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Turkey's Hasty Constitutional Amendment Devoid of Rational Basis: From a Political Crisis to a Governmental System Change

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I would like to thank Prof. Dr. Peter Strauss for not only giving me the opportunity to conduct my research at an excellent academic environment but also being a great supervisor to me.

Abstract

Governmental systems are one of the significant topics of constitutional law literature and comprehensive studies have been carried out on this issue. The answer to the question whether a parliamentary system, a presidential system or a mixed system is the most suitable system of government can change according to the political preferences of the countries. Since countries search for the best system of government, debate about "governmental system change" keep its actuality. (Note 1) Discussions about governmental system change are also not new in Turkey. Parliamentarism has been one of the defining characteristics of the Turkish constitutional system since 1876 Ottoman Constitution; however, during the application of the Constitution of 1982 first ex-president Turgut Özal, then ex-president Süleyman Demirel maintained that the governmental system in Turkey needed to be changed from parliamentary system to semi-presidential or presidential system, because Turkey's growing and pressing problems require an "effective executive" which would take necessary decisions quickly and apply them effectively and the president in such systems fits this requirement. Governmental system change issue also came into question during the The Justice and Development Party Government's term of office. Both the prime minister Recep Tayyip Erdoğan himself and the other senior party members occasionally mentioned that semi-presidential system would be the best governmental system for Turkey (Öder, 2005, p.31; Gönenç, 2008, p.522; Caniklioglu, 1999, p.184-186; Yavuz, 2000, p.544-556; TBMMTD, 1999, p.28).

The crucial constitutional amendment which was accepted through a nationwide referendum on 21 October 2007, overshadowed the discussions about governmental systems in Turkey for awhile. The amendment in question changed the Turkish Governmental System from parliamentary system to parliamentary with "president" system by introducing the principle of "popular election of the president". (Note 2) Moreover, the new system is being considered as a step to pass through a semi-presidential or a presidential system in Turkey. Some academicians think that the adoption of the principle of popular election of the president was not the consequence of the discussions about a transition from the parliamentary system to a presidential or a semi-presidential system among political and academic circles. In fact, it was a reaction to a political crisis related to the election of the President by Turkish Parliament, therefore it is difficult to accept this amendment as a well designed constitutional engineering scheme and the new governmental system could create serious problems in the future. (Note 3)

In this article, the political crisis as the main reason of the last constitutional amendment in Turkey which introduced the principle of popular election of the president by parliament will be summarized and the prospective problems that would arise from the new governmental system will be discussed. The debates of whether the presidential or semi-presidential system is the most suitable option for Turkey or not will also be reviewed. We believe that summarizing the process before the last amendment would be illuminative to comprehend the reason for making the amendment in question.

Keywords: Governmental system debates, Political crisis in the Turkish Parliament, Reaction to the political crisis, Turkey's 2007 Constitutional Amendment

1. From a Political Crisis to a Governmental System Change

Ahmet Necdet Sezer's presidency ended in May 2007 and it was almost certain that the next president was going to be a member of the ruling party, The Justice and Development Party (AKP), since the political party in question held the

majority in the parliament. The idea of a president from AKP triggered a reaction among secular groups on the ground that a president from AKP could be the symbol of islamization of state institutions and would damage Turkey by introducing islamic values into the secular Kemalist state. Mass meetings of secular groups came together in big cities to convey a message that AKP would have to search for consensus over the presidency rather than using its parliamentary dominance. Not only secular groups but also the military was included in sending out messages to AKP. On 12 April 2007, the Chief of General Staff Yaşar Büyükanıt stated that the armed forces was hoping the next president would be someone who would commit himself to the fundamental values of the republic including secularism, not only in words but also in substance at a conference. (Note 4) Because of the harsh reactions of the secular elites including senior army generals, AKP did not nominate the Prime Minister Recep Tayyip Erdoğan as the presidential candidate, but instead Abdullah Gül, Minister of Foreign Affairs at that moment, was nominated. (Note 5) Gül's candidacy did not appease secular forces as well, since he was connected with the Islamist "National Outlook Movement" and his headscarf wearing wife (Note 6) was also considered as an indicator of Gül's anti-secular worldview; however AKP still preserved Gül's candidacy. The first round of the presidential election was held on 27 April 2007; Gül could not acquire the support of the qualified majority of deputies. According to the article 102 of Turkish Constitution before it was amended (Note 7) the President of the Republic shall be elected by a two-thirds majority of the total number of members of the Turkish Grand National Assembly and by secret ballot; if a two-thirds majority of the total number of members (367 deputies) can not be obtained in the first two ballots, between which there shall be at least a three-day interval, a third ballot shall be held and the candidate who receives the absolute majority of votes of the total number of members should be elected President of the Republic.

After the first round, the main opposition party, Republican People's Party (CHP), applied to the Constitutional Court for the annulment of the ballot on the ground that the required quorum had not been present. According to the article 96 of the Constitution, the Assembly shall convene with at least one third of the total number of members, unless otherwise stipulated in the Constitution. (Note 8) CHP considered the election of the president as one of the exceptions stated on article 96 of the Constitution. According to CHP, the article 102 of the Constitution implied that a two-thirds majority of the total number of the members of Assembly were supposed to be present in the session of presidential election.

The most surprising event however, was a harsh declaration on the Official Website of the Office of the Chief of the General Staff stating that : *"It should not be forgotten that the Turkish armed forces are a side in this debate and are a devoted defender of secularism....The Turkish armed forces will display their position and attitudes when it becomes necessary. No one should doubt that...."* The declaration was seen as an "e-memorandum" by many academicians and politicians. (Note 9)

On April 30, 2007 the Constitutional Court declared its decision and determined that 367 deputies must be present for the first two rounds of the presidential ballot when electing the president. (Note 10) On May 6, 2007 the Turkish Assembly could not elect the president once again, because the required quorum which was stated by the Constitutional Court was not acquired. Since the Assembly had failed to elect a new president, early elections came into question. (Note 11) Meanwhile, AKP proposed a package of constitutional amendments including the introduction of the popular election of the president, the reduction of the president's term of office from 7 years to 5 years, the reduction of parliament's term of office from 5 to 4 years and a clarification of the quorum of the Assembly. After the amendments were passed by the Assembly, President Sezer returned them to the Assembly; however they were readopted. (Note 12) On June 18, 2007 Sezer signed the amendments for publication in the Official Gazette and submitted them to a referendum. He also applied to the Constitutional Court for the annulment of the package of amendments, but this time Constitutional Court rejected the application. (Note 13) The amendments were approved by a referendum. (Note 14) On 22.07.2007, early general elections were held and AKP won 46.5% of the votes. On 14.08.2007 Abdullah Gül redeclared his candidacy. This time, AKP was more powerful and event though CHP members did not attend the session for the election of president, the Assembly was able to acquire the required two-thirds majority to convene and Abdullah Gül was elected as the president of Turkey on August 28, 2007.

As can be seen, Parliament's failure to elect a new president, Constitutional Court's controversial decision and military interventions into political process, deepened the tension between AKP and the secular elite. So, one may assert that the adoption of the principle of popular election of the president which has changed the governmental system from parliamentary system to parliamentary with president system involved in the amendment package as a reaction to the political crisis during the election of the president and it was not the consequence of a well judged constitutional step. According to our opinion, even if the amendment which changed the Turkish Governmental System was accepted as part of a well thought out constitutional engineering design, it might still create serious problems in the future.

Before starting to state these prospective problems, it would be appropriate to define parliamentary with president system in general. In this system, the executive authority is completely dependent upon parliamentary confidence and the president is elected by the people but his legislative (Note 15), appointive and emergency powers are much more limited than the powers of a president serving under presidential or semi presidential constitution. Even though it has

similar characteristics with a parliamentary system (Note 16), it can not be accepted as a type of parliamentary system since the president in this system is elected by the people. (Note 17) The problems that might occur from the new governmental system are underlined by some academicians. (Gönenç, 2007, p.39-43) According to their evaluation whom we also agree with, in a parliamentary with president system, not only the political party which competes with the others to have seats in the parliament and achieves majority in the parliament and controls the government after the competition, but also the president puts forward a political program and makes promises, do propagandize during the campaign in order to get elected. When the president, government and the majority of the parliament share the same worldview, these actors cooperate with each other to implement the same political program presumably; however this may hamper the impartiality of the president in favour of the ruling worldview. On the contrary, when these actors have different worldviews, in this case the principle of the unity of the political program is out of question. Both the president and the ruling political party put forward different political programs and the activities that they promised to fulfill whenever they come into power reflect different worldviews. The competing political parties can use the majority of the parliament and government authority in order to fulfill their political programs whenever they come into power, but how is a president in a parliamentary with president system able to fulfill his promises when he is elected? As underlined above, in a parliamentary with president system, the president holds highly limited powers even though he is elected by the people. In such a system, the legislative authority of the president should be increased, at least the power of proposing bills should be given to the president. The right to legislative initiation potentially strengthens the president's control over policy issues. Otherwise the president may enforce his constitutional authorities in order to fulfill his electoral promises. Moreover, a president who would like to fulfill his promises may put aside his impartiality. In other words, the president may be in need of seeking support in the parliament or he may tend to make an alliance with political parties in order to fulfill his electoral promises. In fact, the president may even cooperate with the opposition party in order to dismiss the government which does not share the same worldview with himself. It is not difficult to predict how such tendencies could damage the impartiality of the president. Above all, the competing political programs may cause a legitimacy crisis. In a parliamentary with president system, both the president and the legislature are directly elected by people and thus have separate sources of legitimacy; so there is always the possibility of deadlock and political paralysis when these actors have different worldviews and different political programs. (Gönenç, 2007, p.39-43) In brief, the new system in Turkey may cause considerable problems in the future, specifically when the president and government-parliament majority have different worldviews.

2. Is Parliamentary with President System the Final Choice for Turkey?

As mentioned at the beginning of this article, the parliamentary with president system is being considered as a step to pass through a semi-presidential or a presidential system in Turkey, so the new governmental system probably will not be the last experience for Turkey, however it should be remembered that similar problems can arise from semi-presidential and presidential systems in the long run, if they are adopted in Turkey.

In a common way semi-presidentialism is defined as a situation where there is a directly elected president and a prime minister and cabinet who are responsible to the legislature. (Elgie, 2005, p.98-112; Skach, 2005; Shugart, 2005, p.323-351) (Note 18) There is a widespread consensus that the direct election of the president can encourage the personalization of the political process and encourage the president to ignore any opposition. Linz argues that semi-presidentialism in which the president has considerable powers can turn to "a constitutional dictatorship" (Linz, 1994, p.48) When we consider the constitutional history of Turkey, we can clearly see that its presidents have always been stronger than presidents in the classical parliamentary systems. By referring to this consideration, it can be asserted that a Turkish president serving under a semi-presidential constitution presumably would have quite considerable powers and the combination of a president with strong constitutional powers supported by a parliament majority and a prime minister could encourage the president to ignore the rule of law. As Lijphart points out, semi presidential systems "actually make it possible for the president to be even more powerful than in most pure presidential systems". (Lijphart, 2004, p.102)

When the majority in the parliament is opposed to the president, in other words, when the president and the parliamentary majority have different worldviews, there is always a probability of controversy between these actors. Supposing that neither the president, nor the prime minister is willing to compromise, in this case a deadlock of the political system is inevitable. The problem of a divided executive defined as cohabitation, is the most well known argument against semi presidential system. The only instrument to overcome the cohabitation is compromising; however it is indeed uneasy to overcome such a gridlock for the countries that lack the culture of compromise. For example, such a cohabitation situation ended up with a military intervention in Chile in 1973. According to Faundez, in the event, government and opposition did not agree and as the political confrontation became more acute, with the government refusing to revoke its administrative orders and the opposition demanding the resignation of Allende, the military finally stepped in and staged a coup that brought down the popular Unity Government and democracy. (Faundez, 1997, p.317)

Divided minority government in which neither the president, nor the prime minister, nor any party or coalition, enjoys a substantive majority in the legislature, is identified as another argument against semi-presidentialism” (Skach, 2005, p.15) It is alleged that this situation can predictably lead to an unstable scenario, characterized by shifting legislative coalitions and government reshuffles, on the one hand, and continuous presidential intervention and use of reserved powers, on the other (Skach, 2005, p.17-18) When the executive is weakened, because of the absence of a stable parliamentary majority, directly elected presidents may assert their power over the system and this weakens the democratization process. (Skach, 2005, p.18)

Both the arguments against semi-presidentialism in the name of dual legitimacy and over presidentialization are similar to criticisms of presidentialism. In presidential systems a president with considerable constitutional powers is directly elected by the people for a fixed term and is independent of parliamentary votes of confidence. The president is not only the holder of executive power but also the symbolic head of state and can be removed between elections only by impeachment. (Note 19) In presidential systems since both the president and legislature “derive their power from the vote of the people in a free competition among well defined alternatives, a conflict is always latent and sometimes likely to erupt dramatically; there is no democratic principle to resolve it” (Linz, 1994, p.7). In regard to over presidentialization, the perception of being of the representative of the whole nation may encourage the president to ignore the opposition. This argument is stressed as “The feeling of having independent power, a mandate from the people ... is likely to give a president a sense of power and mission that might be out of proportion to the limited plurality that elected him. This in turn might make resistances he encounters . . . more frustrating, demoralizing, or irritating than resistances usually are for a prime minister.” (Linz, 1994, p.19)

The rigidity of presidentialism, created by the fixed term of office which can be a liability is accepted as another argument against presidential system. This argument is also emphasized as “entails a rigidity . . . that makes adjustment to changing situations extremely difficult; a leader who has lost the confidence of his own party or the parties that acquiesced in his election cannot be replaced.” (Linz, 1994, p. 9-10)

Among these arguments against presidentialism, maybe the most criticized one is “zero sum presidential elections”. According to Linz, presidentialism is ineluctably problematic because it operates according to the rule of “winner-take-all”, an arrangement that tends to make democratic politics a zero-sum game, with all the potential for conflict such games portend. (Linz, 1990, p.56) It is stated that in the American Presidential electoral process, the laws governing the selection of presidential electors in the States generally provide for the winner-take-all principle. This means that the winner of the popular vote in a State is usually awarded the votes of all of the electors that are allocated to that particular State. Consequently, even in a normal presidential election, the winner-take-all scheme can produce a substantial disparity between the popular vote and the electoral college vote. This has in fact happened. Indeed, it happened in the 2000 Presidential Election. Gore, the winner of the nationwide popular vote, failed in the end to gain a majority of the electoral college vote. (Tillers, 2002, p.50)

Linz underlines the danger of zero-sum presidential elections as “The danger that zero-sum presidential elections pose is compounded by the rigidity of the president's fixed term in office. Winners and losers are sharply defined for the entire period of the presidential mandate. There is no hope for shifts in alliances, expansion of the government's base of support through national-unity or emergency grand coalitions, new elections in response to major new events, and so on. Instead, the losers must wait at least four or five years without any access to executive power and patronage. The zero-sum game in presidential regimes raises the stakes of presidential elections and inevitably exacerbates their attendant tension and polarization.” (Linz, 1990, p.56) If, in ethnically divided societies, a president belongs to one ethnic group, then the situation will be more hazardous. Ethnically divided societies need peaceful coexistence among contending groups. This requires compromise and conciliation. For that reason, it is absolutely necessary for representatives of these groups to be included in the decision -making process. However, in presidential systems, because of the rule of “winner - take -all,” consensus and power - sharing mechanisms cannot work. (Lijphart, 1991, p.81)

When we consider the evaluations about semi-presidential and presidential systems above, the whole picture shows us that the systems in question may not be the appropriate options for Turkey as well as parliamentary with president system. First of all, it must be underlined that “a popularly elected president” can bring serious problems for Turkey in the long run. In the Ottoman Empire individuals lived in a society in which the Sultan had absolute powers with no tradition concerning the limitation of political power. During modern Turkish period, presidents have always been stronger than presidents in the classical parliamentary systems. As Heper states, the parliamentary system of government with a more than symbolic president proved to be rather problematic in Turkey. Turkish political actors could not appreciate the need for this type of political structuring. Özal and Demirel presidencies constituted the real test cases for the operation of parliamentarism with a more than symbolic presidency. Especially, ex-president Özal wanted to dominate the political system and resorted to a one-man show. As the nominal head of executive, he attempted to dictate policies to governments. His activist approach created tensions in the polity. (Heper, 1996,

p.501-502) By considering the constitutional history of Turkey, it is not very difficult to predict what will happen when the president is elected popularly and represents the same majority in the legislature. In this situation the fundamental rights of the individuals will be in jeopardy. When the president lacks a parliamentary majority, then the conflict between the legislature and the executive will be more grave because of the absence of tradition of compromise and conciliation.

The reason why the governmental system in Turkey needed to be changed from parliamentary system to semi presidential or presidential system has been explained by the arguments of “instability” and “inefficiency” of Turkish parliamentarism. According to these arguments, Turkey has been administered by unstable and ineffective coalition governments for years; however only stable and effective governments can certainly ease the consolidation of democracy in Turkey.

The negative sides of Turkish parliamentarism can not be avoided; however in our opinion, it would have been more appropriate to rationalize Turkish parliamentarism with efficient institutional remedies than to adopt a new governmental system which is unfamiliar to Turkish constitutional experience.

3. Rationalized Parliamentarism: An Ignored Remedy for Turkey?

What could have been done in order to eliminate negative sides of Turkish parliamentarism? It is emphasized that, the fact that cabinets depend on majority support in parliament and can be dismissed by parliamentary votes of no-confidence may lead to cabinet instability and as a result, regime instability. The position of cabinets vis-a-vis legislatures can be strengthened by constitutional provisions designed to this effect. One such provision is the constructive vote of no confidence, adopted in the 1949 constitution of West Germany, which stipulates that the prime minister (chancellor) can be dismissed by parliament only if a new prime minister is elected simultaneously. This eliminates the risk of a cabinet being voted out of office by a “negative” legislative majority that is unable to form an alternative cabinet. (Lijphart, 2004, p.103) According to the article 67 of Basic Law for the Federal Republic of Germany, no chancellor may be removed unless a majority is able to name a successor. In our opinion, the adoption of the constructive no-confidence vote (Note 20) which can be accepted as the most effective rationalized parliamentarism (Note 21) device could have been put into effect in Turkey in order to reduce the possibility of potential governmental instability. (Note 22)

The Turkish Constitution of 1982 empowers the president to call new elections under two circumstances: 1. In cases where the Council of Ministers fails to receive a vote of confidence or is compelled to resign by a vote of no confidence, and if a new Council of Ministers can not be formed within forty-five days or the new Council of Ministers fails to receive a vote of confidence; 2. If a new Council of Ministers can not be formed within forty-five days after the resignation of the Prime Minister without having been defeated by a vote of confidence, or within forty-five days of the elections for the Bureau of the Speaker of the newly elected Assembly. In either case, the President, after consultation with the Speaker of the Assembly, may call new elections (Article 116). The power thus granted to the President aims to ensure governmental stability; however, in our opinion if the time period of 45 days had been reduced, a cabinet crisis could have been resolved in shorter time and the governmental stability could have been preserved in this way. (Onar, 2005, p.103)

As mentioned before, in the Turkish parliamentary government system the presidents appear stronger and more active than the presidents in classical parliamentary systems. It is stated that, not only the inherent logic of Turkish Constitutions, but also environmental factors and the personalities of the presidents contributed to making the president relatively strong. (Gönenç, 2008, p.503) The power of presidents has been discussed and criticized under various circumstances in Turkey. Even Ahmet Necdet Sezer, who was the most active president in the Turkish constitutional history in terms of using his constitutional powers (Note 23), stated that the powers given to the president by Article 104 far exceed the limits of a parliamentary democracy. Yet, it is unacceptable for an unaccountable president, from outside parliament, which represents the will of the nation, to share in running the country and to use special powers by himself. (Note 24) Sezer’s term of presidency was full of political crises. The crises during the coalition governments triggered the governmental instability in Turkey. As an efficient remedy, the powers given to the president by article 104 of the Turkish Constitution of 1982 could have been limited in order to be compatible with parliamentary systems. Such an arrangement could also have reduced the possibility of potential governmental instability. (Onar, 2005, p.103)

The issue of European Union Membership is undoubtedly one of Turkey’s most important foreign policy problems. Turkey was officially recognized as an EU candidate in December 1999, and in December 2002 the European Council announced that if Turkey met its political ‘Copenhagen’ criteria by the end of 2004 it would open negotiations without delay. Since 1999, and particularly since the election of the AKP government in November 2002, there has been radical and rapid political reform in Turkey. European Union’s assessments and reactions concerning a governmental system change in Turkey must be considered by Turkish political actors as well. Among the members of the Union, parliamentary system is accepted as the main governmental system. European Union’s historical background, socio-economic and cultural structure makes it impossible to adopt presidential system, while semi-presidential system

can be seen as an exception. However, the members which have adopted semi-presidential systems come face to face with serious political problems too often. (Elgie, 1999, p.26) When the constitutional history of Turkey is taken into consideration, it can easily be asserted that, the amendment changed the Turkish Governmental System from parliamentary system to parliamentary with “president” system by introducing the principle of “popular election of the president”, will probably be criticized, at least it will not be welcomed by European Union in the long run.

4. Conclusion

Governmental system change can not be seen only as a Constitutional Law issue. It would be inappropriate to discuss such a change without considering its effects on the whole legal system. According to Kelsen’s theory, a legal system is made of a hierarchy of norms. Each norm is derived from its superior norm. (Kelsen, 1967; Marty, 2002, p.57) A norm change on the top of the pyramid definitely effects the norms at the bottom. In a similar vein, Krasner states that institutionalization can be conceived of along two dimensions, breadth and depth. Breadth refers to the number of links an institution has. Horizontal linkage refers to the density of links between a particular activity and other activities. If a particular activity is densely linked, then one modification requires changes in many others. (Krasner, 1988, p.75-76) In the light of these theoretical expansions, it may be accepted that, when a change occurs in the governmental system, the whole legal system should be reviewed and a platform which is adaptable to the new system should be built momentarily. However, when the amendment process in Turkey is considered, it can be clearly recognized that neither the constitutional system was revised nor a platform which is adaptable to the new governmental system was built before the last constitutional amendment, that changed the governmental system, was accepted.

Lindner indicates that, the political costs of institutional reform (switching costs) plays an important role in stabilizing the existing institutional path. Even though actors accept that reform is necessary, the switching costs and the uncertainty over the gains from a new system (opportunity cost) prevents change. (Lindner, 2003, p.924; Pierson, 2000, p.251-267) This particular point was also not considered by political actors in Turkey during the amendment process, therefore, if the political costs of the governmental system change in Turkey exceeded the gains from the new governmental system, this would not be surprising.

As Lipset has pointed out, it is difficult, if not impossible, to change culture. Historical legacies do not disappear overnight. Nevertheless, it is much easier to modify political institutions than adopt a new system. (Lipset, 1990, p.83) So, ignoring the devices to rationalize Turkish parliamentarism and adopting a new governmental system by introducing the principle of “popular election of the president” which might bring serious problems in the future may be the biggest regret of Turkish political actors in the long run.

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Notes

Note 1. For the government system pursuit in West Europe, please see Colomer J. M. (1996). *Political Institutions in Europe*. London and New York: Routledge and for Russian constitutional change, please see Sharlet, R. (1997). The Politics of Constitutional Amendment in Russia. *Post-Soviet Affairs*, 13 (3), 197-227.

Note 2. Shugart divides the constitutional systems into 5 categories as pure presidential, premier-presidential, president-parliamentary, parliamentary with "president" and "pure" parliamentary system. Please see, Shugart, M. S. (1993). Of Presidents and Parliaments. *East European Constitutional Review*, 2(1), p.30.

Note 3. For this evaluation please see, Gönenç, L. (2008). Presidential Elements in Government: Turkey. *European Constitutional Law Review*, 4(3), p. 522.

Note 4. *Cumhuriyet Newspaper*, 13 April 2007, p.1; also see, "Turkish Power Balance Shifts Gül's Way", searchable through <http://news.bbc.co.uk/2/hi/europe/6951909.stm>.

Note 5. As the leaders of the previous ruling parties both Turgut Özal and Süleyman Demirel, unlike Recep Tayyip Erdoğan, were nominated as presidential candidates.

Note 6. Abdullah Gül's wife applied to the European Court of Human Rights (ECHR) upon the rejection of her case by the Turkish Council of State for the reason that her registration had not been made by the university due to wearing headscarf although she had succeeded the university entrance exam. However, she withdrew her application after Abdullah Gül became the foreign minister in 2003. Please see, *Poli Gazette*, "Mrs. Gül and the Headscarf Issue", 25 April, 2007; searchable through <http://www.poligazette.com/2007/04/25/mrs-gul-and-the-headscarf-issue>.

Note 7. The Constitution of the Republic of Turkey, Article 102, searchable through, http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf.

Note 8. Ibid, Article 96.

Note 9. For the debates please see, Can Dündar, "Anayasa Mahkemesi'nin Kararı: 367. Şimdi Ne Olacak? (Decision of Constitutional Court: 367. What Will Happen Now?)," searchable through, <http://www.candundar.com.tr/index.php?Did=4876>.

Note 10. Decision of the Constitutional Court, E.2007/45; K.2007/5, 01.05.2007.

Note 11. *Hürriyet Gazette*, "Gül Adaylıktan Çekildi" (Gül Withdrew His Candidature), 06.05.2007; searchable through <http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=6466839&tarikh=2007-05-06>.

Note 12. *Sabah Gazette*, "Anayasa Paketi Aynen İade" (The Package of Constitutional Amendments is Returned), 31.05.2007; searchable through;

<http://arsiv.sabah.com.tr/2007/05/31/haber,FF26F6A6B92040D2BB5856214B7D40D9.html>.

Note 13. Decision of the Constitutional Court, E.2007/72; K.2007/68, 05.07.2007.

Note 14. Turkish electoral system has been under debate since it came into force. The main point of the discussion has been the national 10% threshold. In 2002 elections, more than 15 parties participated in the elections; however only two parties achieved to pass the threshold and almost 45% of the electorate could not have been represented in the Turkish parliament. When a parliament constituted by this electoral system tends to change the governmental system, legitimacy discussions come into question inevitably since governmental system changes require wide based reconciliation. Not only the political parties represented in the parliament, but also the ones out of the parliament should comply with such a change.

Note 15. The right to initiate laws, the right to call referenda, decree and veto powers and the right to apply to the Constitutional Court for the review of the constitutionality of laws are included in legislative power of the president.

Note 16. The Parliamentary Governmental System can be defined as "....a system of government in which the prime minister and his or her cabinet are accountable to any majority of the members of parliament and can be voted out of office by the latter..." Please see, Müller, W. C. , Bergman T. & Strom K. (2006). *Parliamentary Democracy: Promise and Problems*. In K. Strom (ed), *Delegation and Accountability in Parliamentary Democracies*. Oxford: Oxford University Press, p.4.

Note 17. According to Shugart, since parliamentary and presidential systems mainly show similar characteristics, they both can be studied under the rubric of parliamentary systems. Please see, Shugart, M. S. (1993). Of Presidents and Parliaments. *East European Constitutional Review*, 2(1), p.31. Bulgarian Constitutional System has the features of a parliamentary with president system. After the adoption of a constitutional amendment by introducing the election of the president by the people, the Slovak Constitutional System also became a parliamentary with president system.

Note 18. Duverger who introduced semi-presidentialism in the 1970s as a means of comparing the political system of the French Fifth Republic, defined semi-presidential system as a political regime which combines three elements: 1. The president of the republic is elected by universal suffrage 2. He possesses quite considerable powers 3. He has opposite him, however a prime minister and ministers who possess executive and governmental power and can stay in office only if the parliament does not show its opposition to them. Please see, Duverger, M. (1980). *A New Political System Model: Semi-presidential Government*. *European Journal of Political Research*, 8(2), p. 166.

