the IMF was created to repair the disintegration of the international monetary system after the war, the World Bank was created to stimulate and support foreign investment which had declined significantly. It is worthy of notation that in the course of their development, both the World Bank and the IMF have collaborated in the enforcement of structural adjustment programs (SAPs) and the imposition of otherwise painful ‘conditionalities’, respectively (Note 19). The unpopularity of these conditionalities in African countries is understandable in light of their negative implications on “domestic issues as wage rates, levels of public expenditures, budget deficits and export levels.” (Note 20) The GATT, however, was intended to help reverse the protectionist and discriminatory practices which tremendously fuelled the war. In the subsequent amendments to GATT, specifically, the eight-year Uruguay Round of Talks (1986-1994), the WTO was formed in 1996 as a full-fledge international organization for the efficient implementation of GATT as was originally envisioned under the ITO. The WTO introduced a couple of innovative provisions which included substantial revisions in the trade dispute settlement procedures, expanded its coverage to include trade in services (GATS), the protection of all trade obligations, as well as the obligation of all member states to abide by all the provisions of the agreements.

As this writer posited earlier, by the end of World War II, most of the countries presently classified as developing were either under colonial rule or just emerging from colonial rule into political independence (Note 21). Consequently, the majority of them still under colonial rule could not attend the Bretton Woods conference, while the few which were emerging from colonial rule lacked the political clout to make substantial inputs at the conference dominated by the leaders of the victorious Allied Powers. Indeed, the final form and shape of the BWIs, *ipso facto*, reflected substantially the Euro-American interests while the governing structures were (and still is) dominated by their representatives (Note 22). Regardless of the form of the BWIs, it was expected that they will serve as the international watchdog for economic and financial crisis as is presently being experienced.

## 3. Crisis Factors

According to Professor George Walker, “the crisis arose as a result of a combination of factors” (Note 23). He, however, identified five major factors as follows – credit accumulation (and economic bubbles); product complexity, valuation limits, risk separation and liquidity provision (Note 24). Other more general underlying trends, according to him, include financial innovation, securitization and repacking, disintermediation, the privatization of debt and the ‘deconstruction of risk.’ (Note 25)

### 3.1 Credit Accumulation

The over supply of cheap credit for an unreasonably long period of time, particularly in the United States of America, understandably created “insatiable corporate and household appetite for debt and consumption.” (Note 26) The result was that the massive accumulation of credit and debt by households and the corporate world resulted in an inevitable economic and financial burst.

Although the September 11 2001 terrorist attacks (Note 27) justified the maintenance of low interest rates to spur recovery in the U. S. economy, the rates should have been gradually reviewed as the economy continued to show signs of recovery. Rather, the low and cheap rates were maintained long after the economy recovered until the bubbles burst.

### *3.2 Product Complexity*

As the appetite of the corporate world and the households grew insatiably, so was the corresponding demand on the banks for more debt products. The banks responded by creatively fashioning new and complex debt products.

In addition to the 'formal' banks (Note 28), there arose the 'informal' banks (Note 29) attracted by an apparently insatiable consumer appetite. Working in concert and competition, both banking sectors 'flooded' the economy with an endless variety of cheap debt products. The cycle thus became vicious.

### *3.3 Asset Valuation*

The complexity of new financial debt products deprived the banks of the vital and accurate rating of the volatility of such products. Rating agencies (Note 30), though lacking in requisite expertise to correctly rate these products, nevertheless responded to corporate pressures to provide some rating, even if flawed. As a result, otherwise risky and highly volatile debt products were rated unjustifiably high and good. By the time banks like Halifax Bank of Scotland and Royal Bank of Scotland realized the magnitude of their respective exposure, it was too late.

### *3.4 Market Risk*

The co-mingling of the relatively new and 'toxic' (Note 31) debt products with the time-tested and proven safe debt products ultimately 'polluted' the entire debt market. This was most apparent in the US economy where the new mortgage securities from the subprime market 'polluted' the rather conventional securities products. For example, it has been estimated (Note 32) that the \$500bn subprime market was only likely to default by a quarter of the entire portfolio, i.e. \$125bn. However, by co-mingling the 'toxic' subprime product with the time-tested regular products with an estimated value of \$1 trillion, the entire market became severely infected.

### *3.5 Market Support*

In the wake of the crisis, there arose severe scarcity of credit in interbank transactions. The line of credit typically provided by central banks could not adequately cover the deepening credit crunch faced by most banks. As banks scrambled for support in the form of additional credit infusions from their governments, some governments (particularly the US and the UK) were initially reluctant to intervene in what they erroneously thought would be rectified by normal market forces (Note 33). By the time the governments decided to throw credit life-lines at the banks, the economic horse had bolted.

### *3.6 Others*

As we pointed out earlier, other contributory factors identified by Professor George Walker include financial innovation, securitization and repacking, disintermediation, the privatization of debt and the 'deconstruction of risk.' (Note 34) This writer strongly believes that with particular respect to the U.S., the prosecution of two wars (Note 35) simultaneously contributed tremendously to the credit crisis. In order to finance both wars which were costing billions of dollars monthly, the U.S. government sucked up facilities in the economy which would otherwise have been available to households and the corporate world. Moreover, the reluctance of the U.S. government to initially intervene, aside from the erroneous diagnosis of the problem, may also have been informed by the already mounting sovereign debt (Note 36) and huge deficit faced by the government.

## **4. Crisis Response**

After their initial reluctance (and outright refusal) to 'meddle' in the free market forces, governments intervened, albeit lately, to salvage what was left of their severely battered economies. Due to their belated intervention, by the time they did, palliative measures were grossly inadequate to stem the tide.

In the final analysis, the only viable option was an outright takeover of the businesses whose outright collapse would gravely impact their respective economies. Thus, began what for a lack of better expression, we shall call 'benevolent nationalization.'

### *4.1 Benevolent Nationalization*

The general assumption is that it is only in communist or socialist types of government that factors of production are owned and managed by the government. However, under certain circumstances, governments of countries which profess and champion the ideals of free market economies can, and do, takeover the factors of production for a variety of reasons. Infact, as some commentators have rightly opined, "all governments are in business to some degree." (Note 37)

What, therefore, is nationalization? Nationalization is the process whereby governments, in exercise of their economic sovereignty, take over a vital productive sector which had been privately owned and managed. Again, there is a pervasive assumption that such takeovers are 'hostile' because they involve businesses with substantial foreign ownership interests.



It is in an attempt to distinguish between 'hostile' takeovers (Note 38) and 'non-hostile' takeovers (Note 39) that we have described the latter as benevolent nationalization. The recent examples of governments in Europe and the U.S. taking over very vital businesses in response to the global economic crisis fit the unique type of nationalization process called benevolent nationalization.

#### 4.2 Nationalization Factors

Inherent in all nationalization process are some motivating factors; some of them hostile, while others are not. Interestingly, both kinds may be identified simultaneously in any given effort to nationalize a business. The popular factors have been identified to include the following (Note 40):

(4.2.1) To force the firms to pay more taxes from their profits. Inherent in this factor is an overriding suspicion by government that the firm is concealing the exact profit amount. (Note 41)

(4.2.2) Government believes it can run the firm more profitably (Note 42). This factor overlaps with the former one because it is driven by the desire of the government to maximize the profit.

(4.2.3) Ideological reasons. Typically, left-wing governments, communist and socialist governments believe strongly in government takeover of firms, particularly, those whose functions are critical to the welfare of the people (Note 43). Such has been the case in Nigeria, Britain, France, Canada, Venezuela, etc.

(4.2.4.) For political expediency. Political motivations, especially during election year, compel the ruling political party to sustain sometimes unprofitable firms in order to win re-elections. (Note 44)

(4.2.5) To protect government investment in the firm (Note 45). At times, due to the huge amount of money already invested by the government in a firm, it naturally wants to be in control.

(4.2.6) As a consequence of war. Governments, as a price of war, have justified the takeover of firms owned by their enemies. (Note 46) This was the case with the European takeover of German-owned firms after World War II. Similar example was seen in the U.S. after the attacks of September 11 2001 (Note 47), when the U.S. government nationalized all the firms linked to Al Qaeda and froze all their accounts.

(4.2.7) In response to grave economic and financial crisis (Note 48). Under extremely difficult economic and financial conditions, governments can takeover firms locally owned if such response appears to be the last option to avert the worsening of the national crisis. This is the prevalent response of many governments in Europe and the U.S. under the current global economic crisis which has apparently defied the solutions of the free market forces. This is our classic example of benevolent nationalization. (Note 49)

### 5. Case for a new world order

The need to create a new world financial order in the light of the current financial crisis is premised on a variety of reasons which include political harmony, political dignity, flexibility, re-enforcement, diversification, etc. Let's look at them *seriatim*.

#### 5.1 Political harmony

The current BWIs were creations of post-World War II. The exigencies of the aftermath of the war motivated the creation of these institutions, and greatly influenced their composition and objectives. After over six decades of operation (Note 50), these institutions are faced with a completely 'new' world from the world in existence when they were created (Note 51). Consequently, the scope of their operation has tremendously expanded while their responsibilities have increased exponentially.

Further, as more countries have since then gained their political independence and swelled the rank of these institutions, (with varying degrees of influence), they have consistently clamored for a re-distribution of influence and resources within these institutions. They argue, and rightfully so, that the concept of independence and sovereignty should entail not just participation but some stake in the affairs of these institutions.

More critical is the elimination of what one commentator (Note 52) classified as the 'creditor' mentality and 'debtor' mentality in these institutions which is antithetical to the international collaboration of all member countries critically needed in order to ensure the efficient operation of these institutions. No wonder that in the light of the current financial crisis, the clamor for a new world order has gained tremendous momentum.

#### 5.2 Political dignity

Prior to the current financial crisis, the bulk of the work done by these BWIs (particularly the World Bank and IMF) in the past four decades was in developing countries. Thus, most of the policies developed by them were fashioned for the benefit of the developing countries. The most controversial of them all framed as 'conditionalities' for the receipt of financial assistance connotes far-reaching political, social, and economic reforms in the recipient country. Research

shows that some of the conditionalities have tremendously contributed to the instability and eventual overthrow of some governments in some developing countries.

Critics of these harsh conditionalities have accused the BWIs of insensitivity in the formulation and enforcement of these conditionalities. They allege that the BWIs adopt a one-size-fits-all package which lacks knowledge of the peculiarities of each developing country (Note 53). In order to avert such criticism and ensure the credibility of such reform packages, it is suggested that the input of the recipient country be sought and incorporated in the respective reform package formulated for that country.

### *5.3 Flexibility*

Following from the point enumerated above, apart from harnessing political harmony and collaboration, a re-invented world financial order will address the vital issue of flexibility in responding to the evolving roles and challenges constantly faced by such institutions. Take for instance, the World Bank, which upon creation was devoted primarily to the rebuilding of devastated Europe. Since the successful accomplishment of that role, its roles have evolved and will continue to evolve in an ever-changing and dynamic world. The need for flexibility, therefore, can not be over-emphasized. Ditto for the other institutions.

### *5.4 Re-enforcement*

A new world financial order which not only takes cognizance of the 'new' world but fully integrates members of that new world into its decision-making organs with equal access to resources and responsibilities will better serve the world. There is no doubt that members from developing countries will enrich these institutions with their human capital thereby re-enforcing the human capital base of these institutions. In the final analysis, both these institutions and the world they serve will be the chief beneficiaries. It is on the basis of this point that the earlier criticism of the Bretton Woods II is premised. A global financial crisis in the magnitude and reach as is currently being experienced demands a truly global approach in the search for a lasting solution(s). It can not be the exclusive preserve and privilege of the few 'elite' countries called the G20.

### *5.5 Diversification*

In this context, special cognizance is paid to the chief source of the current global financial crisis – the US economy. The current BWIs and indeed the IFIs are heavily dependent on the well-being of few Western economies, primarily, the economy of the United States of America. Thus, the saying that when the US economy sneezes, the world would catch cold takes a literal meaning. As we stated earlier, the current crisis which emanated initially from the meltdown in the US housing sector spread the entire US economy and the world economy like a wild fire in the harmattan. Such an over-reliance is not safe for the overall well-being of the entire world's economy.

However, if the new world financial order is fashioned in such a way that no country's economy can be so dominant as to literally 'pollute' the entire world economy, it will save the world a repeat of the current crisis on such a global scale.

## **6. Conclusion**

The current global economic and financial crisis has starkly exposed the inefficiency of some IFIs, particularly, the BWIs. Not only have they failed in their core function of monitoring the economic and financial developments on a global basis, but they have also failed to monitor such development arising from their neighborhoods in Europe and the U.S.

As a result, world leaders from France, UK, Japan, etc. have called for a new world financial order (Note 54). African countries, and indeed all developing countries, must join in the clamor for the reform of the IFIs, particularly, the BWIs. Such a reform must entail "appropriate institutional or other diplomatic concessions...including amending the composition and voting rights on the IMF, World Bank and other IFIs' boards." (Note 55) The convening of the 'Bretton Woods II' (Note 56), under the auspices of the G20 'Leaders Summit on Financial Markets and the World Economy', it is submitted, was a faulty beginning (Note 57). Such a conference should not have been limited to only the G20 leaders, but should have been convened under the United Nations General Assembly, thereby ensuring a more global participation of all nations.

Understandable that during the original Bretton Woods conference, African participation was limited due to colonialism (Note 58). However, there should be no justification for the continued exclusion of all developing countries (apart from some in attendance as observers), and indeed African countries, under the current Bretton Woods II.

In addition to reforming the BWIs, other reform measures which have been proposed include "financial system revision, regulatory revision, supervisory revision, crisis management revision and institutional revision." (Note 59) It is ironic that the genesis of the current global financial crisis emanated from the U.S. and Europe; yet, the impact is felt in varying degrees in other parts of the world, including Africa (Note 60). Inexplicably, those other parts of the world are excluded in the 'global' search for the solution to the crisis. Hopefully, Bretton Woods II will not be a case of old wine in new bottle.

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## Notes

Note 1. World War II (1939-1945) was fought between the victorious Allied Powers and the Axis Powers. The Allied Powers comprised of major players like the United States of America, United Kingdom, France, Soviet Union and China. The Axis Powers, on the other hand, comprised major players like Germany, Japan and Italy. Although the Allied Powers won, yet; it is estimated that the war cost them over seventeen million of their military personnel and over thirty three million civilians. On the contrary, the Axis Powers lost an estimated eight million military personnel and over twelve million civilians.

Note 2. From London to New York to Japan, the present global financial crisis has rocked the foundation of the world's major financial and economic pillars. In all these economies, unemployment has hit double digits while most banks are struggling to survive and others have collapsed.

Note 3. The subprime mortgage defaults in the US heralded what turned out to be a global economic and financial crisis of unimaginable proportions.

Note 4. Contagion effect in this context connotes the pollution of other sectors and economies by the 'toxic' subprime mortgage defaults in the U.S.

Note 5. International financial institutions (IFIs) comprise of all the international organizations whose mandate is to formulate, monitor and enforce financial policies on a global scale. The major component is the Bretton Woods institutions (BWIs) which are the IMF and the World Bank. The WTO, although replacing the originally conceived ITO under the Bretton Woods model was birthed in 1996.

Note 6. Article IV, section 3 of the Articles of Agreement of the IMF specifically provides for the surveillance function of the Fund. Section 3 provides that (a) The Fund shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article. (b) In order to fulfill its functions under (a) above, the Fund shall exercise firm surveillance over the exchange rate policies of members, and shall adopt specific principles for the guidance of all members with respect to those policies. Available at <http://www.imf.org/external/about/histcoop.htm>.

Note 7. The World Bank and IMF are both headquartered in the US while the WTO is headquartered in Europe.

Note 8. See Ogbodo, S. Gozie (2009). The Evolving Roles of certain International Financial Institutions in Developing Countries under International Law in C.C. Nweze (Ed.), *Contemporary Issues on Public International and Comparative Law*, Vandeplas Publishing, 2009.

Note 9. Colonialism of African states deprived them of their respective sovereignties. As a result, those under colonialism could not participate as sovereign states during the Bretton Woods conferences. Many African countries swelled the membership of both the IMF and World Bank beginning from the 1950s and 1960s when many of them gained their political independence.

Note 10. Ibid

Note 11. Since the formation of the World Bank and the IMF, the head of each of them have been Americans and Europeans, respectively. The Presidents of the World Bank since creation are as follows: Eugene Meyer (June 1946 – December 1946), John J. McCloy (March 1947 – June 1949), Eugene R. Black (July 1949 – December 1962), George D. Woods (January 1963 – March 1968), Robert S. McNamara (April 1968 – June 1981), Alden W. Clausen (July 1981 – June 1986), Barber Conable (July 1986 – August 1991), Lewis Preston (September 1991 – May 1995), James D. Wolfensohn (June 1995 – May 2005), Paul Wolfowitz (June 2005 – June 2007) and Robert B. Zoellick (June 2007 – present). See <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES/O>. The Managing Directors of the IMF since creation are as follows: Camille Gutt from Belgium (May 6, 1946 – May 5, 1951), Ivar Rooth from Sweden (August 3, 1951 – October 3, 1956), Per Jacobsson from Sweden (November 21, 1956 – May 5,

1963), Pierre-Paul Schweitzer from France (September 1, 1963 – August 31, 1973), H. Johannes Witteveen from the Netherlands (September 1, 1973 – June 16, 1978), Jacques de Larosiere from France (June 17, 1978 – January 15, 1987), Michel Camdessus from France (January 16, 1987 – February 14, 2000), Horst Kohler from Germany (May 1, 2000 – March 4, 2004), Rodrigo de Rato from Spain (June 7, 2004 – October 31, 2007), Dominique Strauss-Kahn from France (November 1, 2007 – present). See <http://www.imf.org/external/np/exr/chron/mds.asp>

Note 12. The BWIs comprise of the IMF which is an intergovernmental organization of 186 countries. It was created in July 1944 when representatives of 45 countries met in Bretton Woods, New Hampshire in the US for that purpose. See <http://www.imf.org/external/about/histcoop.htm>. Same for the World Bank which became effective on December 31, 1945. Its current membership is also 186 countries. See <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/O>.