Note 19. Lijphart emphasizes three major points in distinguishing between presidential and parliamentary systems. According to Lijphart, firstly, in a presidential system the head of government (the president) is elected for a fixed term and will serve this unless there is the 'unusual and exceptional process of impeachment', whereas in a parliamentary system the head of government (prime minister or equivalent) is dependent on the confidence of the legislature and thus can be removed (along with the whole government) by a motion of no-confidence. Secondly, in a presidential system the head of government (the president) is popularly elected, if not literally directly by the voters then by an electoral college popularly elected expressly for this purpose, whereas in a parliamentary system the head of government (prime minister or equivalent) is 'selected' by the legislature. Thirdly, in a presidential system there is effectively a one person

non-collegial executive, whereas in a parliamentary system the executive (i.e., the cabinet) is collective or collegial. Please see, Lijphart, A. (1992). Introduction. In A. Lijphart (ed.), *Parliamentary versus Presidential Government*. Oxford: Oxford University Press, p. 2-3; Lijphart, A. (1999). *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*. New Haven, CT: Yale University Press, p. 17.

Note 20. The constructive vote of no confidence is also adopted by Spain, Belgium, Hungary and Poland. (Spain Constitution of 1978: Article- 113, Belgium Constitution of 1970: Article- 96, Hungary Constitution of 1949-:Article- 39 A, Poland Constitution of 1997-:Article- 158).

Note 21. Rationalized parliamentarism is defined as a set of constitutional devices and procedures aimed at promoting the stability of cabinets while retaining the core features of the parliamentary system, including legislative oversight of government policy. Please see Tanchev, E. (1993). *Parliamentarism Rationalized*. *East European Constitutional Review*, 2(1), p. 33.

Note 22. “The vote of confidence under dissolution threat” and “the state of legislative emergency” mechanisms included both in the German Constitution of 1949, are other significant devices of rationalized parliamentarism. Article 68 of the German Constitution of 1949 arranges the mechanism of “vote of confidence under dissolution threat”. According to the article in question, if a motion of the Federal Chancellor for a vote of confidence is not supported by the majority of the Members of the Bundestag, the Federal President, upon the proposal of the Federal Chancellor, may dissolve the Bundestag within twenty-one days. The right of dissolution shall lapse as soon as the Bundestag elects another Federal Chancellor by the vote of a majority of its Members.

“The state of legislative emergency” mechanism is arranged in the article 81 of the German Constitution of 1949. Article 81 states: “1. If in the circumstances of article 68, the Bundestag is not dissolved, then the Federal President upon the request of the Federal Government with the consent of the Upper House of Parliament may declare a state of legislative emergency with respect to a bill if the Bundestag rejects it, although the Federal Government has called it to be urgent. 2. If after a state of legislative emergency has been declared, the Bundestag again rejects the bill or adopts it in a version the Federal Government declares unacceptable, the bill shall be deemed to have become law to the extent that it receives the consent of the Upper House of Parliament. The same shall apply if the Bundestag does not pass the bill within four weeks after it is reintroduced. 3. During the term of office of a Federal Chancellor, any other bill rejected by the Bundestag may become law in accordance with paragraphs 1 and 2 of this article within a period of six months after the first declaration of a state of legislative emergency. After the expiration of this period, no further declaration of a state of legislative emergency may be made during the term of office of the same Federal Chancellor.”

As rationalized parliamentarism devices, these mechanisms are anticipated to reduce the possibility of potential governmental instability. Turkey could have been adopted similar mechanisms to reduce the possibility of its potential governmental instability.

Note 23. Ahmet Necdet Sezer exercised his veto power 72 times, including one constitutional amendment. Please see, Bahçeci, B. (2008). *Karşılaştırmalı Hukukta ve Türkiye’de Devlet Başkanının Veto Yetkisi* (President’s Veto Power in Comparative Law and in Turkey). Ankara: Yetkin Publishers, p. 222-230.

Note 24. His speech was delivered at the opening ceremony of the 37th anniversary of the establishment of Constitutional Court. For the full text of the speech in Turkish, see *The Official Website of the Constitutional Court of Turkey*, searchable through,

<<http://www.anayasa.gov.tr/general/icerikler.asp?contID=267&menuID=64>>.

An Interpretative Framework of Grassroots Resistance in Chinese Urban Society -----A Case Study of Worker Collective Action

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Abstract

Since the 1990s, Chinese government has accelerated the legalization and standardization of labor relations in enterprises and has paid attention to the social stability. This paper analyzes two workers' protests of defending rights pursuant to the law which take place in a medium-sized Taiwan-funded manufacturing enterprise in Shanghai. The author focuses, on one hand, on the increase of urban worker's right consciousness, and workers' self-organization under the direction of worker elite in the background of "maintaining social stability". On the other hand, worker's law-abiding strategy developed according to the social governance means of local government is explored. The last part of this paper attempts to examine institutional origins, positive significance and limitations of this kind of collective protest.

Keywords: Right protection pursuant to law, Self-organization, Law-abiding strategy, Worker elite, Nonantagonistic, Nonpolitical

1. Background of research and proposing of problems

In the process of Chinese legalization, a diversified view has been revealed in the resistance strategy of grassroots, such as, "everyday resistance" (Note 1), "rightful resistance" (Note 2) and "resistance pursuant to law" (Note 3). Defenders resort more and more to laws and policies to seek for the maximum interest for themselves.

In the above research, researchers mostly concentrate on rural areas, and give explanations to resistance modes, which, to a certain extent, can illustrate fundamental modes of Chinese grassroots resistance, but still have definite limitations. Compared with rural and central and west regions, in coastal urban areas in which social conflicts evolve into placidity and local government goes towards governance by law, law and policy are the significant evidence for defenders. However, the high cost of legal proceedings often daunts them in practice. Furthermore, demand of individuals is often difficult to gain attention from local government, so collective legal appeals gradually appear in grassroots.

In this article, the author investigates a medium-sized Taiwan-funded manufacturing enterprise in Shanghai and attempts to resort to the resistance modes of workers to illustrate how they launch a temperate collective action under the current social management system and what kind of strategies they adopt to acquire support from local government in disputes, to resolve the disputes quickly and to reduce cost for right protection.

2. Two right protection activities pursuant to the law in SNS Company

2.1 From rightful protest to establishment of Trade Union --- the first contradiction between labor and capital in SNS (in 2003)

SNS Company is a wholly-owned branch office established in suburbs of Shanghai in 1994 by a wire netting Co. Ltd. in Taiwan. There were altogether approximately 200 employees in the company, including over 80% workshop operators. The company mainly manufactured all sorts of industrial metal filter screens, with its major products exported overseas. With low costs of labor force, local preferential tax policies and advantages of differential rent, SNS Company become the primary contributor to profits of the Head Office in Taiwan.

In July 2003, standard for minimum wages in Shanghai was adjusted to 570 Yuan, but the company did not execute the standard in strict rotation, and, on the contrary, it reduced this standard to 540 Yuan (Note 4) with all excuses, which was the cause for the first dispute. Dissatisfaction with the wages was merely a cause for this dispute, and it was a more important reason that employees burst out their gradually accumulated dissatisfaction with the long-run irrational management method of the enterprise.

It also occurred to employees that if they negotiate with corporate manager personally to ask for the back salary, it

would be a great risk, so it would be an appropriate method to act in the collective name. However, the requirement for negotiation was refused by the manager with a strong hand. Having asked for opinions of workers, labor representatives wrote a letter to the local town Labor Union to apply for establishment of a Labor Union. At the same time, under the direction of labor representatives, workers launched a stand-down protest action in May 2003, which lasted for three days. The joint application also gained response from the superior Labor Union immediately, and, afterwards, election of Labor Union members within the enterprise proceeded in regular sequence under supervision of the town Labor Union leaders. After the election of Labor Union Chairman was finished and under requirement of the town Labor Union, the enterprise liquidated the back salary exactly the amount according to relevant stipulations. Employees of SNS Company gained the first victory.

2.2 Claim for reimbursement of overtime compensation --- the second contradiction between labor and capital in SNS Company (in 2007)

In the spring of 2007, controversy between employees and managers over calculation method of overtime compensation caused another dispute.

After participating a training of common law organized by the town Labor Union, several employees discovered that the calculation method of overtime compensation in the enterprise was not as it should be. According to the Fourteenth Article in "Measures of Shanghai Municipality for Payment of Wages by Enterprises" ("Measures") formulated by Shanghai Labour & Social Insurance Bureau on January 17, 2003, the daily salary of extra shifts or extra hours should be calculated by dividing basic salary with the number of days of 20.92, the average monthly working days. However, the company calculated the average working days as 30 days. Therefore, strong dissatisfaction was aroused among workers on the issue of calculating overtime compensation in the company.

The Labor Union Chairman held a temporary meeting for front-line workers, and after the meeting, disclosed to the manager on behalf of workers about existence of violating action within the enterprise according to will of workers. Furthermore, the Chairman required managerial personnel to immediately correct the wrong calculation method of overtime compensation. Simultaneously, Xiao Li went to the town Labor Union. Under pressure of the governmental Labor Union, the manager acquiesced to correct the calculation method of overtime compensation. With growth of overtime compensation, welfare of employees in the enterprise was also adjusted accordingly, which resulted in worse income of overtime compensation after adjustment than that before adjustment. Thus, the corporate Labor Union held another meeting for employees, and more than 80% of members were in support of the Labor Union to ask for defaulted overtime payment for employees.

The Labor Union Chairman and committee members went to the Labor Inspection Team for lodging a complaint, the enterprise directly under the authority of the Labor Inspection Team, and also presented relevant evidence about the enterprise defaulting overtime compensation. However, the Labor Inspection Team did not hold a positive attitude towards that. In face of the labor arbitration which wasted time and energy and possibly more complicated judicial procedures later, representatives of the Labor Union reported this situation several times to the District Labor Union. Since it was a collective dispute, the District Labor Union paid due attention to the infringement within the company. Leaders of the District Labor Union asked the subordinate Law Aid Center to resolve this issue in an adequate way and report the handling results in a written form. Under supervision of the Law Aid Center, the District Labor Inspection Team again made an investigation into the overtime compensation of the enterprise, and finally confirmed existence of illegal performance in the enterprise. Under coordination of the two parties, the employees obtained due compensation according to relevant provisions.

3. Self organization and law-abiding strategies

From the two collective disputes of labor and capital, it can be found that a strong consciousness of right was gradually generated among workers. In addition, they attempted to seek for self protection under the legal framework and to make it possible "minimization of risk" (Note 5). The consciousness of right among workers was far beyond that, and they also created competitive advantages for themselves and organized themselves by making full use of all sorts of rules in practice. Worker "elites" played a significant enlightening and leading role in the process and resolved problems together with workers by means of democratic participation mechanism.

In the process of appeal, on one hand, workers posed certain pressure to local government with effect of collective events by "nonantagonistic" and "nonpolitical" means, and, on the other hand, did not "overstep", but took the initiative to seek for cooperation with local government. They made use of the governmental administrative resources to resolve conflicts of labor and capital, and this sort of protest strategy is termed as "law-abiding logic".

3.1 "Elites" (Note 6), self organization of workers and consciousness of right

First of all, workers' interest being deprived of was the origin of self organization of workers. The initial stage of dissatisfaction of workers with management method in the enterprise had the characteristics of class struggle of "weapon of the weak". "Weapon of the weak" could only be an initial resistance of laborers, but common experiences

of the weak gave rise to collective dissatisfaction at the bottom of their heart.

Secondly, the relationship of fellow countrymen promoted self organization of workers. There were a large majority of workers in SNS with fellow countrymen relation. Even some workers were relatives or friends for several years, and quite a large number of workers entered this enterprise by means of being introduced. Forepast studies indicate that the relationship of fellow countrymen played an important role of internal contact in collective action and solidarity of workers (Note 7). The author of this article found out similar situation through his investigation into SNS Company. The solidarity consciousness, which originated from the relationship of fellow countrymen and was gradually accumulated in common working and living occasion, played a significant role in the collective labor dispute.

Thirdly, worker elites played an inspirational and leading role in self organization of workers. The Labor Union Chairman of the enterprise elected had always enjoyed high prestige among employees. Of course, he was also endowed with some important qualifications, such as, high school record, warmheartedness, love of learning and having fight in one. On one hand, he had a style of individual heroism, and often reported unfair issues and dissatisfaction on behalf of workers, regardless of his personal gains and losses; on the other hand, he also had flexible skills in terms of organizing employees. He never made a decision without authorization, or distorted will of workers. In addition, he also understood how to make a rational use of government resources to accelerate resolution on disputes by relevant departments and to make a legitimate decision as early as possible.

Fourthly, self organization of workers is strengthened by democratic procedures. In face of important events, a Labor Union would organize employees for an interim meeting. Collective decision by workers would determine further action. What's more, this may avoid dissatisfaction of a minority of employees in the future and provocation of an enterprise in secret.

However, "function and power of cooperation is limited", and "it can not always evade from the system, policy and any transitional 'systematic risk'" (Note 8). Ultimate efficiency of cooperation is still owing to governance level of local government.

3.2 Law-abiding strategies of workers

Successful self organization of workers in SNS Company was owing not only to sound labor law, upgrading employees' consciousness of law and successful organization of members, but also to workers' abiding by governance principles of local government, the outcome of "stepping over the line but not overstepping it". Of course, this sort of participation in collective defense is not unique to the SNS Company the author has observed, and She Xiaoye has also discovered similar phenomenon in rural migrants' resistance in relatively developed areas. According to her, this kind of collective action can avoid the danger of collectively direct and public resistance. On the contrary, this sort of action resorts to resultant force and legal framework of cooperative organizations to bring informal constraints into formal operation and to express their political participation attitude with a method of collective defense (Note 9). However, different from study by She Xiaoye, the author of this article escalates her "nonantagonistic resistance" onto "law-abiding strategies". In this article, "law-abiding strategies" refer to the nonantagonistic and nonpolitical action method of national law and policy of central government, which, here, includes both explicit policy provisions and macroscopical governance principle, as well as control and explanation on the principle by governments at all levels based on local conditions.

The workers not only regarded jurisdiction clause as resources and framework of their action, but also applied national governance rules to expand their action boundary. Therefore, we should allow for legal provisions and local governance rules to interact in action of workers in "law-abiding strategies"

4. Further discussion

If we put the collective action by labors in SNS under the background of macro-society for consideration, then we may find out that their action strategy has changed gradually. On the part of the subjects of the action, their consciousness of right is gradually raised; they begin to be familiar with tolerance boundary of local government and master skills to communicate and coordinate with local government; they wage an enthusiastic struggle within the framework of law and regard cooperative organization as legal foundation for action of workers, so as to protect themselves from great damages in the struggle. In the above case, workers in SNS organized themselves and waged an enthusiastic struggle according to governance logic of the government within the framework of law, which we can term as "law-abiding strategy for self organization".

On one hand, we should be aware that these protests kee the law, but not appealing to the law, and that protestors may not trust in lengthy and complicated legal procedures or any possible results in the future. Therefore, from their point of view, directly turning to governmental departments may reduce cost of right protection to a large extent. On the other hand, these protests are neither behaviors of individuals, nor collective protests by the public, but a collective pressure formed under direction of elites.

As a new action framework of cooperative resistance by grassroot citizens, law-abiding strategy of self organization has

emerged with the precondition of gradual perfection of social management mechanism, such as, “ruling by law, good governance by the government, and maintenance of social order”, etc.

Different from former studies, this article studies a collective action which is a continuous and gradual struggle occurring in the duration period of labor relationship. First of all, the struggle is launched by elites, who determine the subject of the struggle through joint negotiation. Then, the elites act in a personal capacity to mediate with local government to pose particular pressure upon it, and further obtain support from local government to resolve disputes as fast as possible pursuant to legal provisions. This sort of resistance is propitious to continuous struggle, but not to ultimate struggle. It would not be attributed as “creating a disturbance” and punished, but should give an alarm to local government for reminder of the existence of a crisis. Organizers of the action would not be prosecuted for “obligation” or suppressed. Although this kind of people was not popular to the government, they can assist the government to deal with a crisis in a rational and effective way.

It should be said, law-abiding strategy of self organization is a struggle model which emerges by taking advantage of legal and policy crack. It seems that a new weapon is added to the grassroot struggle, but as a matter of fact, it is a reluctant action by the public to resist against any unfair treatment. They can neither resort to the organizational power which represents the interest of the public to strive for their own legal interest, nor burden any losses in human resources, material resources and energy caused by legal proceedings unlikely to be predicted. Therefore, they can only launch a nonantagonistic and nonpolitical collective resistance within the scope of tolerance by local government. This is at least an expedient measure they can resort to before they take up the ultimate weapon --- legal proceedings.

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Note 1. Scott. (2007). *Weapon of the Weak --- Everyday Forms of Peasant Resistance*, translated by Zheng, Guanghuai, et al. Yinlin Press.

Note 2. Li, Lianjiang and Kevin J. O'Brien. (1996). Villagers and Popular Resistance in Contemporary China. *Modern*

China, 22.

Note 3. Yu, Jianrong. (2004). One Interpreting Framework of Rural Migrants' Right Protection Activities. *The Study of Sociology*, No. 2.

Note 4. In 2002, the minimal montly standard of workers in enterprises in Shanghai was 535 Yuan. Thus, as a matter of fact, the minimal wage of workers in SNS only increased by 5 Yuan.

Note 5. She, Xiaoye. (2008). Cooperation and Nonantagonistic Resistance --- "Tough Weapon" of the Weak. *The Study of Sociology*. No. 3.

Note 6. Worker elite or worker leader is a term for leaders of worker movement in western discourse system of worker movement. Compared with the expression of employee representative with background of Cinese discourse, the expression of worker elite or worker leader can more obviously reflect the spirit of militancy and resistance. The author in this article prefers the former expression just in the hope of reflecting intelligence and courageousness of employee representatives in SNS.

Note 7. Lee, Ching Kwan. (2002). From the Spectre of Mao to the Spirit of Law: Labor Insurgency in China. *Theory and Society* (31); Pei, Yili. *Shanghai on Strike: The Politics of Chinese Labor*, translated by Liu, Ping. (2001). Jiangsu Renmin Press.

Note 8. She, Xiaoye. (2008). Cooperation and Nonantagonistic Resistance --- "Tough Weapon" of the Weak. *The Study of Sociology*. No. 3.

Note 9. She, Xiaoye. (2008). Cooperation and Nonantagonistic Resistance --- "Tough Weapon" of the Weak. *The Study of Sociology*. No. 3.



On Relationships between Technology Standards and Patented Technology Licensing

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Abstract

There exist the close relationships between technology standards and patented technology licensing. Whether a technology standard contains a specific patented technology solution or not, there is always a patented technology licensing implied: patented technology licensing is a prerequisite for the existence and development of technology standards, and technology standards create a good many of potential chances for patented technology licensing. Furthermore, patentees achieve large-scale profits by means of licensing technologies through a standard mainly in form of a patent pool, which is realized by know-how licensing behind the patented technology licensing involved in the standard.

Keywords: Technology Standard, Patented Technology Licensing, Patent Pool, Know-how Licensing

As far as an enterprise is concerned, the highest level of technical innovation is to set a technology standard on the foundation of owning the patented technology schemes or solutions of proprietary intellectual property rights, and further make it de facto standard, industrial standard, state standard, and even international standard, and thus obtain permanent market competitive advantages. Traditionally, when a technology standard was set, patented technology schemes were always excluded. A technology standard, which is regarded as public goods composed of different formal and precise specifications such as static parameters as well as indicators, can be used freely by most people; whereas patent rights, regarded as private rights, are exclusive rights, and the patent holders often get benefits with the utilization of the technology solutions of those patents. In a word, there was no compatibility between a technology standard and a patented technology scheme in the past.

However, with the rapid development of technology, especially the appearance of abundant de facto standards, the existence of common problem and common interest, as well as the fast development of the market globalization, the integration or inclusion of technology schemes into technology standards (especially into those high and new technology standards) has been an irreversible trend. So far, some technology standards in certain fields have already gone beyond the excluding-patented-technology-solution period into the integrating period. In the process of accomplishing this transformation, technology or license has played a decisive role. It is just the existence of technology licensing that has made the impossible thing---a technology scheme is one major part of a technology standard in the past---come into the reality today. Therefore, there is great necessity in discussing the relations between technology licensing and technology standards.

1. Patented Technology Licensing in Technology Standards System

A technology standard refers to the unified regulation of duplicated technical items in a due extent. Established mainly reflecting the specifications to the technical items which need negotiating and unifying in the standardization domain, a technology standard is used to guarantee the interchangeability, compatibility and universality of different parts of certain products or services or of themselves. It is the most fundamental part of the standard system, and the other standards such as product or service ones, either derive from it or serve it. Technology transfer is the transfer of systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service, (Note 1) and is substantially completed by the means of assignment, sale and licensing of all forms of technology property or technological achievements. However, technology licensing, which refers to permit other parties to use a certain technology within certain places and period without the assignment of the intellectual property ownership, is the most ordinary technology transaction; and on most occasions, it often includes the license of a patented technology and know-how as well.

1.1 Policies on Patented Technology Licensing Related to Technology Standards by the Three World's Leading Organizations for Standardization

One important function of the technology standards is to promote the technology diffusion (technology transfer is the main form), which can be implied from the following words: "the fine-tuning of this policy (It refers to the common patent policy in the process of setting a technology standard published by IEC, ISO and ITU.) to achieve exactly the right balance — ownership versus sharing of intellectual property — is no small achievement. In this way we enable international standards to be used to successfully disseminate innovation, with a clear set of guidelines regarding the disclosure of and commitment to license the use of patented technologies." (Note 2) The world's leading international standards organizations IEC (International Electro-technical Commission), ISO (International Organization for Standardization) and ITU (International Telecommunication Union), under the banner of the World Standards Cooperation (WSC), have aligned their policies which allow for commercial entities to contribute the fruits of their research and development (R&D) activity safe in the knowledge that their intellectual property rights are respected. The policy adopted by the three organizations on March 19th, 2007 strongly encourages the disclosure of patented technology which is necessary for the implementation of a standard before the standardization process has been completed. It allows for companies' innovative technology schemes to be included in standards as long as such intellectual property is made available on reasonable and non-discriminatory (RAND) terms. They intended to promote the dissemination of the technological innovation with use of the international standards through the new agreement. "Today, it is difficult to develop technical standards without implicating patents... we have to take into account the interests of end-users. Therefore a balance must be found. We believe that this policy will encourage industry to share its intellectual property with implementers of standards on a reasonable basis knowing that their interests will be protected." (Note 3) In order to implement the policies, the three organizations respectively publicize *IEC, ISO and ITU, the world's leading developers of international standards agree on common patent policy* on their websites.

The policy declared explicitly, considering the standards set by the standardization are mostly recommendatory and their target is to guarantee the compatibility of technologies and correlative systems on a global scale, it allows for standards to include all or part of a certain patented technology schemes on basis that the patent should be able to be available by anyone without illicit interference. Charges for patent licensing and using shall be determined by the parties involved in different cases. Moreover, it provides three situations in case of disclosure of patent information in the process of setting standards: 1) the patent holder is willing to negotiate licenses free of charge with other parties on a non-discriminatory basis on reasonable terms and conditions, or 2) the patent holder is willing to negotiate licenses with other parties on a non-discriminatory basis on reasonable terms and conditions; such negotiations are left to the parties concerned and are performed outside ITU-T/ITU-R/ISO/IEC.3) If the patent holder is not willing to comply with the provisions of either 1) or 2), the Recommendation shall not include provisions depending on the patent. (Note 4)

1.2 Requirements on the patent holders in the standards-setting process by the leading world's standardization organizations.

The process of setting international standards related to patented technology solution accounts for this question more clearly. For example, when ISO organizes setting an international standard, the proposal of the standard is allowed to include patented technologies in the proposal phase; whereas explicit and specific stipulations are needed for a license. In the examination phase, the commission who is discussing the proposal of the technology standard which includes patented technology schemes shall consult with the patent holders about agreement of the license one by one. The proposal shall be immediately ceased to discuss if the patent holder disagrees to the license; the international standard shall be passed and published only when all patented technologies related to the standard are allowed to be licensed by the patent holders. After publishing the standard, ISO has a reexamination procedure to measure the licensing effect of the patented technology; if the patent holder is not able to give his/her patent license on a reasonable and non-discriminatory basis, the international standard shall be reexamined.

ITU requires that its members pay attention to the patented technologies related to the standard proposal to the best of their abilities while setting a standard, and also requires the patent holders involved issue a statement of patented license through due procedures and forms. If the patent holder refuses to issue the statement, ITU shall rapidly inform its correlative departments or organs to discuss whether they can bypass the patented technology which may be not regarded as the indispensable element of the standard or if it is an essential one, whether they can find a replacement; otherwise, the proposal will be suspended. When the standard has been passed or is about to be published, if a new patent holder wants to make his or her patent to be a part of the standard, ITU will ask him/her to make a acceptance statement; if the patent holder refuses, ITU shall delay the publishing of the text, and inform correlative departments to discuss if they can bypass the patented technology or find a replacement; otherwise, the proposal will be suspended. ITU has also specially established a patent statement database, publishing the patented technology abstracts of the correlative patent holders and the statements the holders have made to ITU as well; its function is to tell those who are going to use the standards how and from whom to get a license.

We can see from the above that the leading standards organizations make technology licensing top list of the concerns while setting a standard; the technology or factors of the technology shall not be included in the standard without permission of the patent holder. Some holders of advanced technologies, especially those whose technologies have been accepted by the market and obtained advantage in their fields, will directly decide whether the advanced technology standard can successfully get passed; once passed, there will be more possibility in licensing the patented technology, and the integration with the know-how licensing would bring the correlative patent holders great benefits. Therefore, as a matter of fact, few patent holders are not willing to get their technologies included in the standards; on the contrary, most patent holders wish their technologies or correlative factors can be included in a certain standard, and thus the standard will help them occupy the market as a kind of advertisement free of charge.

Therefore, license is the axis of the setting and implementing of the international standards including patented technology schemes, which means that an international standard including a patent would not come out without the patent holder's agreement to license the patented technology schemes. The standards concerning patented technology may contain the ones including the patented technology schemes and the ones including only some static content like parameters or indicators instead of the specific patented technology solutions. For the former, it is easier for us to understand why the license is needed, for without licensing, the products or services conforming to the standards would not be manufactured or provided. But for the latter, it is a little difficult for us to get the reasons. Theoretically speaking, for those standards including static indexes such as indicators or criterions, we may not need the patent holders to make the statement of agreeing to license, for the products or the services supplied by some manufacturers or service providers out of the standard's participants or setters would meet the requirements of the standard without employment of the patented technology solutions related to a standard. However, in reality, in order to make sure that those manufacturers or service providers can supply with products and services complying with due standards, it is still necessary for them to obtain the license, for all the parameters involved a standard derive from the patented technology schemes without which the products or services could not be produced or provided. So if the patent is allowed to enter into a standard without requirement of agreement to license, there exist possibilities of monopolization with the abuse of standards by the patent holders. As a result, in the process of setting standards by standardization organizations, it is essential for the patent holders to make a statement of license as long as a patent is involved.

Moreover, under the production conditions in the modern society, the standard itself implies the license in a certain manner, for it is impossible for an enterprise to produce all parts of most merchandise and it can only provide some parts of it to satisfy the desire of the whole society; and the other parts may be left to be produced either by its competitors who have similar technologies or by a licensee who gets the licensed technology. The technology licensing is more common when it comes to the enterprises who have achieved comparatively monopoly situation and those who have many technologies included in different standards but lack of production capacity.

In a word, patented technology licensing is a prerequisite for the existence and development of technology standards, and technology standards provide numerous chances for patented technology licensing and widen the channel for correlative patent holders to achieve profits.

1.3 The Economic and Juristic Foundation of the Combination of Patent Licensing and Technology Standards

As far as the enterprises of intellectual property are concerned, the combination of patented technology schemes and technology standards is of great strategic value. It enables the enterprise to hold the superiority in transaction negotiations, to occupy new market shares, and to transfer the technologies faster on a larger scale with lower direct costs in hope of profits. Technology standards can also bring convenience for those who want to obtain related technologies by cross license as soon as possible. Therefore, the technology transfer based on a technology standard cuts down the social research cost, transaction cost, coordination cost and information cost (standards act like the market transaction signal and help cut the cost in searching information in market transaction), (Note 5) and create more wealth for the society. And besides, given the internal coordination cost, the development of standardization, on the premise of good quality, enables enterprises to adjust their boundaries and concentrate their production in the most professional advantageous fields through outsourcing the parts, thereby further deepens the divisions of labor, and enhances their mutual dependence and technology transfers. (Note 6) These may lay the economic foundation of the combination of patent licensing and technology standards.

Under the circumstance of market economy, with the weakening of the government power on market and the extension of the power of the social nongovernmental organizations which reflect the sense of global *democracy*, those enterprises, who have got priority in setting standards, have been taking full advantage of their strength to play a leading role in setting standards. Through the soft-law-like normative documents (standards), the enterprises can always get a high position in the commercial operating chain and thus achieve generous profits; enterprises who have no power to discuss or no chances to participate in the standards will become a tool of the technology standards providers ("lawmakers") to create and supply the profits for the latter through their own activities, follow the latter's steps passively, and become the latter's performers of "laws". In the background of internationalization of the technology standards, most enterprises

with underdeveloped technologies in developing countries get approach to technologies and then build their producing capacity through being licensed of the technologies related to the standards system. However, due to the high charges for license and the low position in the production chain concerning the standards, only meager profits can be achieved by the enterprises from developing countries.

Furthermore, standards including patented technologies can easily monopolize the market, (For patent itself is a lawful monopoly within due scale.) and restrain the development and expansion of competitors. For example, in the respect of market access, it would exclude the products that do not comply with the standard, and thus beat its competitors. If the competitor wants to continue its life in this area, it has to cooperate through technology licensing. If the technology transfer problem related to technology standards can not be dealt with well, the technology standards will fail to help realize the objectives of enhancing the technology development and economic growth, and become obstacles to impede the economic and social development. Therefore, most countries regulate the problems on technology standards and technology transfer through antimonopoly law or fair-competition law in avoidance of any passive or negative results. The above-mentioned issues compose the juristic foundation for the global technology licensing strategy.

2. Patent Pool Involved in Technology Standards and Technology Licensing

2.1 Patent Pool is the Main Pattern of Technology Licensing in Standards

A patent pool is a bridge for constructing relationship between technology standards and technology licensing, and the chief means by which the patent holders carry out the license through standards and achieve high and scale profits. Patent pools are usually formed in the industries in which the products or services have more complicated and various functions and each part of them is often interdependent and the patents concerned can be applied with each other. In the market with daily specialization of technology development and integration of world economy, enterprises would find it more and more difficult for a single enterprise itself to set a uniform standard for a certain product, and thus they would prefer to participate in setting standards, for it has been unrealistic for an enterprise to occupy all the technologies of a product (the technology of a product is often a collection of a set of indicators, factors and even technology solutions related to the primary patent); it is often acknowledged that it is the best choice for several enterprises to share the related technologies of manufacturing a product in the fierce market competition. These enterprises begin to carry on cross technology licensing in hope of manufacturing products complying with the requirements or standards accepted by the market.

However, as enterprises with related technologies increases, the individuation and low efficiency of individual cross licensing would impair the parties involved when a conflict occurs. To avoid this phenomena and gain the most benefits, the enterprises with related technologies gradually set up a technology association, or otherwise, participate in the patent pool dealing with related product technology standards in different ways; they contribute their patented technologies to constitute a joint venture and make them part of the standards, afterwards they can get license by the means of “a package agreement”.

Additionally, in a patent pool, each patent holder may have a secret weapon—know-how, which are inevitably bundled to be licensed with the patented technologies when transferring the patented technologies; therefore they have the privities of achieving common interests as well as the approach of checking each other and the achievement of respective profits goal.

2.2 Essence of a Patent Pool concerning a Technology Standard

A patent pool is actually a sublimation of cross license pattern, which could meet the requirements to maintain the common interests of the patent holders and reach their aim of gaining more profits. A number of enterprises with core technologies set a technology standard for a certain high and new technology product through negotiations; they can share the technologies of each other, while when they license the technologies to the enterprises who are not the members of the pool, they will be paid by the latter. In this way, the transaction costs among them can be reduced whereas their royalties are not lessened but increased, and thus the patent holders' community would achieve maximum benefits. As soon as a standard get passed or accepted by the market, especially when a technology solution is part of the standard, each member of the community would achieve the most profits through package licensing of the patent in the form of standard.

It is not difficult for us to understand why the standard setters show great interest in making standards as well as establishing a patent pool. It implies not only to get more power and influence in certain technology areas, but also the occupation of the market share, which means profits; this may be more important. From the perspective of economy, it is the most economic way to achieve comparatively competitive advantages and the enterprise goals. According to the rules of the market economy, the enterprises whose standard is presumed and accepted by the consumer will acquire a priority in gaining profits from the market.

License occurs twice in the specific operation of a patent pool: the patent holder license the patented technology schemes included in the standard to the administrative department of the pool and the latter grants the license to the

specific users. (Note 7) Apparently it is more convenient and economical for the standard users to be licensed by the pool (But when it comes to the know-how licensing, the standards users may need to negotiate respectively with each patent holders one by one.) than by the patent holders through individual negotiations. As a result, it would attract most standards users. (Standards users in this article refer to users excluding the standards setters and participants unless specially noted.) Meanwhile, the administrative department takes charge of the license on behalf of the members of the pool and thus would save their time and cut their costs. Combined these two aspects, the patent holders related to the standards would gain much more benefits.

Therefore, two kinds of contracts are concluded when the patents, which are parts of a patent pool and whose technology schemes involved in a standard, are licensed. The first contract is the one concluded between the holders and the standard setters, which are completed after the holders make a statement to declare that he is willingly to license the patented technologies to others. This contract is used to make preparations for licensing. The second contract is the one concluded between the standard users and the holders, which has real relations with profits; the ultimate goal of the patent holders participating in setting standards and joining a patent pool is to establish such kind contracts and thus gain profits.

A patent pool is a typical kind of a contractual organization as well in which each patent holder restricts other members' activities on certain degree and shares profits with others in the form of a contract. Some scholar believe that a technology standards association is essentially a collection of a series of licensing contracts; patent holders and technology standards administrative department, as well as technology standards administrative department and technology standards users, sign a series of licensing contracts, and get their rights, responsibilities, obligations written in the contracts, therefore the association members have formed a contractual relationship between each other. (Note 8) This is reasonable and we know that a technology standard association usually exists in the form of a patent pool.

3. Deep Analysis of the Relationship between the Technology Schemes and the Technology Licensing in the Standards

3.1 The Know-how Licensing behind the Patented Technology Licensing

The inclusion of technology schemes in standards inconsequently integrates the technology standards, which belong to public goods, with the patents, which have certain features of private rights; and the best solution to this conflict is suggested to be that the patent holders be required to declare explicitly the license of employment by others at free charge or under the fair and reasonable conditions before integrating the technologies into the standards, otherwise the technologies should be excluded from the standards.

However, the problem arising from such suggestion is quite obvious: first, what does "fair and reasonable conditions" mean? It is almost impossible to make a clear definition or set an objective and specific standard. According to regulations by related standardization organizations, all technology licensing related to the standards shall be negotiated by the parties involved in specific cases. "Fair and reasonable" is truly difficult to achieve due to the inequality in status, economic strength, negotiation capability and so on between the licensor and the licensee. Secondly, many patent holders are generally unwilling to make the key portion or essential part of their technology schemes, which may be maintained as know-how by themselves, reflected in the patent application files, therefore the standards users have to pay for the high charges for know-how licensing if they want to manufacture the products complying with the technology standards. In realistic technology licensing related to the standards, as for those enterprises whose patents or elements of whose patents are included in the technology standards, the integration of patented technologies with know-how is the ultimate safeguard of the achievement of their profits. There are few pure patent technology transfers related to standards. (Note 9) The statistical data shows that over 90% of the technology transfers are connected with the activities of know-how licensing, ((Note 10) and most technologies licensed and helpful to achieve the goals of the licensor are merely patented technologies which are either outdated or to be terminated. (Note 11)

Although the standard brings unification and may reduce low social transaction costs, it is a weapon in hands of the strong whose patents are included in a technology standard and may make the licensees fall into a set of tricks. Through the public goods—a standard, the participants thrust other standards users with know-how licensing which would bring high profits; and as is known, most standards users are enterprises in developing countries. Though the standards participants allow the standards users to use their patented technologies, even free of charge, expected targets or ideal products may not be easily achieved or manufactured, for some essential solutions in the form of know-how are not included in the patented technologies, but are usually reflected as the static indicators and parameters in a technology standard. The patented technology files usually tell no more than general manufacturing method. No patent offices in the world could make a patent instruction booklet disclose detailed information of manufacturing products or patented methods completely; and it's impossible to require the patent examiners to make accurate judgments that the core parts of a technology is contained in the patent application materials in the examination process. Thus it can be seen that the standards users who have not participated in the standards can hardly achieve the expected target only through patented technology licensing related to the standards. On most occasions, in order to manufacture satisfying products, they have

to conclude know-how licensing agreement with the standards participants, in which the standards participants may raise the royalties for such licensing and recover their costs on the free license of the patents and gain big profits. In this way, the standards participants have occupied the market with standards and realized the goal of gaining profits. As for those standards including the patented technology schemes which are allowed to be licensed on RAND terms, the participants would probably gain more profits through technology (including patents and know-how) licensing while the licensees have to accept the bundled licenses of the know-how and the patented technologies.

3.2 The Essence of the Patented Technology Solutions Included in the Standards

The standards including patented technology schemes, which may take public goods as the coat with licensing patented technology as the form while licensing the related know-how as the kernel, help the technology standards setters to acquire high profits and bigger market shares which may not be reachable by any other means. That is the value and the objectives of the modern standards we should understand thoroughly, and when studying the technology standards, we shall attach importance to their relationships with technology transfer, and further see through the appearance to perceive the essence behind the technology standard system.

Once a private intellectual property is adopted in a technology standard as public goods, it may bring high profits for its holders with help of the public goods after publishing the standard. This is the reason why patentees exhaust their efforts to have their patents included in technology standards. The patented technology schemes included in the standards would probably turn the standards into the monopoly tool and weapon of patent holders or group, which goes the opposite to the original intention of setting technology standards. If a standard consists of only specific indicators, parameters as well as requirements, etc, the technology solutions to realize these specifications can be very different; parameters are like a destination, and each technology schemes is like a road, and there are many different roads to a definite destination, which has been described as the proverb "every road leads to Rome". Therefore, one possible negative result of making a technology scheme one part of a technology standard is to impede the enforcement of the right of the other patent holders and thus harm the fair competition.

We may analyze an extreme situation to show the negative results of making technology scheme a part of technology standards. The situation is that: if the technology standards are totally composed of patented technology solutions, (We believe that technology solutions can not be part of standards due to its privacy; however, the related specs and parameters may be a component of the standards.) then the standards are actually "combinations of public goods and private rights", which makes two kinds of contradictory things a monster. In this way, the patent system and standard system will be posed in a situation of conflicts and the foundation of the original goal and root of establishing the standardization system with public goods features will be lost and the technology standards will become an effective instrument for their makers to make profits, which will greatly hinder the economic development and encourage those with technological advantages to obtain or consolidate their "monopoly position". As for the standardization system, the result of such kind of standards would be subversive; the private rights of technology holders would get a coat of public goods in a disguised form. (Although information about patented technologies is public, it is not public goods but belongs to private rights.) The damages arising out of the implementation of these standards to other competitors and to the rights and interests of the consumers would be much more terrible than those caused by any other form of monopoly.

As public goods, the technology standards aim to be widely and universally applied to promote economic development and protect consumers' due rights and interests. If patentees agree to license a patented technology related to the standards to a licensee but refuse to license know-how related to the patents, a monopoly situation may come forth to restrict the fair competition in the fields related to the standards; for although the standards participants make it clear that the combination act of patented technologies and technology standards shall be regulated in accordance to the anti-monopoly law or the competition law on suspicion of monopoly, and make a high-sounding declaration that they agree to license the related patented technology on fair, reasonable and nondiscriminatory terms, or even free of charge, they may utilize know-how related to the patent as a secret weapon. Their attitude to the patented technology involved a technology standard may shift the licensees' attention so that they can conceal their real intention to be a participant of a standard—to license know-how behind the veil of patented technology to others, which may bring high profits.

The real intendment of putting the patented technologies into the technology standards is the license of know-how related to the patented technologies. As we have known, in a specific technology licensing process, without know-how, the achievement of patented technologies, even at free charge or in a fair and reasonable condition, is of no significance for the licensees. We should see this point for all costs and expected profits have been recovered through the license of know-how. It is not difficult for us to understand why most patent holders scramble for the standards when the related standardization organizations require them to disclose their patent information and make a statement to declare they are willing to license the patented technology to others in the future in the process of setting a standard; for a licensor, although the patent has been publicized and even can be transferred free of charge, the key to high profits is still in their own hands. Therefore, when discussing the technology transfer related to the technology standard, we should not focus

only on the patent license while ignoring the true invisible “killer” or the ultimate weapon—the know-how license. The license of patent is in the light while the license of know-how in the dark; the combination of the light and the dark contributes to the easy accomplishment of the strategic goal of the standards participants.

In brief, combination of patented technologies and know-how licensing is the intrinsic requirement on which the technology standards can exist and develop; and the know-how licensing hiding in a standard is the fundamental guarantee of the realization of the benefits of the patent holders related to the standards.

Some scholars believe that antitrust review can efficiently prevent the enterprises from opposing the employment of the standards by other enterprises or pursuing higher charges for patent usage through incorrect disclosure of their patent information related to the standards, and from denying the licensing in order to maintain their monopoly advantage. In practice, however, patents and standards would integrate immediately after patented technology solutions become standards; patent holders obtain monopoly advantages with help of the license of patented technologies and related know-how, escape the so-called review and avoid all possible punishments by use of the secret weapon—license of know-how. In my opinion, the technology standards which contain specific technology schemes may bring benefits and efficiency to the humanity, but may bring injustices as well, although there exists antimonopoly or fair competition laws. If we want to avoid this demerit, we shall either reject technology schemes to be put into a technology standard or take more effective measures and strategies to hold back the unfair results. However, it is impossible for us to refuse a solution to be allowed in a technology standard in these days, we should attach more importance to adopt forceful measures to balance the licensors and licensees.

4. Conclusion

It is the combination of standards and patented technology licensing that contributes to achieving the goals of standards participants; that's why transnational corporations are enthusiastic about setting and participating in standards; it is unnecessary to list the harms brought to the enterprises in technology underdeveloped countries by the technology standards. On the part of them, they shall catch up fast. First, they shall understand, grasp and utilize the rules of setting international technology standards, and then actively participate in the setting activities of international standards; secondly, they shall develop their own core technologies through all channels (such as independent research, development on basis of introduction, cooperation with others ,etc.), and thus have more and louder voices and enhance the influences in the process of setting international technology standards. They shall try to establish a patent pool with their own technologies as the core or take part in the related patent pool and to make their own patented technology schemes part of the standards, and then bring along the know-how licensing behind, and eventually get approach to their legitimate and lawful benefits. Perhaps this is the best and ultimate way for the enterprises in developing countries to find for their going out of the present disadvantageous situation.

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Notes

Note 1. Clause1.2 of Draft International Code of Conduct on the Transfer of Technology 1985 Version

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Employees' Rights under the Malaysian Social Security Organisation

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Abstract

This article discusses on the remedies available to the injured employees under the *Employees' Social Security Act 1969* (*ESSA 1969*) (Note 1). Remedies are the means given by the law for the recovery of a right, or of compensation for the infringement thereof (Note 2). Since employees covered by *ESSA 1969* are not eligible for workmen's compensation, they are only eligible for benefits administered by the Social Security Organisation (SOCSO) (Note 3). The relevant issues in this article pertain to the curtailment of the employees' rights to a claim under SOCSO as once an employee is injured, the employee must know what to do, what are the benefits and remedies available, the laws applicable, how to withdraw the contributions and so on. The article introduces a discussion on *ESSA 1969*, that is, the purpose of the Act, the requirements for eligibility of the benefits and the contributions. As the object of *ESSA 1969* is to provide, through SOCSO, social security to employees and their dependants in the event of injury or death arising in the course of employment under the employment injury insurance scheme and the invalidity pension scheme, the study then examines the two SOCSO's schemes. This article also discusses the various benefits available under the insurance schemes focusing on benefits that are directly related to employees.

Keywords: Employees' right, Malaysian Social Security Organisation, *Employees' Social Security Act 1969*

1. Introduction

SOCSCO is a statutory body under the Ministry of Human Resources. It was established in January 1971 to improve social security protection by social insurance including medical and cash benefits, provision of artificial aids and rehabilitation to employees to reduce suffering and to provide financial guarantees and protection to families. The Employment Injury Insurance Scheme provides protection for accidents that occur while travelling, arising out of and in the course of employment and occupational diseases and Invalidity Pension Scheme provides protection against invalidity or death due to any cause not connected with employment. Benefits include medical benefit, temporary and permanent disablement benefit, constant attendance allowance, dependant's benefit, funeral benefit, rehabilitation benefit and education benefit, survivors' pension, invalidity grant (Note 4).

Employees are covered by the *Employment Act 1955*, the *Industrial Relations Act 1967*, the *Employees Provident Fund Act 1951*, the *Employees Social Security Act 1969* and the *Occupational Health and Safety Act 1994* (Note 5). The *Employment Act 1955* is the main legislation covering the relationship between employer and employee. The Act is applicable to all manual workers and other workers earning less than RM1500.00. The Act provides the minimum conditions of employment. Amendments to the Act in the year 1998 provide that all those earning below RM5000.00 can seek protection under the Act if their employers fail to adhere to the terms and conditions in the contract of service between employer and employee. The *Industrial Relations Act 1967* covers the relationship between unionised workers and employers. Section 20 of the Act also allows for workers to seek reinstatement if unfairly dismissed. The *Employees Provident Fund Act 1951* requires the employer and employee to contribute 12% and 11% of the employee's salary to the Employees Provident Fund. The *Employees Social Security Act 1969* covers all workers who earn less than RM3000.00. The Act provides for benefits and pension if a worker is injured or disabled during working hours or while travelling to and from work. The *Occupational Health and Safety Act 1994* protects the worker against unsafe work sites and unhealthy work practices.

An employee under SOCSO is a person who works for a company or industry (in return for wages) to which *ESSA 1969* applies. The employee is the 'insured person' and it does not matter that the industry or employee is not registered with SOCSO (Note 6). An insured person is a person who is or was an employee in an industry to one in which the Act applies (Note 7) and who contributed to the insurance scheme (Note 8). An employee is still an insured person even though he was registered with the SOCSO office two days after the accident and had made no contributions at that time as in *Liang Jee Keng v. Yik Kee Restaurant Sdn. Bhd* (Note 9).

2. The General Principles of Employees' Social Security

ESSA 1969 was implemented in 1971 to provide protection for employees and their families against economic and social distress in situations where the employees sustain injury or death. In other words, this Act provides certain benefits (Note 10) to employees in cases of invalidity and employment injury including occupational diseases. The schemes of social security under the said Act are administered by SOCSO and are financed by compulsory contributions made by the employers and the employees. Contribution is the sum of money payable to the Organization by the principal employer for the insured employee (Note 11).

Generally, *ESSA 1969* is applicable to all industries in the private sector in Malaysia employing one or more employees (Note 12). Since 'industry' has been given a wide definition (Note 13) the applicability of the Act and hence, the liability assumed by SOCSO on behalf of the employers is very comprehensive. The scope of coverage is further enhanced by the fact that the present definition of 'insured person' expressly states that it no longer matters whether the industry or employee was registered or not for as long as the industry is one to which the Act applies (Note 14). This is expressly stated in the concluding part of the definition which reads 'notwithstanding that such industry or employee was not so registered, so long as the industry was one to which this Act applies'. An insured person is a person who is or was an employee in an industry to one in which the Act applies (Note 15) and who contributed to the insurance scheme (Note 16). In *Liang Jee Keng v. Yik Kee Restaurant Sdn. Bhd.* (Note 17) the employee was an insured person even though he was registered with the SOCSO office two days after the accident and no contributions were made at that time.

Every employer employing one or more employees as specified by the Act must register and contribute to SOCSO. Thus, all employees of such industries must be insured (Note 18) and such industry must register with SOCSO (Note 19). This means that all employees under a contract of service or apprenticeship and earning less than RM3,000 per month must compulsorily register and contribute to SOCSO regardless of the employment status whether it is permanent, temporary or casual in nature (Note 20). The exception is foreign workers who are no longer protected by SOCSO and are protected under *WCA 1952*. The public sector workers have also been exempted since 1983 because they are covered by the *Pension Act 1980* (Note 21) and are entitled to medical benefits under their scheme of service (Note 22). An employee who has never been registered with or contributed to SOCSO and who is earning more than RM2,000 per month is given an option to be covered under the Act with the agreement of his or her employer. This once-in-always-in principle, that is, once an employee has made a contribution, he remains liable to make contribution always, even if his or her earnings exceed that sum subsequently (Note 23).

The payment of monthly contributions is the responsibility of the employer, who is empowered to make deductions from the employee's wages to recover the employee's share and paid to SOCSO according to the rates specified under the Act. *ESSA 1969* reads

'The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Organization.' (Note 24)

Thus, the contributions that should be paid to SOCSO in respect of an employee comprise of contribution payable by the employer (the employer's contribution) and contribution payable by the employee (the employee's contribution) as described in *ESSA 1969* as follows

(2) The contributions shall fall into the following two categories, namely:

- (a) the contributions of the first category, being the contributions payable by or on behalf of the employees insured against the contingencies of invalidity and employment injury; and
- (b) the contributions of the second category, being the contributions payable by or on behalf of employees insured only against the contingency of employment injury.' (Note 25)

The first category is the employer's contribution that insures the employees against the contingency of invalidity and employment injury. The employer and the employee share these contributions in the ratio specified under the Act (Note 26). Contribution of the second category or the employee's contribution only insures the employee against the contingency of employment injury. Then contributions are paid entirely by the employer at the rate specified (Note 27).

It is noted that SOCSO still maintains the rates of contribution ever since the Act came into effect in 1971 (Note 28). For example, the lowest rate of contributions for an insured person is RM 0.10 cent and the highest rate for an insured person earning RM1,900 is only RM9.75 and is still the lowest compared to any premium rates offered by any insurance company.

Despite that, there has been an increase in contributions in SOCSO's Fund (Note 29) as a result of SOCSO's efforts in detecting and registering eligible employers who have avoided registration. In addition, any employer who fails to register and to make contributions is liable to be prosecuted. However, the punishment for failure to pay contributions is

imprisonment of two years and a fine of ten thousand ringgit (Note 30). Furthermore, failure to pay contributions to SOCSO also included the arrears of contributions as was decided in *Public Prosecutor v. KATS Cleaning Service (S) Sdn. Bhd. (Note 31)*. The above case involved the employer who pleaded guilty and was fined for failure to pay contributions and included the arrears of contributions not included in the charge.

Table 1 shows the increase in the number of contributing employers and employees between 2003 and 2007.

The number of employers contributed to SOCSO has increased by 4.61% or 16,903 to 383,215 employers in the year 2007 compared to 2006 due to increase in awareness on the benefits of the SOCSO insurance scheme as a result of its effort to disseminate information through seminars, mass media, enforcement activities and continuous inspections. However, the number of employees currently contributing declined marginally by 0.07% or 5,450,943 by the year 2007 from 5,454,799 employees in 2006. The data cleansing process conducted by SOCSO's Information Technology Department was one of the reasons for the reduction in the number of contributors.

In line with the increase in the number of contributing employers and registered employees who contribute to SOCSO, the total amount of contributions collected from the employers and employees also rose by 6.52% or RM103.42 million with collections amounting to RM1,689.57 million in 2007, compared to RM1,586.15 million in 2006 (Note 32). Table 2 shows the total amount of contributions between the years 2003 to 2007.

The rise in contributions collected also reflects the increasing awareness among employers of their responsibility to contribute to SOCSO. Greater awareness of their responsibilities came about as a result of enforcement activities and publicity campaigns conducted by SOCSO to enhance knowledge of SOCSO's Insurance Schemes. The intensification of enforcement activities to ensure employers adhere to the *ESSA 1969* and the prosecution of errant employers saw an increase in the amount of contributions collected. Contributions received represented 64.82% of SOCSO's total income (Note 33).

Besides prosecuting the employers, action was also taken to impose interest charges on late contribution payments to ensure that employers pay their contributions on time. This deterrent measure is to ensure and encourage employers to place importance and priority on prompt contribution payments within the stipulated period. The interest charges on late contribution payments imposed on the employers in the year 2006 have declined by RM5,090,451 to RM20,069,685 compared to RM25,160,136 in 2005 (Note 34). This reflected the growing awareness of employers of their responsibilities to pay within the stipulated period provided in the rules and regulations of SOCSO. By the year 2007, interest on late contributions collected amounted to RM2.2 million (Note 35) as compared to RM20.07 million in 2006, representing an increase of 25.87%. This shows that more vigorous efforts in inspection and enforcement of the provisions of *ESSA 1969* have shown positive results.

Table 3 shows the enforcement activities by SOCSO officers in the year 2005 and 2006. From the table, it can be observed that enforcement through scheduled inspections was carried out on 118,810 employees (completed and still processing) in 2006. These scheduled inspections were focused on employers who defaulted payments. There are 366,312 registered employers (Note 36) but inspections were only carried out on 118,810 employees compared to 97,398 employees in the previous year.

In addition, several actions were taken to detect defaulting employers who had failed to register with SOCSO. In this regard, in year 2006, 81,871 inspections were conducted on employers who failed to make contribution payments. In addition, 57,724 inspections were conducted on employers who failed to settle interest on late contributions (ILC) payments. At the same time, a total of 130,536 inspections were conducted on employers who have not been inspected previously or have not been inspected for more than three years (Note 37). By year 2007 SOCSO staff had conducted 34,905 inspections on employers who failed to make contribution and ILC payments, 40,456 inspections were conducted on employers who failed to make contribution payments and 35,753 inspections were conducted on employers who failed to make ILC payments (Note 38). To increase enforcement activities, the number of inspection officers has also been increased.

Indeed such regulations regarding contribution need to be continued with a view to increase the proportion of contributing employers and employees. However, social security schemes provide protection to organised sectors in the urban sector that constitute only a part of the working population. The vast majority of workers in the unorganised sector in rural areas, especially contract workers, are not covered (Note 39). So, a few amendments need to be made to the Act to include these workers. In addition, the enforcement and prosecution for failure to register and contribute should be continued.

3. Schemes under the Social Security Organisation

Basically, *ESSA 1969* provides benefits under two social insurance schemes namely, the Employment Injury Insurance Scheme and the Invalidity Pension Scheme. The former provides for payment of certain benefits to an employee for any injury or disease that arises out of the employment or during the course of employment. The latter scheme provides for

payment of certain benefits where an employee becomes invalid due to illness or any other reason. Both the two insurance schemes are administered by SOCSO established under the Act (Note 40).

Under the above two schemes, all employees earning less than RM3,000 per month and working in any industry with one or more employees, must be insured under these two insurance schemes. The objectives of these insurance schemes are to provide employees with an assurance of income support for periods when they are physically unable to perform their work. Both the insurance schemes are based on the concept of compulsory participation except for those specifically excluded such as casual workers, foreign employees, self-employed persons, government servants, domestic servants or spouse (Note 41). Furthermore, the scheme is compulsory even if the employers have also insured their employees under other private insurance policy and when making claims, the employees are eligible for both the benefits (Note 42).

3.1 Employment Injury Insurance Scheme

This was the first type of protection scheme offered by SOCSO. Under this scheme employees who are involved in an industrial accident and sustained an employment injury are entitled to claim benefits from SOCSO for the resulting disablement. This insurance scheme was implemented in 1972 under *ESSA 1969*. It covers the contingency of injury and death arising out of and in the course of employment to employees who meet with an employment injury.

This scheme provides an employee protection for industrial accidents that occurs at work or while traveling (Note 43) which include commuting on a route between his or her residence and his or her workplace or between his or her workplace to a place where he or she takes his or her meal during approved rest hours or during a journey that is directly connected to his or her employment. In addition, this scheme also protects employees from accidents arising out of and in the course of employment (Note 44). Finally, this scheme also provides an employee protection for accidents involving occupational diseases (Note 45), that is, diseases that result due to exposure at work to various hazards.