Note 13. Note 1, *supra*, on World War II.

Note 14. The IMF was created in July 1944 with the mandate to “foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world.” See <http://www.imf.org/external/about/histcoop.htm>

Note 15. The World Bank started the formation of one of its two primary lending organs, the International Bank for Reconstruction and Development (IBRD) in 1945. Its original mission was to facilitate the reconstruction of Europe. Later, it expanded its mission to facilitating development lending at preferential rates. The other lending organ, the International Development Association (IDA), was formed in 1960 to facilitate development in the poorest countries of the world by providing them lending facilities at concessional (zero-interest) rates and grants. See [http://siteresources.worldbank.org/EXTARCHIVES/Resources/WB\\_Historical\\_Chronology\\_1944\\_2005.pdf](http://siteresources.worldbank.org/EXTARCHIVES/Resources/WB_Historical_Chronology_1944_2005.pdf).

Note 16. The ITO suffered a “still birth” when the US government at the time failed to secure the support of the US Congress to authorize the President to ratify the ITO draft Agreement.

Note 17. *Ibid*

Note 18. In the absence of an organization envisioned under the ITO, the surviving GATT lacked the character of an international organization, thus nation participants were referred to as “contracting parties.”

Note 19. The World Bank’s Structural Adjustment Programs (SAPs) and the IMF’s conditionalities work simultaneously by insisting on domestic policy reforms in the beneficiary countries. According to the IMF, conditionality is the link between the approval or continuation of the Fund’s financing and the implementation of specified elements of economic policy by the country receiving the financing. See IMF, ‘Conditionality in Fund-Supported Programs – Overview’ <http://www.imf.org/external/np/pdr/cond/2001/eng/overview/index.htm>, cited by Garcia, F.J. (2007). *Global Justice and the Bretton Woods Institutions*, JIEL (461)

Note 20. See Garcia, F.J., *ibid*

Note 21. See note 8, *supra*, Ogbodo, S. Gozie (2009). *The Evolving Roles of certain International Financial Institutions in Developing Countries under International Law*. See also note 9, *supra*, on colonialism of African states.

Note 22. See note 11 which lists all the past and current leaders of both the IMF and the World Bank. All of them, past and present, are either Americans or Europeans. The voting power of all African countries in the highest organs of both institutions is also negligible notwithstanding the current population of African countries in these institutions. For instance, the actual voting power of all African countries on the Executive Board of the IMF is less than 5% of the total votes. See <http://www.imf.org/external/np/see/memdir/eds.htm>.

Note 23. See Walker, George (2009). *Credit Crisis, Bretton Woods II and new global response* :pt 2, 2 JIBFL 77, p.2

Note 24. *Ibid*, Walker, George (2009) p.2

Note 25. *Ibid*, Walker, George (2009) p.2

Note 26. *Ibid*, Walker, George (2009) p.2

Note 27. On September 11, 2001, coordinated attacks were carried out on the US by terrorists linked to Al Qaeda group, led by Osama bin Laden. The twin towers of the World Trade Center in New York and the military headquarters of the US called the Pentagon were destroyed. Thousands of lives were also lost in the attacks. The US government reacted by waging wars on Afghanistan and later on Iraq, for harboring Osama bin Laden and for allegedly supporting Al Qaeda, respectively.

Note 28. ‘Formal’ banks included the commercial and mortgage banks.

Note 29. ‘Informal’ banks were the money-lending shops and kiosks which arose in the lucrative era of cheap lending and huge profit.

Note 30. Financial products and securities are typically subjected to a rating process by the rating agencies.

Note 31. See Walker, George (2009), note 23, *supra*, p.4

Note 32. *Ibid*, Walker, George (2009) p.3

Note 33. This was the case of the US government when, initially, then President George Bush insisted that government will not intervene in the free working of the market forces.

Note 34. See Walker, George (2009), note 23, *supra*, p.2

Note 35. See the September 11, 2001 terrorist attacks on the US, note 27, *supra*

Note 36. Sovereign debt is the total outstanding debt owed by a country as a sovereign state.

Note 37. See Ball, McCulloch, et al; (1998). *International Business: The Challenge of Global Competition*, McGraw-Hill Irwin, 8<sup>th</sup> ed, p. 353.

Note 38. 'Hostile' in this context is used to describe the government takeover of businesses with substantial foreign ownership interests as well as cases where the action is retaliatory.

Note 39. 'Non-hostile', on the contrary, is driven by benevolence and purely self-survival of the government.

Note 40. See Ball, McCulloch, et al; (1998) 37, *supra*

Note 41. This factor is most apparent in the nationalization of firms substantially owned by foreign interests. Government's desire to 'capture' maximum tax benefits informs such a takeover.

Note 42. This factor is an extension of the former because it is driven by the same desire to maximize the profits from the business.

Note 43. This factor is motivated purely by left-wing political ideology which is mostly at variance with the capitalist ideology. While the former is people-oriented, the latter is profit-oriented.

Note 44. This factor is driven by the short-term goal to survive politically. Typically in an election year, the government's desire to win re-election overrides all other considerations.

Note 45. Under equity participation or joint venture agreements, governments do invest heavily in some businesses.

Note 46. Foreign owned businesses, particularly, those owned by enemy countries can, and do suffer as a result of war.

Note 47. See the September 11, 2001 terrorist attacks on the US, note 27, *supra*

Note 48. This factor is informed by non-hostile consideration. The government's response is essentially driven by self survival instincts.

Note 49. See 'non-hostile' takeover in note 39, *supra*

Note 50. The Bretton Woods institutions (IMF and World Bank) were created in 1945 in Bretton Woods, New Hampshire, in the United States of America.

Note 51. The World Bank has grown in membership from 44 countries in 1944 to 186 countries in 2009. See <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/O.htm>. The International Monetary Fund on the contrary has grown in membership from 29 countries in 1945 to 186 countries in 2009. See <http://www.imf.org/external/about/history.htm>.

Note 52. Gianviti, F., (2001). *Evolving Role and Challenges for the International Monetary Fund*. *THE INTERNATIONAL LAWYER*, Volume 35, Number 4, pg 1398. The author emphasized that "Once countries see themselves as creditors or debtors, they tend to have a polarized view of financial assistance...In discussions on the design of Fund facilities, 'creditor countries' may argue for higher costs and shorter maturities of Fund assistance against 'debtor countries,' which want to preserve the status quo."

Note 53. See Ogbodo, S. Gozie (2009), note 8, *supra*, where this writer amplified the inefficiency of such one-size-fits-all approach.

Note 54. Such calls added to the urgency to convene the G20 'Leaders Summit on Financial Markets and the World Economy' (otherwise called 'Bretton Woods II') which held in Washington DC on 14-15 November 2008.

Note 55. See Walker, George (2009), note 23, *supra*

Note 56. Bretton Woods II was coined from the original Bretton Woods conference which gave birth to the World Bank and IMF.

Note 57. First, the original Bretton Woods conference was convened under the auspices of the United Nations, thus, providing all sovereign nations at the time the opportunity to attend. The limitation of Bretton Woods II to only the G20 countries and some invited guests is unfair to other countries.

Note 58. See the colonialism of African states in note 9, *supra*

Note 59. See Walker, George (2009), note 23 *supra*, p. 5

Note 60. According to Donald Kaberuka, President of African Development Bank (ADB), “For us, this is not a financial crisis: we’re not having a banking crisis, we’re having an economic crisis. It’s affecting countries through exports, through remittances and through neighborhood effects.” Oliver Buston, European Director of ONE (a global advocacy organization), also re-echoed the urgency of the situation when he said that “...Urgent action is now needed from the World Bank to protect the billion poorest people on the planet who had no part in creating the economic crisis but who will be hit the hardest.” See Newswatch magazine of May 11, 2009, pgs 36-38



## The 88<sup>th</sup> Densus AT: The Role and the Problem of Coordination on Counter-Terrorism in Indonesia

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### Abstract

This paper has two purposes. First, it discusses the role of Anti Terror of the 88<sup>th</sup> Special Detachment of Indonesia's Police Force in the war against terrorism. The role of the 88<sup>th</sup> Densus AT on counter terrorism in Indonesia is now a role of single institution nationwide, so that other institutions with similar anti terrorist units feel that they do not get a portion of state power. In Indonesia, all armed forces institutions and police, including the State Intelligence Agency have anti terrorist unit in their structure. There is Anti-Terror Detachment (*Detasemen Penanggulangan Terror, Dengultor TNI AD*) in the Indonesia Army with a call sign of Group 5 Anti Terror unit, and also the 81<sup>st</sup> Detachment (*Detasemen 81, Den 81*) inside the Elite Force of Indonesia Army (Kopassus). There is *Jalamangkara* Detachment (*Detasemen Jalamangkara, Denjaka, TNI AL*) of the Indonesia Navy, which has merged into the Marine Corps. There is also Bravo Detachment (*Detasemen Bravo, Denbravo TNI AU*) which has merged into an elite team of the Indonesia Air Force. The State Intelligence Agency (*Badan Intelijen Negara, BIN*), also has an anti-terror desk. Second, this paper also discusses of the problem of coordination between those various agencies.

**Keywords:** The 88<sup>th</sup> Densus AT, Anti-terrorism, The police, Role, Coordination

### I. Introduction

An Anti Terror The 88<sup>th</sup> Special Detachment of Indonesia's Police Force (hereafter, the 88<sup>th</sup> Densus AT) was founded as a response to the expanding threat of terrorism, namely, *Jema'ah Islamiyah* (JI), which is part of Al Qaeda network. Before the founding of the 88<sup>th</sup> Densus AT, Indonesian Police Force (hereafter, the Police) has its own anti-terror unit in Unit Police Paramilitary, Mobile Brigade (Brimob), namely the 1<sup>st</sup> Squad of Gegana. However, the existence of the 1<sup>st</sup> Squad of Gegana was considered less effective to response various threats of terrorist organization post-9/11 era. The Police responded to the situation, where the Indonesian Armed Forces was assumed to be inappropriate to develop an anti terror unit due to Human Right issue. Since 1994, the Indonesia Armed Forces was facing an embargo in weapons and military trainings by Western Countries. So, it was difficult to develop combat ability, especially against terrorist threats. It was not various aid and support, in form of weapon and training, were received by anti-terror team of the Police from Western Countries like the United States, which has lost thousands of persons in terrorist attack of 11 September 2001, moreover, Indonesia also received assistance from Australia, which also lost many citizen during the first and the second Bali Bombing as well as the attack against the Australia Embassy in Jakarta, other Europe Union countries joined the anti-terrorism effort.

The condition presumably raised disparity among the Indonesia Armed Forces, the State Intelligence Agency, and the Indonesia Police Force, especially those related to the legal status of the institution in fighting against terrorism in Indonesia as stipulated in Presidential Decree No. 15/2001 and Law No. 15/2003 on Anti-Terrorism.

The purpose of the paper is to describe and analyse the role of the 88th Densus AT on counter terrorism in Indonesia and problem of coordination among anti-terror units such as in the Indonesia Armed Forces and the State Intelligence Agency.

### II. The 88<sup>th</sup> Densus AT and Counter-terrorism in Indonesia

The 9/11 tragedy has altered the security enforcers in government in fighting against terrorism. This matter was consolidated and focused in pattern of developing special organization against terrorism in various type and level, starting from separatism until terrorist group in communal conflict. During that time, the anti terror unit was spread over in the police, the armed forces, and also the intelligence agency. Unfortunately, the developing process was blocked by "competition" and "sentiment" among all units. It was not strange that after Habibie Presidency was over, Abdurrahman Wahid and his Vice President Megawati established an anti-terror desk in the State Intelligence Agency, since the institution was believed to hold important role to coordinate the armed forces, the police, and the civilian units. Still, it

only brought internal competition in the State Coordination Intelligence Agency (*Badan Koordinasi Intelijen Negara--BAKIN*), which then become the State Intelligence Agency (*Badan Intelijen Negara--BIN*). The new institution started an open conflict, at the moment when Hendropriyono led the State Intelligence Agency, since a number of members of the State Intelligence Agency rose from military officer instead from police unit and civil.

The global campaign against terrorism became a turning point for reinforcement and development of reliable and professional anti-terror institutions. The reinforcement of anti terror units, in the end, was carried out by the Police. This was a strategy to gain support and aid from Western countries in terms of war campaign against terrorist. The military, since year of 1994, faced embargo on weapons and education cooperation for military officers from Western countries due to human rights abuses in East Timor, Aceh, and Papua. Besides that, the Police was considered capable to develop an anti terror unit in the future. The pursuit of perpetrators and terrorists on the field may emerge indisposed acts. For example The State Intelligence Agency arrested key person of JI network, Omar Farouk in Indonesia and directly delivered the person to the United States without any coordination with The Indonesia Police Force.

The Global war campaign against terrorism was responded by the Government of Indonesia by publishing the Presidential Decree No. 4/2002 on Anti Terror, which was then improved by the National Policy on counter-terrorism in form of a Secondary Law (*Peraturan Pengganti Undang-undang--Perpu*) No. 1 and 2 in same year. The responsibility of the Presidential Decree and the Secondary Law lies at the Coordinating Ministry of Politics and Security in form of the Coordinating-Desk of Counter-terrorism. The desk had full legitimacy based on the Minister Decree of the Coordinating Ministry, which was signed by Susilo Bambang Yudhoyono, Number 26/Menko/Polkam/11/2002. The Coordinating-Desk unified anti-terror unit in the Police, known as the 1<sup>st</sup> Squad of Gegana of Brimob and other anti-terror units from the Armed Forces and the State Intelligence Agency. Those institutions were then developed into the Anti-terror Taskforce under coordination of the Ministry of Defense. However, the initiative taken by Matori Abdul Djalil, The Minister of Defence, was absurd since each anti-terror unit was under the structure of each official armed organization. In practice, Anti-Terror taskforce did not run in an effective way, because of the escalation of terror since 1<sup>st</sup> Bali Bombing and communal conflicts. The Ministry of Defense's initiative did not receive a good response from the security institutions. Finally each anti-terror unit move to carry out their own task.

However, the escalation of terrorism grew so quickly and the Police faced major problem in their anti terror unit since they had to set specialized tasks and finally the Police formed the Bomb Squad. Their first duty was to deal with Christmas Eve Bombing in 2001 and continued with other relevant duties. The Bomb Squad became famous after dealing with cases of suicide bombings, for example the 1<sup>st</sup> and the 2<sup>nd</sup> Bali Bombing, the Marriot Bombing, and the Australian Embassy Bombing. The taskforce was under supervision of the Crime Investigation Unit of the Police, and led by a Brigadier General. The first Head of the Bomb Squad in Indonesia Police was Brigadier General Gories Mere (now he is Major General Police), and then replaced by Brigadier General Bekto Suprpto, and the third was Brigadier General Surya Dharma Salim Nasution. Bekto and Surya Dharma were successively also Head of the 88<sup>th</sup> Densus AT.

Beside the Bomb Squad, it has another anti terror units namely the 1<sup>st</sup> Squad of Gegana of Brimob and the 4<sup>th</sup> Directorate of Anti Terror under supervision of the Crime Investigation Unit. The existence of the 4<sup>th</sup> Directorate of Anti Terror crumple and hold similar duties and function as the 1<sup>st</sup> Squad of Gegana of Brimob beside to handle the dynamic of terrorism activity as threat. The Police finally reorganized the 4<sup>th</sup> Directorate Anti Terror when General Police Da'i Bachtiar led the Police. He issued a Decree No. 30/VI/2003 on 20 June 2003 to form the 88<sup>th</sup> Densus AT. The Decree was based on the Law No. 15/2003 on Anti Terror. The Law assured the authority of the Police as special unit on counter-terrorism in Indonesia, while the Armed Forces and the State Intelligence Agency became supplementary units. The condition was in line with the presence of the Presidential Decree and the Secondary Law published by the government before it was ratified. There was question in society was why does the authority on counter terrorism lie only with the Police? Is it true that the joint anti-terror units from the military are more reliable and experienced? The question was also asked in the Armed Forces around the authority given to the Police on counter of terrorism in Indonesia. There are three reasons why the Police has the authority in counter terrorism. *First*, special authorization of counter terrorism was a government strategy to participate in the global action against terrorism. One of them was to push the reinforcement of special reliable units against terrorist with sophisticated equipments support and human resource. The formulation of the 88<sup>th</sup> Densus AT was based on additional fund of Rp. 15 billion (more than US\$ 13 million), including the weapon, equipments, transportation of the team, operation, and training. Most of them derive from aid from Western countries especially Australia and the United States. When the 88<sup>th</sup> Densus AT was formed, the Military was still facing weapon and education embargo from Western countries, especially United States. So that one strategy to found anti terror unit without disruption over poor historical cases of the Military is by developing it inside the Police.

*Second*, the cruel terrorism act has the character of borderless and entangles many factors in society. Related to that, the terrorism in Indonesia context is considered to be crime domain, because separatism in terrorism context shall no longer become main issue, but replaced by terror action against order, security, and also safety of the society.



*Third*, it is important to avoid resistance from the society and international community if the counter terrorism is carried out by the Military and the State Intelligence Agency. Ever since the fall of the Soeharto regime, the Military and the State Intelligence Agency were accused of supporting institutions of Soeharto's New Order Regime. So, the option to develop an anti-terror unit resides in the Police, based on straightening of law enforcement, maintaining security and order of society, and looking after of internal security, as stipulated in Law No.2/2002 of the Indonesia Police Forces, especially Section of 2, 4, and 5.

Based on the above reasons, the existence of the 88<sup>th</sup> Densus AT has to become a professional unit capable to run better role according to its duty and function. Referring to the Decree of Head of Indonesian Police Force No. 30/VI/2003 dated 30 June 2003 on the duty and function of the 88<sup>th</sup> Densus AT, the Police was specifically ordered to overcome the increasing terrorism in Indonesia, especially with modus of suicide bombings. It means, the 88<sup>th</sup> Densus AT is an executor to overcome domestic terror, as decanted in Law of Anti-Terror.