The benefits provided under the Employment Injury Insurance Scheme are medical treatment, disablement benefit (temporary and permanent), constant-attendance allowance, rehabilitation, dependant's benefit, funeral benefit and education benefit. The actual amount of benefit received will depend on the actual nature and extent of the injury and resulting disablement as certified by the medical board.

3.2 Invalidity Pension Scheme

The Invalidity Pension Scheme is where an employee who is certified as an invalid is entitled to receive benefits from SOCSO in the form of a fixed monthly pension. 'Invalidity' is defined as a serious disablement or morbid condition of a permanent nature that is either incurable or not likely to be cured, as a result of which an employee is unable to earn at least one-third of what a normally able person could earn (Note 46). For instance, chronic ailments or diseases that could be considered for invalidity are heart attack, renal or kidney failure, cancer, mental illness, chronic asthma and other similar conditions.

This scheme was started in 1974 under *ESSA 1969* and has been modified to provide for survivors' benefits as well. This scheme provides a 24-hour coverage to an employee against invalidity or death due to any cause not connected with his or her employment. This means that death or invalidity is irrespective of how and where it occurs or happens. Under this scheme, the employer and the employee are required to contribute by sharing in the ratio specified (Note 47). For example, for salaries below RM30 the employer is required to contribute 40 cent and the employee 10 cent, and for salaries above RM1,900, it is a maximum RM34.15 for the employer and RM9.75 for the employee. What is important here is that to be able to receive these benefits, the employee has to be invalid and had contributed to the scheme. However, to be covered under this scheme, the age of the worker has to be below 50 years at the time of first entry (Note 48).

The benefits provided under this scheme are invalidity pension and grant, constant-attendance allowance, survivors' pension, funeral benefit, rehabilitation and educational loan.

4. Benefits under Insurance Schemes

Accidents to employees are common in the factories. However, when an employee is involved in an employment injury, he or she has numerous benefits. These benefits provide cash payments to the employee or his or her survivors reflecting income loss and payments for medical care. The general benefits available are allowances, hospital or medical expenses, rehabilitation and other care costs.

As can be seen from Table 4, both the Employment Injury Insurance Scheme and the Invalidity Pension Scheme provide the same benefits of constant-attendance allowance to the severely incapacitated or disabled, funeral benefit, rehabilitation benefit and education loan benefit. The difference is that the Employment Injury Insurance Scheme has the temporary disablement benefit, permanent disablement benefit, dependant's benefit (all are by way of periodic payments) and medical benefit. In contrast, the Invalidity Pension Scheme has the invalidity pension, the invalidity grant and the survivors' pension. However, the funeral benefit (Note 49), education loan benefit (Note 50), dependant's

benefit (Note 51) and survivors' pension (Note 52) will not be discussed here since they do not directly involve employees. The main objective of these insurances is to provide financial support for a former employee who is no longer able to earn or for the surviving dependants of an employee who died prematurely.

All the benefits under both the insurance schemes are claimed from SOCSO. Sometimes, however, claims take up quite some time, as the procedure might be too lengthy due mainly to the incomplete forms or ignorance of the employees (Note 53). For a normal process, to pay temporary disablement benefit to the injured employees within 30 days upon receipt of all necessary information and the documents received are complete. For permanent disablement benefit and invalidity pension they are within 90 days (Note 54). However, if all the relevant documents and information are not complete then this will cause delays.

These delays are burdensome on the employees and their dependants. So, to speed up claims, SOCSO has recently introduced the e-electronic service including using the short message system (SMS) and facsimile (fax) in the claiming of disablement benefit for employees involved in accident during work (Note 55). With these e-electronic services, employees are able to check their application status of their claim within minutes compared to a week by using letters, previously. This will indirectly improved the quality and efficiency of the SOCSO's services while utilising advanced technology.

Furthermore, SOCSO has introduced the 'PERKESO Prihatin' that ensures payment in three working days for temporary disablement benefit provided that the employees showed the original documents, complete all the necessary documents and applies for accidents at workplace only (Note 56).

The benefits offered to the employee are minimal and some tend to safeguard the employer. Indeed, the benefits outlined do not cover all of the costs incurred by the injured employees. No system can even attempt to redress some of the consequences of workplace injury or death, such as marital breakdown, family dissolution and lost careers and homes. Remedies are only given to an employee to put things right or to correct it. The aim of the award is to compensate the employee for the loss caused to him or her by injuries and to place him or her, so far as possible, in the position he or she would have been had those injuries not been suffered. Therefore, the employee or his or her family must be fully compensated as quickly as possible; not only for the injuries themselves, but also for the effects they have had on him or her emotionally, intellectually and financially. For instance, in year 2002, SOCSO paid about RM650 million compensation for 81,810 accident cases at the workplace, which include the indirect cost (Note 57).

4.1 Constant-attendance Allowance

This constant-attendance allowance is a monthly allowance that is paid to an employee who constantly requires the personal attendance of another person but medical board must verify the incapacity (Note 58). Hence, an employee who is severely disabled or incapacitated and experiences permanent total disablement and needs constant nursing could apply for this benefit. This means that he is entitled to invalidity pension or permanent total disablement benefit and shall also be entitled to this allowance. The constant-attendance allowance is provided under *ESSA 1969* as follows

'an insured person who is entitled to invalidity pension or permanent total disablement benefit shall also be entitled to constant-attendance allowance equivalent to forty per cent of the rate of such pension or benefit subject to such maximum as may be prescribed by the Minister from time to time by regulations, if and so long as he is so severely incapacitated as to constantly require the personal attendance of another person:

Provided that the existence of the degree of incapacity qualifying an insured person for constant-attendance allowance shall be verified by a medical board or the appellate medical board or any other authority so authorized by the Minister, in such manner as is prescribed by the regulations.' (Note 59)

This allowance is 40% of the daily rate of the invalidity pension or permanent total disablement benefit subject to a maximum of RM500 per month (Note 60). This is in addition to the monthly pension for invalidity pension or permanent disablement. The eligibility to receive this allowance is decided by the medical board or the appellate medical board at the time the loss of earnings capacity is being decided. The criteria for deciding whether the employee is eligible for this allowance or not will be determined by the medical board. The allowance will be paid directly to the employee and he may use this allowance in any way he deems fit.

The number receiving this benefit is small. There were 578 recipients of constant-attendance allowance under the Employment Injury Insurance Scheme at the end of 2007 compared to 558 cases in the preceding year. This reflects an increase of 20 cases or 3.58%. However, there were 2,838 recipients of constant-attendance allowance under the Invalidity Pension Scheme as at the end of 2007, an increase of 214 cases or 8.16% compared to the previous year (Note 61). Nowadays employees are more aware of their rights and thus, increase the number of claims under this benefit.

Thus, the constant-attendance allowance is paid to an employee who is so severely injured and is permanently totally disabled who will receive a monthly allowance if he needs the constant personal attendance of another person.

4.2 Rehabilitation Benefit

Employees suffering from invalidity or permanent disablement can take advantage of facilities provided free by SOCSO for their physical and vocational rehabilitation. The facilities for physical or vocational rehabilitation are provided for in *ESSA 1969* as follows:

- (1) An insured person suffering from or claiming to suffer from invalidity or permanent disablement may be provided by the Organization, free of charge facilities for physical or vocational rehabilitation.
- (2) Facilities under *subsection (1)* shall be of such nature and scale and shall be provided to such insured persons and on such conditions as may be specified by the regulations.
- (3) An insured person suffering from or claiming to suffer from invalidity or permanent disablement may, if his or her condition so required, be provided free of charge with prosthetic, orthotic or other appropriate appliances as may be determined by the Organization and such appliances may be renewed, when necessary, free of charge.
- (4) An insured person who has to undergo physical or vocational rehabilitation or who is or is to be fitted with prosthetic, orthotic or other appliances may be paid or reimbursed, as determined by the Organization, expenses reasonably incurred or to be incurred by him on travelling or maintenance in connection with such measures, or the fitting of prosthetic, orthotic or other appliances.' (Note 62)

The objective of this rehabilitation programme is aimed at enabling the affected employees to continue to play an active and productive role in society. This means that it will assist and enable him to attain self-independence and lead an active life.

Physical rehabilitation, which includes medical rehabilitation and the provisions of prosthetic and orthotic appliances (Note 63), aims at developing the functional and psychological abilities of the disabled employee. For instance, in 2007, a total of 86 types of prosthetic and orthotic appliances were provided to 2,382 insured employees who needed them upon the recommendations of the Medical Boards, Appellate Medical Boards, Medical Officers and Local Office Managers (Note 64) when compared to 1,624 insured employees in 2006 (Note 65).

In addition, during 2007, only 129 insured employees were recommended by the Medical Boards and Appellate Medical Boards to receive medical rehabilitation at Government Hospitals and Private Medical Centres compared to 178 insured persons in 2006 as a result of public awareness (Note 66).

The distribution of the type of rehabilitation can be seen in Table 5. The table shows that the majority of these cases required reconstructive surgery where surgeons used implants to improve the health condition of the affected injured insured persons. Alternatively, vocational rehabilitation would assist the employee in retaining his or her previous job or to find a new job suitable to his or her abilities. So, an employee who is suffering from permanent disablement and who may find difficulty in finding suitable work can apply to undergo vocational training or courses. For example, in radio and television repair, electrical wiring, metalwork, refrigerator and air-conditioning unit repair, plumbing, dressmaking or sewing and fashion, baking, typing and secretarial duties. However, vocational training is not popular perhaps due to lack of awareness, and the last report was in the year 2005 where only one person received vocational training (Note 67).

Furthermore, in line with the objective of creating a caring Malaysian society, haemodialysis treatment has been provided by SOCSO to recipients of invalidity pension who are at 'end stage of renal failure' as a result of kidney problems. This follows SOCSO's decision to consider haemodialysis treatment as part of medical rehabilitation since 2000 (Note 68) due to the increase in demand for that treatment. For example, in 2006, there were 522 approved applicants compared to 481 in 2005 who had undergone treatment at SOCSO's panel dialysis centers, government hospitals and also at private or voluntary dialysis centres (Note 69). By year 2007 a total of 651 applicants were received and all were approved for dialysis treatment under SOCSO (Note 70). In fact, this free dialysis treatment has increased by 335% since 1999 (Note 71). To handle this increased demand, 21 new dialysis centers were appointed by SOCSO making a total of 186 centers in year 2007. During the year, a total of RM30.07 million was disbursed by SOCSO to the dialysis centers for payment of haemodialysis treatments compared to RM24.79 million in 2006, indicating an increase of 6 million due to increases in the number of cases and treatment costs (Note 72). Besides that, SOCSO had also donated 16 units of haemodialysis machine at a total cost of RM613,000 during 2007 to 8 dialysis centers run by voluntary organizations (Note 73). The total machines donated so far are 221 units in 2007, an increase of 212 machines since 1998 where there were only nine units (Note 74).

Meanwhile, all expenses incurred for the purpose of vocational and physical rehabilitation will be borne by SOCSO based on rates and conditions determined by the organization (Note 75). This is to enable an employee to go back to the most suitable remunerative employment. SOCSO also pays and arranges for the provisions of artificial aids as recommended by the medical board (Note 76). These include glasses, hearing aids, crutches, wheel chairs, toilet aids and other orthopedic appliances as well as repairs and replacement of worn-out appliances. All expenses incurred while

travelling to places to fit these artificial aids are also borne by SOCSO. SOCSO also makes all administrative arrangements for the supply of these artificial aids. A worker who is fitted with artificial limbs will also be provided physical and vocational training upon application. SOCSO has officers who can advise and guide the worker on the service.

Problems may arise where some employees may avoid rehabilitation or employers may be reluctant to employ handicapped employees. So, efforts should be continued with effective rehabilitation to the injured employees and incentives from the employers, be given to them to return to work. Previously, SOCSO only arranges for the rehabilitation within Malaysia only (Note 77). Today, SOCSO has extended both the physical and vocational rehabilitation to countries outside Malaysia especially if the facilities are unavailable here. So, SOCSO has arrangements for overseas rehabilitation, if necessary (Note 78).

In addition, SOCSO has introduced a new rehabilitation programme in 2007 as "Return to Work" (RTW) for its contributors. It is a physical rehabilitation programme provided for SOCSO's insured employees who suffer from disability due to injury and illness, with the aim of rehabilitating the employee's affected limb and allowing him to return to work earlier. In this case, the bio-psychosocial case management concept is used which involved biological, psychological and sociological aspects, with multi-disciplinary and multi-method approach. This RTW rehabilitation programme involves various disciplines and the process is not standardized and may differ from one individual to another. Each referred individual will undergo a process to evaluate the level of disability and identify the problems faced by him. The initial assessment assists the Case Manager in identifying the insured employee's problems and planning the scope of rehabilitation assistance that shall be provided to the insured employee. The individuals concerned may require rehabilitation services, psychology, counseling services, workplace assessment and other services. The steps taken include identifying long term vocational goals, develop skills and returning to work with other employees after undergoing a proper rehabilitation programme. As of December 2007, the programme had been very successful as shown in Table 6.

4.3 Temporary Disablement Benefit

This benefit applies where the employee is unable to pursue his or her usual occupation during the period of recovery after the injury but is able to return to his or her regular job soon. Temporary disablement benefit is discussed in *ESSA 1969* as follows

'Subject to the provisions of this Act and the regulations, if any-

(a) a person who sustains temporary disablement shall be entitled to periodical payment for the period of such disablement in accordance with the provisions of the *Fourth Schedule*:

Provided that no temporary disablement benefit shall be payable unless the temporary disablement lasts for a period of at least four days including the day of the accident:

Provided further that for the purposes of this section and whether or not the person who sustains the employment injury is paid wages on the day of the employment injury, the commencement of the calculation of the period of four days shall begin from the day of sustaining the employment injury.' (Note 79)

So, when an employee meets with an accident in the course of his or her employment and sustains an employment injury as a result, and a medical practitioner certifies that the employee is unable to work for at least four days (inclusive of the day of the accident), the employee is entitled to temporary disablement benefit for the days he is not able to work (Note 80). An employee is eligible to claim this benefit if the injury sustained is an employment injury and he must produce the medical certificate for the number of days he or she is unable to work. Meanwhile, this benefit is paid to the employee directly by the Local Office for as long as there is medical leave.

As the name suggests, temporary disablement benefits are only for disablement that is temporary and for a short period. Since the objective of this benefit is to compensate the employee for the loss of wages during the period of disablement, it follows, therefore, that this benefit is paid only for the period the employee is on medical leave. However, no benefit will be paid for the days for which the employee works and earns wages during this period. This means that if an employee receives wages for any of the days during which he is certified to be disabled and unfit for work, then for such days, the employee will not be eligible for any temporary benefits. The daily rate of the temporary disablement benefit payment is 80% of an employee's assumed average daily wage (Note 81) subject to a minimum of RM10 a day (Note 82). Meanwhile, the total expenditure for the temporary disablement has increased by RM13.44 million or 18.72% in year 2007 to RM85.21 million (Note 83).

Thus, temporary disablement benefit consists of daily payments and is the most common type of disablement situation and the most number of benefit claims made to SOCSO. This benefit provided a cash benefit paid to the injured employee who has been certified by the doctor unfit to work for a period of four or more days inclusive of the day of accident.

4.4 Permanent Disablement Benefit

Certain injuries may be more severe and permanent in nature. Permanent disablement benefit is contained in *ESSA 1969* as follows

‘Subject to the provisions of this Act and the regulations, if any-

(b) a person who sustains permanent disablement, whether total or partial, shall be entitled to periodical payment for such disablement in accordance with the provisions of the *Fourth Schedule*:

Provided that where permanent disablement, whether total or partial, has been assessed provisionally for a limited period or finally, the benefit provided under this paragraph shall be payable for that limited period or, as the case may be, for life.’ (Note 84)

So, where an accident results in permanent disablement as a result of an employment injury, the injured person after being certified by a medical board will be given permanent disablement benefit (Note 85). If the injured employee is dissatisfied with the decision of the medical board, he can apply to the appellate medical board to review the decision. Thus, the purpose of this benefit is to compensate the disabled employee for the difference in the earning capacity (Note 86) between that which the employee could earn at the time of the accident and that which the employee is now able to earn after the accident.

This benefit applies to both partial and total disablement. Permanent total disablement (Note 87) is a disablement, which is permanent in nature and where the employee is disabled from all work that he was capable of performing at the time of the accident. Permanent partial disablement (Note 88) is where the permanent disablement reduces the earning capacity of the employee in every employment, which he was capable of undertaking at the time of the accident. This means that although the injury is permanent, for example loss of a finger, the injury and resulting disablement may not completely prevent the employee from working. The employee may still be capable of performing some work. However, regardless of this, the injury may affect the capacity of the employee to perform the type of work the employee was capable of doing before the accident. This would, therefore, affect the earning capacity of the employee, which would certainly be reduced.

Assessment and payment of permanent disablement will be made by daily rate or lump sum or periodical pension or both lump sum and periodical payments (Note 89). Periodical payments are to replace income lost through physical inability to earn whereas lump sums are payable upon specified events such as death or loss of a limb in an accident. This benefit also provides cash payment. If a medical board or the appellate medical board assessed disablement at 100%, the daily rate is equivalent to 90% of the average assumed daily wage (Note 90) for life, subject to a minimum daily rate of RM10 (Note 91). An employee who experiences less than 20% disablement may request that the benefit be paid in a lump sum payment (Note 92). Where there is more than 20% disablement, the employee has the option to collect one-fifth of the benefit as a lump sum payment and the balance as a monthly pension to be received for the rest of his or her life. Furthermore, the employee is allowed to continue to work even though he is receiving this benefit (Note 93). The expenditure for permanent disablement benefit amounted to RM171,535,249, a decrease of 0.80% in 2006 as compared to the previous year, and mostly for industrial and commuting accidents (Note 94). However, in year 2007 there is an increased of 10.42% in the expenditure as the number of permanent disablement benefit increased (Note 95).

Thus, permanent disablement benefit is a lump-sum payment or pension. This disability is payable for life or as long as the disability lasts. The number of permanent disablement cases seems to fluctuate over the years as seen in Table 7.

From the table, a total of 10,148 claims were settled in 2007, that is, 1,047 cases more when compared to 2006 due to the increase in awareness of the public. Of this total, 9,473 claims involved lump sum payments in year 2007 (Note 96).

4.5 Medical Benefit

Besides the cash benefits, any medical treatment (Note 97) received by the injured employee will also be provided by SOCSO. The medical services are generally considered to be the most effective as medical assistance are provided at once to injured employees. Where an employee meets with an accident in the course of his or her employment as a result of employment injury or suffers from an occupational disease, the employee is entitled to receive free medical treatment and attendance at any SOCSO’s Panel Clinics or any Government Hospitals or Clinics (Note 98).

SOCSO has a list of Panel Clinics (Note 99) and will settle the medical bill by directly paying for the medical treatment provided. In case of serious injury that requires admission into a hospital, the injured employee is treated in a Government Hospital. The employee is entitled to second-class admission depending on the availability of beds. In the event that specialist treatment is required, it is also provided for in Government Hospitals and the total costs are settled by SOCSO.

Meanwhile, the total medical expenditure incurred through these clinics and doctors have increased by 4.08% to RM4.61 million as a result of increased in accident, when compared to 2006 (Note 100). Furthermore, SOCSO has

initiated a number of measures to improve the level and quality of services provided by its panel clinics. Amongst others is the tightening of conditions for appointment of new clinics where only doctors with experience in providing treatment for occupational diseases are given priority. This could be seen when a total of 22 clinics were removed in 2004 due to change of ownership, closure of business, withdrawal or termination of services (Note 101).

Besides that, SOCSO also provides counter service at the hospital and since 2002, 12 hospitals acted as SOCSO Service Centers. The counter services are located at major towns, namely, Alor Setar, Pulau Pinang, Ipoh, Melaka, Seremban, Johor Bahru, Kuala Terengganu, Hospital Sultanah Rahimah in Kelang, Kuala Lumpur, Kuching, Hospital Ratu Elizabeth in Kota Kinabalu and University Hospital in Kuala Lumpur. These centers handle enquiries and provide advisory services and assistance pertaining to SOCSO's insured persons referred to these centers by various clinics or departments of the hospital concerned (Note 102). Meanwhile, in order to resolve problems associated with complicated and doubtful cases, SOCSO has appointed a total of 18 medical specialists as Medical Advisors since 2000 (Note 103).

In short, medical benefits can be in the form of outpatient treatment in a clinic, dispensary or hospital, or actual hospitalization, or visits of a doctor to the employee's home as stated under *ESSA 1969* as follows

'Such medical benefit may be given either in the form of outpatient treatment and attendance in a hospital or dispensary, clinic or other institution or by visits to the home of the insured person or treatment as inpatient in hospital or other institution.' (Note 104)

Medical care includes first-aid treatment, services of a competent physician, surgical and hospital services, nursing, and all necessary medical drugs, supplies, appliances, and prosthetic devices. However, the employee is only entitled to receive such medical benefits of the type allowed by SOCSO and that, which is provided by the clinic, dispensary or hospital to which the injured employee is sent. The scale of medical benefit is under *ESSA 1969* which reads

'(1) An insured person shall be entitled to receive medical benefit only of such kind and on such scale as may be provided by the Organization, and the insured person shall not have a right to claim any medical treatment except such as is provided by the dispensary, clinic, hospital or other institution to which he is allotted, or as may be provided by the regulations.

(2) Nothing in this Act shall entitle an insured person to claim reimbursement from the Organization of any expenses insured in respect of any medical treatment, except as may be provided by the regulations.' (Note 105)

If the employee decides to seek any other type of treatment or specialist care other than of the type allowed by SOCSO, then SOCSO will not pay the employee or reimburse him for any such fees or charges incurred or paid by the employee.

The employer, on the other hand, must submit an accident or occupational diseases report to the local SOCSO office within 48 hours of being informed of the accident or disease (Note 106). Delay in submitting the report will result in the late payment of benefits.

Thus, medical benefit is given free to an insured employee who suffers from disablement due to an employment injury, in the form of outpatient or inpatient treatment. The benefit is provided through a system of panel clinics appointed by SOCSO and through all government hospitals. At the same time, to improve the benefits, counter services should be extended to other towns. In addition, SOCSO should extend and pay or reimbursed for other type of treatments or specialist cares needed by the injured employees.

4.6 Invalidity Pension and Grant

A person is suffering from invalidity if he is incapable of engaging in any substantially gainful activity as provided under *ESSA 1969* as follows

'An insured person shall be considered as suffering from invalidity, if, by reason of a specific morbid condition of permanent nature, he is incapable of engaging in any substantially gainful activity.' (Note 107)

Incapable of engaging in substantially gainful activity means that he is no longer capable of earning (Note 108). So, an employee who is suffering from invalidity is entitled to receive an invalidity pension if he has completed a full or a reduced qualifying period. In addition, invalidity pension is not applicable to persons who are more than 55 years old as mention in *ESSA 1969*

'Subject to the provisions of this Act, an insured person suffering from invalidity as defined in *Section 16* shall, unless he/she has completed his or her fifty-fifth year of age, be entitled to receive invalidity pension if he has completed a full or a reduced qualifying period.' (Note 109)

Full qualifying period means that the employee has contributed not less than 24 months or not less than two-thirds of the number of complete months from first entry into the insurance and the date he submitted a notice of invalidity (Note 110). Whereas, a reduced qualifying period means that he has paid not less than one-third of the number of completed months from first entry into insurance and the date he submitted the notice of invalidity (Note 111).

Furthermore, payment of invalidity pension is provided under *ESSA 1969* and reads as follows

‘Invalidity pension shall accrue from the day in which the insured person gives notice of invalidity in accordance with the regulations and shall cease on the day following the day in which invalidity ceases or the day the pensioner dies.’ (Note 112)

This means that payment of invalidity pension will be from the day in which the insured employee gives notice of invalidity and ends on the day invalidity ceases or he dies. The basic monthly pension is 50% of his or her average monthly wage (Note 113). Invalidity pension may also be reviewed by SOCSO and SOCSO may increase, continue, reduce or discontinue the pension (Note 114).

An employee who does not qualify for the Invalidity Pension Scheme, as he does not meet any of the contribution qualifying conditions, but has made at least 12 monthly contributions before the notice of invalidity is submitted, is entitled to an invalidity grant.

ESSA 1969 reads

‘(1) A person who is certified to be invalid shall, if he or she fails to complete any of the qualifying conditions specified in *Section 17*, be entitled to an invalidity grant equivalent to the contributions paid in respect of him together with interest thereon at the rate specified in the regulations.

(2) The claimant shall not be entitled to an invalidity grant unless he or she has paid twelve monthly contributions in the aggregate since his or her first entry into insurance.

(3) Invalidity grant under this section shall ordinarily be payable only when the person has completed his or her fifty-fifth year of age or dies before attaining that age.

(4) Notwithstanding the provisions of *subsection (3)*, invalidity grant under this Act may, at the option of the person concerned, be made at the time when invalidity is verified to exist:

Provided that the contributions so refunded shall be ignored in determining at any time in future his or her entitlement to or right to pension.’ (Note 115)

Normally, an invalidity grant is payable only when that person has completed his or her fifty-fifth year of age or dies before attaining that age. The amount of the grant is equivalent to the total of monthly contributions made by the employee and his or her employer to the Invalidity Pension Scheme plus any interest accrued.

The total benefits of invalidity pension amounting to RM224.30 million were disbursed in 2007, an increase of 8.48% against RM206.77 million in 2006. As at the end of 2007, a total of 2,661 cases were confirmed as invalids and eligible to receive invalidity pension compared to 2,516 cases in 2006. Meanwhile, a total of 4,876 claims were rejected in 2007 due to ineligibility compared to 4,709 claims in 2006 (Note 116). The highest monthly invalidity pension received by a pensioner was RM1,331 in the year 2002 (Note 117). The total number of recipients receiving this benefit is 31,655 employees or an increased of 5.47% in 2007 (Note 118).

Therefore, the invalidity pension and grant are given to employees who are invalid, subject to the terms and conditions provided.

5. Benefits in Practice: A Survey

Interviews of employees, including ex-employees, have been conducted focusing on compensation and damages awarded for injuries suffered during the course of employment. Venues for the interviews were the Social Security Organisation Headquarters in Kuala Lumpur (Note 119) and industries around Bandar Baru Bangi (Note 120).

Some difficulties have been encountered in conducting the interviews that constrained this research. Not many employees agreed to cooperate in view of their satisfaction with the paid compensation and the apprehension that the content of interview will be reported back to their employers. The same goes for the ex-employees who refused to talk about the past. As for the employers, they themselves were reluctant to be interviewed and refused to entertain those questions of this researcher that would have discredited their creditability. Another constraint was that the employees needed the employer’s permission to be interviewed, as a result, the researcher had to meet them after their working hours.

By way of fieldwork, this research approached a number of respondents. However, the following cases were selected for analysis. Case One is where the respondent met with an accident after work about 6 p.m. While riding his motorcycle on his way back home, he stopped at petrol station for petrol. It was raining and a lorry hit him from behind when he signalled left to come out of the petrol station. His left leg was broken. He was allowed compensation for temporary disablement.

Case Two involved an employee whose right arm was injured at his workplace due to the negligence of a fellow employee. His claim is still in process due to incomplete documents furnished by his employer. Next case happened during lunch break when the respondent, a female employee, was going to the nearest shop for purchasing.. She slipped,

fell and fractured her left leg. Her case is similar to Case Two whereby her claim is still pending due to incomplete documents supplied by her employer.

As for Case Four, the respondent was very upset, as there was no news about his claim because his employer has not submitted any documents to SOCSO. His accident occurred at his workplace. He was working in the construction area in Putrajaya when he stepped on a nail. He is at present walking with the help of a walking stick. The next respondent Case Five had his right hand amputated from the elbow due to accident at his workplace. According to him the process of claiming and payment takes a long time but he was satisfied with the compensation received.

Both Cases Six and Seven involved motorcycle accidents. The respondent of Case Six felt unsatisfied with his employer, as it has been three months since the accident and he still has no news regarding his claim due to late submission of papers by his employers. He met with an accident on his way back from work when he hurt his back. Case Seven was on her way to work when she had an accident and she needed stitches on her head. Her employer has not submitted any documents to SOCSO.

The following case, Case Eight involved an ex-employee who was on her way to work when she was involved in an accident. Her car was hit by another car sideways when her wrist was injured. She was hospitalized for one week and had received her full payment. Case Nine had an accident in her own home before going to work when she fell from the stairs and broke her leg. Her case is still in process and no payment has been made.

The respondent of next case was on his way to the clinic after work when he fell off his motorcycle at the roundabout. There were scratches on his body, face, arm and leg, and he also broke his front tooth. He had received his payment. Case Eleven had an accident during lunch break when she was on her way to the Bank. She was turning to the right at the traffic light when another car from the left lane overtook her and knocked her car. She sprained her hands and legs. Her employers have not submitted any documents and there is still no news about her compensation.

Next respondent injured herself at home when she fell while locking the gate before going to work. Her arms and legs were injured. Her employers submitted her documents late and her case is still pending. Last case happened at work during sports activity. It was raining the night before and the field was wet and slippery. He fell and hurt his back. He is dissatisfied with his employers for late submission of the documents to SOCSO.

From the survey, it is evident that all the accidents happened during the course of employment either at workplace, or while commuting between place of residence and workplace, or during lunch break.

Table 8 shows that from the number of respondents being interviewed, most accidents, that is 53.3%, occurred while commuting either after, before or even at home just before going to work. Conversely, workplace accidents have declined due to the positive impact of the continuous joint efforts undertaken by SOCSO, government bodies (like the Department of Occupational Safety and Health, the National Institute of Occupational Safety and Health), employees' unions and employers' associations in promoting occupational safety and health awareness at the workplace through seminars, campaigns, periodic inspection and enforcement (Note 121). Further, the respondents interviewed are mostly working in a factory where the machines are not dangerous and most of them are in the assembly line.

From the survey the type of benefits received by the respondents, except for one permanent disablement, is compensation for temporary disablements. It seems the reason for increased total expenditure for temporary disablement in year 2007 (Note 122) although there is an increase in the expenditure of permanent disablement benefit as well (Note 123).

Additionally, from the survey one can find that the payments for benefits under SOCSO received by the respondents have not been smooth. Table 9 shows the survey results of the type of payment to the respondents.

The outcome shows that most of the respondents' claims are still in process either due to incomplete documents by the employers 28.6% or late submission of the documents by the employers 42.8% or new case 14.3% or payment in still in progress 14.3%. Cases that have already been settled and those going to be settled, that is waiting for last payment due to them, constitute 23.1% of the respondents. However, there are still 23.1% of the respondents waiting for their benefits to be approved and the cases here have problems with the employers contribution.

Accordingly, it can be concluded that most of the respondents are satisfied with the compensation paid by SOCSO. Still, there are few cases where the respondents are not pleased or contented, in particular with their employers.

Although this researcher identified number of weaknesses in the law and its application, the fact is that the respondents interviewed have overall shown satisfaction for the compensation received by them. The reason behind their satisfaction seems to be their poor economic background with which they either come and work in Malaysia or if local, work in Malaysia.

It does not however mean everything is good with law and its implementation. We are presently a part of global village and our legal system in relation to employer-employee should reflect current legal developments.

6. Adjudication of Disputes and Claims

In case an employee is dissatisfied with any decision by SOCSO he or she can apply to the Social Security Appellate Board (Note 124) to decide his or her case (Note 125). This board consists of a Chairman, who is appointed by the Minister of Human Resources, and two assessors that will be nominated by the Minister, representing the employers and the employees. Besides being a citizen, the Chairman must have at least ten years experiences as a member of the Judicial and Legal Service of the Federation or an advocate and solicitor of the High Courts in Malaysia. The two assessors represent the employers and the employees and will be nominated by the Minister (Note 126).

At the same time, the Board will have the powers of a Sessions Court Judge (Note 127). The Social Security Appellate Board will decide any dispute or question that arise on matters of employees' social security namely, on the rights of any person to any benefit, its amount and duration, and any claim for the recovery of any benefit admissible under the Act (Note 128). The Board in 2007 received a total of 3,303 cases of appeals (Note 129), which is higher when compared to 2,213 cases received in 2006 (Note 130). For instance, in *Mohd. Nordin bin Othman v. Ketua Pengarah Pertubuhan Keselamatan Sosial* (Note 131) the applicant's appeal against the decision of SOCSO in refusing to accept that the accident was an employment injury was allowed. The Social Security Appellate Board decided that the applicant met the accident enroute to work using the normal route and not while on some deviation. Similarly, in *Fook Thain @ Wong Koh Fong v. Ketua Pengarah Pertubuhan Keselamatan Sosial* (Note 132) SOCSO rejected the claim on the premises that this accident was not a commuting accident. The Social Security Appellate Board found that SOCSO did not do a detailed investigation on the matter that would have produced more evidence and SOCSO did not complete the normal forms. It is clear that the applicant was on his way to report for work from his home when he met with the accident.

Proceedings before the Board are commenced by an application and every such application must be made within three years from the date on which the cause of action arose (Note 133) unless there is a reasonable excuse for not doing so (Note 134). In addition, no civil court will have jurisdiction to decide with any dispute or question under the Act (Note 135). However, the Board may submit any question of law for the decision of the High Court (Note 136).

Pertaining to the appeals made by SOCSO on decision of the Board, the Act (Note 137) provides that an appeal may be made to the High Court by the parties against the decision of the Board on substantial question of law in which event the period of limitation is sixty days from the date the order is made. In actual fact, not many cases have appeal to the High Court (Note 138). From the year 1998 to 2004, out of 2,398 cases decided by the Social Security Appellate Board, SOCSO had appeal only against 48 cases (Note 139). Majority of SOCSO's appeals was granted by the High Court (Note 140). The appeal process is meant to ensure that the Social Security Fund is for the eligible insured persons according to the provisions of the law.

Payment under an order may be stayed pending an appeal against it (Note 141). The procedure to be followed in proceedings before the Board is provided for in detail (Note 142) and parties may be represented, among others, by legal practitioners or trade union authorised by the Appellate Board (Note 143).

7. Limitations

An employee is not entitled to the benefits if he is not involved in an accident in the course of employment and if he does not contribute. Even if there is an accident, the accident must arise out of and in the course of his employment. For example, in *Sarajini a/p Rajoo v. Ketua Pengarah, Pertubuhan Keselamatan Sosial* (Note 144) the applicant failed in her appeal as the Social Security Appellate Board decided that the accident happened while she was working outside her scope of work. Thus, there was an accident but the accident did not arise in the course of her employment and so she was not entitled to the benefits under *ESSA 1969*. Meanwhile, accidents also include while travelling to work and while meeting an emergency but there must be no deviation (Note 145). An employee must also be insured and contribute (Note 146) to SOCSO before he can claim SOCSO's benefit.

ESSA 1969 also forbids an injured employee from suing his employer or co-employee in order to recover damages for work injury (Note 147). Claims made by employees who are insured under the Act against their employers are caught by *Section 31* and are barred (Note 148). The law reads as follows

‘An insured person or his/her dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act.

Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party risks under *Part IV* of the *Road Transport Act 1987*.’ (Note 149)

By virtue of the above provisions, an insured person is precluded from recovering damages from the employer in respect of an employment injury sustained by him as an employee under the common law or any other law for the time

being in force. This means that the Act relieves an employer and his or her employee from liability to pay any compensation or damages under any other law in respect of an employment injury sustained by an employee under the Act (Note 150). For the bar under this section to be effective it must be proved that on the date when the injury was inflicted the cover had not lapsed (Note 151). In addition, unless it is proved that the claimant is an employee of the employer, this section has no application (Note 152). The injured employee is only paid for loss of wages or loss of future earnings, but no payment is made for pain and suffering unlike accident claims in court. Therefore, an employee has to accept SOCSO's benefits and cannot take further action in the event such compensation does not adequately cover his or her loss (Note 153). This violates the basic precept of vicarious relationship where the master is responsible for the actions of his or her employees. The protection afforded by *Section 31* extends to an employer who is proposed to be made a third party by an employee who is sued by a co-employee. Thus, the exclusion of liability of employers under the Act is very wide indeed (Note 154).

In addition, an employee is not entitled to claim more than one benefit for the same disablement for the same period. Thus, an employee could not receive both invalidity pension and permanent disablement benefit for the same period and for the same disablement. He could only choose one benefit (Note 155). There should not be an option here, as he should get the maximum benefit available.

At the same time, the time limit within which benefit claims must be made is a period of twelve months after the claim becomes due unless there is a reasonable excuse for not doing so. A claim is not admissible unless made in accordance with these *Regulations* (Note 156). The date when a claim becomes due is specified depending on the benefit in question (Note 157). Claims for benefit have to be made in writing to the appropriate office of the Organization where the staff are required to provide assistance for filling in the claim forms in case the insured persons cannot do so themselves (Note 158). Meanwhile, a legal practitioner (or an official of a registered trade union) may represent the insured person or his or her dependants in claiming the benefits (Note 159).

Hence, while benefits are available to an insured employee but there are terms and conditions that have to be fulfilled before such benefits can be disbursed.

8. Conclusion

There is no doubt that the numerous benefits available through the schemes under the Act are adequate but continuous enforcement needs to be carried out. In terms of employer and employee contribution, strict enforcement and prosecution for failure to register or contribute should be continued. It is noted that many employers do not contribute on behalf of their employees, either through ignorance or plain willfulness. Although SOCSO officers carry out regular checks on employers to ensure they are registered with the organisation and are making payments as required by the law, but there are too few officers to check on all the employers. It is also clear that the duty to provide reimbursement treatment, free medical care and counter service should be extended to all employees and hospitals.

The provisions under *ESSA 1969* have made it compulsory for employers to insure their employees against injury under the two insurance schemes. The differences between the two schemes is that the employment injury insurance scheme is where certain benefits are available to the employee who suffered any injury or diseases arising out of and in the course of his or her employment whereas, the invalidity pension scheme is where certain benefits are available to an employee who becomes invalid due to any reason. Nevertheless, the law forbids an injured employee from receiving benefits from both schemes for the same injury. The provisions, however, are still not clear in determining which scheme a permanently disabled employee should choose from and he could get his or her compensation in installments. These provisions require improvement for the purpose of efficacy and efficiency so that an employee should get the maximum benefit available.

Finally, it is hoped that 'PERKESO Prihatin' will be extended to other benefits to ensure that employees will receive payment as soon as possible.

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Notes

Note 1. Act 4.

Note 2. J.E. Penner, *Mozley & Whiteley's Law Dictionary*, 12th edn., London, Butterworths, 2001, p. 302. See also John Burke, *Jowitt's Dictionary of English Law*, 2nd edn., Vol. 2, London, Sweet & Maxwell, 1977, p. 1540; Henry Campbell Black, *Black's Law Dictionary with Pronunciations*, 5th edn., United States, West Publishing Co., 1979, p. 1163; Bryan A. Garner (ed.), *Black's Law Dictionary*, 7th edn., United States, West Publishing Co. 1999, p. 1296; and David M. Walker, *The Oxford Companion to Law*, Oxford, Great Britain, Clarendon Press, 1980, p. 1056.

Note 3. Also known as PERKESO or Pertubuhan Keselamatan Sosial. The official site is www.perkeso.gov.my.

Note 4. http://www.lawyerment.com/guide/pub/Employment/Employee_Benefits_and_Contributions/

Note 5. http://www.mtuc.org.my/mtuc/workers_right.htm#w1

Note 6. See the *Employees' Social Security Act 1969, Section 2(11)*. See also Chan Shick Chin, *Personal Injury Law, Practice and Precedents*, Kuala Lumpur, Malayan Law Journal, 2004, p. 98.

Note 7. See *Abdul Rahim bin Mohammad v. Kejuruteraan Besi dan Pembinaan Zaman Kini* [1998] 4 M.L.J. 323, 327.

Note 8. See the *Employees' Social Security Act 1969, Section 2(11)*.

Note 9. [2002] 2 C.L.J. 750.

Note 10. See the *Employees' Social Security Act 1969, Section 15*.

Note 11. See the *Employees' Social Security Act 1969, Section 2(2)*.

Note 12. See the *Employees' Social Security Act 1969, Section 3*. See also Maimunah Aminuddin, *Malaysian Industrial Relations & Employment Law*, 6th edn., Kuala Lumpur, Mc Graw Hill, 2007, pp. 73-74.

Note 13. See the *Employees' Social Security Act 1969, Section 2(10)*.

Note 14. Chan Shick Chin, *Personal Injury Law, Practice and Precedents*, Kuala Lumpur, Malayan Law Journal, 2004, p. 98.

Note 15. See *Abdul Rahim bin Mohammad v. Kejuruteraan Besi dan Pembinaan Zaman Kini* [1998] 4 M.L.J. 323, 327.

Note 16. See the *Employees' Social Security Act 1969, Section 2(11)*.

Note 17. [2002] 2 C.L.J. 750.

Note 18. See the *Employees' Social Security Act 1969, Section 5*.

Note 19. See the *Employees' Social Security Act 1969, Section 4*.

Note 20. See the *Employees' Social Security Act 1969, section 2(5) and First Schedule*.

Note 21. Act 227. This Act is to provide for the administration of pensions, gratuities and other benefits for officers in the public service and their dependants.

Note 22. Maimunah Aminuddin, *Malaysian Industrial Relations & Employment Law*, p. 74.

Note 23. Goh Chen Chuan, *Guide to the Employment Act and Labour Laws of Malaysia*, Revised edn., Petaling Jaya, Leeds Publications, 2003, p. 156 and Maimunah Aminuddin, *Malaysian Industrial Relations & Employment Law*, p. 78.

Note 24. The *Employees' Social Security Act 1969, Section 6(1)*. See also the *Employees' Social Security Act 1969, the Third Schedule*.

Note 25. The *Employees' Social Security Act 1969, Section 6(2)(a) and (b)*.

Note 26. See the *Employees' Social Security Act 1969, Section 6(4) and Part I of the Third Schedule*.

Note 27. See the *Employees' Social Security Act 1969, Section 6(5) and Part III of the Third Schedule*.

Note 28. Came in force from 1st January 1971.

Note 29. See the *Employees' Social Security Act 1969, Section 2(6A)* for the definition of fund and *Section 68* for Social Security Fund.

Note 30. See the *Employees' Social Security Act 1969, Section 94* and the punishment for false information is also the same.

Note 31. [1995] 1 M.L.J. 371.

Note 32. SOCSO Annual Report 2007, pp. 17 and 27.

Note 33. See SOCSO Annual Report 2007, p. 27 and 28.

Note 34. See SOCSO Annual Report 2006, p. 26 and SOCSO Annual Report 2005 p. 26.

Note 35. See SOCSO Annual Report 2007, p. 28.

Note 36. See Table 1 and also SOCSO Annual Report 2006, p. 14.

Note 37. See SOCSO Annual Report 2006, p. 27.

Note 38. See SOCSO Annual Report 2007, p. 29.

Note 39. See the *Employees' Social Security Act 1969, First Schedule*.

Note 40. See the *Employees' Social Security Act 1969, Section 58*.

Note 41. See the *Employees' Social Security Act 1969, First Schedule*.

Note 42. Goh Chen Chuan, *Guide to the Employment Act and Labour Laws of Malaysia*, p.156.

Note 43. See the *Employees' Social Security Act 1969, Section 24*.

Note 44. The *Employees' Social Security Act 1969, Section 23*.

Note 45. The *Employees' Social Security Act 1969, Section 28 and Fifth Schedule*.

Note 46. As in the *Employees' Social Security Act 1969, Section 16 and Section 17*.

Note 47. See the *Employees' Social Security Act 1969, Section 6 and Third Schedule*.

Note 48. See the *Employees' Social Security Act 1969, First Schedule*.

Note 49. Under the funeral benefit a sum of money is paid to the eligible next of kin of an employee. See the *Employees' Social Security Act 1969, Section 29*. The amount and the persons eligible to receive this benefit are the same under both the Employment Injury Scheme and the Invalidity Pension Scheme.

Note 50. The education loan benefit was introduced in 1997 to assist the children of insured persons who faced financial difficulties in continuing their education in institutions of higher learning. This benefit is in the form of a loan or scholarship given to dependant children as in the *Employees' Social Security Act 1969, Section 57A*. Under the SOCSO Annual Report 2007 p. 62 a total of 228 students were given education loans amounting to RM7,662,629 in 2007.

Note 51. Widow or widower, children, parents, grandparents, brothers and sisters can receive dependant's benefits under the *Employees' Social Security Act 1969, Sections 26, 27 and 36*. If a worker dies as a result of a fatal employment injury, his immediate dependants are entitled to this dependants' benefit.

Note 52. The survivors' pension is payable to the dependants of an employee who dies irrespective of the cause of death. See the *Employees' Social Security Act 1969, Sections 17A, 20A and 20B*.

Note 53. Johari bin Tarmuji, interview by thesis writer, Ampang, Kuala Lumpur, 15 March 2005.

Note 54. SOCSO Annual Report 2007, p. 12.

Note 55. *Berita Harian*, "Perkeso perkenal khidmat e-elektronik," 17 December 2003, p. B7.

Note 56. PERKESO Prihatin pamphlet.

Note 57. *Berita Harian*, "Perkeso bayar RM650j tahun lalu," 30 September 2003, p. 7.

Note 58. For verification of incapacity entitling constant-attendance allowance see the *Employees' Social Security (General) Regulations 1971, Regulation 56*.

Note 59. The *Employees' Social Security Act 1969, Section 30*. See also the *Employees' Social Security Act 1969, Section 15(e)*.

Note 60. The *Employees' Social Security (Maximum Monthly amount of Constant-Attendance Allowance) Regulations 1992, Regulation 2*.

Note 61. See SOCSO Annual Report 2007, p. 49.

Note 62. The *Employees' Social Security Act 1969, Section 57*.

Note 63. See the *Employees' Social Security Act 1969, Section 40*. Physical rehabilitation also incorporates physiotherapy, occupational therapy, reconstructive surgery, as well as the supply of artificial limbs and equipment..

Note 64. SOCSO Annual Report 2007, p. 53.

Note 65. SOCSO Annual Report 2006, p. 48.

Note 66. SOCSO Annual Report 2007, p. 57.

Note 67. SOCSO Annual Report 2005, p. 47. The insured person received vocational training in Computer Aided Design (CAD) at Pusat Pembangunan Kemahiran dan Pengurusan Kedah Darul Aman.

Note 68. SOCSO Annual Report 2001, p. 41 and SOCSO Annual Report 2002, p. 45.

Note 69. SOCSO Annual Report 2006, p. 50 and SOCSO Annual Report 2005, p. 44.

Note 70. SOCSO Annual Report 2007, p. 55.

Note 71. See <http://www.perkeso.gov.my>.

Note 72. SOCSO Annual Report 2007, p. 55 and SOCSO Annual Report 2006, p. 50.

Note 73. SOCSO Annual Report 2007, p. 56.

Note 74. See SOCSO Annual Report 1998, p. 38. See also SOCSO Annual Report 1999, p. 51 (5 haemodialysis machines), SOCSO Annual Report 2000, p. 41 (18 machines), SOCSO Annual Report 2001, p. 42 (14 machines), SOCSO Annual Report 2002, p. 46 (27 machines), SOCSO Annual Report 2003, p. 45 (27 machines), SOCSO Annual Report 2004, p. 44 (40 machines), SOCSO Annual Report 2005, p. 46 (42 machines), SOCSO Annual Report 2006, p. 50 (23 machines) and SOCSO Annual Report 2007, p. 56 (16 machines).

Note 75. As provided in the *Employees' Social Security Act 1969, Section 57(4)*.

Note 76. See the *Employees' Social Security Act 1969, Sections 40 and 57*.

Note 77. Colin Nicholas & Arne Wangel, *Safety at Work in Malaysia*, Kuala Lumpur, Institut Pengajian Tinggi, Universiti Malaya, 1991, p.28.

Note 78. Johari bin Tarmuji, interview by thesis writer, Ampang, Kuala Lumpur, 15 March 2005.

Note 79. The *Employees' Social Security Act 1969, Section 22(a)*.

Note 80. See the *Employees' Social Security Act 1969, Sections 2(23), 22(a) and Fourth Schedule*. See also the *Employees' Social Security (General) Regulations 1971, Regulation 57* for evidence of temporary disablement. Compare the four days rule with the *Workmen's Compensation Act 1952, Section 4(2)(a)*.

Note 81. See the *Employees' Social Security Act 1969, paragraph 1(1)(a) of the Fourth Schedule*.

Note 82. The *Employees' Social Security (Minimum Daily Rate of Benefit) Regulations 1999, Regulation 3*. The maximum daily rate payable is RM52.00 if the wage exceeds RM1,900 per month.

Note 83. See SOCSO Annual Report 2007, p. 38.

Note 84. The *Employees' Social Security Act 1969, Sections 22(b)*.

Note 85. See the *Employees' Social Security Act 1969, Sections 15(b) & 22(b), Second and Fourth Schedule*.

Note 86. The *Employees' Social Security Act 1969, the Second Schedule* gives the percentages of loss of earning capacity for a long list of bodily injuries that are deemed to result in Permanent Total or Partial Disablement. However, *Abdul Samad v. Gammon & Christiani-Nielsen* [1962] M.L.J. 394 appears to suggest that it is for the court to decide on the actual percentage of loss based on the facts and circumstances of each case.

Note 87. See the *Employees' Social Security Act 1969, Section 2(18) and Part I of the Second Schedule*. See also the *Workmen's Compensation Act 1952, Section 3 and Part I and II of the First Schedule*.

Note 88. See the *Employees' Social Security Act 1969, Section 2(17)* and *Part II* of the *Second Schedule*. See also the *Workmen's Compensation Act 1952, Section 3* and *Part II* of the *First Schedule*.

Note 89. See the *Employees' Social Security Act 1969, Section 22(b)*.

Note 90. See the *Employees' Social Security Act 1969, Paragraph 1(1)(b)* of the *Fourth Schedule*.

Note 91. See the *Employees' Social Security (Minimum Daily Rate of Benefit) Regulations 1999, Regulation 3*.

Note 92. The *Employees' Social Security (General) Regulations 1971, Regulation 84*.

Note 93. Goh Chen Chuan, *Guide to the Employment Act and Labour Laws of Malaysia*, p.151.

Note 94. SOCSO Annual Report 2006 p.37.

Note 95. SOCSO Annual Report 2007 p.39.

Note 96. SOCSO Annual Report 2007 p.40.

Note 97. See the *Employees' Social Security Act 1969, Sections 15(f), 37* and *38*.

Note 98. Regarding medical treatment facilities, to date, there are 132 Government Hospitals and ten Health Clinics providing medical care to employees insured by SOCSO. Of these, 97 are located in Peninsular Malaysia and 35 in Sabah, Federal Territory of Labuan and Sarawak. See SOCSO Annual Report 2007, p. 51.

Note 99. After taking into consideration new appointments and those delisted, the total number of panel clinics and panel doctors as at the end of 2007 were 2,896 clinics and 4,718 doctors. Of this, 2,652 clinics and 4,428 doctors were located in Peninsular Malaysia while 244 clinics and 290 doctors were located in Sabah (including Federal Territory of Labuan) and Sarawak. This will ensure that medical facilities are easily accessible to injured employees. See SOCSO Annual Report 2007, p.50.

Note 100. SOCSO Annual Report 2007, p. 51.

Note 101. SOCSO Annual Report 2004, p. 41.

Note 102. SOCSO Annual Report 2002, p. 51.

Note 103. See SOCSO Annual Report 2000, p. 46.

Note 104. The *Employees' Social Security Act 1969, Sections 37(2)*.

Note 105. The *Employees' Social Security Act 1969, Sections 38*

Note 106. See the *Employees' Social Security (General) Regulations 1971, Regulations 71 & 71A*.

Note 107. The *Employees' Social Security Act 1969, Sections 16(1)*.

Note 108. The *Employees' Social Security Act 1969, Section 16(2)(b)*.

Note 109. The *Employees' Social Security Act 1969, Sections 17(1)*.

Note 110. See the *Employees' Social Security Act 1969, Section 17(2)*.

Note 111. See the *Employees' Social Security Act 1969, Section 17(3)*.

Note 112. The *Employees' Social Security Act 1969, Sections 19(1)*.

Note 113. See the *Employees' Social Security Act 1969, Section 20* and *Fourth Schedule*.

Note 114. See the *Employees' Social Security Act 1969, Section 35*.

Note 115. The *Employees' Social Security Act 1969, Sections 21*.

Note 116. SOCSO Annual Report 2007, pp. 45 and 46.

Note 117. SOCSO Annual Report 2002, p. 41.

Note 118. SOCSO Annual Report 2007, p. 45.

Note 119. Social Security Organisation, Aras 7-19, Menara PERKESO, 281 Jalan Ampang, 50538 Kuala Lumpur.

Note 120. Hosiden Electronics (M) Sdn. Bhd., Lot 1, Jalan P/1A, Bangi Industrial Estate, 43650 Bandar Baru Bangi; Denso (Malaysia) Sdn. Bhd., Lot 2, Jalan P/1, Section 13, 43650 Bandar Baru Bangi; Sony EMCS (Malaysia) Sdn. Bhd. (KL Tec) (North Plant), Lot 4, Jalan P/1, 43650 Bandar Baru Bangi; Sony EMCS (Malaysia) Sdn. Bhd. (South Plant), Lot 5, Jalan Kemajuan, Bangi Industrial Estate, 43650 Bandar Baru Bangi and Hitachi Electronic Products (M) Sdn. Bhd., Lot 12, Jalan Kemajuan, Bangi Industrial Estate, 43650 Bandar Baru Bangi, Selangor Darul Ehsan.

Note 121. SOCSO Annual Report 2007 p. 36.

Note 122. See SOCSO Annual Report 2007, p. 38.

Note 123. SOCSO Annual Report 2007 p.39.

Note 124. More often than not, the Appellate Board normally takes pity of the injured employees and so cases could not be used as precedent. Puan Azlaily bt Abdul Rahman, interview by thesis writer, Ampang, Kuala Lumpur, 7 February 2001.

Note 125. See the *Employees' Social Security Act 1969, Part V*. See also *Employees' Social Security (Social Security Appellate Board Procedure) Regulations 1976*.

Note 126. The *Employees' Social Security Act 1969, Section 83*.

Note 127. See the *Employees' Social Security Act 1969, Section 87*.

Note 128. See the *Employees' Social Security Act 1969, Section 84*. The matters decided by the Board are the meaning of an employee, the rate of wages, the rate of contribution, who is the employer, the right of any person to any benefit and as to amount and duration, review of any payment and any other dispute between the employer, employee and the Organization.

Note 129. SOCSO Annual Report 2007, p. 72.

Note 130. SOCSO Annual Report 2006, p. 67.

Note 131. Application No. SS (PP) 71 of 1997.

Note 132. Application No. SS (PP) 92 of 1996. In this case, the applicant left his house in Ayer Kuning, Kampar intending to go to his rented premises in Batu Gajah, change to working attire and then proceed to work. He met with an accident before reaching Kampar town.

Note 133. See the *Employees' Social Security Act 1969, Section 86* and the *Employees' Social Security (General) Regulations 1971, Regulation 124*.

Note 134. See the *Employees' Social Security Act 1969, Section 89*.

Note 135. See the *Employees' Social Security Act 1969, Section 84(4) and (5)*.

Note 136. See the *Employees' Social Security Act 1969, Section 90*.

Note 137. See the *Employees' Social Security Act 1969, Section 91*.

Note 138. Puan Azlaily bt Abdul Rahman, interview by thesis writer, Ampang, Kuala Lumpur, 7 February 2001.

Note 139. See <http://www.perkeso.gov.my/aduan/clarification%20nst%20article290505.html>.

Note 140. However, only a few written judgements were reported as many of the judges in the High Court do not give their written grounds of judgement.

Note 141. See the *Employees' Social Security Act 1969, Section 92*.