Meanwhile, the organization of the 88<sup>th</sup> Densus AT is in Headquarter of the National Police and the Provincial Police. In Headquarter, it is under supervision of the Crime Investigation Unit led by a Brigadier General Police. At the provincial police level, The 88<sup>th</sup> Densus AT is under supervision of the Crime Investigation Directorate led by middle rank police officers, depending on the type of the provincial Police. The 88<sup>th</sup> Densus AT in A-type provincial police is led by a Chief Commissioner Police, while in Type-B and preparation stage of provincial police; it is led by a Adjutant Chief Commissioner. There are only three Head of the 88<sup>th</sup> Densus AT so far. The first one was Brigadier General Bekto Suprpto who is re-assigned as Head of the North Sulawesi Provincial Police. The second one Brigadier General Surya Dharma Salim Nasution, former 1<sup>st</sup> Director of the Transnational Crime Investigation Unit of Headquarter of Indonesia Police Force. Now, the current of the Head of Densus 88 AT is Brigadier General Police Saud Usman Nasution, before he is in that position, he was a vice of Head of Densus 88 AT.

Insert Table 1, Table 2 Here

The organizational chart of the 88<sup>th</sup> Densus AT was based on four supporting pillars of operation named as sub-Detachment. They are Sub-Detachment Intelligence, Sub-Detachment Affirmative Action, Sub-Detachment Investigation, and Sub-detachment Support. Every Sub-detachment leads some supporting units for the operation of the 88<sup>th</sup> Densus AT. Sub-Detachment intelligence consists of Analysing Unit, Detection, and Contra-Intelligence Unit. Sub-Detachment Affirmative Action consists of Negotiation Unit, Reconnaissance Unit, Penetration Unit, and Bomb Unit. Sub-Detachment investigation consists of Crime Scene Unit, Investigation Unit, and Technical Support Unit. Sub-Detachment Support consists of Operation Support Unit and Administration Support Unit.

One of prerequisites to recruit members and personnel of the 88<sup>th</sup> Densus AT for the development and formulation of special anti-terror unit are personnel should have never been assigned to Aceh, Papua, and East Timor, to prevent any collision of human right. However, it was rather difficult, since many personnel of the 88<sup>th</sup> Densus AT are from the Brimob, specially the 1<sup>st</sup> Squad of Gegana. So, the level of prerequisite was reduced and should be supported by competent skill as special unit. Beside from the Brimob and the 1<sup>st</sup> Squad of Gegana, other unit as supporting pillars of the 88<sup>th</sup> Densus AT was the Security and Crime Intelligence Agency of the Indonesia Police Force (Baintelkam). The recruitment of personnel of the 88<sup>th</sup> Densus AT is also from the Police Academy, the Female Police School, and the special unit from the Indonesia Police College (PTIK).

Now the number of personnel of the 88<sup>th</sup> Densus AT is not more than 500 personnel with best qualification of anti-terror, while in Provincial Police are around 50 and 75 personnel. Before the police was recruited and become part of the 88<sup>th</sup> Densus AT, the personnel should be trained in the Education Center for Investigator of Indonesia Police Force in, Puncak, West Java, and also at the National Anti-Terror Education Center in Police Academy Campus, Semarang, Central Java. All instructors, in addition to the Police, are from CIA, FBI, the Australia National Service, the Australian Police Federal, the Secret Service and intelligence network in Western countries. Besides theories and methodologies training, both education centres also supported by simulators.

Meanwhile, weapons, equipments, and other supporting devices are very sophisticated. For example, assault rifle of Colt M4 5.56 mm and the latest Steyr-AUG, or sharpshooter rifle, Armalite AR-10, and also Remington 870 shotgun. Most of them are supplied by the United States. Beside weapons, every personnel of the 88<sup>th</sup> Densus AT are provided with personal and team equipments; communication tools, GPS, night camera, eavesdropping appliances, micro recorder, plane interceptor, signal assembling machine, and others. To support the operation of the 88<sup>th</sup> Densus AT, the unit also cooperates with operator cellular phone and internet provider to detect movement of terrorist groups. For a while, each unit has bomb tamer with supporting equipments, for example metal detector, special gauntlet and mask, anti land mine vests and shoes, and also tactical vehicle of bomb silencer. It is also issued that the 88<sup>th</sup> Densus AT has its own C-130 airplane Hercules to deploy personnel. However it is difficult to be proved since the Headquarter of Police have formed the 88<sup>th</sup> Densus AT in Provincial level. It means the unit answers the mislead information.

The budget support to form the 88<sup>th</sup> Densus AT was from the United States, precisely through US Diplomatic Security, State Department. In early forming of the 88<sup>th</sup> Densus AT, there was around Rp. 150 billion (more than US\$ 130 million)

at 2003, while the next year of operation of the 88<sup>th</sup> Densus AT there was only Rp. 1.5 billions (more than US\$ 1.3 million). The low budget was because the allocated budget was already covered in mid 2003. In 2005, they spent up to Rp. 15 billion (more than US\$ 13 million), and 2006 the budget was Rp. 43 billion (more than US\$ 40 million). The annual fund of 2006 was not yet for the formulation of the 88<sup>th</sup> Densus AT in provinces, because practically Heads of Provincial Police do not have resources to find budget aid for the development of the 88<sup>th</sup> Densus AT. An example was Inspector General Firman Gani, when he was Head of Jakarta Police, as he built the building for the 88<sup>th</sup> Densus AT from self-supporting aid. It was actually prohibited as stipulated in Law No. 2/2002 on the Indonesia Police Forces, but with limited State budget, the process become a justification for other Provincial Police to follow an example made by the Jakarta Police. Around year 2007-2008 almost 29th of the Provincial Police have The 88<sup>th</sup> Densus AT Unit on their structures, some of them used self-supporting aid, because the budget support from abroad was reduced and the national budget was not enough to allocate for developed the new units on the Provincial Police.

Based on the description, it is not out of the ordinary if the 88<sup>th</sup> Densus AT was expected by the Police and the government to be a reliable anti-terror unit. Since 2003 until now, the 88<sup>th</sup> Densus AT has played a role on counter-terrorism, as Law No.2/2002 on Indonesia Police Forces and Law of Anti-Terror mentioned. Two months after this unit was formed, the unit had to directly deal with the car bomb at J.W. Marriot Hotel, a United States network hotel, killing 13 people. In a week time, the network of bombers were detected and arrested.

Following the arrest of terrorist network of Marriot bombing, at 9 September 2004, Jakarta was surprised once again with a car bomb in front of the Australian Embassy. This bomb killed ten people and did not hit the inside part of the Embassy. Within a month, the 88<sup>th</sup> Densus AT and Australian Federal Police (AFP) succeed to solve the case, and caught the perpetrators. They were sentenced years in prison and some were even sentenced with death pinalty.

One year after the explosion in front of the Australian Embassy, Bali, was shocked again by a bomb. Although it was not equal to the 1<sup>st</sup> Bali Bombing. The explosion killed 23 people and hurt hundreds of others. Again, in three months, the 88<sup>th</sup> Densus AT could solve and arrest perpetrators. the 2<sup>nd</sup> Bali bombing also brought them close to a terrorist Kingpin in Indonesia; Dr. Azahari. A months after the 2<sup>nd</sup> Bali Bombing, they invaded a house of terrorist fugitive, Dr. Azahari, in Batu Malang, East Java. This attacked caused the death of him, and lob the name of the 88<sup>th</sup> Densus AT as a notable anti-terror unit in Asia. During at the same time, the 88<sup>th</sup> Densus AT succeeded to catch perpetrators of bombing in traditional market, Palu, Central Sulawesi. The perpetrator was one of the conflicting groups in Poso.

In 2006, the 88<sup>th</sup> Densus AT almost caught another terrorist kingpin, Noordin M. Top, in a raid at Dusun Binangun, Wonosobo, Central Java. Noordin got away from the pursuit of the 88<sup>th</sup> Densus AT. The attack was a gunfight between the 88<sup>th</sup> Densus AT and terrorist group and police succeed to catch two people and pick two others. A year later, precisely on 22 March 2007, the 88<sup>th</sup> Densus AT raid the terror group in Central Java and succeeded to discover the biggest bomb and weapons network since the last 30 years in Sleman, Yogyakarta, and catch seven accused owners of the weapons, depositor, and assemblers. In the attack, two perpetrators were killed when trying to run away.

Following the success to discover the network of Central Java group, the 88<sup>th</sup> Densus AT also succeeded to arrest and paralyse Abu Dujana alias Ainul Bahri, Commander of Military Wing *Jema'ah Islamiyah* (JI), and Zarkasih, the new Spiritual Leader of JI. The arrest lobs the name of the 88<sup>th</sup> Densus AT and prove that Indonesia have reliable and professional anti-terror unit.

The coherent role of the 88<sup>th</sup> Densus AT in fact assures the commitment of Indonesia Police Forces and government in active global war against terrorism. Six years after its formulation, the role and function of Densus 88 AT has received high reputation by the international community. The 88<sup>th</sup> Densus AT has brought the Police to a distinctive level where it becomes commitment of the Indonesia Police Force in fighting against the terrorism. Even on the way, the 88<sup>th</sup> Densus AT is not only focused at identifying and pursuit of terrorists, but also assists other units in the Indonesia Police Force on other arsonist like illegal logging, narcotic, and others. The 88<sup>th</sup> Densus AT even assists to identify regional problems as happened at the case of Republic of Southern Moluccas (RMS), the separatist group's flag at a national political event in Ambon when Indonesia's President was also attended.

The 88<sup>th</sup> Densus AT is even focused on counter terrorism, besides that it also has three other coherent functions and role. *First*, the 88<sup>th</sup> Densus AT resides in the Crime Investigation Unit of Indonesia Police Force, and the Investigator Directorate of Provincial Police. Therefore, the personnel are also reliable qualification as detective. So that, it is not strange if every police officer activity in the Crime Investigation Unit and the Investigator Directorate, always brings in personnel of the 88<sup>th</sup> Densus AT on field, especially related to special crime like; illicit drug, illegal logging, illegal fishing, people smuggling, and others.

*Second*, personnel of the 88<sup>th</sup> Densus AT are also member the Indonesia Police Force with qualification in security intelligence such as in doing detection, analysis, and contra-intelligence. In few cases involving personnel of the 88<sup>th</sup> Densus AT in police intelligence also improve the performance of the Headquarter of Indonesia Police Force and local police, as implemented by provincial police during direct regional election and other conflict areas.

*Third*, the personnel of the 88<sup>th</sup> Densus AT are good negotiators. The negotiator skills are required not only by the 88<sup>th</sup> Densus AT but also by police personnel in general. It means a negotiator is required to reduce the fall of larger victims, for example, in cases of terrorism; various steps should be taken to reduce risks regarding the law, as special pillar of police duty. Difficult negotiation processes were carried out done on the siege of Dr. Azahari and Noordin M. Top hideout. Even both of them could not be caught, since Dr. Azahari chose to detonate himself and Noordin M. Top succeeded to get away. However, steps and procedures by the negotiator from the 88<sup>th</sup> Densus AT was relatively succeed, because it did not hurt or cause negative effect at the society.

### III. Coordination of All Anti Terror Units

The efficacy of the 88<sup>th</sup> Densus AT in reducing the movement of terrorist groups in Indonesia gives big consequences for the detachment and relation between other security officer in the government. The attack on Dr. Azahari and the capture of numbers of high leaders of JI in Indonesia, makes the pattern of counter terrorism now is focused at Noordin M. Top only. The consequence of efficacy of the 88<sup>th</sup> Densus AT affects the relation on the unity of anti terror units in Indonesia which are less harmonious. The duty and function of the 88<sup>th</sup> Densus AT is limited only at the counter of bomb terrorism and other terrorist action. There are two the consequences following the efficacy of the 88<sup>th</sup> Densus AT. Firstly, there are internal consequences. The different treatment among units of anti terror in the Police may cause internal conflict. It is based on the moment of attack against Dr. Azahari hideout in Batu, Malang, East Java. As known, inside of the Indonesia Police Forces, there are four units with qualification of anti terror: the 1<sup>st</sup> Squad of Gegana of Brimob, the Bomb Squad of Indonesia Police Force, the 4<sup>th</sup> Directorate of Anti Terror, and the 88<sup>th</sup> Densus AT.

The piquancy is even worse when the 88<sup>th</sup> Densus AT have been formed. The existence of the 4<sup>th</sup> Directorate of Anti-Terror, Bomb Squad, and also the existence of 1<sup>st</sup> Squad of Gegana Brimob are at stake. The early assumption was that each unit could support each other and do integrated works. However, the existences of three units in the Police were likely to repeat the mistaken process of Anti-terror Taskforce made by Matori Abdul Djilil, Former Minister of Defence, with minimum coordination and many unnecessary activities among one another. Even former Head of Crime Investigation Unit, the late Bambang Hendarso Danuri (now he is Chief of Indonesian Police Force) disbanded the Bomb Squad and the 4<sup>th</sup> Directorate of Anti Terror then cope them into the 88<sup>th</sup> Densus AT and directly under his supervision. It has to be confessed that the existence of two anti terror units; The 88<sup>th</sup> Densus AT and 1<sup>st</sup> Squad of Gegana of the Brimob in the Police become unfavourable for the organisation, at least there should be coherent role and function. Until now, the 88<sup>th</sup> Densus AT, and 1<sup>st</sup> Squad of Gegana of the Brimob have almost the same role and functions. There are not yet any escalating problems so far, but unlikely problems may emerge and become problems in the future.

Secondly, the external consequences. The efficacy of the 88<sup>th</sup> Densus AT has made high rank officers in the Military and the State Intelligence Agency dubious concerning the ability of the Police in developing anti-terror unit with best qualification. This condition opened conflict among anti-terror units on field, especially related in handling separatism in Aceh and Papua and also communal conflict in Poso and Maluccas, related to the role of the 88<sup>th</sup> Densus AT. Since it was under the Investigator Directorate of Provincial Police, entangled also mentioned operation cases. Referring to Law No. 2/2002 on the Indonesian Police Force and Law No. 34/2004 on the Indonesia Armed Forces, separatism is the conflict of interest between the Military and the Police, where the military are considered as the main element and the Police is the supporting element for the condition. On the other side, the assignation of the 88<sup>th</sup> Densus AT is related to act of terrorism and separatism dealt by Police Paramilitary Unit, Brimob.

The two consequences above have to be faced with approaches based on nationalism, threat of terrorism, and institution. An institution was required for effective coordination, so that each unit can play role and function effectively. In this context, there should be an affirmative policy for coordination. For example, the *Dengultor* and the *Group 5* of the Indonesian Army on focus at terrorism at the state border, separatism with high intensity, and also threats related to sovereignty of the state, with specialization in city war, piracy of plane, and contra-intelligence. Meanwhile, the *Denbravo* of the Indonesia Air Force is focused at security of aerospace weaponry system, anti piracy of plane, and contra-intelligence. The *Denjaka* of the Indonesia Navy has specialization of anti piracy of sea, all kind of sea terror, sabotage, and contra-intelligence. Then, the 88<sup>th</sup> Densus AT and also the 1<sup>st</sup> Squad of Gegana of the Brimob should be more focus on all kind of terrors using bombs against public security and order and home security affairs.

Looking at all anti terror units, in fact, the constraints are very clear, namely each unit has its own role and function. There are some parallel duties and roles among four units like intelligence qualification and contra-intelligence. Besides that, each unity has an equal role, like between *Dengultor*, *Group 5* of the Army and *Denbravo* of the Air Force, where both have the have same qualification of anti hijackings of airplanes.

Terrorism's threats in the future are stipulated in the Indonesia's Defence White Paper 2008. At least there are four threats against the State: Separatism, terrorism, communal conflict, and transnational crimes. In threat of separatism, all of units of anti terror could be assigned at the same time based on their own qualification. As in broader terrorism definition, separatism is classified as one of type of terrorism, because it tends to use violence and terror. The possibility of the increasing act of terrorism is based on failure agreement of peace in Aceh and also Special autonomy in Papua.

Against threat of terrorism, the 88<sup>th</sup> Densus AT and also the 1<sup>st</sup> Squad of Gegana have larger portion than other anti terror units. This is caused by level of terrorism with specialized ability should faced by the 88<sup>th</sup> Densus AT and the 1<sup>st</sup> Squad of Gegana. Whereas other anti terror units should be assigned to assist when the specific level related to the requirement for joint taskforce is required. For example, hijackings of airplane might possibly be handled by Dengultor, Group 5, and Denbravo with coordination to the 88<sup>th</sup> Densus AT.

On the other hand, related to threat of communal conflict, the solution is carried out by other external unit of anti terror, like the 1<sup>st</sup> of Gegana and unit in the Armed Forces, just like how to solve conflicts at Borneo's Indonesia and Timor's Indonesia. However, in handling communal conflict in Poso and Maluccas, the 88<sup>th</sup> Densus AT was involved, because the conflict was presumably exploited by terrorist network with various intensions on both places.

Last but not least, all units should be highly involved in dealing with transnational crimes. It is caused by of transnational level in exploiting various medium for the action whether on land, sea, and air. Developing effective coordination is not only limited on meeting among staffs of the armed forces and heads of police, but also internal obligatory mechanism.

There are two prerequisites to improve coordination. *First*, revising the Law of Anti Terror so that it should be more comprehensive, not simply describing terrorism as an act of injustice related to the international network like Al Qaeda and *Jema'ah Islamiyah*. It should also consider the effects of separatism, communal conflict, and transnational crime.

*Second*, there should be Coordinating-Desk of Anti-Terror once issued by the Coordinating Ministry of Politic and Security. It means all anti-terror taskforces as developed by the former Minister of Defence, Matori Abdul Djalil, will be refused by the Indonesia Police Forces, because the Ministry of Defence is considered as a representation of military institution. Therefore, there should be a neutral institution, one of them is the Coordinating Ministry of Politic and Security.