Note 142. See the *Employees' Social Security (Social Security Appellate Board Procedure) Regulations 1976*.

Note 143. See the *Employees' Social Security Act 1969, Section 88*.

Note 144. Permohonan No. SS (KS) 77 Tahun 1995.

Note 145. See the *Employees' Social Security Act 1969, Sections 24 and 25*.

Note 146. See the *Employees' Social Security Act 1969, Sections 5 and 6*.

Note 147. Chan Shick Chin, *Personal Injury Law, Practice and Precedents*, pp. 35-36, Kamal Halili Hassan, *Undang-undang Keselamatan Industri di Malaysia*, Kuala Lumpur, Percetakan Dewan Bahasa dan Pustaka, 2001, p. 102 and Mahinder Singh Sidhu, *The Motor Insurer, Insured and Third Party Rights*, Kuala Lumpur, International Law Book Services, 1993, pp. 139 - 140.

Note 148. See *Abdul Rahim bin Mohammad v. Kejuruteraan Besi dan Pembinaan Zaman Kini* [1998] 4 M.L.J. 323, *Tan Peng Loh v. Lee Aik Fong & Anor.* [1982] 1 M.L.J. 74, F.C. and *Che Noh bin Yaacob v. Syarikat Kilang Getah Seng Hin* [1980] 2 M.L.J. 264 (*Section 31* applied).

Note 149. The *Employees' Social Security Act 1969, Sections 31*.

Note 150. However, by a recent amendment, this exemption no longer applies to any claim arising from a motor vehicle accident where the employer or the employee of the employer is required to be insured against third party risks under the *Road Transport Act 1987, Part IV*. See the *Employees Social Security (Amendment) Act 1997, Act A981*.

Note 151. In *Abdul Ghani bin Hamid v. Abdul Nasir bin Abdul Jabbar & Anor.* [1995] 4 M.L.J. 182 the plaintiff was insured by SOCSO between 28 March 1988 and 31 May 1988 but no evidence adduced that he was insured on 22 April 1992.

Note 152. See *Cheng Siak Hor T/A United Penang Trading & Transport Agency & Anor. v. Rozali bin Ahmad* [2002] 7 M.L.J. 275.

Note 153. Mahinder Singh Sidhu, *The Motor Insurer, Insured and Third Party Rights*, p. 139.

Note 154. Chan Shick Chin, *Personal Injury Law, Practice and Precedents*, p. 36.

Note 155. See the *Employees' Social Security Act 1969, Section 96*. Similarly, where a dependant is entitled to both survivors' pension and dependants' benefit for the same period, he may choose to receive the benefit which is payable at the higher rate as provided under the *Employees' Social Security Act 1969, Section 96A*.

Note 156. The *Employees' Social Security (General) Regulations 1971, Regulation 106A*.

Note 157. The *Employees' Social Security (General) Regulations 1971, Regulation 99*.

Note 158. The *Employees' Social Security (General) Regulations 1971, Regulation 45*. The claim forms for Invalidity, Temporary Disablement and Permanent Disablement is Form 10, Dependant's Benefit is Form 24 and Funeral Benefit is Form 26.

Note 159. See the *Employees' Social Security Act 1969, Section 111*.

Table 1. Contributed Employers and Employees Year 2003-2007

Year	Employers	Percentage (%)	Employees	Percentage (%)
	Number		Number	
2003	309,399	3.90	4,426,569	8.79
2004	335,335	8.38	4,567,365	3.18
2005	351,437	4.80	4,882,953	6.91
2006	366,312	4.23	5,454,799	11.71
2007	383,215	4.61	5,450,943	(0.07)

Source: SOCSO Annual Report 2007, p. 18, pp 26-27 Chart 1 & 2.

Table 2. Aggregate Amount Contributed by Employer and Employee

Year	2003	2004	2005	2006	2007
Contributions (RM)	1,143,628,297	1,213,709,009	1,382,155,523	1,586,148,479	1,689,568,125

Source: SOCSO Annual Report 2007, p. 28 Chart 3.

Table 3. Enforcement and Investigation Activities

Type of Activities	2006		2005	
	Number	%	Number	%
Enforcement				
1. Number of scheduled inspection				
- Completed	91,503	39.81	75,048	38.38
- Still processing	27,307	11.88	22,350	11.43
2. Number of unscheduled inspections	19,246	8.37	14,875	7.61
Investigation				
1. Number of cases investigated				
- Certification of Salary	25,477	11.08	24,497	12.53
- Dependants				
- Dependants' Benefit	5,001	2.18	3,455	1.77
- Survivors Pension	27,338	11.89	21,354	10.92
- Employment Injury Cases	15,386	6.69	17,627	9.01
- Others	17,628	7.67	15,505	7.93
Briefings	973	0.42	827	0.42
TOTAL	229,859	100	195,538	100

Source: SOCSO Annual Report 2006, p. 28.

Table 4. The Insurance Schemes' Benefits

Employment Injury Insurance Scheme	Invalidity Pension Scheme
Constant-attendance Allowance	Constant-attendance Allowance
Rehabilitation Benefit	Rehabilitation Benefit
Funeral Benefit	Funeral Benefit
Education Loan Benefit	Education Loan Benefit
Temporary Disablement Benefit	Invalidity Pension
Permanent Disablement Benefit	Invalidity Grant
Dependant's Benefit	Survivors' Pension
Medical Benefit	

Table 5. Type of Medical Rehabilitation, 2005-2007

Type of Rehabilitation	2005	2006	2007
Reconstructive/Corrective Surgery (Orthopedic)	125	173	127
Reconstructive/Corrective Surgery (Plastic)	-	-	-
Physiotherapy/MRI	-	-	-
Corrective Eye Surgery	-	-	-
Dental Surgery	4	5	2
Total	129	178	129

Source: SOCSO Annual Report 2005, p. 46, 2006, p. 53 and 2007, p. 57.

Table 6. Statistics of the Return to Work Programme in 2007

Status of Referred Cases	
Initial assessment session conducted	326 cases
Cases of Motivated to join the RTW programme	260 cases (82.2%)
Not motivated to join the RTW programme	56 cases (17.8%)
Status of those Motivated to join the RTW programme	
Returned to work	166 cases (63.8%)
Rehabilitation stage	74 cases (28.4%)
Still undergoing treatment	20 cases (7.8%)
RTW Hierarchy	
Same job/Same Employer	92 (55.4%)
Similar job/Same Employer	16 (9.6%)
Different job/Same Employer	35 (21.0%)
Same job/Different Employer	2 (1.4%)
Similar job/Different Employer	-
Different job/Different Employer	21 (12.6%)

Source: SOCSO Annual Report 2007, p. 61.

Table 7. Settled Cases of Permanent Disablement

Year	2001	2002	2003	2004	2005	2006	2007
Total number of cases	10,423	11,932	9,589	9,796	9,796	9,101	10,148

Source: SOCSO Annual Report 2001-2007

SOCSO Annual Report 2001 p. 99, SOCSO Annual Report 2002 p. 104, SOCSO Annual Report 2003 p. 146, SOCSO Annual Report 2004 p. 125, SOCSO Annual Report 2005 p. 131, SOCSO Annual Report 2006 p. 126 and SOCSO Annual Report 2007 p. 134.

Table 8. Place of Accident

Place of Accident	Percentage
At workplace	30.7
While commuting between home and workplace:	
1) after work	23.1
2) before work	15.4
3) at home before work	15.4
Lunch Break	15.4

Table 9. Payment to Respondents

Type	Percentage
Last Payment	7.7
Processing	53.8
1) Incomplete documents	28.6
2) Progress payment	14.3
3) Late submission	42.8
4) New case	14.3
No News	23.1
Settled	15.4



Access to Collective Litigations in China: A Tough Work

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Abstract

Since the legislation of the China's 1991 Civil Procedure Law (CPL), which explicitly permits three types of collective actions, multi-plaintiff groups have brought suits seeking compensation. With the high tempo in economy and the social reform, disputes related to collective parties arise rapidly, class rushes to China's courtrooms. The increasing number of collective actions is one of the remarkable aspects of the civil litigation explosion in recent years in China. Series of "Judicial Interpretations" issued by the Supreme People's Court (SPC) which show SPC's hostile attitude to the collective litigation have triggered the fire among the scholars. To release heavy pressure in the collective litigation, the SPC and the local courts turn to alternative resolutions, such as the mediation and the test case device. Attention should be paid to the SPC's policies and their impact to the multi-plaintiff disputes so as to get a deep understanding about the collective litigation in China. The purpose of this article is to set forth that claimants' access to collective litigation is a very tough work under the SPC's policies and other related guidelines.

Keywords: Collective Litigation, Judicial Policy, Alternative Resolutions

Introduction

As it is in many countries, collective and representative actions have always received much attention, not only from the legislators but also from the courts. Since the legislation of the China's 1991 Civil Procedure Law (CPL), which explicitly permits three types of collective actions, multi-plaintiff groups have brought suits seeking compensation for their damage caused by mass tort or breach of contract. With the high tempo in economy and the social reform, disputes related to collective parties arise rapidly, class rush to China's courtrooms, especially with the fast developing securities market since 2000. The increasing number of collective actions is one of the remarkable aspects of the civil litigation explosion in recent years in China. The anniversary report in Mar. 9, 2005 by the president of the Supreme Court stated that the number of the collective suits has reached to 538,941, increased by 9.5% comparing with 2004. Series of "Judicial Interpretations" issued by the Supreme People's Court (SPC) are focused on the collective and representative litigation. These interpretations or other kinds of normative guidance by the SPC are binding on all courts across China, which show the judicial policies of the SPC on dealing with collective disputes. And such policies have been the subject of intense debate among the scholars.

To release heavy pressure in the collective litigation, the SPC and the local courts turn to alternative resolutions. Attention should be paid to the SPC's policies and their impact so as to get a deep understanding about the collective litigation in China. The purpose of this article is to set forth the SPC's policies and other related guidelines make the claimants' access to collective litigation a very tough work. This article is divided into five parts: Part I provides a brief statutory outline of the collective and representative actions in China. Part II provides an overview of the judicial policy from the SPC. The primary attitude of the SPC is that, collective litigation should be restricted. Part III outlines the role of the lawyer in the resolving the collective disputes; legal aid and judicial aid are presented too. Part IV analyses Chinese scholars have fierce debate over the SPC's policies. Part V gives an overall introduction on the development of the alternative disputes resolutions from the practical point of view with some typical cases. Lastly, the article concludes with a brief comment on the judicial policy and the importance of the collective litigation to the society.

1. A brief statutory outline

While Chinese civil procedure law has its deepest roots in the continental law tradition, common law influences are also

increasingly evident. In terms of forms of collective litigation, China has borrowed from both the Japanese type of representative action (Art. 54, CPL) and the US model of class action (Art. 55, CPL). Under the CPL, there are broadly three types of “collective litigations”. These are: “non-representative group litigation” (*gongtong susong*), “representative group litigation in which the number of litigants is fixed” at the time the case is filed (*renshu queding de daibiaoren susong*), and “representative group litigation in which the number of litigants is not fixed” at the time the case is filed (*renshu bu queding de daibiaoren susong*).

1.1 “Non-representative group litigation” (Art. 53, CPL)

The non-representative form of collective litigation under Art. 53 CPL originates from Art. 47 of the 1982 CPL, which governed the non-representative form of collection action. Under Art. 53, in the case of the common question of law or fact, and the number of the plaintiffs or the defendants exceed 2, the court should join the parties if they agree. The burden of managing the procedure is heavy if the number of the party reach to hundreds and thousands. In the late 1980s, courts in China faced an increasing number of multiparty disputes, and the mechanism was soon found not to be inadequate to handle collective dispute (Jiang Wei and Jia Changcun, 1989, P.103, 110). The lack of alternative formal procedures in the 1982 CPL posed a challenge to the Chinese courts. Reform was needed to deal with the mass disputes litigation effectively. Some courts used procedures resembling representative actions later included in the CPL 1991 to deal with some of more complex disputes that came before them. The famous “An Yue Rice-Seed Case” (*Anyue Zhongzi An*) was the very beginning.

The “An Yue Rice-Seed Case” is one of the successful litigation which the court used representative procedure to solve a multiparty dispute. In that case, 1,569 Sichuan farmers brought an action before a Basic People’s court in order to compensate their loss in a seed contract. The court permitted the plaintiff as a class to select eight representatives to carry out the specific work through the procedure for the class (SPC GAZETTE, No. 3, 1986). Since then, cases handled in similar fashion were reported (Jiang Wei and Jia Changcun, 1989, P.110, 111). The SPC authorized the use of representative litigation in some of its opinions, such as “Opinions of the SPC on several issues regarding the hearing of Village Assignment Contract Dispute Cases (*Zuigao Renmin Fayuan Guanyu Shenli Nongcun Chengbao Hetong Jiufen Anjian Ruogan Wenti De Yijian*)”, “Response of the SPC regarding Some Questions Concerning the Specific Use of the Economic Contract Law in the Judging of Economic Contract Dispute Cases (*Zuigao Renmin Fayuan Guanyu Zai Shenli Jingji Hetong Jiufen Anjian Zhong Juti Shiyong Hetong Fa De Rougan Wenti De jieda*)”.

Considering the growth in number and scale of multiparty disputes in China, the need for a more efficient mechanism than the Art. 53, and the successful judicial experience in certain collective litigations, the Chinese legislators decided in 1991 to introduce representative forms for collective disputes, which resulted in the Art. 54 and 55, CPL.

1.2 Representative Group litigation under Art 54, CPL (*renshu queding de daibiaoren susong*)

Art 54 of the CPL governs group litigation suits in which the number of litigants on either side of the party is “large” and fixed at the time the suit is filed. The litigants on each side may select a certain number of representatives (leading plaintiffs) to carry out the procedure. The SPC, in “Opinion on Several Issues Regarding the Implementation of the Civil Procedure Law of the People’s Republic of China,” (1992 SPC Opinion) (*Zuigao Renmin Fayuan Guanyu Shiyong Zhongguo Renmin Gongheguo Minshi Susong fa Ruogan Wenti De Yijian*) defines “large” generally to be ten or more persons (Art. 59, 1992 SPC Opinion). Two or five representatives may be selected (Art. 62, 1992 SPC Opinion). For those who fail to select a representative, they are permitted to join the litigation on their own name in the case of essential joint litigation (*biyao gongtong susong*), or file individual independent claim in the case of ordinary joint litigation (*putong gongtong susong*) (Tang Dehua, 1991, P.105).

Representatives are on behalf of themselves and those who select them, and the class judgment has a binding effect on the represented parties (Art. 54, CPL). Under Art. 54, almost every procedural decision made by the representative has the binding effect on the class. However, major decisions disposing the class’s substantial rights should be approved by the represented parties in advance. These decisions include the change of the representative, abandoning the claims, acceptance of the counter claims from the opposing side, and settlement (Art. 54, CPL).

1.3 Representative Group litigation under Art 55, CPL (*renshu bu queding de daibiaoren susong*)

China’s highest legislative body, the National People’s Congress (NPC)’s decision in Art 55 in 1991 CPL, which models the US type of class action (Jiang Wei and Xiao Jianguo, 1994, P.3,4), came as a surprise to many Chinese scholars (Zhang Weiping, 2000, P. 362,363). Some believe that Chinese legislators acted in haste, without enough argumentation, and that the Art 55 is in counter to the Chinese continental law tradition (Fan Yu, 2005, P. 25.26).

As the number of parties is not fixed at the time the case is filed, the court may issue a notice about the question of law or fact to the litigation, and instructing all persons who have the common question of law or fact to register within a specific period (Art. 55, CPL). The length of the period may not be less than 30 days (Art 63, 1992 SPC Opinion).

Potential participants who seek to register will have to demonstrate to the court that they have common questions of law

or fact. Those failing to register in time will not be permitted to join the class, but they are not prevented from bringing their own litigation (Art 64, 1992 SPC Opinion).

All the registered plaintiffs may select representatives as leading plaintiffs to carry on the litigation (Art 55, CPL). If they fail to appoint any representatives, the court may nominate representatives after consultation with the registered parties (Art 61, 1992 SPC Opinion). Restriction to the representatives' procedural rights are resemble to Art. 54 CPL (Art 55, CPL).

The court's decision is binding on all those who have registered and on those who do not join the class but bring similar claims within "the limitation of the action" (Art 55, CPL).

2. Judicial Policy

Facing with the increasing collective disputes in China, the SPC has developed a set of rules governing the multiparty litigation. And the SPC starts from the private securities litigation arising from false statements on China's securities market. The series of judicial rules triggered the intensive academic debate, and scholars once again focus their eyes on the collective litigation and the SPC's judicial policy in it.

On 20 September 2001, 363 aggrieved investors of the *Yorkpoint Science & Technology Co. (Yi An Keji Gufen Youxian Gongsi)*, a Chinese listed company notorious for its large-scale market manipulation, simultaneously filed lawsuits with Intermediate People's Courts in Beijing, Shanghai and Guangzhou. The next day the SPC issued a notice, "Notice on Temporarily Not to Accept Securities Related Civil Compensation Cases" (**2001 Notice**) (*Guanyu She Zhengquan Minshi Peichang Anjian Zan Bu Shouli De Tongzhi*) promulgated on Sep. 21, 2001, explaining that People's Courts were not ready for accepting the securities litigation concerned with false statements, manipulation, fraud and insider dealing, and instructing lower courts temporarily not to accept private securities lawsuit. Justice Li Guoguang, then drafter of **2001 Notice**, justified the SPC's refusal to the securities litigation on the grounds that the Chinese security market then was weak, it needed a stable circumstance for further development, that the new arising securities problems needed to be settled step by step, surely litigation couldn't get the problems solved once for ever, and that Chinese judges lacked the judicial resources and knowledge to adjudicate such case (Li Guoguang and Jia Wei, 2003, P. 2, 3). However, the *2001 Notice* received severe criticism from academics, practitioners and investors, saying that the SPC's policy unfairly blocked the stockholders' access to the justice (Jiang Wei, 2005, P. 113, 114).

Facing mounting pressure, on 15 January 2002 the SPC partially lifted the temporary ban. It issued a second notice "Notice on Relevant Issues Concerning Accepting Civil Tort Dispute Cases Caused by False Statement on the Securities Market" (**2002 Notice**) (*Guanyu Shouli Zhengquan Shichang yin Xujia Chenshu Yinfa de Minshi Qinquan Jiufen Anjian Youguan Wenti de Tongzhi*), allowing lower courts to accept private securities suits against the false statements only. Other unlawful behaviors in the securities market are still rejected from the courts. Three days later, shareholders in the Daqing Liangyi Co., a listed company involved in fraudulent disclosure scandals, took the lead in a race triggered by **2002 Notice** to sue listed companies. Harbin Intermediate People's Court accepted the *Daqing Liangyi Case* on 24 January. By 28 March over 700 investors had filed suit. Harbin People's Court asked the plaintiffs divided into several units, 10 or 20 persons at most in each, or else refused hearing (Zhang Wusheng and Yang Yanyan, 2007). Within a year, according to the Michael Palmer, the Chinese courts had accepted nearly 900 cases in which investors sought damages from listed companies that allegedly made false disclosures (Michael Palmer and Chao Xi, 2007).

About one year after **2002 Notice**, the SPC eventually on December 26, 2002 issued another judicial interpretation for the lower courts to handle the collective securities compensation, "Several Provisions on Hearing Civil Compensation Cases Caused by False Statements on the Securities Market" (**2002 Provisions**) (*Guanyu Shenli Zhengquan Shichang yin Xujia Chenshu Yinfa de Minshi Peichang Anjian de Ruogan Guiding*). Both **2002 Notice** and **2002 Provisions** ruled out the use of Class Action (*jituan susong*)—the CPL Art 55 type of representative litigation—as a mechanism for collective securities disputes arising from false disclosures (Li Guoguang and Jia Wei, 2003, P. 295, 296). The SPC's strong preference for CPL Art 54 Style of representative litigation has been explicitly expressed. According to **2002 Provisions**, the court may require individual claimants to join collective litigation arising from the same false disclosure, and order a merger of several collective litigations into a single one if conditions are fixed (Art. 13, **2002 Provisions**). The power of the court significantly expands as the court can divide or merger into a collective case, for the sake of connivance in managing the litigation. The plaintiff had to join the unit other wise, the claim would not accept, *Daqing Liangyi Case* showed.

Another noticeable SPC's policy is "Notice on Accepting Group Litigation" (**2006 Notice**) (*Guanyu Renmin Fayuan Shouli Gongtong Susong Anjian Wenti de Tongzhi*) on 1 Jan. 2006. **2006 Notice** emphasizes that Basic People's Courts should be the major bodies to handle the collective suits, only when in special circumstance and approved by the SPC should the Higher People's Courts accept the collective litigation (Art. 1, **2006 Notice**). The courts can accept the case individually if not suitable in collective litigation mechanism (Art. 1, **2006 Notice**). The SPC's effort to lower the level of the court is to "nip the collective disputes in the bud", according to the drafter of **2006 Notice** (Ji Min, 2006, P.

14-16). Articles criticizes that **2006 Notice** gives the representative litigation a deathblow. The representative litigation which has already been used hardly is going to receive inhospitality from the courts (Zhang Wusheng and Yang Yanyan, 2007, P.118). From **2002 Provisions** to **2006 Notice**, the SPC's attitude is clearly showed: the scale of collective litigation should be reduced to as small as possible, individual suit is always better than the collective one. As higher level of the courts may bring more negative impact to the society, Basic People's Courts should make every possible effort to settle the collective litigation (Art. 4, **2002 Provisions**).

3. Tightly Strict With the Legal Profession

Not only the hostile policies from the SPC but also the tightly control of the legal profession and other sort of aid that add the difficulty to the litigants' access to the collective actions.

3.1 Legal Profession: Restricted

With the rise of collective litigations is the rapid growth of the Chinese legal profession too. Collective litigations are almost certain to increase incentives for lawyers to undertake difficult cases. However, the strength of such incentives will depend both on the control over the lawyers' participation in multiparty cases and on China's regulation of lawyer's fees.

3.1.1 Control of the Legal Profession

So far the Chinese government has maintained tight control over the lawyers participating in multiparty cases. In April 2006, the National China Lawyers' Association, a government-backed regulatory body of Chinese lawyers, promulgated guideline "National China Lawyers' Association Guiding Opinions on Lawyers Handling Mass Suits" (**Guiding Opinions**) (*Zhonghua Quanguo Lüshi Xiehui Guanyu Lüshi Banli Quntixing Anjian Zhidao Yijian*) instructing lawyers on how to handle "mass suits" (*quntixing anjian*). In principle, lawyers should play a supervisor role in representing group litigations (Art. 1(3), **Guiding Opinions**). Lawyers are required to report to the responsible government agencies, should they find that the clients they represented are likely to take a course of action threatening "social stability" (Art. 2, **Guiding Opinions**). Lawyers should be well cautious to if there is any connection with overseas organizations and foreign media during collective litigation procedure (Art. 2, **Guiding Opinions**). There are other procedural burdens for participating lawyers and their firms (Art. 3, **Guid**). In one word, lawyers are restricted to the collective cases.

3.1.2 Lawyers' Fees

The above guideline is not the only regulation that makes the lawyers under strict control. They are bind to the regulations on the Lawyers fee. Firstly, party has to afford his own lawyer's fee even in the collection litigation, which is different from the U.S. style class action that the lawyer's fee can be asked to be paid by the loser. Plaintiffs can not afford lawyers in most cases, not alone in the collective litigation that claims for little but pay much for success. Secondly, contingency fee in collective cases is explicitly forbidden since the promulgation of "Supervisory Measures on Lawyers Services Fees" (**2006 Supervisory Measures**) (*Lüshi Fuwu Shoufei Guanli Banfa*) in 2006. Before that, contingency fee arrangements have operated unofficially in China for many years. It is reported that the range of the contingency fee percentage is from 10% to 40%, or even as high as 50% of the recovery. An well-known example is the *Daqing Lianyi Case*, in which a group of lawyers headed by a prominent shareholder activist, Prof. Guo Feng, represented a large number of injured investors on a "no win, no pay" agreement. The counsel finally reaped 20% of the net recovery as contingency fee (Michael Palmer and Chao Xi, 2007).

While the contingency fee connects the interest of the group and its counsel together, thus keeping the lawyer acting diligently and helping parties accessing to justice (Linda Silberman, 1999, P.201), unfortunately, contingency fee arrangements is no longer available under **2006 Supervisory Measures**.

Though facing with many impediments, recent collective actions, such as the "Sanlu Milk Powder Case" (*Sanlu Naifen An*) may suggest a shifting role for lawyers as they are drawn to cases with potentially large social impacts. Since the disclosure by media of the melamine Sanlu Milk Powder, lawyers from all around China are ready to help for free. According to the "Briefing of the Volunteer Lawyers in Sanlu Milk Powder Case" (the Briefing) (*Sanlu Naifen Shijian Zhiyuan Lüshituan Gongzuo Jianbao*), until September 27, 2008, the total number reached to 124 within 22 provinces, and the number is increasing. At the night of September 18, 2008, 18 volunteer lawyers in Beijing had a meeting discussing plans for further legal aid. That the volunteer lawyers' success in helping the victims in Sanlu Milk Powder Case has once again called for recognition of the role of the lawyer in law enforcement. Unlike U.S legal profession, who act as a bounty hunter in class action obtain nearly 30% of the recover (Theodore Eisenber and Geoffrey P. Miller, 2004, P. 27, 51-54), the increased willingness of Chinese lawyers to challenge powerful local entities suggests that increased involved in collective litigation may help to accelerate the development of a more independent legal profession. Meanwhile the lawyers' endeavors in the collective cases may help the China building a law-bases society too: lawyer-represented collective cases may force local governments or industries to obey national laws (Deorah R. Hensler, 1999, P.20). Collective litigations suggest that lawyers may be assuming more active position in the project of law implementation (Benjamin Liebman, 1998).

3.2 Legal Aid

China has developed a nationwide formal legal aid system, providing free legal assistance to economically disadvantaged citizens (Benjamin Liebman, 1999). Most legal aid programs have established by the Ministry of Justice and local justice bureaus, and are funded mainly by the government, in a few cases, the Ford Foundation. Under the “Regulations on Legal Aid” (**2003 Regulation**) (*Falü Yuanzhu Tiaoli*), those with low incomes may apply for legal aid under six circumstances (Art. 10, **2003 Regulation**). Whether parties in collective suits are entitled to the legal aid is unclear. Theoretically legal aid is likely to be offered to the multiparty suits, if they fall into those six circumstances. However, it seems that plaintiffs in collective litigation have only limited access to legal aid. For one thing, many local administrative departments set a very low maximum income eligibility level for legal aid, and only a small fraction of the population living in extreme poverty is eligible for legal aid. A large number of people are not eligible for legal aid neither can they afford to pay for their own lawyers. In addition, legal aid providers tend to lack independence. Government-funded aid centers would probably not provide legal aids to collective actions against a government-related defendant, for example, a powerful local state-owned enterprise, or a big land agent.

3.3 Judicial Aid

China has developed a so-called “Judicial Aid” (*sifa jiuji*) system alongside the legal aid system. According to the “Measures on Litigation Fees” (**2006 Measures**) (*Susong Shoufei Banfa*), Chinese courts provide financial aid — in form of full or partial remission of court fees (Art. 4, **2006 Measures**). There are reported collective suits in which Chinese local courts exempted the claimants from paying the court fees, for example, a group of 73 claimants who were victims in a chemical explosion incident got such judicial aid. In addition, the court fee is halved if the case is concluded by mediation.

The above analysis shows that, while contingency fee arrangements is prohibited in collective litigations, litigants are not guaranteed to access to justice sufficiently from current legal aid projects and judicial aid schemes. Collective litigants may have to find other solutions to protect their rights whether they like it or not.

4. Critiques and analysis

Generally speaking, most researchers are critical to the SPC’s policy on the collective litigation. In a frequently quoted article, the author speaks high of the representative litigation in CPL, pointing out that it is one of the most successful mechanisms adapting merits of foreign collective litigation with consideration of Chinese parties’ inability and reluctance to use the courts (Fu Yulin, 2002). The representative litigation in CPL is perfect both from the theoretical and feasible point of view. Prof. Fu further analyses the reasons why such mechanism isn’t used as it should be in practice:

- Lacking of judicial independence, the courts are unable to handle collective disputes. Although facing with the dramatic increase in multiparty disputes and the needs for more judicial remedies from the justice, the People’s Court in China has no enough resources to fulfill its duty to offer judicial products to the society. Historically, Chinese courts are dependent heavily on the government, especially the financial aspect, which makes the courts so “loyal” to government’s policies or decision. The Courts have little voice in collective dispute litigation. The courts would like to choose not to accept the some sensitive cases and leave them to the government who the courts believe is strong enough to deal with the collective disputes. However, whether it is sensitive or not, is all up to the courts. Sometimes, local governments interfere with the courts’ power in case acceptance. In some sensitive cases, local governments tried their best to give the courts pressure not to accept the cases, especially when the government departments are at stake.
- Irrational evaluation system brings the judge heavy pressure on his work. Theoretically, representative litigation may make litigation more economically feasible by allowing plaintiffs to pool their resources to hire counsel and cover litigation costs. Time and money could be saved. However, the Chinese courts follow an administrative supervision model, in which judge’s work is appraised by the number of cases he has processed. The more cases he hears, the more he will be paid. Therefore, division of a collective litigation is a good choice. Meanwhile, representative litigation is time-consuming: judges must notify prospective group members, supervise the appointment of representatives, and if plaintiffs are successful, oversee the distribution of awards to large numbers of individuals. The enforcement of civil judgments is a tough job (Donald Clark, 1996, Vol. 10). Not to mention the collective litigation. As a result, many judges resist accepting class actions out of fear that the cases will be too complex.

Finally, Prof. Fu suggests that the government should leave more room for the court to increase its role of collective dispute resolution, and the court must prove itself in managing multiparty litigation — reject to accept the case can’t be a good choice.

It’s not until the publication of *Group Litigation* by Prof. Fan that the SPC’s policy receive positive appraisal. The *Group Litigation* gives us totally fresh comments on the SPC’s policy. Prof. Fan concludes that (Fan Yu, 2005, P.450.451), the representative litigation relies heavily on the judge’s management. At present, China is not ready to adopt the US type of class action — the Chinese legislators acted in haste, with very limited ledge of possible problems

with using Art 55 CPL. She emphasizes that, it's right and necessary for the SPC to take a negative policy towards the collective litigation. Although the *Group Litigation* doesn't justify the courts' rejection on collective claims, as far as the effect of the collective disputes resolutions is concerned, representative litigation is not the best choice in China either. The suitable way to deal with the collective action is the alternative dispute resolutions. In one well quoted paper, the author expresses strong disapproval of *Group Litigation*, stating that the SPC's negative policies towards the collective cases are understandable but not acceptable, and that these policies result in the decrease of the status of the representative litigation in Chinese disputes resolution system. Because of such policies, People's Courts are not willing to accept multiparty cases without any lawful reasons, which harms the party's *actio* and runs counter to the CPL. The author believe that not the lack of judicial independence and court's own interest but the misunderstanding of the function of the representative litiagation is the real reason why the representative litigation is ignored in practice (Zhang Wusheng and Yang Yanyan, 2007).

Although the three typical opinions above are somehow rational, according to Prof. Wu, both researchers and the SPC misunderstand the collective disputes in China. Prof Wu sorts the collective disputes into 5 types: labor disputes, real estate disputes, farming disputes, securities disputes and mass tort/contract disputes. In dealing with these 5 types of the disputes, different kind of pressure may be caused by: lack of enough judicial power, judicial inability or short of judicial technique. The SPC should make a difference between collective disputes and corresponding judicial policies. The SPC now try to establish a uniform policy to handle different collective disputes, which neither resolve disputes nor help to release the courts' pressure in dealing with the dramatic increase cases. Only by telling the difference between types of the collective disputes can the research helps to perfect the collective litigation in China (Wu Zeyong, 2008, P.145-151).

The scholars' opinions seem against each other, however they all agree that the SPC's refusal to the representative litigation is unjustified. The key difference between scholars is what type of resolution should the SPC choose to deal with the collective disputes. Apparently, Prof. Fan is for the ADR, while others believe the representative litigation should play a more important role, and the policy of the SPC makes the hindrance.

Since the publication of Prof. Fan's **On ADR** advocating the merits of the ADR which have been forgotten as Chinese over-dedicate to building a formal litigation procedure system, Chinese traditional dispute resolution "People's Mediation"(*Renmin Tiaojie*) meets its good chance to revive. From then on China has moved to the wave of ADR movement, and the SPC could not out of this movement. However, China could not pay much more attention to the alternative dispute resolutions.

In a newly published monograph, Prof. Fan systematically study recent dispute resolutions in China. She sings high to the mediation, as she always does (Fan Yu, 2007). However, Prof. Fan goes too far. She overpraises the function of the mediation in disputes resolution: litigation procedure seems to be secondary when it comes to building multiple dispute resolutions. For the sake of easing burden of the courts, Prof. Fan is quite right, as China has a strong tradition to mediation and hundreds of Peolple's Mediation Committees need cases to be settled to revive. However, Prof. Fan overlooks the fact that too much ADR may reduce the function of civil procedure where law is well implemented. In the mediation, "consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praise."(Owen Fiss, 1984, P. 1075) China now has reached the peak of the ADR-advocacy movement, and it is time to stay calm to rethink about what kind of cases are fit for settlement and what for judgment. "Two tracks" may be simple to understand the dispute resolutions, however, I would like to include those cases in which there are significant distributional inequalities; those in which it is difficult to generate authoritative consent because organizations or social groups are parties or because the power to settle is vested in autonomous agents; those in which the court must continue to supervise the parties after judgment; and those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law (Owen Fiss, 1984, P. 1078).

It should be mentioned that, the ADR movement in USA or European countries is totally different from China. As those countries have already had their formal and well-functioned litigation procedures, the civil procedure in China is too young and just starts to gain its weight. However, the fast growing informal mediation-type resolution may steal the thunder in cases where the civil procedure should play its role.

5. New Development: Alternative Resolutions

The SPC may not be willing to see the increase of the collective litigation, however, collective struggle has moved to the courts. The administrative bodies still want to control the disputes resolutions, but the influence continues to decrease. For example, the number of disputes handled by the government-backed "People's Mediation" has dramatically decreased from 7,919,506 in 1980 to 5,433,319 in 2004 (Wang Jue, 2005). However, the governments still hope to resolve most disputes (Stanley B. Lubman, 1996, P.82, 96). In recent years, when it comes to the collective

disputes, both the government and courts have tried their efforts to settle them.

5.1 Mediation

ADR movement prevails inside and outside the courtrooms. The traditional type of disputes resolution has now come to rebound. There has been a significantly increased emphasis on using judicial mediation to resolve multiple party disputes recently, especially when Chinese are endeavored to a harmonic society under the slogan of "Making a Harmonic Society" (*Goujian Shehui Zhuyi Hexie Shehui*).

5.1.1 outside the courtrooms: People's Mediation (*Renmin Tiaojie*)

In contrast to many nations that have collective litigation, China has a strong collective tradition. Disputes have often been resolved collectively and informally (Lester Ross, 1990, P. 15). Additionally, Chinese courts have historically been inhospitable for adjudicating individual rights (Lester Ross, 1990, P. 16, 17), and individuals are often reluctant to use the courts (Albert H. Y. Chen, 2004).

In China, the People's Mediation Committees (PMCs) are, with courts, the most widely known dispute resolution institutions. People's Mediation has been frequently used in China, and is honored with the name of "Oriental Flower" (*Dongfang Yizhi Hua*). It is clear that the People's Mediation occupies a major place among different dispute resolutions. Although the People's Mediation is not used as frequently as it used to be (Fu Hualing, 1992), it rebounds when Chinese leaders find that the People's Mediation contains more harmonic elements than the litigation. Corresponding rules are made to encourage the use of the People's Mediation, such as "Opinions on Improving the People's Mediation" (*Guanyu Jingyibu Jiaqiang Xinshiqi Renmin Tiaojie Gongzuo de Yijian*), "Provisions on Hearing Civil Cases involving the People's Mediation Agreement" (*Guanyu Shenli Sheji Renmin Tiaojie Xieyi de Minshi Anjian de Ruogan Guiding*), "Provisions on the People's Mediation" (*Renmin Tiaojie Gongzuo Ruogan Guiding*), "Opinions on Improve the People's Mediation For Social Stability" (*Guanyu Jinyibu Jiaqiang Renmin Tiaojie Gongzuo, Qieshi Weihu Shehui Wending de Yijian*), "Opinions on Further Improving the People's Mediation" (*Guanyu Jinyibu Jiaqiang Xinshixingxia Renmin Tiaojie Gongzuo de Yijian*). The most important rules are an SPC normative provision in 5 September 2002 — "Provisions on Hearing Civil Cases involving the People's Mediation Agreement" (*Guanyu Shenli Sheji Renmin Tiaojie Xieyi de Minshi Anjian de Ruogan Guiding*) and "Provisions on the People's Mediation" (*Renmin Tiaojie Gongzuo Ruogan Guiding*) by Justice Department in 11 September 2002.

These two provisions primary aimed at improving the status of the People's Mediation. The legal effect of the mediated agreement and the mediation procedure are the key parts. Both the SPC and the Justice Department explicitly state that the mediated agreement has preferential effect: the legal effect will be affirmed by the courts once the mediation procedure is legitimate. Previously, settlements reached through other mediation institutions were said to have no binding legal effect. It may simply mean that mediated agreements were just a contract between two parties, and parties could at any time deny the agreement and sued to court for a hearing on the merits as if the mediated agreement was not a result of resolution.

No official statistics are available as to the exact proportion of multiparty disputes resolved through People's Mediation. However, some empirical evidence indicating the important role of the People's Mediation has played in dealing with the collective disputes can be obtained (Hu Dongping, 2006). In Ningbo Zhejiang province, the People's Mediation Committees successfully mediated nearly 1,000 collective disputes, 75% of total number.

Many articles have provided a specific list of the virtues of mediation, such as: it has the flexibility needed to deal with cases where there are gaps between the law and the reality, it simplifies judicial procedure for the masses and decreases the backlog of cases in the courts, it gives the greatest possible control to the parties over their own rights and interests, and it provides a settlement that is relatively easy to implement because it is based on the agreement of the parties. But I would like to say that, most important of all, "Mediation" literally fits for the Chinese, especially the leaders' taste of harmony. China always takes the "Litigation" as a have-to device---- only when alternative resolutions can not get the dispute resolved will people resort to court (Neil Diamant, 2000, P. 541).

Recently, however, Chinese legal scholars have begun to question those rosy views of mediation. Some argue that the emphasis on mediation has led to a denial of proper remedies to those whose rights have been infringed. Courts spend an inordinate amount of time attempting to mediate cases that should simply be adjudicated and dispensed with. Thus, it may not even be true that mediation reduces the load on courts (Ji Weidong, 1989). Some criticize that mediation for often failing to tell right and wrong in disputes and only coming up with muddled settlements not based on parties' clear understanding of the facts and the law. This type of mediation is criticized as "out-of-precedure" mediation (Zheng Qixiang, 1990, P. 26-28). Meanwhile, the expandability of the jurisdiction of the PMCs, from the ordinary civil disputes to some complex or even collective ones worries the scholars a lot (Zhou Yongkun, 2007): the PMCs are often unable or unwilling to enforce legal standards; the mediators may simply lack the education necessary to do the job competently (Yang Yulin, 2005). Mediators' ignorance of the law particularly devastates the collective disputes resolution system, and the function of adjudication. As Prof. Fiss said in his *Against Settlement*, the purpose of

adjudication should be understood in broader terms. Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure or break the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharge when the parties settle in heavy mediation-apt air (Owen Fiss, *Against Settlement*, 1984, P.1805).

5.1.2 Inside the courtrooms: *Susong Tiaojie* (Court Mediation)

Court Mediation is always the preference of the Chinese legislators. The 1982 CPL instructed that mediation should be “emphasized” (*zhuzhong tiaojie*); when attempts at mediation failed, they were to proceed to adjudication (Art. 6 1982 CPL). Art. 9 CPL stated that the People’s Courts should conduct mediation in accordance with the principles of voluntariness and lawfulness.

According to the CPL, the mediation agreement has the same effect as a court judgment, once it is serviced to the parties. In fact, judges may incline to mediation rather than the adjudication as mediation agreement may hardly be appealed—only when the mediation violates principles of voluntariness and lawfulness can the retrial process get started (Art. 182, CPL) — therefore, judges may no fear of being overruled by higher courts, which may seen as a threat to his career. The fact is that, to prove such violation is a very hard job, as the mediation itself is not as formal as the adjudication. Procedural rules in mediation may not be complied with (Palmer Michael, 1989, P. 145).

The SPC has in many times shows its preference in some judicial interpretation on the Court Mediation in handling the collective disputes, and the Court Mediation has met its rebound in 2004 (Figure 1). In the **2002 Provisions** mentioned above, Art 4, the SPC instructs the People’s Court, as a principle, should stress mediation and encourage the parties to reach reconciliation. So is another SPC normative document in March 2007, “Several Opinions Regarding Further Improving the Positive Roles Judicial Mediation Plays in the Construction of Socialist Harmonious Society” (**2007 Opinions**) (*Guanyu Jinyibu Fahui Susong Tiaojie zai Goujian Shehui Zhuyi Hexie Shehui zhong Jiji Zuoyong de Ruogan Yijian*), which speaks highly of the importance of the Court Mediation in building a harmonic society. While the **2007 Opinions** leaves much room for the courts to innovate the Court Mediation mechanism, the SPC emphasizes that, court mediation should be firstly considered when it comes to certain types of civil cases. Art. 5 of **2007 Opinions** demands that courts should focus on, among other things, mediating joint litigation and group litigation and those cases involving collective interests.

The same as the People’s Mediation, no official statistics are available as to the exact proportion of multiparty disputes resolved through mediation by the courts across the country. However, as most of the collective disputes are accepted by the basic courts, percentage of mediation when the Basic People’s Courts handle multiparty disputes may fairly tell the truth that the Court Mediation is clearly a dominant technique for multiparty disputes. In Chongwen District Basic People’s Court, Beijing, for example, the proportion of multiparty cases resolved by mediation has increased from 64% in 2003 to a claimed 92.4% in 2005 (Table 1). Table 2 illustrates the percentage of mediation in different types of multiparty civil suits (Michael Palmer and Chao Xi, 2007).

5.2 Litigation: Test Case

As mentioned above, lawsuits filed by hundreds or thousands of plaintiffs against the same defendant(s) can paralyse entire courts completely. The *Daqing Lianyi Case* is a good example. The court ordered the attorney of the plaintiffs to divide the collective litigation into several tiny cases with each 10 plaintiffs at most. Although the representative litigation could somehow pool the plaintiffs’ interests effectively, judges still face heavy pressure when hear such cases with so many parties. Actually speaking, the courts must consider collective cases as a multitude of individual cases — each plaintiff has a number of procedural rights, is entitled to be heard and may participate personally in the hearings.

Like the other types of collective litigation in some countries, the most prevalent characteristic of the collective disputes is that all cases are based on more or less the same facts and legal issues. Thus, it would be sufficient to solve this issue once and for all cases, if a court decision were binding for all plaintiffs. Hence the question is how to deal efficiently with a great number of lawsuits based on the same matter. Theoretically, while one of the answers to the question is to pool all the plaintiffs’ interests in a case by allowing a group litigation or representative litigation, the other answer would be a test case, which allow the court to focus on a two-party-litigation (one plaintiff, one defendant) and the outcome of the test case will be binding for all other plaintiffs.

So far there are no provisions on the Test Case in China, however, the courts have amazing wisdom when dealing with the collective litigation, which I call it “*Pick one for Trial*” (*Fenbie Li'an, Xianxing Shenli*). The court would firstly instruct the multiparty to bring their own case individually, and then choose one or several typical suits from these individual cases which have the same fact or legal issues. Such case(s) is the test case: the decision to it will bind other collective disputes, or at least has influence on the other cases. When the test case(s) is (are) heard, other plaintiffs or

potential parties intend to bring their cases usually pay attention to the test case(s).

The Test Case mechanism has already successfully played its role in collective disputes, especially in the fields of labor disputes, real estate disputes, stock disputes and so on (Zhang Wusheng, 2007, P.447-448). In the Daqing Lianyi Case the courts pick up 24 cases as the test cases. All the plaintiffs get compensations. Another typical case is the *Zhujiang Oasis Case* (*Zhujiang Lüzhou An*), where Test Case mechanism is applied by the Chaoyang District Court, Beijing. Tens of owners sued the seller for breach of faith not offering municipal water pipe and electricity and claimed damages. The court picked up one case for trial and the judgment has domino-effect in the following hearing (Xiao Jianguo, 2007, P.136).

The Test Case mechanism has released much pressure of the courts in China. Still questions are waiting to be solved. Some of them are: not even all other cases could embracing *res judicata* effect to the test case judgment, as the individual claim may be different; the judgment of the test case has binding effect to the following cases is counter to the Due Process Principle — Nobody can be subject to the binding force of a court judgment unless he or she had the right to participate in the proceedings, to attend the hearings, to present facts, evidence and legal arguments to the courts.

Conclusion

Different impediments have barred the road for the collective litigants' access to the court. These impediments may be from the SPC, the local courts, or from the government. From the People's Court's aspect, collective litigations tend to place significant pressures on the Chinese courts. The latter have generally found it difficult to establish autonomy and authority in the shadow of the leadership of Communist Party. Collective actions are sometimes problematic to the leadership, because they may carry significant political overtones. A collective suit may involve, on one hand, a politically well-connected local entity, and on the other, hundreds of distressed and aggrieved claimants who are prepared to protest on the street if the judgment is for the defendant. Collective action has indeed become a very powerful weapon for powerless civilians to improve their welfare (Kevin Latham, 2006, P. 56, 76). In that case, political ramifications of the collective litigation weigh heavily on the courts' mind. The SPC and some local Chinese courts are strongly averse to politically sensitive cases or force the parties into mediation, disregarding how long the judicial process would tend to be prolonged.

Many press accounts of collective actions have noted the role such cases play in raising the legal awareness of both the litigants and society. The filing of a collective action may at times be sufficient to attract the interest of higher-level authorities, or simply to pressure local officials and courts. Collective litigation may also force society to confront cases and areas of law that might otherwise be ignored. Thus collective litigation is more influential than other forms of litigation. Both the SPC and the Government seem not pleased with the increase of the collective litigation. However, that the plaintiffs increasingly using law (through litigation) to pursue their own interests and to force government pay more attention to their welfare, will further promote the improvement of the collective litigation mechanism, and the evolution of the state's approach towards rule of law in China.

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Table 1. Concluded Multiparty Civil Suits in Chong Wen District People's Court, Beijing: Mediation v. Judicial Decision

Year	Concluded Multiparty Litigation Cases	Cases Resolved by Mediaton	Cases Withdrawn Following Mediaiton	Percentage of Mediated Cases	Cases Resolved by Adjudication	Percentage
2003	643	238	174	64	231	36%
2004	679	213	229	65	237	35%
2005	3705	472	2952	92.4	281	7.60%

Table 2. Percentage of Mediation in Different Types of Multiparty Civil Suits.

Type	Number of Multiparty Suits	Mediated Suits	Percentage Mediated
Heating Supply Disputes	395	355	90%
Labor Disputes	41	31	76%
Rental Disputes	64	42	65.60%
Real Estate Contract Disputes	146	6	4%
Reputation Disputes	8	8	100%
Property Disputes	52	28	54%
Loan Contract Disputes	2689	2618	97%
Demolition Disputes	13	8	62%
Sales Contract Disputes	191	160	84%
Insurance Contract Disputes	327	17	5%
Processing Contract Disputes	5	5	100%

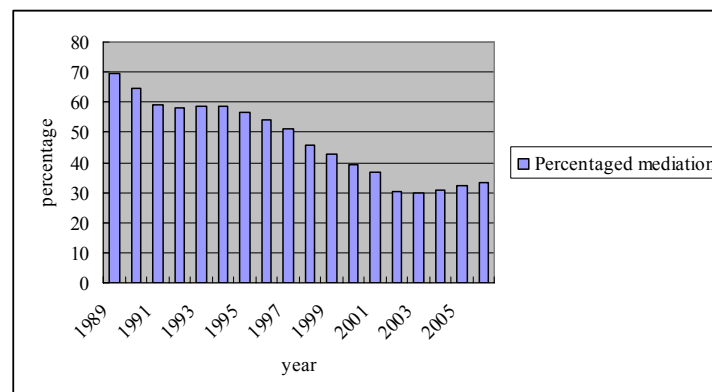


Figure 1. Percentage of Court Civil Suits Mediation in the First Instance across China



Constitutional Game - An Analytical Framework of Constitutional Law and Constitutional Politics

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Abstract

Most lawyers have a doctrinal understanding of constitution. They are skeptical of any political understanding of a constitution, feeling that this may taint the sacredness of the legal paradigm. Political scientists view things differently. They offer three approaches to understanding a constitution from the political paradigm perspective: the attitudinal approach, the institutional approach and the strategic approach. The author argues that the incorporation of the political paradigm into one's analytical framework is unavoidable if one wants to have a comprehensive understanding of the constitution.

After arguing that different paradigms can be integrated if alternative epistemological presuppositions are being adopted, the legal and political paradigms and approaches are integrated into an analytical framework of constitutional game illustrating how law and politics may interact in the constitutional development of a country-state.

Under this analytical framework of constitutional game, the constitutional processes in which decisions on the making, interpretation, implementation, adjudication and amendment or change of the constitution are made can be understood from features borrowed from the concept of game including players, rules of the game, winning goals, game resources, game actions, game field, interaction, strategy, and the end of the game.

Keywords: Constitution, Game, Paradigm, Law, Politics, Interpretation, Attitude, Institution, Strategy

1. Introduction

Almost every country-state now has a constitution. There are many decisions a country-state makes involve its constitution. There are decisions to make, implement, interpret, adjudicate, amend and change a constitution. To have a comprehensive understanding of a constitution, we need to know how all these decisions relating to a constitution are made.

Most lawyers treat a constitution as a legal code and apply the same doctrinal analysis to interpret a constitution as they would any other legal codes. Doctrinal analysis "aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates." (Note 1)

Such a doctrinal mindset causes lawyers to view constitutional interpretation as mainly a process of assigning meaning. Their primary concern is to discern the meaning embedded in the constitutional text. A practical reason for the need to have a definite meaning for the text is that this is necessary to resolve constitutional disputes that may break out in a courtroom, a legislative chamber or even in the public square.

Legal scholarship is also predominately normative. (Note 2) The main interest of legal scholars is to make prescriptions to legal decision makers on how they should give meaning to the constitutional text and decide cases accordingly. This may be called the doctrinal paradigm or legal paradigm (Note 3) of the constitution. In this article, a constitutional paradigm is the perspective through which a constitutionalist with her presuppositions and disciplinary orientation understands the nature, functions, purposes and meaning of a constitution.

Applying the doctrinal paradigm, legal scholars and judges develop different legal principles or approaches to assist them in ascertaining the "right" meaning of the text of a constitution (Note 4) and debate with each other on what should be the proper method of interpretation. Bobbitt provides a summary of the six principles or approaches that are used by legal scholars and judges to discover the meaning of a constitutional provision. They are:

"...the historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary 'man on the street'); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the ...ethos

that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).” (Note 5)

Though the approaches are different and may even conflict with each other, they share the same assumption that upon identifying the right method of interpretation, one can make the right interpretive decision. (Note 6) However, the sufficiency of the legal paradigm to understand decision making concerning constitution has been questioned by many. (Note 7) Dahl comments that:

“...competent students of constitutional law, including learned justices of the Supreme Court themselves, disagree...where the words of the Constitution are general, vague, ambiguous, or not clearly applicable; where precedents may be found on both sides; and where experts differ in predicting the consequences of the various alternatives or the degree of probability that the possible consequences will actually ensue.” (Note 8)

Besides lawyers, political scientists belong to another group which also has an interest in examining constitutions. As Sweet said, “All law is politics, but not all politics is law.” (Note 9) Among all forms of law, constitution must be the one with the strongest political flavour. The status and coverage of a constitution make any decision concerning its making, interpretation, implementation, adjudication and amendment or change highly political because it deeply and widely involves and affects political and social interests and groups. (Note 10)

Unlike lawyers, political scientists’ focus is not so much “what does the constitution mean?” but “why is the constitution understood by the political actors (including the court) in a particular way?” (Note 11) Different methods have been applied by political scientists to answer this question. Their approaches may be called the political paradigm of the constitution. There may be a very fine distinction between pure politics and constitutional politics and the differences will be explained in Part 4 of this paper. Therefore, in approaching constitution from a political paradigm, not all approaches in the study of political science will be borrowed. For those approaches that are borrowed to enrich the study questions concerning the making, interpretation, implementation, adjudication and amendment or change of a constitution, they may not be expressed in their original form. (Note 12)

The thesis of this paper is that for one to have a comprehensive understanding of decisions concerning constitution including its making, interpretation, implementation, adjudication and amendment or change, both the legal and political paradigms of the constitution have to be studied. Part 2 of this paper introduces the approaches of the political paradigm and explores the contribution of these approaches in enriching lawyers’ understanding of a constitution. Part 3 explains why the two paradigms are not necessarily conflicting and could be complementary to each other. Part 4 puts forward an analytical framework: a constitutional game to integrate the legal and the political paradigms aiming to assist one in arriving at a comprehensive understanding of the constitution. Part 5 makes some conclusive observations on the value of this constitutional game analysis.

2. The approaches of the political paradigm of constitution

Like the legal paradigm, there is more than one approach from the political paradigm. At least three can be identified. (Note 13) They are the attitudinal approach, the institutional approach and the strategic approach. (Note 14) Political scientists also disagree among each other on what should be the proper approach of the political paradigm. I will argue that the debates among political scientists, among lawyers, and between political scientists and lawyers on which approach or paradigm should be preferred are unnecessary. All the approaches and paradigms can be integrated to give a comprehensive understanding of a constitution’s complexity. (Note 15)

2.1. The Attitudinal Approach (Note 16)

According to the attitudinal approach, political actors give meaning to the constitution in light of their ideological attitudes and values (Note 17) and make decisions concerning the constitution accordingly so as to have those values realized in the constitutional system. There may not be too much difficulty in applying the attitudinal approach to political actors who are free to rely on their ideological attitudes and values to make political decisions like the members of the legislature or the chief executive. However, the explanatory power of the attitudinal approach may be more limited if it is applied to judges. Most people believe that judges make constitutional decisions only on the basis of its legal nature. That is the reason why most of the works on the attitudinal approach pertain to an analysis of judicial decision making.

Segal and Spaeth are the most prominent promoters of the attitudinal approach. (Note 18) As they explained in their most important publication, *The Supreme Court and the Attitudinal Model Revisited* (2002), (Note 19) the attitudinal approach “represents a melding together of key concepts from legal realism, political science, psychology, and economics.” (Note 20)

Like the legal realists, the attitudinal approach deconstructs the legal paradigm by asserting that the legal text cannot be the actual basis of meaning given to constitutional provisions. Behavioralism from political science, in turn, provides the research methodologies and orientation. (Note 21) It also supplies the explanation that political actors are all

“motivated by their own preferences.” (Note 22) The attitudinal approach obtains its definition of attitude from psychology. An attitude is “an interrelated set of beliefs about an object or situation.” (Note 23) In the discussion of constitutional politics, the object of the beliefs may be the nature, purpose and function of a constitution and the situation of the beliefs may be the historical, ideological, economic, political, social and cultural background, and contexts from which a constitutional question arises and has to be answered. (Note 24)

The influence of economics can be seen from the emphasis of the attitudinal approach in which political actors choose a decision concerning constitution by applying an economic notion of rationality. (Note 25) They select an understanding of the constitution among various alternatives available within the framework of the formal and informal rules and norms that can best achieve their policy goal after considering whether the likelihood of this understanding will at the end be realized. (Note 26)

There are several major criticisms about the attitudinal approach. First, it fails to give sufficient account for factors which “complicate the relationship between a political actor’s choice and the effectuation of his/her desired outcome.” (Note 27) Second, by dismissing the relevance of the legal nature of the constitutional text completely, the attitudinal approach gives no weight to the belief that a constitution would have “a constraining or a motivating force in the mind of political actors.” (Note 28) Third, attitudinalists place too much emphasis on the individual preference of political actors and overlook “how preferences are constituted by broader, institutionalized patterns of meaning.” (Note 29) Fourth, by concentrating on the instrumental value of a constitution to achieve what the political actors desired, there is not much description and analysis on the substantive values believed to be embedded in the constitution by the political actors. In other words, prescriptive and normative jurisprudence are excluded. (Note 30) Fifth, the attitudinal approach continues to see the decision of political actors concerning constitution as “shaped by forces outside their strategic context”. (Note 31)

Nonetheless, the attitudinal approach opens a new perspective for one to see constitution not just from “a sterile brand of doctrinal analysis” but can develop a constitutional understanding with “deeper and more systemic attempts to predict and explain how and why political actors operating under a unique set of institutional constraints decide as they do.” (Note 32)

2.2. The Institutional Approach

As stated above, one of the limitations of the attitudinal approach is that it fails to explain from where the ideological values of individual political actors originate from. The institutional approach asserts that the values and attitudes of political actors are shaped by the institution in which the political actors live and act.