Finally, with effective coordination among all anti-terror units, it will give warranty for effective counter terrorism in Indonesia. The presence of the 88<sup>th</sup> Densus AT, has to be comprehended as part of effort to tighten the unity of all anti terror units in Indonesia in fighting against terrorism.

#### IV. Conclusion

Based on above explanation, the existence of the 88<sup>th</sup> Densus AT as one of anti terror units may provide effective and measured evidences. The role of the 88<sup>th</sup> Densus AT is limited at counter bombing terrorism, should become one of the specialties of the Police. At least when measured with achievement, image, stimulation, and effectiveness of developing human resources, and also improvement of facilities.

Aside of the efficacy reached by the 88<sup>th</sup> Densus AT, it still leaves problems related to duty constraints and function inside the Indonesia Police Force, especially with Brimob, more specific at 1<sup>st</sup> Squad of Gegana. There should be assurance against constraints and coordination in practice among all special units owned by the Indonesia Police Force. Problems of coordination and division of authority with other anti terror units from the armed forces should be coherent with the existence of legal umbrella to reduce constraints in coordination and function, threat of terrorism will expand with various models and actions. If we expect one anti terror unit to fighting against terrorism, it is not a good policy for Indonesia. As we know, the characteristic of terrorism has many various types and patterns. So that, there should be requirements to co-ordinate with detailed steps and give the bigger picture for the importance of state sovereignty and the society against threat of terrorism.

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## Notes

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Table 1. The Rank Structure of the Indonesia Police Force

(Based on the Decree of the Chief of the Indonesian Police Force, Skep No: 1259/X/2000, dated November 3<sup>rd</sup>, 2000)

No.	The Rank Structure
<b>I</b>	<b>General Grade</b>
1	Jenderal Polisi (Police General)
2	Komisaris Jenderal Polisi/Komjen Pol. (Commissioner General)
3	Inspektur Jenderal Polisi/Irjen Pol. (Inspector General)
4	Brigadir Jenderal Polisi/Brigjen Pol. (Brigadier General)
<b>II</b>	<b>Commissioner Grade</b>
1	Komisaris Besar Polisi/KBP (Chief Commissioner)
2	Ajun Komisaris Besar Polisi/AKBP (Adjutant Chief Commissioner)
3	Komisaris Polisi/Kompol (Commissioner)
<b>III</b>	<b>Inspector Grade</b>
1	Ajun Komisaris Polisi/AKP (Adjutant Commissioner)
2	Inspektur Satu Polisi/Iptu (Inspector 1 <sup>st</sup> Grade)
3	Inspektur Dua Polisi/Ipda (Inspector 2 <sup>nd</sup> Grade)
<b>IV</b>	<b>Senior NCO Grade</b>
1	Ajun Inspektur Satu Polisi/AIPTU (Adjutant Inspector 1 <sup>st</sup> Grade)
2	Ajun Inspektur Dua Polisi/AIPDA (Adjutant Inspector 2 <sup>nd</sup> Grade)
3	Brigadir Polisi/Brigpol (Brigadier)
4	Brigadir Kepala Polisi/Bripka (Chief Brigadier)
5	Brigadir Satu Polisi/Briptu (Brigadier 1 <sup>st</sup> Grade)
6	Brigadir Dua Polisi/Bripda (Brigadier 2 <sup>nd</sup> Grade)
<b>V</b>	<b>NCO Grade</b>
1	Ajun Brigadir Kepala Polisi/Abripka (Adjutant Chief Brigadier)
2	Ajun Brigadir Satu Polisi/Abriptu (Adjutant Brigadier 1 <sup>st</sup> Grade)
3	Ajun Brigadir Dua Polisi/Abrida (Adjutant Brigadier 2 <sup>nd</sup> Grade)
4	Bhayangkara Kepala/Baraka (Chief Patrolman)
5	Bhayangkara Satu Polisi/Baratu (Patrolman 1 <sup>st</sup> Grade)
6	Bhayangkara Dua Polisi/Barada (Patrolman 2 <sup>nd</sup> Grade)



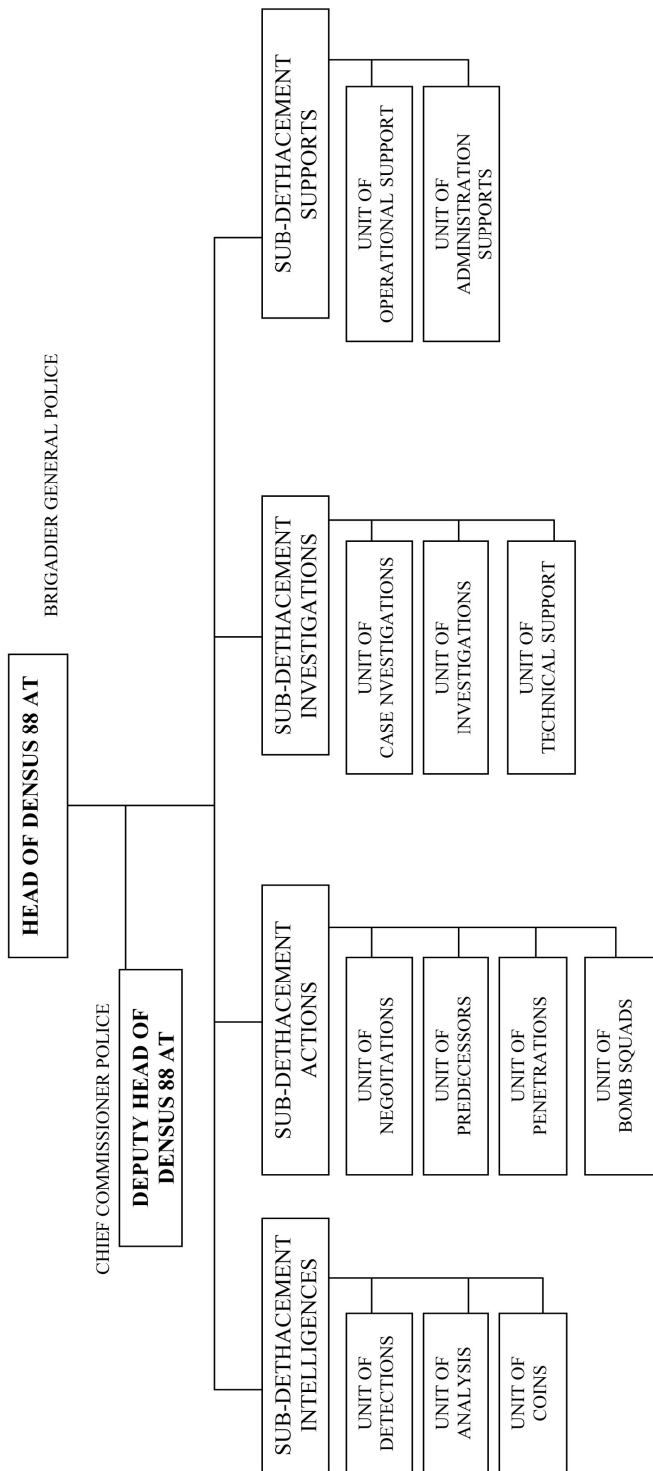
Tabel 2. Lists of Indonesia's Provincial Police

TYPE A	TYPE B	TYPE C
NAD	Jambi	West Sulawesi
North Sumatera	Bengkulu	West Irian Jaya
South Sumatera	Riau	
DKI Jakarta	West Sumatera	
West Java	Lampung	
Central Java	Riau Archipelago	
East Java	Bangka-Belitung	
East Kalimantan	D.I. Yogyakarta	
Bali	South Kalimantan	
South Sulawesi	Central Kalimantan	
Papua	West Kalimantan	
	West Nusa Tenggara	
	East Nusa Tenggara	
	North Sulawesi	
	Central Sulawesi	
	South-East Sulawesi	
	Gorontalo	
	Maluku	
	North Maluku	
	Banten	

Source: The Decree of the Chief of the Indonesian Police Force, Pol. KP/05/X/2000.

## Appendix

**ORGANIZATION OF SPECIAL DETACHMENT OF 88 ANTI TERROR OF  
INDONESIA NATIONAL POLICE**





## Analyze the One-Sidedness of “Clash of Civilizations”

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### Abstract

No matter what it is the academic field or the political field, the clash of civilizations generates profound international effects. However, the sidedness of recognition accompanies with the clash of civilizations. Since the clash of civilization is still popular at present, it is necessary to clarify its sidedness. This paper tries to made analyses from these aspects: difference and commonness of civilizations, root of civilizations clash, civilizations clash and civilizations internal clash, civilizations clash and cooperation, western civilizations’ prospect, non-western civilizations’ prospect.

**Keywords:** Globalization, Civilization, Clash, Scientific analysis

The clash of civilizations is a paradigm advanced by Samuel. P. Huntington, which is used to describe contemporary world pattern. The time of globalization is accompanied with fast changing world situations in human history, which needs new theories and doctrines urgently. Under this background Samuel. P. Huntington studies and builds the clash of civilizations, considering the needs at the time. No matter what it is the academic field or the political field, the clash of civilizations generates profound international effects. However, the sidedness of recognition accompanies with the clash of civilizations. This paper abstracts the main viewpoints of The Clash of Civilizations and the Remaking of World Order, and analyzes the sidedness from several aspects.

### 1. The difference and commonness of civilizations

Samuel. P. Huntington’s clash of civilizations is mainly based on analyzing the differences of civilizations. He especially points out: “Philosophical assumption, basic value, social relationship, custom, and comprehensive life view are different sharply among various civilizations. .... The significant differences in politics and economic development for various civilizations are rooted in their different cultures apparently. (Samuel. P. Huntington, 1998, p8)” But he does not mention or make deeper researches on the commonness of civilizations. Differences of civilizations are objective facts indeed. But it is just one side of comparing civilizations. The comparative relationship of civilizations is dual. It concerns not only difference but also commonness. It is not convincible for civilizations comparison merely viewing differences but no commonness. Human civilizations have the widest and most fundamental commonness, concerning the common system, globe, target, chance, threat, profit, and defect. The dimension of commonness deserves more explorations. To discuss a question under the known conditions, human civilization is the only one in the universe. There is only one standard distinguishing human being from other species: whether there is civilization or not. Therefore, compared with differences, the commonness of civilizations is essential. To understand the commonness of civilization is more important than understanding the differences. If a study only focuses on differences but neglect the commonness, it is sided. With this base, the clash of civilizations lacks of the pre-condition with sufficient and necessary logic reasoning. So, it is short of strong reliability and persuasion.

### 2. The root of civilizations clash

Samuel. P. Huntington thinks that the root of clash civilizations is the difference of civilizations. He tries to ask and gives an answer: “Why does the cultural commonness drive the cooperation and cohesion among people, whereas cultural difference strengthens separation and conflict? (Samuel. P. Huntington, 1998, p113)” He further emphasizes: “The root of clash is the essential difference in social and cultural aspects. (Samuel. P. Huntington, 1998, p250). As a matter of fact, civilizations difference leads to civilizations clash, which merely reflects part of causation. Except that civilizations difference may cause civilizations clash, civilizations commonness can also lead to clashes. The commonness of civilizations does not completely exert effects on civilizations cooperation. Certain contradictory commonness among different civilizations or in one civilization, such as the competitiveness, self-interest, and parochialism of all parties, may serve as reasons for clashes among different civilizations or in one civilization. Therefore, not only the commonness of civilizations can drive the cooperation of civilizations, but the difference of civilizations can do it. The complementary differences of different civilizations or in one civilization can turn into the reason for the cooperation of different civilizations or in one civilization. For example, there are two methods A and B to deal with the same threat. The party with strong A and weak B and the party with weak A and strong B may become partners. Civilizations’ comparative relationship has differences and commonness at the same time. The mutual effects of civilizations are full of clashes and cooperation. They for four kinds of causation relationships: difference --> clash,

commonness → clash, commonness → cooperation, difference → cooperation. Apparently, to emphasize on one side is improper.

### **3. The civilizations clash and civilization internal clash**

Samuel. P. Huntington mainly studies the clash of civilizations ----- from the title to the contents he names it as clash of civilizations. He discusses few on the commonness of civilizations. Surely, he also mentions in history that “most mutual commercial, cultural, and military effects happen in one civilization. For example, although India and China have been invaded or slaved by foreign nations sometimes, the two civilizations experience their long ‘warring time’ by themselves. Similarly, wars and trade between Greeks are more frequent than that between Greeks and Persians or other nations. (Samuel. P. Huntington, 1998, p35)” In history, European is not an exception. “They are in war constantly. In European countries, peace is only an exception but not a normal state. (Samuel. P. Huntington, 1998, p38)” But, he does not explain anything for positioning civilizations internal clash at a corner. “After experiencing clashes in several centuries, Western Europe realizes the peace. Wars tend to be unimaginable. (Samuel. P. Huntington, 1998, p245)” He is optimistic toward the western civilization but more worry about non-western civilizations. “In the coming time, the clash of civilizations is the greatest threat to world peace. (Samuel. P. Huntington, 1998, p372)” No matter when it is in world history or today’s global system, the clash of civilizations stays at the top level. But its frequency, intensity, and damage are not necessarily the largest. Civilization internal clash is at a lower level, but the frequency, intensity, and damage are maybe more serious. Samuel. P. Huntington uses the “western civil war 1939-1945” (Samuel. P. Huntington, 1998, p154) to name the World War II. The two world wars are civilization internal clashes undoubtedly. In other words, no world war is from the clash of civilizations. In practice, the largest damage on world peace is from civilization internal clash. Viewing from different lens, sometimes the clash of civilizations is in human wars, and sometimes the civilization internal clash. It is hard to determine which one serves as the largest threat to today’s world peace. At least there is not any reason that is convincible to push the civilization internal clash into a corner. Opposite to Samuel. P. Huntington’s viewpoint, “as for the issue of civilization (culture) clash, Professor Dieter. Senghaas emphasizes: what the world large cultures face is firstly the internal clash. It is more essential than ‘civilization collision (the clash between cultures)’. (Dieter. Senghaas, 2004, p3)”

### **4. The civilization clash and civilization cooperation**

Samuel. P. Huntington’s opinion toward the mutual effects of civilizations is sided. As he emphasizes on the clash of civilization, he neglects a more important, at least equal important, fact, namely the cooperation of civilizations. “Cold peace, cold war, trade war, semi-war, unstable peace, difficult relation, tight confrontation, competitive coexistence, and military match, maybe these words properly describe the relationship between different civilization subjects. Trust and friendship will be rare. (Dieter. Senghaas, 2004, p229)” However, the clash of civilizations is only one side of civilizations’ mutual effects. The mutual effects of civilizations are dual. Except for clashes, there is cooperation based on wide communications. In other words, there are two interactive ways between civilizations: clash and cooperation. The clash may disturb cooperation. Cooperation can help to solve the clash. The fact and the meanings of cooperation should not be neglected. International trade is to construct commercial channels and logistics net according to the distribution of resources and markets, and the supply-and-demand relationship. Here we can not find borders for civilizations. World travel lines bring all travelers to different scenes in the world. Here we can not find the special characteristics of cultural pattern either. In fields of education, science, arts, and sports, international cultural communication and cooperation are performed frequently in the internal civilization and between different civilizations. For some serious global issues, we have no choice but global cooperation. For example, managing the global financial crisis, getting rid of global economic regression, dealing with global climate changes, protecting global ecological environment, all these activities must depend on global cooperation. There are no borders for civilizations concerning the impacts of global financial crisis and environmental degradation. In order to solve these issues effectively, the international cooperation should be restricted by the border of civilizations. Although the global cooperation for certain issue is not satisfying, it steps forward. Compared with the clash, the cooperation of civilizations has more active constructive meanings.

### **5. The western civilization’s prospect**

Samuel. P. Huntington’s study has a strong subjective color. He is worry about the decline of western civilization. He is always protecting the traditional advantages of western civilization. Today, western civilization is till strong, which is at a leading position in science & technology field and economic field. However, the dominating effect of western civilization is weakening. It tends to be declining relatively. Western civilization faces challenges from outside. It is also confronted with internal problems. Samuel. P. Huntington emphasizes on the challenges from the outer. He advances specific countermeasures: “Facing the decline of western power, to protect the western civilization can benefit America and European countries. In order to reach this goal, they need: strengthen the integration of politics, economy, and military, and coordinate policies, in case of other countries in different civilizations getting advantages over the differences; absorb Central European countries, namely the Visegrad Group, the Baltic Republics, Slovenia, and Croatia

into EU and NATO; encourage Latin America to be westernization, and make Latin America combine with western countries as much as possible; depress the development of normal and abnormal military force in Islamic and Chinese countries; stop Japan betraying the west and following China; admit that Russia is the core country of the orthodox and admit that to insure the safety of the south is the legal right of Russia; maintain the west's advantages of technologies and military force over other civilizations; the more important is to realize that the interference of the west to other civilizations may be the only factor causing the instability of multiple civilizations and the potential global clash. (Dieter. Senghaas, 2004, p360)" These countermeasures are nothing but emphasizing on forming cliques. It is not creative. On the other hand, as facing challenges, western civilization falls in difficulties. Samuel. P. Huntington points out: "That is a declining civilization. In contrast to other civilizations, the west's rights in world politics, economy, and military fields is decreasing. The west wins the cold war. But it brings not a victory but a failure. The west pay more attentions to the internal problems and needs, because it faces a series of problems, such as the slow growth of economy, the population issue, unemployment, big government defects, drugs, and crimes. (Dieter. Senghaas, 2004, p76)" However, he does not lay stresses on the internal problems of western civilization just as how he treats the outer challenges. He does not advance relevant countermeasures. Contrary to Samuel. P. Huntington's judgment, there are greater crises in the internal problems of western civilization rather than outer challenges, which deserve more attentions and countermeasures. The key to determine the future of western civilization is not to deal with challenges from non-western civilizations but overcome the self vital problems. In other words, the prospect of western civilization is not determined by whether it can deal with the outer challenges effectively but whether it can overcome the internal problems properly. If the world victims the continuous decline of western civilization unfortunately, the grave-digger is nobody but itself. The internal problem of western civilization is the lagged-behind ecological environment protection, which fails to catch up with the social development. In other words, it is the lagged-behind progress of humanism spirit, which fails to catch up with the progress of material civilization. It also serves as a pre-warning for other non-western civilizations. Western civilization is a pioneer. Non-western civilizations should not rejoice in the calamity of western civilization's difficulty.

## 6. The prospect of non-western civilizations

Samuel. P. Huntington thinks that the development of non-western civilizations challenges and threatens western civilization. "The reason for the new clash between Islam and the west lies in the right and the culture. Who governs whom? Who is the governor? Who is under the governance? (Dieter. Senghaas, 2004, p234)" "The rise of China serves as the most essential challenge for America. (Dieter. Senghaas, 2004, p254)" Samuel. P. Huntington supposes that the western civilization and non-western civilizations are in a war for survival. He hopes that: the western civilization sustains its advantage position and non-western civilizations stay the disadvantage positions. Non-western civilizations submit to and are controlled by the western civilization forever. At every time in history, the development of civilization is unequal. Some are faster and some slower. Some are stronger and some weaker. Some are latest and some are lagged-behind. It is inevitable and natural for the distance of civilizations' development. The different development levels of civilizations will cause unfair rights distribution and unequal social positions, what signalizes the evolvement of human being. In the clash of civilizations, the distance of development level → unfair rights distribution and unequal social positions turns into an eternal law, what becomes a fixed thinking and is used to judge situations. In fact, this law is untenable. Although it is inevitable for the development distance between people, human is always pursuing for fairness and equality of nations, countries, and civilizations. Maybe the following ideas are nearer to the truth than the complicated and sided view of the clash of civilizations.

No matter what the difference is, western civilization has no initiative advantages over other civilizations.

No matter how the development is, different civilizations should enjoy equal rights and positions.

It is not necessary to get an approval of the west. Non-western civilizations have the endowed right of independent development.

If cooperation surpasses clash, world will enter a new stage in which all human civilizations enjoy their prosperities.

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# Rosmini on Individual Rights: The Soul (Reason) as Forerunner of Individual Rights in Human Society

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## Abstract

The question that can be asked today is: Of what relevance is Rosmini's legal theory on individual rights for modern man? Rosmini's individual rights did not appear from nowhere. From the opinions of some Greek writers, he concluded that the soul, as a result of its immortal and mobile qualities, is divine in nature and therefore serves as the origin of individual rights. Rosmini is of the opinion, unlike Thomas Aquinas, that the protection of individual rights should filter through to all levels of human existence; from the foetal stage to adult life. In contrast with the Aristotelian Thomistic hylomorphism doctrine, he believes that just like an adult, a foetus has a soul, even in its early stages, and is entitled to the protection of his/her individual rights. This is the basis of the Constitution of South Africa 108 of 1996. Owing to the innate nature of the human soul, Rosmini succeeded in postulating God as ontological framework for the individual rights of man. The description of the unique value of humans in Psalm 8:5 is striking: "For thou hast made him but little lower than God, and crownest him with glory and honor." (*American Standard Version*) Man, as image bearer of God, is thus endowed with individual rights that must be recognised by all, including the state. Rosmini hereby rejects the *salus rei publicae suprema lex* doctrine supported by Thomas Aquinas. Rosmini argues that, if this (*salus reipublicae suprema lex*) doctrine were to be followed, the state would be encroaching on the individual rights of its citizens. Furthermore, he believes that the state is geared to protect the individual rights of its citizens. Rosmini thus argues that the interests of the state are best served if the interests of the citizen are first protected.

**Keywords:** Hylomorphism, Soul, Body, Man, Foetus, Individual rights.

## 1. The soul

### 1.1 Introduction

This study is based on qualitative research in that it is a text analytic reading of Hippo, Empedocles, Critias, Anaxagoras, Democritus, Aristotle, Thomas Aquinas and Rosmini's conception of the unity of body and soul. Our investigation will begin with what are accepted by Greek philosophers as the natural characteristics of the soul. Two characteristics of the soul, namely mobility and perception, are compared by these philosophers. These two characteristics indicate the divinity of the soul and will serve as a preamble to our discussion. Rosmini constitutes these characteristics of the soul in such a way that it subsequently serves as a basis or object of individual rights in human society.

## 2. Motion and perception as constitutive elements of the soul

In this paper, Rosmini rectify the perceptions of some of the Greek philosophers. It has been established, on the one hand, that the opinions of Hippo (Note 1), Empedocles (Note 2) and Critias (Note 3) do not at all conform to the characteristics of motion and perception, which are generally ascribed (by most Greek philosophers) to the soul. On the other hand, Anaxagoras and Democritus, stresses motion, but ignore the principle of perception. Anaxagoras, for example, attributed a soul to animals. He argued that because the soul is a moving principle, animals do possess a soul. Although, Anaxagoras is correct, in terms of the motion principle, he errs in respect of the principle of perception. Animals do not possess perception (in terms of interpretative observation). (Note 4) This means that animals do not possess a soul (which is tantamount to reason). Similarly, Democritus emphasises correctly that the soul is the cause of motion, but he errs in arguing that loadstone possesses a soul because it attracts iron objects. (Note 5) He errs furthermore, when he says that a loadstone, cause motion. In so doing, he interprets motion in the sense that it is not loadstone that is moving, but loadstone that cause movement. Like, in the case of Anaxagoras, the principle of perception is also omitted here (by Democritus). Loadstone does not possess a soul. It would appear that Rosmini would agree with those philosophers who would assert motion and perception, and on the other hand, differs with those who assert that the soul is simply matter.

### 3. Man as composition of soul and body

Rosmini deduced man as a composition of soul and body from Aristotle's doctrine of form/matter and actuality/potentiality. (Note 6) Matter can be analogous to potentiality, and form to actuality. Although a composition, Rosmini plays off the soul and body against each other. (Note 7) The finding was that the body is not the soul. It is matter (potentiality), while the soul is the form of the body (actuality). The soul is the first actuality of a natural body having in it the capacity of life. (Note 8) Rosmini says: "In the composite, soul is the form, body the matter of the human being." (Note 9) It means that the soul is not independent of the body. (Note 10) If the soul is a substance altogether different from the body, we cannot infer the death of the soul from the death of the body. (Note 11) Man (in the sense of a person or an individual) is not only soul and body, but soul and body combined. (Note 12) This means that were the question respecting man to be posed, namely: "What exists here?" the answer would not necessarily be, "A soul or body", but rather, "A person exists here." Similarly, we do not say, for example, "My thought believes", or, "My hand plays piano", but rather, "I believe," or, "I play."

### 4. Divinity of man

Having identified a single soul in man, we must investigate the divinity of man. Rosmini writes that a substance which has no bodily or material property is called 'spiritual' or spirit. The human soul, therefore, is a spirit. (Note 13)

The concept of spirituality naturally relates to immortality. The word "death" only has reference to a physical (natural) entity: "[...] it would be absurd to attribute it to what is not body." (Note 14) Since spirituality indicates non-corporeality, the former is not subject to death. Rosmini furthermore says, that the soul is spiritual and therefore immortal. (Note 15) Owing to the fact that man is a union of soul and body, and that the soul preponderates, it can be inferred that man is a divine being. (Note 16) The description of the unique value of humans in Psalm 8:5 is striking: "For thou hast made him but little lower than God, and crownest him with glory and honor." (*American Standard Version*)

In view of the divine nature of man, the soul is immortal and possess reason (interpretative observation, which is not present in animals or loadstones). (Note 17) Rosmini writes: "The infinite is found in man only by having recourse to [reason]." (Note 18) and consequently: "The very unity of [men] unites souls to themselves." (Note 19) On account of the soul's divine characteristics, man is considered to be a divine being.

### 5. Human/foetal life

Under influence of the hylomorphism doctrine, Thomas Aquinas denies that the soul (human life) begins at conception. This results in a debate with Rosmini.

#### 5.1 Debate between Rosmini and Aquinas on the different stages of human/foetal life: Rosmini in defence of individual right

Thomas Aquinas argues that a foetus cannot be viewed as a human, since it does not possess a soul. He explains: "[This=human life] does not occur until the foetus has developed its brain and sensory systems to the point where it can support the distinctive intellectual capacities of a human being." (Note 20) His perception of when life begins is shaped by his view that material entities (humans) have life by virtue of the soul. He writes: "[Until] the foetus has a human soul, it is not a human being, no matter what the underlying biology looks like." (Note 21) Rosmini holds, on the other hand, that the foetus also possesses a (human) soul (from conception): "Primal, hidden, initial life [...] never perishes." (Note 22) Hereby Rosmini rejects Thomas Aquinas' argument that before a soul can exist, a foetal development should take place, according to which the vegetative soul portion expires and is followed by a more developed sensory (animal) soul portion that perishes, after which it culminates in a rational (intellectual) soul of man. According to Aquinas, only by the latter development stage, is there a human being, wherein the soul possesses a perfect body and developed brain with which to conduct life. (Note 23) Aquinas asserts that during the early stage of pregnancy (*anima vegetative* and the *anima sensitive*), the foetus does not have these characteristics (for example, a perfect body and developed brain). He writes that, if a body is not present, there is no soul and therefore there can be no human life. (Note 24) In other words: Before the rational soul (*anima rationalis*) can be created, the foetus will not have the ability to think. According to Aquinas, the foetus in the early stages of pregnancy is comparable to a plant or animal, and as such is not human. (Note 25) As mentioned previously, Rosmini acknowledges the existence of the soul from the beginning of the life of a foetus (that is, from conception) and is therefore, in his view, a human being. Rosmini thereafter emphasises the immortality of the soul (from foetal to adult stage). According to Thomas Aquinas the two preceding soul portions are mortal. Rosmini argues that the soul does not expire and that they are rather in "[...] a harmonious stimulation in a perpetual cycle." He therefore writes: "[...] the soul is immortal because life cannot lack life." (Note 26) Since Rosmini is afraid that he will end up with the same dilemma as Aquinas, he emphasizes that the sensory element (animal) soul portion is absorbed by the rational (intellectual soul) and that the latter furthermore preponderates. Hereby Rosmini again emphasises the unity of the human soul (as mentioned in paragraph 3) and also believes that different soul portions

never exist: “the soul is one in each human being,” (Note 27) and argues further: “[...] the unity of the soul disposes of the error requiring simultaneously three souls, animal, sensitive and intellective, which certain authors [such as Thomas Aquinas] have endeavoured to posit in human beings.” (Note 28) Rosmini says regarding the Aristotelian Thomistic hylomorphism doctrine: “Even granted the existence in human beings of a principle of vegetation and sensation distinct from myself, this principle would not be the human soul, but something different from it.” (Note 29)

Rosmini thus acknowledges the existence of a single soul that shows development until man’s eventual birth.

Thomas Aquinas consequently argues that it is impossible for the rational soul to be created in man at the moment of conception. He asserts that God would not want a foetus to have an innate rational soul. God would only create the soul in man when the foetus has sufficiently developed. (Note 30) The question that can be asked is: At what point does this occur? According to Aquinas, the foetus is sufficiently developed during mid-pregnancy, that is, the twentieth week of pregnancy. At this point it has a perfect body and developed brain: This is 40 days for men and 90 days for women. The rational soul is only implanted at these respective times in the different sexes. (Note 31) At these respective times, the foetus will have sufficiently developed in Thomistic terms and can therefore be viewed as a human being. (Note 32) It is during the late stage of pregnancy, that is, after the twentieth week of pregnancy (ensouling), that one has to do with a human being, and abortion is stimulated by ethical considerations. According to this, abortion is criminalised and the taking of a human life is an encroachment of individual rights and tantamount to murder. (Note 33) Thomas Aquinas thus asserts that abortion during the early stage of pregnancy is permissible, but not during and after the twentieth week of pregnancy. In relation to the Thomistic distinction between the early and late stage of pregnancy, Thomas Aquinas debates with Rosmini and causes a violation of the individual right of the foetus by allowing abortion in the early stage of pregnancy. Despite Rosmini’s disapproval thereof, Thomas Aquinas’ approach was accepted in South Africa’s *Choice on Termination of Pregnancy Act 92 of 1996*.

Obviously, Rosmini views man, as well as the foetus, as an intellectual (rational) being. Rosmini therefore states that the Thomistic distinction between the early and late beginning of life is spurious and should be regarded as of lesser importance. Despite Rosmini’s association with the Church *magisterium*, which is silent on the subject of at which moment life begins, Rosmini argues, as do the majority of Catholics, that an actual person exists from the moment of conception. The Church *magisterium* views the foetus as a gift from God to mankind. On the basis of this God-given gift, the foetus must consequently be endowed with divine characteristics, even from the moment of conception. This therefore involves that the foetus also has individual rights during the stage of conception, which according to Article 11 (the right to life) of the Constitution of South Africa, act 108 of 1996, must be respected by all. According to this, performing an abortion (regardless at which stage of pregnancy) can therefore be considered a violation of the individual rights of the foetus.

## 6. *Nasciturus* fiction

Rosmini faces a dilemma. He desires to ascribe legal subjectivity (legal personality) to the foetus, but is prevented from doing this by South African common law, since a legal subject in the legally technical sense refers to someone that is endowed with rights and obligations. (Note 34) This means that, despite the fact that the foetus is an intellectual and rational being and thus has a soul, it still does not have legal subjectivity (legal personality). In terms of the South African common law, the legal subjectivity of a natural person only begins at birth. An unborn child is, for the purposes of the law, not a legal subject, since it has not yet been born. (Note 35) Rosmini’s dilemma is, however, solved by a legal institution, the *nasciturus* fiction, of South African law. According to Judge Hiemstra, the *nasciturus* fiction in the case of *Pinchin v Santam Insurance Co. Ltd.* (Note 36) involves that the foetus can be viewed as a living being (born) [regardless of the stage of pregnancy], if it is in the foetus’ interest or to its advantage. (Note 37) This finding by the judge implies that Thomas Aquinas’ distinction between early and late pregnancy can be dispensed with, and that in both stages of pregnancy (early and late) the foetus should be endowed with legal subjectivity. The thought can be rounded off as follows: When the foetus is born alive, it will be to his/her advantage. According to this, the foetus not only benefits by virtue of the *nasciturus* fiction, but, just like every other person, is also entitled to the protection of his/her individual right, namely his/her right to life (as guaranteed by Article 11 of the South African Constitution 108 of 1996).

Owing to the *nasciturus* fiction, the foetus will have subjective rights, provided it is to his/her advantage. But what if this provision is not met? Does this mean that the foetus’ subjective right is denied? If that is the case, Thomas Aquinas’ argument that the foetus is a plant (*anima vegetativa*) or animal (*anima sensitiva*) in the early stage of pregnancy, would be correct. The result hereof is that the foetus is not a legal subject, and therefore does not have individual rights. His/her individual right (the right to life) can thus, according to Thomas Aquinas and the South African common law, be encroached upon. On these grounds, Rosmini can argue that the prescriptions of the *nasciturus* fiction should be expanded—not only to the point where it is entitled to an advantage, but also if there is no material benefit for him/her. Rosmini thus pleads that South African common law should coincide with the Constitution.



## 7. Constitutional protection

From the debate between Rosmini and Aquinas, and the former's approach being superior, we can reach the conclusion that a foetus, despite the lack of legal subjectivity (according to the South African common law), is also a person. On this foundation, Rosmini has made a study for the protection of individual rights for all (including the foetus) possible.

The requirements of the moral law, which issues from the natural law, involve that one does not do to others that which one does not want done to oneself. The fact that you as an adult were not aborted when you were an foetus (embryo) signifies that you should do the same for your unborn baby. The inalienable right to life must be acknowledged and respected by both the state and the courts. Among these inalienable rights are each individual's right to life and physical integrity from the moment of conception until death. As soon as the state denies or deprives a certain category of human beings protection, it denies the equality of all before the law, which is guaranteed in terms of Article 9 of the *Constitution of South Africa* 108 of 1996. In terms of Article 9(3) of the Constitution, the state will thus be unfairly discriminating against the foetus if it does not protect the foetus' right to life. In this regard Article 9(3) says that the state would: "[...] unfairly discriminate directly or indirectly against anyone on one or more grounds, including [...] age [...] and birth," if it did not guarantee the foetus' right to life in terms of the Constitution. In my opinion, Rosmini could argue that the requirements of the *Choice on Termination of Pregnancy Act* 92 of 1996 should not be complied with, since it undermines the equality principle of the Constitution. After all, Article 2 of the Constitution expresses the principle of constitutional supremacy. Article 8 of the Constitution also stipulates that the *Bill of Rights* of the Constitution supersedes all legislation (including the *Choice on Termination of Pregnancy Act*). This approach is supported by the court case *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC), in which it was determined: "Any law or conduct that is not in accordance with the Constitution [...] will therefore not have the force of law." (Note 38) In view of this, the South African Constitution is the best guarantee for the protection and preservation of individual rights. The Constitution should, in my opinion, declare the *Choice on Termination of Pregnancy Act* unconstitutional.

## 8. Man and the State

The practical implication of Rosmini's basic legal doctrine involves that man must be endowed with fundamental rights, from the foetal stage of pregnancy to adulthood. On the basis of this, man may not be deprived of individual rights. (Note 39) The Church *magisterium*, in the *Declaration on Procured Abortion*, and Tertullian confirms that the foetus: "[...] would never be made human if it were not human already." (Note 40)

The person as an intellectual being possesses a soul (reason) (paragraph 4) and, by virtue of this, is viewed as a carrier of individual rights. According to this, man as an intellectual (divine) being, is endowed with moral dignity. He must be respected, since man is the image bearer of God. This divine intellect, or reason, is constitutive of the dignity of man. (Note 41) By virtue of this dignity, man possesses a fundamental individual right, that may not be encroached upon, even by the state. Rosmini writes: "The State, for example, cannot absorb the inalienable rights proper to persons, nor can it be considered as more than its individual members in such a way that persons can be sacrificed for the sake of society." (Note 42) Further, he says: "[...] not a single right of individual citizens [...] can be sacrificed for the sake of the public good [...]" (Note 43) On account of these quotations of Rosmini, there cannot be complied with the doctrine *salus rei publicae suprema lex*. The doctrine *salus rei publicae suprema lex* is totalitarian in nature and leads to a belittlement of man, since Thomas Aquinas writes that the individual subject to the state. (Note 44) This means that the *salus rei publicae suprema lex* doctrine which Thomas Aquinas obviously supports, approves the state's power to infringe upon the individual rights of its citizens. The approach is demonstrated in the light of the following references: In terms of the court case *S v Essop and Others* (Note 45), the *salus rei publicae suprema lex* doctrine is explained as follows: "The safety of the State is the supreme law of a state." This maxim is also mentioned elsewhere in judicature, for example, *Africa v Boothan* (Note 46) and *S v Baker, S v Doyle*. (Note 47) The source *Latin for Lawyers* explains it this way: "[The] welfare of the people, or of the public, is supreme law," (Note 48) and further says: "[This] phrase is based on the implied assent of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good." (Note 49)

Basic individual rights are described as unassailable. Yet, the principle, *salus rei publicae suprema lex*, implies that the government authority can utilise all the means at its disposal to overcome any threat to the security of the state, even if individual rights are thereby sacrificed. This principle is supported by Judge Rose-Innes in *Krohn v Minister of Defence and Others*: (Note 50): "[...] but there is an inherent right in every state, as in every individual, to use all means at its disposal to defend itself when its existence is at stake; when the force upon which the courts depend and upon which the constitution is based, is itself challenged. Under such circumstances the state may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger." Rosmini, on the other hand, opine (in contradiction to *salus rei publicae*) that the right of the individual is very important and

must therefore be protected up to the point where the interests of the community prevail (since its existence is threatened). After all, the individual's right would not be able to keep existing, if the society in which he exercises that right, were to perish. Rosmini puts it this way: "[...] society must prefer not to do harm to a private individual even for the sake of obtaining the safety of all the others. Conversely, it cannot do some good to the individual unless this good comes about without any damage or diminution of public good." (Note 51)

The general legal feeling is that a balanced relationship must be maintained between individual rights and state security (*salus rei publicae*). However, this does not seem to be the case with Rosmini and Thomas Aquinas. The former tends to give preference to the individual over the state: "Not a single right of individual citizens [...] can be sacrificed for the sake of the public good," (Note 52) while the latter is in favour of the interests of the individual being subject to the state: "[...] the individual as subordinate to the [state]." (Note 53)

## 9. Conclusion

The message is directed to those individuals who are responsible for the formulating of the conscience and public opinion, namely scientists, physicians, jurists and politicians. They should support the South African Constitution, which is the best guarantee for protection and preservation of individual rights (of the foetus and the adult), and undo the shortcomings which handicap it, so that the practical implications of Rosmini's Christian view of individual rights can be highlighted in reference to the South African Constitution. It stands to reason that Rosmini's treatment of individual rights can be viewed as a precursor of the South African Constitution. The Bill of Rights, in the Constitution, finds support in Rosmini's treatment of individual rights. If Aquinas had been in possession of the facts about embryology, he would have had a totally different view of the beginning of biotic life. Regarding embryology, he was completely influence by Aristotle. As for the distinction between the early and late beginning of life and Aquinas' choice respecting the former, and also because of his (Thomas Aquinas') totalitarian view of the state, the debate between him and Rosmini resulted.

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## Notes

Note 1. De Anima 405a 12-405b 8. To Hippo the soul is water. The reason for this is that in all living beings semen is wet/damp. Semen is to him the undeveloped soul.

Note 2. Note. Aristotle. De Anima xxi; De Anima 404a 19-404b 15. Empedocles seeks the existence of the soul in air, earth, water and fire, which are the origins of the vital functions. He undermines the element of perception (senses) and feels that this element is imperfect. He also disregards the element of motion. Empedocles rather constitutes the soul in the element of blood.

Aristotle. De Anima xxiv. "Thus, then, we perceive like by like, the four elements of all things air, earth, fire and water, because air earth, fire and water are present in our bodies. Blood is the most perfect mixture of these four elements and to this blood where it is purest, viz. about the heart, he attributed thought."

Note 3. De Anima 405a 12-405b 8. Critias agrees with Empedocles against Hippo when he says that the soul is blood. He differs from Empedocles though, in the sense that he does not include earth in the composition of the distinct components for the formation of blood. Moreover, his opinions show parallels to those of Empedocles

Note 4. De Anima 404a 19-404b 15.

Note 5. De Anima 405a 12-405b 8.

Note 6. Rosmini, Development (1999 (vol. 2)) 47.

Aristotle, De Anima 412a 5-20.

Note 7. Rosmini, Development (1999 (vol. 2)) 12-13.

Note 8. De Anima 412a 22-412b 21.

Note 9. Rosmini, Essence (1999 (vol. 1)) 115.

Note 10. De Anima 414a 14-414b 10.

Note 11. Essence (1999 (vol. 1)) 85.

Note 12. Thomas Aquinas, Summa Theologiae 1a, q. 75, a. 4. "[Hominem] nec aliam solam, nec solam corpus, sed animam simul et corpus esse arbitrator."

Note 13. Rosmini, Essence (1999 (vol. 1)) 85.

Note 14. Essence (1999 (vol. 1)) 85.

Note 15. Essence (1999 (vol. 1)) 85.

Note 16. Rosmini supposes that the good (the divine nature of the man), will eventually prevail over the physical (natural), and that man thus has participation with God, the highest Being. The idea shows parallels to the Thomistic analogia entis and participation doctrine.

Note 17. Aristotle, De Anima 415a 8-415b 5.

Note 18. Essence (1999 (vol. 1)) 123.

Note 19. Essence (1999 (vol. 1)) 123, voetnoot 109.

Note 20. Thomas Aquinas, Summa Contra Gentiles II. 89. 1737

Pasnau, Aquinas on Human Nature (2002) 108.

Note 21. Aquinas on Human Nature (2002) 109.

Parallel reading: Thomas Aquinas, Summa Theologiae 1a, q. 75, a. 5.

Note 22. Rosmini, *Essence* (1999 (vol. 1) 288.

Note 23. *Summa Theologiae* 1a, q. 76, a. 3; 1a, q. 76, a. 5.

*Summa Contra Gentiles* II.89.1745. "The vegetative soul comes first, when the embryo lives the life of a plant. Then it is corrupted, and a more complete soul follows, at once both nutritive and sensory, and then the embryo lives the life of an animal. But once this is corrupted, the rational soul follows [...]"

Note 24. *Summa Theologiae* 1a, 76, a. 4.

Note 25. Thomas Aquinas *Summa Theologiae* 1a, 76, a. 3. "Animal autem dicitur ex eo quod habet animam sensitivam."

*Summa Theologiae* 1a, 76, a. 3, obj. 3. "Praeterea Philosophus dicit quod embryo est prius animal quam homo."

Note 26. Rosmini, *Essence* (1999 (vol. 1)) 287.

Note 27. *Essence* 82.

Note 28. *Essence* 82.

Note 29. *Essence* 82.

Note 30. *Summa Theologiae* 1a, q. 78, a. 1.

Note 31. Haldene, Aquinas on Human Ensoulment, *Abortion and the Value of Life* (2003) 266.

Note 32. *Summa Theologiae* 1a, q. 76, a. 5.

Haldene, Aquinas on Human Ensoulment (2003) 269.

Note 33. Thomas Aquinas, *Summa Theologiae* 1a2ae, q. 95, a. 2. "Derivantur ergo quaedam a principiis communibus legis naturae per modum conclusionem: sicut hoc quod est 'non esse occidum', ut conclusio quaedam derivari potest ab eo quod est 'nulli esse malum faciendum'"

Note 34. Davel, *Introduction to Child Law in South Africa* (2000) 2, footnote 9.

Neethling, *Deliktereg* (2006) 46.

Note 35. Davel, *Child Law* (2000) 2-3

Note 36. 1963 2 SA 254 (W)

Note 37. Testamentary advantage, or advantage of any kind, is viewed as of lesser importance in this context.

Note 38. Iain Currie, *The Bill of Rights Handbook* (2005) 9.

Note 39. Rosmini, *Rights of the Individual* (1993(b)) 19.

Note 40. *Congregation for the Doctrine of the Faith* (1987) 13.

Tertullianus, *Aplogoeticum* ix. In opposition to Aquinas, Tertullianus supports the Church magisterium and Rosmini. He writes: "Nobis vero semel homicidio interdicto etiam conceptum utero, dum adhuc sanguis in hominem delibatur, dissolvere non licet. Homicidii festinatio est prohibere nasci, nec refert natam quis eripiat animam an nascentem disturbet. Homo est et qui est futurus; etiam fructus omnis iam in semine est."

Note 41. *Anthropology* (1991) ix.

Note 42. Rosmini, *Rights in Civil Society* (1996) 37.

Note 43. Rosmini, *Rights in Civil Society* (1996) 37.

Note 44. Thomas Aquinas, *Summa Theologiae* 1-2, q. 90, a. 3. "Et ideo sicut bonum unius hominis non est ultimus finis, sed ordinatur ad commune bonum, ita etiam et bonum unius domus ordinatur ad bonum unius civitatis, quae est communitas perfecta."

Note 45. 1973 2 SA 815 (T).

Note 46. 1958 2 SA 459 (A) 462-3.

Note 47. 1965 1 SA 821 (W).

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Note 50. 1915 AD 191.

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Note 52. *Rights in Civil Society* (1996) 37.

Note 53. D'Entrèves, Aquinas. *Selected Political Writings* (1965) xviii.

## On Several Problems in Legal Transplantation

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### Abstract

Legal transplantation, existing between nations and national districts, usually means the digestive and absorptive process happened in legal article, legal principle, legal system, legal norm, legal concept and technology, legal idea. It usually includes four aspects about its qualities. There have been two significant legal transplantations in Chinese history. Legal transplantation is an important way that enriches our legal culture in terms of legal development.

**Keywords:** Legal transplantation, Norm group, Legal culture, Legal system

By the explanation of "Chinese lexicography", the word "transplantation" has two main meanings: (1) grafting. This is a botanical sense, refers to botanical transplantation. (2) Technological transplantation, refers to a particular organ or body part of human beings. The transplantation which refers to medical sense is always related to autograft (transplant one part of the body in another part of the same body) and allograft (transplant one part of the body in the same part of another body). The specific purpose of transplantation is to survive the life. Since the 50s of this century, with the birth of variety of cross-curriculum, "transplantation" was gradually evolved into the concept of "multi-disciplinary". In addition to biological and medical meaning, there are a cultural sense (cultural transplantation), the legal sense (legal transplantation), the political sense (political transplantation). The article mainly discusses the legal transplantations.

### Part 1. The meaning and the characteristics of legal transplantation

In terms of legal transplantation, there is a variety views between domestic scholars and international scholars. One view is that the legal transplantation is "followed by the identification, recognition, adaptation, integration, based on the introduction, absorption, adoption, uptake, assimilation of foreign law (including the legal concepts, technology, norms, principles, systems and legal concepts, etc.)" Arlanwosen, British legal history scholars, on his book "legal transplantation - a study on comparative law", pointed out that: "legal transplantation means a transition of legal system from one country to another country, or from one family to another family." A lots of organist argued that the attention should be paid to the internal and external coordination, that is: legal principles, concepts, structures and social relations between mutual adaptation and coordination. The above point of view is basically correct, but it has not fully revealed the profound meaning of transplantation and all characteristics. The author believes that the grafting law should be such a transplantation existing in few countries or within one country. The various administrative areas of law and specific legal principles always have different legal systems, regulations, norms, rules, concepts and technology. Legal transplantation is a mutual process happened in mutual digestion and mutual absorption. It has the following characteristics:

#### *1. It is a mutual transplantation:*

Legal transplantation is a mutual processing including implantation of the law and explanation of the law. Explanations mean one country's legal norms, rules, principles migrated in another country. Implantation or dissemination means one country's legal norms, legal principles, output to another nations. The performance of the introduction of legal means absorbing. Above two together constitute a two-way of migration. Historically said the legal transplantation is sometimes dependent on the output and dissemination of military expansion, and sometimes relying on the superiority of their own legal culture. Implantation of the law is mainly based on the needs of the construction of domestic law. In a field of legislation, due to their lack of traditional legal culture and legislative experience, in order to promote the progress of the country's rule of law, this country usually introduced foreign law system through the running of the history.

#### *2. Legal transplantation is a relevant grafting*

From the botanical sense the term "transplantation" means the whole implantation, but from the medical point of view, organ transplantation is clearly means part implantation rather than comprehensive transplantation. Organ transplantation also suggests that the human body is composed by series of exclusive physiological activities. This shows that we are talking about medical transplantation rather than the botanical transplantation. "This transplantation based on certain commonality between civil law and international law which is dominated by the same legal system.

There will be an attraction between them. It was not simply dimension indicated the possibility of legal occurrence. "The relevance of legal transplantation showed that legal grafting is not simply a legal integration, it always means cultural transplantation. Ermain, comparative jurists of United States, pointed out that legal transplantation rely on "standardize certain systems and move from one culture to another culture". Generally speaking, the transfer of the legal system and the implantation of the law has always related to the cultural traditions of the special mechanism. There will be a convergence process between explanation and implantation. This process is not only mean the digestion and absorption but also mean the cultural convergence.

### *3. Legal transplantation is an unification between autologous transplantation and allografting*

Autograft refers to a specific legal system or the principle of unity in the body .It was limited in the scope of interior countries and the various administrative areas. For example, in the United States, with the exception of the Federal Constitution and Federal Law, the States also have its own Constitution and Laws, in order to promote the regional rule, the States often implant other region's law. Legal system of European Community is also originated the comparison, the adoption and integration of member countries. Legal transplantation, based on the formation between legal system and international practice, can be said to a production of legal migration. With the corresponding autografting and allografting, Legal transplantation is a specific intercourse happened to two countries. Autologous grafting should be viewed dialectically. For example, as a unified regional legal movement, if see the region as a whole, the area of legal migration between countries is an autograft; but if not see the region as a whole, then such transplantation is called allografting. In short, autologous transplantation is always explained by lawyer dialectically.

### *4. Legal transplantation means methods and techniques of grafting*

Transplantation of laws and regulations is not only a means or a legal system from one country to another or from one region to another region, but also refers to such skills and methods of transplantation. This is reflected in the legal requirements. Legal implantation and explanation can not be copied by another legal system and can not be applied mechanically. This implantation often indicated a particular aspect. Transplantation of foreign law is a intricate process. It is focused on methods and techniques .It can be transplanted to the "norm group". This" legal norm "will become more effective after the implementation. Practice has proved that the only way to make legal transplantation is to engage in a new healthy growth of the social body. The viewpoint was made that: there are no individual transplantations. Legal transplantation is always activated by group. On this point of view, I beg to believe efficient legal scutinizations. There are two reasons: (1) the history and realities display that there were provisions transplanted by individual legal system. Such as the Silla (now North Korea and South Korea) law, implanted "norm group"of Tang Dynasty. Certain specific provisions really existed in Japan, France and Germany. (2) regulating the transplantation group should be a specific task.. For example, we can not overall implant any civil or criminal law to China, but also can not explain Chinese administrative procedure law to Japan or other countries. So, the question is what kind of normative group allowed to transplant? The author believes that the only way to transplant is to analysis the normative group and affirmed that the norms of particular group are an integral part of departmental laws. In terms of the specific provisions of "group norms" there are the same questions. The logic of the provisions is as the same well. We need legal rights and inseparable nature of the obligations. China's contract law and foreign investment law were all developed by new countries. The introduction of foreign legal norms of a particular group is just a case at random.

## **Part 2. two large-scale legal transplantation in Chinese history**

### *1. The legal transplantation in Tang Dynasty is the largest legal explantation in Chinese history*

The legal transplantation in Tang Dynasty is characterized by that: Tang Dynasty have made great progress in political transition and economic development. At the same time the neighboring countries has largely implanted Tang's cultural in the light of initiative and lessons. This transplantation is mainly relied on sending students to Tang .Completing legal system of Tang Dynasty is a strong imperative. Tang also implanted external factors existing in neighboring countries, such as Japan, Southeast Asia. Other countries also implanted Tang's law comprehensively. These two factors combined to render large-scale transplantation.

For example, in 700 AD Japan immigrated a large number of the laws of Tang Dynasty .Such as "dabao imperative," a total of 16 volumes, composed by 11 vol, equivalent to the Criminal Law, really imitate Tang's norms.The civil law, administrative law, procedural law are suitable for actual Japanese society in the era of the Tang Dynasty. On penalties, "dabao imperative" provided five kinds of categories: caning, cane, resettlement, flow, death."Dabao imperative" also provided eight kinds of penalties: the act of murder conspiracy, destruction of imperial tombs and the palace, conspiracy of the State, rebelling crimes, assault and murder of grandparents and parents, acts of killing, crimes on the road, stolen artifacts."Dabao imperative" indicated that unfilial conduct and unjust crime of National Secretary will be punished severely. These provisions not only from the content, but also from the name are both comprehensive system. In addition, at the 19 century Okinawa and Southeast Asian countries have close relationship with Tang Dynasty. They have implanted a large number of Chinese Law.

## 2. The largest legal implantation at the end of Qing Dynasty

After the Opium War, China's legal system has made great changes in history and legal actions has always been associated with implantations. At the end of Qing Dynasty legal reform was a notable feature in Chinese history. There were great conflict between Chinese law and Western law. Foreign law has an unprecedented impact on traditional Chinese law. The impact carried a series of amendment and a large number of foreign legal methods.

At the end of the Qing Dynasty the legal implantations were mainly concentrated in the following aspects:

(1) The "constitutional framework", published in 1908, is the first constitutional document in Chinese history. It provided the rights and obligations of citizenship. The first of these two stated that: "subject to the principle of all speeches, all press, all assembly, all association, all quasi, are all free." Article 3 provided that: "according to the law of penalty there was non-custodial punishment." This Constitutional outline was completely absorbed the spirit of Japanese Constitution. Hsiao, Taiwan scholars, pointed out that: "The constitutional framework, purely constituted by copying Japanese Constitution."

(2) In 1911, the Qing dynasty was crumbling in the wind, the development of "Constitution" was deeply sunk into the "creed" of the emperor, the royal family's right was restricted by the British law. All above regulations embodied the principle of constitutional monarchy. The "Constitution" stated that: "Emperor's right is limited" (Article 3); "international treaties, Congress's resolutions, shall be confined" (Article 12); "the employment of people should be regulated by the Congress" (Article 15); "royal ceremony shall not be inconsistent with the constitution" (Article 16); "the government should be divided into two organizations" (article 17). As a legal document the "Constitution" clearly reflects the principles and spirit of Chinese monarchy, but it did not save the life of Qing Dynasty. In the late 1911 Qing Dynasty was quickly overturned by Xinhai Revolution.

(3) At the end of the Qing Dynasty, legal transplantation was related to the structure of the bourgeois, the penalty system, probation, parole, timeliness and principle of statutory crimes.

(4) There is no formal announcement about the "Draft Law of Civil Procedure" and "the draft Criminal Law". Chinese judicial system introduced the principles and system of Britain, France, Germany and other countries. The penalty system is borrowed from the French and German traditions. At the same time they carried out the "Company Law", "Bankruptcy Law" and a series of "Economic Law".

### Part 3. Legal transplantation is a significant way to enrich Chinese legal culture

Legal development shows that a country's legal culture is a result of its own accumulation. Now we will continue to accumulate the experience so as to promote the country's progress. Development of law proved that: "to a large scale the history of the country's legal system is to borrow materials which it is outside the native country, this is the history of assimilation." [2] Chinese culture has strong cohesion and assimilation, and if we can emancipate the mind, a bold introduction, absorption and assimilation to foreign law will appear. Outstanding achievements will adapt to create a practical and unique legal system. The legal transplantation is a result of cultural conflict. Of course, we must remember that the law is a specific national history, culture, social values and the general concept of ideology. The law is a cultural form of expression. Without the process of localization it can not be easily transplanted from one culture to another culture. China's legal system has its characteristics. To absorb and transfer domestic legislation is an intellectual property. International intellectual property protection system needs mature experience and advanced technology. We will to develop and improve the "Patent Law", "Trademark Law", "Copyright Law". We must discuss the spirit of the laws and regulations and other implementation details. We have recently formulated "State Compensation Law", "Administrative Punishment Law". We absorbed conception in varying degrees including Western country experience. To release "National Civil Service Law" we will absorb and transplant foreign law systems and principles. As long as the legal transplantation combined with the cultural transplantation, our country will enter a new healthy growth era. It is the most important missions to forming the legal system with Chinese characteristics.

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## Malaysia in Transition: A Comparative Analysis of Asian Values, *Islam Hadhari* and 1malaysia

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### Abstract

This paper discusses on the principles of Asian values, propagated by Malaysia fourth prime minister Mahathir Mohamad, *Islam Hadhari* by the fifth prime minister Abdullah Ahmad Badawi, and 1Malaysia by the current prime minister Najib Razak. This paper gives a special attention to Abdullah and *Islam Hadhari* because it links the Mahathir's period to current Najib's leadership. The intension of this paper is to prove that actually these concepts are similar in theory and practice in stressing more on Islam and neo-feudalistic Malay agenda. In fact, *Islam Hadhari* is ironically a concept created by Mahathir himself to counter the idea of Islamic State from the Islamic party, PAS. Therefore, even after resigning from government, Mahathir's agenda of Asian values is still being practiced. Najib Razak, current Prime Minister, on the other hand intended to promote quality leadership performance for the public and unity among the multiracial Malaysia. Although there are differences in term of the arguments for each of the idea, it is clear that these ideas or philosophies attempt to protect the real agenda of those three leaders which were to protect the political culture of neo-feudalism and ensure the ruling United Malays National Organization (UMNO) and Barisan Nasional (BN) will stay in power. This paper shows the debates between scholars in explaining the ideas and philosophies behind those three concepts in Malaysia's *realpolitik*.

**Keywords:** Malaysia, 1Malaysia, Asian Values, *Islam Hadhari*, Neo-feudalism

### 1. Asian Values: 'The Mahathir Model'

According to R.S. Milne and Diane K. Mauzy (1999, p. 168), 'Mahathirism is not a guide to Mahathir's thoughts or actions. Rather, Mahathir's thoughts and actions are a guide to constructing Mahathirism. Mahathirism is an exercise in allocating thoughts into logical categories with the aim of achieving intellectual satisfaction and understanding'. As an advocate of 'Asian values', Mahathir Mohamad, former Prime Minister who ruled Malaysia from 1981 till 2003, explained that the Malaysian perspective of 'Asian values' is based on Malay-Islamic culture and should be protected against absorption by Western values. He urged the three most basic elements of 'Malayness' – feudalism, Islam, and *adat* (traditional customs) as he saw it in 1970 in his book, *The Malay Dilemma*, should all be classed as features to be merely accepted as realities and perhaps adapted to modern needs (Barr, 2002, p. 42). Mahathir (Mahathir and Ishihara,



1995, pp. 71-86) rejected universalism or the Western liberal notion of human rights which, he believed, can corrupt Malaysian culture and religious beliefs. Concerned about the influence of Western individualism, and the future of Asian values and traditions, Mahathir accepted the idea of cultural relativism and launched the 'Look East' policy in 1982 as a broader campaign against 'Western values'. Mahathir told the 1982 United Malays National Organisation (UMNO) General Assembly to 'Look East' to emulate the diligence found there and 'to rid ourselves of the Western values that we have absorbed' (Khoo, 1995, p.69).

Errol P. Mendes (1994, p. 3) labels the Malaysian version of Asian values as 'The Mahathir Model' to differentiate it from other types of Asian values such as Singaporean School that stresses on Confucianism and China Model that emphasises the combination of Chinese-Nationalist-Communist values. 'The Mahathir Model' is basically influenced by Malay-Islamic values. As Alan Dupont points out, Mahathir had the clarion call for Asian values:

...despite the fact that the Islamic ethos of his country differs markedly from the neo-Confucianism of Singapore and other Sino-centred states in East Asia. However, he (Mahathir) reconciles this apparent contradiction by subsuming Malaysia's distinctive national character in broader obeisance to Asian Values. (Dupont, 1996, p. 14)

This model of Asian values has also helped to support the government agenda. Stability and enforced social cohesion in a heterogeneous society has become internalised as a fundamental core Asian values (Mendes, 1994). Asian leaders, such as Mahathir and Lee Kuan Yew of Singapore, also introduced the concept of Asian values in response to the global democratisation, booming economy and political stability of the 1990s, before the currency crisis of July 1997 had shocked Asian countries (Naisbitt, 1997, pp. 51-85; Inoguchi and Newman, 1997, pp. 1-2). The main elements of 'The Mahathir Model' are strong authority, prioritising the community over the individual, and a strong family based society. The distinctive feature of 'the Mahathir Model' is that it draws upon the experience of the Western world in order to evaluate state and society in the light of modernity. Its main critique both of a universalist-liberal democratic model of politics and individual rights as reflecting Western hegemony is based upon empirical and cultural grounds. Mahathirism or 'the Mahathir Model' is clearly a reaction to the debate between two main theories of human rights, universalism and cultural relativism, and it could also be expanded into these three arguments: anti-western imperialism, strong government and protecting community.

## 2. Abdullah's *Islam Hadhari*

Mahathir Mohamad's successor, Abdullah Ahmad Badawi, introduced a concept or a list of values called '*Islam Hadhari*' which, I believe, is not a new concept to replace Asian values propagated by Mahathir. Instead it is a new twist or expansion to the Asian values thesis where there are strong inputs on Islam and the Malay agenda. Abdullah has also never announced that he did not follow the concept of Asian values. Abdullah articulated his ideas of *Islam Hadhari* in his speech entitled '*Islam Hadhari* and the Malay Agenda' at the UMNO General Assembly on 23 September 2004 in Kuala Lumpur. He argued that *Islam Hadhari* is an approach of 'progressive' or 'civilisation' Islam that emphasises on development, consistent with the tenets of Islam, and is focused on enhancing the quality of life. It aims to achieve these through the mastery of knowledge and the development of the individual and the nation (Abdullah, 2006, p. 3). In addition, through the implementation of a dynamic economic, trading and financial system, it aims to achieve an integrated and balanced development that creates a knowledgeable and pious people who hold fast to noble value and are honest, trustworthy and prepared to take on global challenge. It also ensures that the government upholds the practice of good

Abdullah (2006, p. 3) also explains that *Islam Hadhari* is not a new religion, a new teaching nor a new *mazhab* (denomination). It is an effort to bring the *ummah* (the worldwide community comprising all adherent of the Muslim faith) back to the basics of Islam, back to the fundamentals as prescribed in the *Quran* and the *hadith* which form the foundations for an Islamic civilisation. Therefore, *Islam Hadhari* aims to achieve 10 main principles:

- 1) Faith and piety in Allah;
- 2) A just and trustworthy government;
- 3) A free and independent people;
- 4) A vigorous pursuit and mastery of knowledge;
- 5) A balanced and comprehensive economic development;
- 6) A good quality of life for the people;
- 7) The protection of the rights of minority groups and women;
- 8) Cultural and moral integrity;
- 9) The safeguarding of natural resources and the environment; and
- 10) Strong defence capabilities.

In Parliamentary session on 27 August 2007, the prime minister reiterated that Malaysia was a Muslim country and governed according to Islamic principles. He said that Malaysia firmly believed in the principles of Parliamentary democracy guided by the country's highest law, namely the Federal Constitution (Bernama, 2007). Abdullah argued that the *Islam Hadhari* approach did not mean that Malaysia was a theocratic country. He explained that:

The government that I lead is a government based on the principles of Parliamentary democracy and is answerable to Parliament. At the same time, the Cabinet comprises ministers who profess Islam, Buddhism, Hinduism, Christianity and others respectively, who reach consensus based on discussions and come out with the national development policies....I also dismiss the argument that it contravenes the social contract negotiated by our past leaders. We must remember that the Federal Constitution was successfully drafted on the basis of compromise and cooperation demonstrated by the three major races in the country when fighting for independence. (Bernama, 2007, p. 1)

The prime minister said that this approach in administration has been practised by the Malaysian government for over 50 years, and the unique formula had been tested and its effectiveness had been proven. The adoption of Islamic principles in the country's administration did not in any way change the social contract or the constitution (Bernama, 2007).

*Islam Hadhari* is also looked as a general framework for the development of the Muslim *ummah* away from the violent trend of *jihad*, extremism, and militaristic Islamic groups especially from the most famous of which are al-Qaeda and Jumaah Islamiyah. Malaysia had the experience with Islamic militant movements such as the al-Maunah and Kumpulan Mujahidin (Militer) Malaysia (KMM) attempt at *jihad* in 2002 and 2003. Abdullah openly criticised and disavowed the violent streak in the Islamic jihadist movement (Zainal, 2006, p. 180). Besides, *Islam Hadhari* is in intention to erase Islamophobia among the non-Muslim especially in Malaysia. Therefore, Abdullah encourages dialogue between Muslim and non-Muslim in order to wipe out the stereotype of non-Muslim about violence in Muslim community.

Regarding democracy and free speech, Abdullah (2006, p. 114) believes that *Islam Hadhari* is entirely consistent with democracy, because *Islam Hadhari* is all about living peacefully and respecting each other in the society. *Islam Hadhari* encourages consensus building (*musyawarah*) as an approach to solving problems, and accepts the consultative process (*shura*) as the best way of dealing with various societal issues. Abdullah also urges people of goodwill, NGOs, and institutions of higher learning can all play a part to promote critical dialogue between the non-Muslim world and the Muslim world. While it is necessary on their part to find common ground with people of other faiths, Muslims must also open up the discourse within their own faith, a more open and diverse Islamic discourse. The observance of the canon of accountability in Islam was often matched by respect for the people's views. Morally upright Caliphs accommodated opinions that were different from theirs. In fact, there is a *hadith* that even eulogises differences of opinion within the *ummah* as a sign of divine blessing. It explains why at different points in Muslim history, there were healthy discussions and debates about religious and political matters among scholars and segments of the populace (Abdullah, 2006, p. 39).

### 3. Critics to *Islam Hadhari*

There are many criticisms to the concept of *Islam Hadhari*. First, there is obvious that despite the idealistic argument of *Islam Hadhari*, it was definitely a politically astute strategy that succeeded in Islamising UMNO with the result of nullifying the attraction of 'PAS Islam', especially among the Malay peasants and new professionals. Abdullah made it a key point to assert the civilising function of religion in his formulation of a strategy to face the challenge of the 'Islamic state' by PAS. According to Terence Chong (2006, p. 38), *Islam Hadhari* was a cause celebre in the run up to the March 2004 general election. The prime minister won by a landslide and *Islam Hadhari* was proclaimed a triumph by the onlooking media.

Historically, argued Zainal Keling (2006, p. 180), *Islam Hadhari* was first proposed in 2001, before Abdullah became prime minister, by several Islamic thinkers within UMNO who grappled with the loss of 22 seats, the defeat of senior UMNO figures, and PAS's win of a state government (Terengganu) in the 1999 general election. A special information unit was formed within the Ministry of Information to combat the growing violent messages of Islam by various factions in society and messages against UMNO by members of PAS. Islamic programmes were launched to search for the most appropriate strategy and to reduce the effect of the messages. By 2002, Abdullah, as the then deputy prime minister, began to speak of *Islam Hadhari* as a general concept for Islamic development, in line with the thoughts of several renowned world Islamic thinkers such as Yusuf Qardawi, Muhammad Amarah and Syeikh Mohamad al-Ghazali. (Note 1)

Second, Chong (2006, pp. 38-39) argues that *Islam Hadhari*'s content continues to be heavy on rhetoric and light on meaning, even with the Minister of Religious Affairs Abdullah Md. Zin's offering of '*wasatiyah* or a balanced approach to life'. While the details of *Islam Hadhari* remain vague, it is also traced to the teaching of Islamic philosopher, Ibn Khaldun. Its notion of 'progressiveness' is drawn from the adaptive mindset and practices whereby 'nomadic societies moved in a law-like manner from their tribal and primitive origins to a progressive civilisation'. Given the importance

that Ibn Khaldun places on laws, social order, and its enforcement, it is not surprising that the state finds *Islam Hadhari* attractive.

Clive Kessler (2008, p. 73) also argues that *Islam Hadhari* is woefully unexplained and unelaborated. It remains discursively underdeveloped and intellectually impoverished despite the great official investment in seminars, prime ministerial lectures worldwide, and ensuing books on the subject. Such an ‘unpacking’ of the term *Islam Hadhari* might provide the basis for, and so both unleash and give legitimacy to, a genuine modernist Islamic sensibility and politics. But this has not been attempted, not even this possibility has been officially glimpsed, in Malaysia (Kessler, 2008, p. 75). Instead of original creative thought in authentic, historically informed Islamic terms, all that is offered substantively is ‘ten key values’ of the utmost blandness, generality and unexceptional conventionality. All this talk about ‘values’ is the expression of a crippled, even defunct, sociology that is intellectually vacuous. It is circular, since it explains social reality in terms of supposedly determining values that are simply ‘shorthand’ summaries of the realities that they are invoked to explain. It is also politically impotent. As Malaysian experience shows, this approach cannot generate a new Islamic sensibility, an effective human agenda, an authentic and plausible politics, certainly not one to rival the Islamist dynamism of PAS. *Islam Hadhari* remains a failed challenge and a lost opportunity – if not a still-born child then an intellectual orphan. Yet it is only in such a genuinely civilisational understanding of Islam and by recognising the full implications of what *Islam Hadhari* might imply that the political impetus may be found to counter the ambitions of the encircling authoritarian Islamists (Kessler, 2008, pp. 75-76).

Furthermore, Mohamed Nawab Mohamed Osman, Shahirah Mahmood and Joseph Chinyong Liow (2008, p. 15-16) and Kamila Ghazali (2006, p. 140) argue that on closer inspection to the concept of *Islam Hadhari*, it is little more than a repackaging of old ideas especially from Mahathir’s ‘*Penerapan Nilai-nilai Islam*’ (Incultation of Islamic Values) and Anwar’s ‘*Masyarakat Madani*’ (Civil Society). (Note 2) It remains unclear how the abstract principles of *Islam Hadhari* have been, or indeed can be, operationalised. The inability of the Malaysian government under Abdullah to make this abstract concept speak to the everyday realities confronting the Malaysian people, particularly the non-Muslim minority, was made abundantly clear when *Islam Hadhari* was conspicuously absent in the government’s explanation of how it would address a host of challenges such as the integrity of the judiciary, rising inflation, polarisation wrought by the deepening of Islamic conservatism and perceived encroachment on non-Muslim rights. In fact, by enunciating ‘Belief in Allah’ as its first principle, the concept of *Islam Hadhari* marks a discernible shift from the *Rukunegara*, which has as its first principle ‘Belief in God’. In so doing, it has inadvertently contributed to the escalation of the Islamisation discourse and further heightened the reservation of non-Muslims. Ultimately, for non-Muslim, *Islam Hadhari* has proven to be less about Islam or civilisation than it has been about the all-too-familiar refrain of Malay primacy. While lip service is paid to the protection of the ‘rights of minority groups’ by the champions of *Islam Hadhari*, the baggage of race had undoubtedly weighed it down (Osman, Mahmood and Liow, 2008, p. 16). This is evident when Abdullah pronounced in his 2004 UMNO General Assembly speech:

*Islam Hadhari* is complete and comprehensive, with an emphasis on the development of the economy and civilisation, capable of building Malay competitiveness. The glorious heritage of the Islamic civilisation in all its aspects must be used as a reference in order to become the source of inspiration for the Malay race to prosper. (Abdullah, 2006, p. 3)

Not only academicians who felt that *Islam Hadhari* is not a proper concept, Malaysian *ulama* or Muslim scholars also reckon that although *Islam Hadhari* has principles and values which good for the society, many Malaysians still confuse and wrangle with the concept. For instance, Mohd Asri Zainul Abidin, *Mufti* (religious leader) of Malaysian state of Perlis, asserts that after four years the concept being introduced, the government is still working hard to explain and give understanding to the people about the ambiguous concept. Many questions why the government needs to introduce the new concept of *Islam Hadhari*, and some even think that this is a new sect created by UMNO. Mohd Asri, personally, agrees for the word ‘Islam’ in the concept is to be replaced to other words such as ‘*Pemikiran*’ *Hadhari* (*Hadhari* Thought) or ‘*Gerakan*’ *Hadhari* (*Hadhari* Movement). According to him, it is improper to use the word ‘Islam’ as label because the word could create misunderstanding to the people. He sees so far *Islam Hadhari* is just a brand with no product because people do not understand the contents of the concept. What people’s want is not the concept of *Islam Hadhari*, argued Mohd Asri, instead they want a clean and transparent government from corruption and abuse of power, plus serving for the interests of the people (Yani, 2008, pp. 41-42).

Third, critics argue that *Islam Hadhari* was propagated to define the UMNO version of Islam. Anwar Ibrahim accused the government of appealing to puritanical Muslim sentiment to reinforce support ahead of the vote previously in the 11<sup>th</sup> general election and then in the 12<sup>th</sup> general election. Commentators in multiracial but Muslim majority Malaysia have sounded alarm over the growing ‘Islamisation’ of the country and the increasing polarisation of the three main ethnic communities. Anwar, speaking in the Institute of Southeast Asian Studies’ Regional Outlook Forum on 8 January 2008, argued that Malaysia’s problem is not radicalism but the issue of state-sponsored Muslim Puritanism which is more by racist sentiments than religious principles. Anwar said that ‘for some reason it is the belief of the present administration in Kuala Lumpur that playing the puritanical card would be best bet for the UMNO-dominated ruling

coalition to secure electoral success in the coming (2008) election...By holding themselves out to be the staunchest defender of Islam, UMNO hope to garner greater support' (AFP, 2008, p. 1).

Meanwhile, PAS attacks the concept as *bi'dah*, revisionism of Islamic tenets and injunctions – and highlighted the failure of the concept to relate the foundation of Islam to the *shariah* law and its necessity in an Islamic state (Zainal, 2006, p. 181). PAS President Abdul Hadi Awang accused the prime minister of being 'inauthentic' (Chong, 2006, p. 39). A roadshow was undertaken among its members to spread the message that *Islam Hadhari* was *haram* (unlawful) under Islamic *shariah* law. It is a new Islam, departing from truth (Zainal, 2006, p. 181).

#### 4. *Islam Hadhari* and Asian Values: Are They Compatible?

Regarding the issue of democracy, Abdullah explained very little about the compatibility between this issue with *Islam Hadhari*. Although, Abdullah suggested that *Islam Hadhari* will encourage critical debates especially in resolving the Muslim issues locally as well as globally, the implementation is remained to been seen after more than five years in office. Many laws pertaining to restrict human rights are still continued to exist and be applied. With many criticisms of the concept of *Islam Hadhari*, clearly it does not contribute credential to be a new idea in guiding the Malaysian politics, instead it tries to copy the agenda of 'Asian values' propagated by Mahathir. Abdullah also propagates the cultural factor by mentioning about how importance culture to Malaysian people especially for the Malays. For instance, Abdullah argues that in order for the Malays to reach greatness and progress in development and economy, they have to go back and embrace their traditional cultures and values by saying that:

The Malays have to be reminded to return to the noble values that are a part of their culture, a culture that has produced our strength and built our civilisation. Enrich the Malay race with knowledge so that Malays will become a wiser people. The Malays are an industrious people. The Malays know that comfort does not come easy, and that wealth must be earned. We are a people that realise how important it is to be vigilant to ensure our survival; we are aware of how important it is to be prepared to face any eventuality. But when there are Malays who are inclined towards adopting negative values, then the Malay race is in grave danger. Then we will have Malays who would sacrifice substance for style, Malays who will betray their own kind in the name of short-term gain. (Abdullah, 2006, p. 20)

Abdullah believes that the Malays, UMNO and Islam in this country cannot be separated where together the three elements form a distinct culture and identity.

With regard to Malaysian multiracial society, Abdullah stresses that the young Malaysian must be taught to believe in God, to be of good morally upright character, to uphold family values and to be confident and patriotic (Abdullah, 2006, p. 28). Abdullah, as well as Mahathir, prioritises national stability and economic rights than civil and political liberties. By referring to political opposition, he argues that:

We are a democratic country. We value the people's right to choose and elect government they want. There are no grounds for anyone or any group to act beyond this democratic process or outside the confines of the country's laws....Much of our agenda to develop our people and our nation lies before us. We will continue to work together with the people to bring further development. We will bring full force of the law against anyone or any group that tries to obstruct us from fulfilling this development agenda through violence and rioting. (Abdullah, 2006, p. 25)

Thus, people of many faiths live in peace and harmony with mutual respect and tolerance towards each other. In achieving that, Abdullah maintains deliberate and sensible management of race relations through power sharing and managing economic growth and equitable distribution of wealth and benefits. Abdullah also wants to preserve the Barisan Nasional (BN, National Front) democratic style of consensus or consociational politics in decision-making process. According to Zainal (2006, pp. 186-187), BN is always very cautiously and principally using a consultative and circumspect bargaining method to reach a common decision. The prime minister would make the final decision on certain issues related to any particular ethnic groups after an open debate and information-sharing. Abdullah has revealed that:

All have the right to speak, even if the issue involves matters related to specific races or specific religions. In the BN style, we are confident that we can discuss all issues, even if they involved sensitive topics, in a wise manner and come to a consensus. The key to this is that we must engage in discussion in an attitude of moderation (New Sunday Times, 2004, p. 1)

Deputy Prime Minister, Najib Razak explains that 'We remain as one nation not because of the need to meet the constitutional requirements, but because we are able to reach political consensus under the BN' (New Straits Times, 2008, p. 4). The BN made decisions on the basis of mutual agreement, not majorities where the small parties had the same rights and voice as the big parties in the BN. The traditional BN-UMNO coalition has continued with the understanding that each and every political party in this coalition will represent the interest of their racial group within the government. Abdullah does not seem to have made any radical changes to the nature of the relationship or the process of decision-making. The enlargement in the number of Parliamentary seats and state legislative assemblies for

the previous general election, including in the 2008 general election, have been allocated to all parties within the confines of the general principle and the outcome generally has been accepted by all concerned (Zainal, 2006, p. 187).

Moreover, like Mahathir, Abdullah (2006, p. 47) is also critical to the Western values of individualism and the West for not doing much in resolving the issues of terrorism and Israeli occupation of Palestinian land. He urges the West to learn about Muslim world because in his view Muslims see themselves as a collective *ummah*, notwithstanding the occasional disunity among Muslims countries. Unlike Western individualism, Muslims have a strong sense of fraternity as a community of believers. This means empathy because Muslims who are not affected by poverty or who have nothing to do with Palestine feel so strongly about the issue. Abdullah argues that this is why without addressing and identifying the root causes of terrorism the war against terror will not succeed. Islam and the Muslims continue to be portrayed as 'violent', 'extreme' and 'intolerant'. In the post-11 September 2001, Western world has perpetuated a negative Muslim stereotype, well-documented and now clear for all to see especially by the Western media. Malicious generalisations about Islam have become the last acceptable form of denigration of foreign culture in the West. To their credit, some Western leaders have repeatedly stressed that 'theirs is not a war against Islam'. But this appears trivial when popular sentiment is driven by a sensationalist seeking Western media that focuses almost exclusively on extremist discourse. Abdullah (2006, pp. 55-56) hopes that there is a willingness on the part of the West to demonstrate that their policies can change accordingly and try to rectify the erroneous stereotype of the Muslims portrayed by the Western media.

Finally, one of the important characteristics of Asian values is Malay's neo-feudalism. First, Abdullah leads the UMNO's struggles to uphold the concept of '*Ketuanan Melayu*' (Malay supremacy). This concept defends the right of Malays to rule the country which makes some the non-Malays especially in the opposition felt that they are second class citizens. Abdullah said that:

I understand the apprehension of the *Bumiputeras*. I strongly uphold the objectives behind the formation of UMNO. UMNO was formed to fight for the right of the Malays. I strongly uphold the nationalist agenda of the Malays. It is important that we think critically and develop strategies to face global challenges. UMNO must not allow the Malays to be defeatists; we must not allow the Malays to believe that they are fated to be weak in perpetuity. (Abdullah, 2006, p. 18)

During the UMNO general assembly in December 2006, there was a serious disconnect between Prime Minister Abdullah and members of his UMNO party. When opening the party's annual meeting, Abdullah urged his party members to tone down on the rhetoric of race and religion, two extremely sensitive issues in multiracial Malaysia. However, in successive speeches by delegates at the UMNO general assembly which, race and religion have featured prominently in shrill tones, stirring unease among locals and foreigners. Hasnoor Hussein, a delegate from Malacca, was among those who railed against critics of the special privileges accorded to Malays and Islam's place as the country's official religion. He said that 'UMNO is willing to risk lives and bathe in blood to defend the race and religion. Don't play with fire. If they messed with our rights, we will mess with theirs,' in his 15-minute address to UMNO members (Lopez, 2006, p. 1). The DAP, which had been a vocal opponent of the SA, filed a police report against UMNO, whose annual general assembly had been noted for its heated rhetoric (Lopez, 2006). After the assembly, in response to public unhappiness, especially Chinese, Indians and other non-Malays, with speakers who touched on racial and religious issues, Abdullah reminded everyone that race and religious issues are still very sensitive matters. Whether any of the statements were seditious would no doubt depend on what was actually said and the effect of those words (Singh, 2006).

Furthermore, Abdullah, in his speech at the 2007 UMNO General Assembly on 7 November 2007, defended his UMNO Youth Chief action of *keris*-waving in the 2006 General Assembly which was received criticisms and considered by many non-Malays as a racist act to them. Instead Abdullah blamed the critics as wish to inflame communal sentiments and sensationalise the words and acts of a few UMNO leaders and speakers. He argued that the act of unsheathing and kissing a *keris*, which was seen by some opposition leaders as an act for war (Lee, 2008), is part of Malay cultural heritage and the act has been twisted to spread fear among non-Malays in order to smear the image of UMNO (The Star Online, 2007). The photo of the *keris*-waving had been circulated to the non-Malays especially Chinese and Indians during the 2008 general election, and managed to upset the non-Malays to vote the opposition.

In overall, *Islam Hadhari* is partly compatible with Asian values. It has several elements of Asian values, but unlike Asian values, it is not properly constructed as a great concept and policy agenda for the country. Although it is rather weak as a proper concept, the agenda to protect the Malays and Islam have become its priority which needs to be accepted as reality by other races in Malaysia.

### 5. New Leadership: Najib Razak with '1malaysia'

Several decisions of current premier Najib Razak since he took office are clearly in line or give a clear indication that he accepts the process of genuine democracy to be practiced in Malaysia. Najib, who assumed office as the nation's sixth

Prime Minister on April 3, 2009, has urged the people to join him in his quest to revitalize the country through the concept of '1Malaysia.' His slogan is 'People First, Performance Now.' '1Malaysia,' the thrust of Najib's new administration, which hinges on mutual respect and trust among the various races, will be the guide in programs and policies as well as in his vision for the economy, politics and direction of the government. Acknowledging the importance for any government to have the trust and confidence of the people, Najib Razak urged the government to be truthful to the people (Bernama, 2009a). Therefore, Najib introduced the eight values of '1Malaysia'; a culture of excellence, perseverance, humility, acceptance, loyalty, meritocracy, education, and integrity (Bernama, 2009a). With the spirit of '1Malaysia,' Najib also introduced Key Performance Indicators (KPI) for his ministers. Minister in the Prime Minister's Department Koh Tsu Koon said that the KPI was aimed at monitoring the performance of ministers and deputy ministers and making improvements and not to haul them up. The KPI framework and guideline were being drafted based on the one used to evaluate the ministry secretary-generals and department director-generals. Public feedback and views on the quality of the civil service including media reports will be among factors to be used in evaluating KPIs for ministers and deputy ministers. Direct feedback received by ministries would also be taken into account and that dialogue sessions would be continued (Bernama, 2009b).

Realizing that efficient implementation is the key to the success of the stimulus package, in May 2009, Najib stressed on the necessity of coming up with a new economic model for the country, which breaks away from the Multimedia Super Corridor (MSC) initiative that only focused on Information and Communication Technology (ICT). Najib announced on 22 April 2009 that the immediate dismantling of a rule that required companies in 27 service sub-sectors to set aside 30 percent of their company for Malay investors. Later, he announced new measures to boost the country's financial services sector, allowing greater foreign stakes in investment banks and both Islamic and commercial insurers from 49 percent to 70 percent.

In an interview follows the unprecedented "First 100 Days" event held on 11 July 2009 in which the PM emphasised that his administration would focus on six national key result areas – crime prevention, combating corruption, providing greater access to quality and affordable education, improving the quality of life for the poor, improving rural infrastructure and upgrading public transportation in the medium term. Najib said that: "The success of the government and my administration depends on the KPI achievement. It is easier if we did not choose this path, as there won't be so much pressure. Now the pressure is on to perform... We have to set a high target, but not too high until it is unrealistic. If the target was too low, then the people would think the KPIs were meaningless" (The Malaysian Insider, 2009a, p. 1).

Barely a month into his new role, Najib's new government also released 13 people who were held without trial under the ISA. He also promises to review the law which labelled as draconian especially by the opposition because it has not only used to detain terrorists but it has proven to be used against the leaders of opposition parties. Due to several new measures imposed by Najib, supports in his administration seem increasing. Around the time of his appointment, Najib's popularity rating stood at just 41 percent, an embarrassing figure considering his predecessor Abdullah Ahmad Badawi enjoyed a figure of 46 percent despite being criticized as largely ineffective. In the latest Merdeka Center polls, Najib received 65 percent of approval rating from Malaysians answered positively to the question "How strongly are you satisfied or dissatisfied with the way Najib Razak is performing his job as the Prime Minister?" Among Malays and Indians, the figure is even higher at 74 per cent while it was 48 per cent among Chinese (Liew, 2009, pp. 1-3).

However, there are criticisms made especially by the opposition that the new concept set by Najib is too rhetorical and has no real policy agenda, except only for gaining supports and portraying new image of the government with the same old policy of repressive politics. The idea of '1Malaysia' is nothing more a brand with the same old product with the intention to prolong neo-feudalistic political culture and the BN and UMNO in power. For instance, Anwar Ibrahim has ripped into the Najib administration's '1Malaysia' concept, calling it cosmetic and nothing more than a bald-faced political move to try and win back support from non-Malays who deserted from supporting the ruling government since the 12<sup>th</sup> general election in 2008. Other opposition politicians such as Lim Kit Siang (Zahid, 2009) and Tunku Abdul Aziz (2009) and online news portals like The Malaysian Insider (2009b) have questioned the meaning and content of '1Malaysia' but Anwar gutted the whole concept, pointing out that Najib's comments about unity and togetherness are only for public consumption. He argued that behind the scenes, the Biro Tatanegara (BTN), an agency under Prime Minister's Department, is still continuing its indoctrination programs for Malay civil servants and politicians, telling Malays to be wary of Chinese and Indians and continuously spreading the neo-feudalism. Anwar's attack on the '1Malaysia' concept also betrays a growing uneasiness among the opposition on BN's charm offensive to regain the support of non-Malay voters, the segment of voters who since the 2008 general election have become a reliable vote bank for the opposition Pakatan Rakyat (PR, People's Alliance). The new administration has also liberalized the financial services sector and attempted to solve the thorny issues of conversion of children to Islam when marriages breakdown. Nothing has been said about dismantling the New Economic Policy or spelling out how equality can be achieved among Malaysians with the main architecture of affirmative action is still in place and the Malay-centric civil service calling the shots at implementation stage. In his blog posting, <http://www.anwaribrahimblog.com>, Anwar noted

that UMNO called PR as the tool of the Chinese and also hammered the DAP as a chauvinist party for its Malaysian Malaysia concept (The Malaysian Insider, 2009c).

## 6. Conclusion

In sum, there are similarities between the concepts of Asian values, *Islam Hadhari* and 1Malaysia even though they were propagated by different prime minister of Malaysia, Mahathir, Abdullah, and Najib respectively. Asia values more or less tried to promote and strengthen the Malay values which were based on Islam. *Islam Hadhari*, similarly, attempted to blend Islam with traditional Malay values. 1Malaysia, however, has some added values in trying to promote quality performance by the government and unity among Malaysians since the end of 2008 general election. Therefore, some elements of these concepts especially in promoting the Malay-Islam agenda, were not actually dissimilar. However, they can be considered as concepts that purposely utilised to maintain UMNO's agenda of neo-feudalism and ensured it to stay in power and protect Malay rights. Even some especially from the opposition claimed that these concepts were used to manipulate the Malay values, Islam and national unity in justifying agenda setting and rules by leaders, Mahathir, Abdullah and Najib. What is clear is that these concepts have given significant impacts toward Malaysia society. Thus, in order to understand Malaysian politics, these concepts are definitely relevant and must be explored in understanding the future of Malaysia as a country.

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## Notes

Note 1. These thinkers were regarded as the modern manifestation of earlier Islamic reformists such as Jamaluddin al-Afghani, Muhammad Abduh, and Rashid Redha whose influence had made an impact on Islamic reformist movements in many Muslim states during the colonial period (Zainal, 2006, p. 181).

Note 2. Mahathir in mid 1980s oversaw the Islamisation of the Malaysian polity and bureaucracy, major facet of which was an initiative to construct an Islamic work ethic that could underpin the industrialisation of the country. Termed '*Penerapan Nilai-nilai Islam*', this policy effectively formed the base for his developmental and modernisation strategies. A decade later, Anwar coined the term '*Masyarakat Madani*' to describe his own vision of Muslim governance in Malaysia, one that would be inclusive, just and democratic (Osman, Mahmood and Liow, 2008, p. 15).



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