Depending on the conception of institution, the institutional approach is further divided into the old and new institutional approaches. (Note 33) The old institutional approach sees the institution as the formal structures and concrete organizations of the state system (Note 34) while the new institutional approach (Note 35) accepts a “more dynamic and porous conception” (Note 36) emphasizing the informal norms, myths, habits of thought or background structures and patterns of meaning. (Note 37) Smith provides a very good summary of the institutional approaches:

“In these approaches of the study of politics, institutions are expected to shape interests, resources, and ultimately the conduct of political actors, such as judges, governmental officials generally, party or interest-group leaders, and other identifiable persons. The actions of such persons are in turn expected to reshape those institutions more or less extensively. Ideally, then, a full account of an important political event would consider both the ways the context of ‘background’ institutions influenced the political actions in question, and the ways in which those actions altered relevant contextual structures or institutions.” (Note 38)

The new institutional approach adds to the old institutional approach by “showing how the more formal and tangible institutions that old institutionalists saw as causes or motivations for political actions are themselves understood by new institutionalists as created within a received framework of culture and the socially constructed mind.” (Note 39)

Unlike the attitudinal approach (Note 40) which mainly uses individual persons (members of political institutions) as the basic unit of analysis, the new institutional approach considers how institutions “influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively ‘institutional’ perspectives.” (Note 41) Hence, institutions can be “a unit of analysis in their own right” (Note 42) and can adopt their own value preferences as more than just an aggregate of the preferences of their members. A political institution as a political actor is taken to be acting to a certain extent coherently (Note 43) and autonomously. (Note 44)

As members of institutions, individual political actors do not make decisions necessarily out of their personal preferences. They may make decisions to fulfill their duties and obligations which are defined by the institutions to which they belong. These duties and obligations are transmitted to them by socialization through their participation in the internal processes of the institution. (Note 45)

Political actors also do not necessarily make decisions rationally, in an instrumental sense, to select the best possible outcome that can realize their values. (Note 46) Decisions may be made just to create a certain symbolic effect which gives a perception of legitimacy for such an institution (Note 47) as expected or demanded by other political actors or institutions.

Applying the institutional approaches, especially the new version, to constitutional politics, decisions of political actors concerning constitution are influenced by the formal institution to which they belong and vice versa. This institution in turn is also influenced by the wider social institutions and vice versa.

This approach is also subject to several criticisms. First, the institutional approach's understanding on the general question of preference formation is too narrow. There is no reason that preferences of political actors could only be shaped by their institutions but could not be motivated by various other factors at the same time. (Note 48) Second, the institutional approach does not provide much explanation on how institutions actually affect the behaviours of political actors. (Note 49) Third, if individual political actors are so inseparable from their specific institutional contexts, the institutional approach would not be able to accommodate at least a certain degree of creative individual choices relatively autonomous from the institutional contexts and social background structures that individuals are embedded within. Without such reflective autonomy of their members, there cannot be any change or improvement to the institutions generated from the inside. (Note 50) Fourth, it is said that political process is so much shaped by contingent events and subjective perceptions that it is highly unlikely that institutions could mould decisions of political actors in a very systematic manner. (Note 51)

Nonetheless, the institutional approach does add another dimension to the study of constitutional politics. Individual political actors might not be as unconstrained as the attitudinalists perceive. The source of such constraints could be external as well as internal. Decisions concerning constitution might not only be instrumental, but could also be symbolic.

2.3. *The Strategic Approach* (Note 52)

The strategic approach has several basic premises. First, political actors make constitutional decisions to achieve certain political goals. This is similar to the attitudinal approach. Second, unlike the attitudinalists, the strategic approach does not see political actors as unsophisticated actors who make decisions merely on the basis of their ideological attitudes. (Note 53) According to the strategic approach, political actors realize that their ability to achieve their goals depends on a consideration of the preferences of other political actors and actions they expect them to take. (Note 54) In other words, their decisions are dependent on the decisions of other political actors. Third, the choices available to political actors are structured by institutions. This is similar to the institutional approach but the strategic approach has a stronger emphasis on the external constraints rather than the internal constraints from institutions. (Note 55) Maltzman, Spriggs II and Wahlbeck give a very good description of how strategic considerations work in institutions:

“To act strategically...[political actors] must understand the consequences of their own actions and be able to anticipate the responses of others. Institutions facilitate this process and thus mediate between preferences and outcomes by affecting the [political actors] beliefs about the consequences of their actions. Institutions therefore influence strategic decision makers through two principal mechanisms – by providing information about expected behavior and by signaling sanctions for noncompliance.” (Note 56)

On the basis of these premises, many followers of the strategic approach have applied a game-analytical framework to analyze the inter-relationships of political actors in different constitutional settings. (Note 57) This game analytical framework will be further elaborated in Part 4.

The strategic approach also has its criticisms. First, this approach presumes that there is at least a certain degree of institutional separation of powers within the constitutional system before political actors can act strategically. (Note 58) The explanatory power of the strategic approach is more limited for authoritarian regimes. Second, like all analysis relying on rational choice thinking, the strategic approach has another questionable assumption that all political actors must act rationally and only engage in instrumental politics. (Note 59) Third, it seems that the goals of political actors under the strategic approach must be short term and self-centred. (Note 60) This may be too narrow a view of what actually motivates political actors. Fourth, the strategic approach presents all interactions between political actors as if they are all in the form of competition, i.e. each competing to have one's goal be realized. This dismisses the possibility of consensus reached by the political actors through genuine dialogue or deliberation. (Note 61)

Nonetheless, another important dimension in understanding political actors in their decisions concerning constitutions is provided by the strategic approach. Constitutional politics is a dynamic process involving the interdependent decisions of all political actors who perceive, predict and prepare for the decisions of others before making their own.

3. *Paradigm v. Paradigm? Approach v. Approach?*

There is disagreement among legal scholars on what is the right legal approach to adopt. Political scientists also dispute with each other on what should be the right political approach. In addition, there is dissent between legal scholars and

political scientists on whether one should use a legal or a political approach to understand constitution; sometimes, fierce debate ensues. At other times, the opposing parties are simply ignored. Both situations may not be healthy for reaching an in-depth understanding of our legal reality.

3.1. Epistemological Presuppositions

These disagreements are caused by an epistemological presupposition that there can only be a single path to arrive at a unique understanding of reality. According to this presupposition, the different approaches and paradigms must then be incommensurable. If constitutional understanding is right, then all other approaches and paradigms cannot be right at the same time. (Note 62) However, must we see the approaches and paradigms of constitution as incommensurable? Must we approach the study of constitution with such a presupposition?

I will put forward some alternative epistemological presuppositions drawn from two general factual propositions that most people will accept intuitively or find it difficult to dispute. First, the world is a complex system and therefore a constitution must also be a complex system. Second, human beings have limited capabilities and therefore researchers in constitution also only have limited capabilities. No matter how intelligent and knowledgeable a person is, no one can claim that she can understand everything in this world or just a part of this complex world. These alternative epistemological presuppositions may help us overcome the theoretical bar from integrating the different approaches and paradigms into a bigger analytical framework for understanding constitution.

The concepts of “system” and “complexity” are borrowed from the general system theory. (Note 63) A systems view sees the world as a world full of systems. (Note 64) A system is understood to be “a complex of interacting elements” (Note 65) or “a regularly interacting or interdependent group of items forming a unified whole.” (Note 66) This systems worldview provides us a perspective to analyse and understand the wholeness of the world, not only the details in its parts. Through it, we can see how parts are embedded in a bigger system which is also a part of an even bigger system. Also, we can appreciate how the connection, interaction, and interdependence between the parts and the systems work to make a particular system function. (Note 67) Applying the systems worldview to constitution, we can see that a constitution creates a constitutional system with at least the following elements: textual elements, institutional elements (the executive authorities, legislature, judiciary and civil services), (Note 68) ideological or normative elements, (Note 69) and political elements. (Note 70)

A constitution is not only a system; it is also a complex system. The complexity of a system illustrates the following characteristics: (1) Complex systems consist of a large number of elements. (2) The elements interact in a dynamic manner. (3) The interaction is fairly rich, i.e. any element in the system influences, and is influenced by, quite a few other ones. (4) The interactions are non-linear. (5) The effect of interactions can feed back onto the elements. (6) Complex systems are usually open systems, i.e. they interact with their environment. (7) Complex systems operate under conditions far from equilibrium. (8) Complex systems have a history. (9) Each element in the system is ignorant of the behavior of the system as a whole; it responds only to information that is available to it locally. (Note 71) Applying these characteristics to a constitution, there is little doubt that a constitution must be a very complex system.

Through this understanding of the complexity of systems, social systems and constitutional systems, we can see the problem of the original epistemological presupposition. It would not be too rational to insist that there can only be one single path to understand the reality concerning a system that is very complex. Therefore, I can now suggest some alternative epistemological presuppositions which may be more realistic.

First, a social system is composed of many distinct components each with their characteristics but the components are inseparable for the survival of the system. A constitutional system has its legal as well as political components and they are inseparable for the constitutional system to function. Therefore, to understand a constitution, we must adopt a method that can analyze both the legal and political components. Second, the same event in a complex system could have different dimensions of meaning and significance. (Note 72) A constitutional decision may have legal as well as political consequences. Therefore, to fully appreciate the impact of a constitutional decision resulting from the interactions between the elements to the constitutional system itself or with other social systems, we must consider a constitution’s multi-dimensional implications. Third, the truth or reality may be reached or discovered by not just one method or one single path. To make a decision concerning constitution, a form of legal or political reasoning might produce the same conclusion. There is no need to exclude other paths to reality in our understanding of constitution.

Fourth, researchers may observe a phenomenon from different perspectives. What they can derive from the observation will depend on the vantage point at which they position themselves and from which they observe. Different researchers (legal and political), depending on their academic orientation, may have adopted different vantage points to approach a constitutional question. Different conclusions might be reached but this does not mean that one is right and the other must be wrong. They could be arrived at from different perspectives and considering all the conclusions complementarily may enrich our understanding of the reality. Fifth, even if researchers adopt the same perspective, they may have different perceptions of the same phenomenon owing to the different pre-understanding, background, training

and concern of the researchers. Through personal reflection on the differing reasoning and conclusions of other researchers, we may expose the subjective factors which might have distorted our perception and understanding of the reality. It can also enable us to have a deeper appreciation of the concerns of other researchers which we may have overlooked.

Sixth, the natural limitations on the capacity and ability of an individual researcher (or even a team of researchers) restrict most studies to a narrow scope of the phenomenon. Legal and political science scholars can only approach a narrow scope of a constitution. Working together can provide more pieces of the constitutional jigsaw puzzle. Seventh, the reality is never static and is, in fact, ever changing though it may appear to have no change for a long time. However, the impression of the lengthiness of the period is only considered from the perspective of the researchers. Researchers are also limited by time. In most situations, they can only study a phenomenon observable at a specific moment. Even if they can study a matter's behaviour in a time period, that time period cannot be too long (at least not longer than the life of the researcher).

The legal or the political nature of a constitution may seem to be more explicitly influencing the constitutional process during a certain period of the life of a constitution but as the constitutional process is also ever changing, the originally more explicit element may give way to another. If legal or political science researchers observe only a certain period of the life of the constitution, (Note 73) they may reach a wrong conclusion on the actual impact that the legal or political element could have upon the constitutional process in the whole lifespan of the constitution. Joining the legal and political researches together will allow a more thorough understanding of the evolutionary processes of the constitution.

These epistemological presuppositions: multi-component, multi-dimension, multi-path, multi-perspective, multi-perception, multi-scope and multi-period would justify an attempt to integrate the different approaches and paradigms. Surely, if they are incommensurable (Note 74) to such a degree that even these presuppositions could not help, this attempt to integrate may still fail. Therefore, we must now examine how incommensurable they are. (Note 75)

3.2. Integration of the approaches of the legal paradigm

If a political actor has to interpret a constitutional provision, she may have to choose one particular interpretation approach to assist her in determining the meaning to be given to the constitutional text and make decisions accordingly to resolve the constitutional question she encounters.

Seeing merely for the purpose of making decisions concerning constitution, the various approaches of the legal paradigm seem to be incommensurable because most political actors will only rely on one approach to interpret at a time though it is possible that several approaches of interpretation could reach the same conclusion on the meaning to be given to the constitutional text.

However, this is not the only way for us to use these legal approaches. If we do not ask this question: "How can a decision be made to resolve a constitutional dispute by applying the constitutional provision?" but "What are the options available in resolving a constitutional dispute?" or "What is the theoretical basis of each of the options?" or "Why has a particular option been chosen in resolving a particular dispute?" or "Which is the best option?" or "Is the option a legitimate one under the present constitutional context?" Then these approaches would not be incommensurable in a sense that only one can be right and the others must be wrong and have to be excluded. (Note 76)

Presenting all the approaches together in a form of pluralistic theory of constitutional interpretation (Note 77) will help us understand the complexity of legal reasoning of constitutional provisions and the interdependence of legal approaches with external standards and considerations.

3.3. Integration of approaches of the political paradigm

It seems that political scientists are more receptive to the political approaches advanced by their fellow colleagues. As they face no immediate need to make a decision in resolving a constitutional dispute and the main objective of their studies is to discover why a decision concerning constitution is made or provide guidance for decision making in the future, the need to make an exclusive claim is less pressing than it is for lawyers.

Comparing the first edition (Note 78) of Segal and Spaeth's classic text on the attitudinal approach with their second edition, (Note 79) one will find that they have added a substantial section on the influence of rational choice theory to the development of the attitudinal approach. Segal later also makes the following comment:

"In sum, outside of the decision on the merits, attitudinal works, broadly defined, very much resemble many of the strategic-choice hypotheses of more recent vintages." (Note 80)

The contribution of the attitudinalists is also well recognized by followers of the institutional approach and the strategic approach. They all agree with the finding of the attitudinalists that decisions concerning constitutions, especially judicial decisions, are political decisions and the Court in making such decisions is also a policy-making body. They only disagree that the claims of the attitudinalists cannot be complete and adequate explanations of constitutional decision-making. (Note 81)

The difference between the institutional approach and the strategic approach is also not as substantial as one thinks. Speaking on behalf of the institutional approach, Gillman said,

“We agree that there are advantages to explore the ways in which judicial decision-making is influenced, constrained, or constituted by institutional contexts. We also agree...that our accounts should emphasize ‘the political elements institutional development’ and not merely ‘organizational logic’ or functionalism. ...And so the benefits of rational choice institutionalism [strategic approach] should not be discounted on the grounds that it does not explain everything about institutional politics and the new historical institutionalism [institutional approach] should not be discounted on the grounds that it uses data that is not machine readable and feels no need to translate explanations into models.” (Note 82)

Both followers of the institutional approach (Note 83) and the strategic approach (Note 84) agree that the two approaches are complementary. Even when they compete with each other, the competition could be a healthy one with each trying to demonstrate that it “is doing the most work” (Note 85) without excluding the contribution of the other. I agree with what Gillman said on the relationship between the approaches,

“No single method can illuminate everything we might be interested in knowing, and this means that we should evaluate the strengths and weaknesses of various approaches by asking whether they give us satisfying answers to particular questions.” (Note 86)

3.4. Integration of the legal and political paradigms

For those within the same paradigm, trying to integrate may still be easy; but for those from totally different paradigms, an intuitive presumption may be that they are inherently incompatible. Fortunately, there are people who are already working to integrate law and politics. Barry Friedman is a professor of law at the New York University School of Law. He provides an alternative view on the relationship between law and politics: “Politics and law are not separated, they are symbiotic.” (Note 87) He suggests that legal scholars do not need to resist any political project outright. He finds that the political paradigm could illuminate “rich veins even in the well-mined field of traditional normative and doctrinal scholarships.” (Note 88)

With the insights from the political paradigm, legal scholars can continue to do their primary work in formulating normative constitutional doctrines but just in a new way. They could take up a new challenge by “designing workable doctrine” (Note 89) rather than indulge in designing doctrines for an ideal world out of touch with the issues of “practical implementation” and “realities of political trends.” (Note 90) He challenges other legal scholars to make use of the findings from political scientists and develop new constitutional theories. (Note 91)

Even among the existing legal approaches, we can find that some of the political considerations have already been explicitly or implicitly considered. Just by referring back to the six legal approaches identified by Bobbitt, it is not difficult to find the concerns of institutionalists (old and new) in the historical, structural, ethical, and the doctrinal approaches. These approaches all require the political actors to infer the meaning of the constitutional text from matters embedded in the formal or informal institutions established directly or indirectly by the constitution.

Attitudinalists’ emphasis on ideological values is not too different from the ethical approach which legitimizes political actors to refer to political or moral ideology which they believe to be the ethos of the society as the basis of their interpretation of the constitutional text. In the process of identifying the ethos of the society, it may not be easy for the political actors to separate their personal values from those values they identified as the values of the society. It will also not be too difficult for followers of the prudential approach to befriend followers of the strategic approach as both must find cost-benefit analysis the most useful analytical tool. The loneliest ones may be the followers of the textual approach. However, even for them, the meaning of the constitutional text may in some cases be found within or determined by their interpretive communities which can also be a form of institution.

Similarly, legal considerations can be found in the analysis of the political approaches (Note 92) though Friedman warns that they should take law more seriously. (Note 93) The ideological attitude of the political actors can be a sincere commitment to follow the original understandings of the constitutional fathers and need not be some kind of political values. The text of the constitution and the accompanying norms as understood and enriched by an interpretive community applying whatever approaches of legal interpretation is surely a part of the institution in a wide (or new) sense. To follow the textual meaning of the constitution as far as possible may be a strategic constraint upon political actors as they may be expected to be doing so or their decisions concerning constitution may only be legitimate if they can demonstrate that they are so doing.

Therefore, the legal and political paradigms actually are not that far apart and there are already many points of contact which can be used as seedbeds for a full-scale integration to take place. However, before we finally move to integrate the two paradigms, some last words about integration have to be said.

3.5. *Some thoughts on Integration*

Integration presumes the existence of at least two distinct matters and it is about how they are linked together. The process of integration is not automatic. (Note 94) It requires a judgment regarding the guiding value for the integration which, in turn, will affect how the matters are integrated and the extent of their integration. (Note 95) In other words, the answer to the question of why we integrate underlies the answers for the questions of what to integrate and how to integrate. (Note 96)

If the objective of our project to integrate the legal and political paradigms of the constitution is just to develop a more comprehensive understanding, then the methodology for integration to be adopted in this project does not need to be so demanding as to require a complete blending of the two paradigms a new paradigm.

The legal and political paradigms can basically maintain their own entities and the contribution of each can still be recognizable in the analytical framework that will be developed in this integration project. Surely, this is not the only way to integrate the two paradigms as one may have an integration product that has a lesser or a higher degree of integration. In addition, the proportion of the ingredients may also vary depending on the taste of the chef or her customers. Even if the methodology is the same, the resulting integrated product may still be strong in a particular flavour, legal or political. As I am trained in the law, the integrated analytical framework may still be considered to be too legal by political scientists. Ironically, some legal scholars may at the same time feel that it is too political. These may be criticisms that an integrationist or interdisciplinarian must live with.

However, I believe the reward from participating in an integration project will surely outweigh these aspects. It may provide a valuable opportunity for a researcher in a particular discipline to reflect on some taken for granted “truths” in her discipline. (Note 97) To some, this may even transform her thinking of the subject and new perspectives or innovative methodologies may be developed. (Note 98) Even if all these cannot be achieved, a researcher can at least know how much she does not know. (Note 99)

4. **Constitutional game** (Note 100)

The integrated analytical framework for understanding constitution that I suggest in this article is a kind of game framework. (Note 101) This can illustrate how political actors, in an occasion where a constitutional decision is demanded or expected, interact with the constitutional text, the constitutional or institutional contexts and other political actors resulting in a constitutional decision that has an impact on the short- and long-term development of the constitutional system. To put it in a form that has a more easily accessible form/term of reference, I call this analytical framework ‘a constitutional game’.

To be consistent with my epistemological presuppositions stated above, I do not claim that this analytical framework is complete or even comprehensive though I believe this concept of constitutional game could provide a more coherent framework to understand the complexity of the practices of any constitutional system.

Like all games, a constitutional game must have these basic features: (Note 102) (a) players; (b) rules of the game; (c) winning goals; (d) game resources; (e) game actions; (f) game field; (g) interaction; (h) strategy; and (i) end of the game.

4.1. *Players of the constitutional game*

To have a game there must be players and in most games there will be more than one player. The players in a constitutional game can basically be identified within the constitution. The institutions in the constitutional system (Note 103) and other political actors referred to directly or indirectly by the constitution are usually the main players of the game. (Note 104)

A constitutional game in a typical western liberal constitution has the president or/and the prime minister, the parliament, the supreme court or the constitutional court, and the bureaucracy as the main players. (Note 105) A new player can join a constitutional game if it has a significant role to play in the game after some fundamental changes in the social and political contexts.

There is an assumption that the players enjoy at least a certain degree of autonomy from the other players for a constitutional game to be played. If not, not many interesting things will happen in a constitutional game. Fortunately, in most constitutional systems, even in constitutional systems that are authoritarian, some form of separateness between the institutions still exist qualifying them to be players in a constitutional game.

4.2. *The constitution as the rules of the game*

All games have rules and the constitution is the rules for a constitutional game. In a pure political game, only power matters, (Note 106) but in a constitutional game the constitution provides a set of binding rules for the game and all players accept being bound by the constitution when they join the game. This is the most important thing that

distinguishes a constitutional game from a pure political game. In other words, players' willingness to be bound by the constitution is a precondition of this constitutional game. (Note 107)

In theory, the rules of any game must clearly set out what the roles of the players in the game are, how the players can win and actions the players can take in the game. If not, disputes will naturally arise and a game cannot be played effectively without such clear provisions. However, this may not be the case for the constitution as it sets the rules of the game in a constitutional game. Though a constitution will also set out for every player her role, game resources and limitations on game actions she can take in the game, the main difference between a constitutional game and other games is that a constitution in many cases cannot accurately or clearly define the roles, powers and limits of the players in the constitutional game. This is mainly caused by the ambiguity inherent in constitutional language. In such occasions where language cannot indicate what the exact roles, powers and limits of the players are, players will be left with a certain amount of room to choose what they want to do, what they can do, and what actual actions they will take in the game. This room within a constitution for players to make use of is the very special thing that makes constitutional decision making so complex and studying constitution so difficult but also so interesting.

Giving a certain interpretation or reading to the constitutional text is one of the main forms of action of a player in a constitutional game and resolving competing interpretations of the constitution by the players is one of the main forms of interaction between the players. Constitutional interpretation is, therefore, the key of a constitutional game.

4.3. Winning goals of players

Like all games, players in a constitutional game play to win. (Note 108) In most games, the winning goal of all players is the same; obtaining the highest score. Usually, there may only be one winner in the game and the game will end when a player wins. However, the winning goals for the players in a constitutional game may not be the same. (Note 109) The winning goal of each player is basically set out by the constitution. A player's winning goal is very much related to the institutional role assigned to her by the constitution. (Note 110) I refer to the institutional role of a player in a constitution as so perceived by the player as her constitutional position in a constitutional game. By ascertaining her constitutional position, a player in a constitutional game can define her winning goals.

The winning goal of a player may be very complicated such as to cause the constitutional system to actualize certain substantial values in the society on the basis of the player's ideological beliefs. The goal may also be as simple as just to ensure the terms of the constitution (no matter what) are followed by all players. Another special thing about the winning goals of players in a constitutional game is that they may not be constant. The constitution may assign a particular constitutional position to a player with the accompanying winning goals. However, because of the indeterminacy of the constitutional text to definitely and exclusively define the constitutional position of the players, the language of the constitution will always allow some room for an individual political actor as a player in the game to refine or develop her constitutional positions. Her winning goals may also be refined accordingly on the condition that they do not conflict directly with the positions and goals explicitly provided in the constitution and are considered to be legitimate by other players.

A player's personal ideological values may influence how she defines her constitutional positions and prioritizes her goals in the game. The institutional context may also have a similar influence upon a player. (Note 111) For example, the constitution may give the court the power to review administrative actions and the constitution may set that the basic goal for such review is to ensure that the administration acts are within the legal boundary of the empowering statutes. The court's winning goal in the game is to ensure the administrative bodies act within the legal boundary. However, there may still be room for the court to further develop the concept of legality and it may incorporate the concept of rationality or even proportionality into the concept of legality enriching it to such an extent that the court may achieve more winning goals than the one expressly provided by the constitution. The constitutional position of the court may then not be just a guardian of legality but a vanguard for good governance. Refining constitutional positions and winning goals within the space allowed or provided for by the constitution is actually part of the game actions, interactions and strategies of the players in a constitutional game.

4.4. Game resources of the players

Players come to a game with certain capabilities of their own or they may possess different levels of skills. The game will allocate to each of the players equal or unequal game resources which they can utilize to win the game. For example, in any card game, a player will be given a certain number of cards randomly and each card will enable her to take different actions in the game depending on the rules of the game. Some players may have more resources and their chance of winning the game will be enhanced.

It is the same situation in a constitutional game that players come to the game with different capabilities of their own and different levels of skills. The constitution may also allocate equal or unequal constitutional powers (game resources) which they can make use of by applying their personal capabilities and skills so as to attain their winning goals in the game. A parliament can make laws, but a president can veto those laws. A constitutional court can

invalidate a law by exercising its constitutional review power. These are all typical examples of game resources available to different players in a constitutional game.

Apart from enabling players to refine their constitutional positions and winning goals, a constitution may allow some room for the players to refine what game resources they could use. For example, in exercising their powers to review legislation, a constitutional court may further develop what kind of constitutional remedies they can provide to a successful challenge of the constitutionality of a law especially if the constitution is silent on this.

4.5. Game actions

All players act in a particular way in a game to win. However, not all actions by a player are allowed by the rules of a game as there are limitations on the players' actions. As the constitution plays such an important role in a constitutional game, it should come as no surprise that most game actions concern constitutional decision making. Game actions in a constitutional game may include decisions on what provisions will be included in a constitution and how to express the provisions to ensure their goals will be achieved; what statute has to be made to implement the provisions of the constitution; how to exercise powers granted by the statute or the constitution to implement the provisions of the constitution; how the provisions of the constitution should be interpreted; what ruling should be given in adjudicating a constitutional dispute; which provisions in the constitution need to be amended and how they are to be amended.

In a constitutional game, because the constitutional positions and winning goals of the players are not the same, the specific actions they can take in constitutional decision making also differ. The players need to take these specific actions on constitutional decision making so that they can achieve their winning goals in the constitutional game.

Similarly, the constitution in a constitutional game also imposes limits on the kind of actions players can take. Every player must act in the game according to the constitution. Instead of using raw power to gain maximum benefits for themselves, all players have to play in conformity with the constitution to win. Free fights between the players are not allowed in a constitutional game just as they are banned in a pure political game. (Note 112)

Again, the constitution may not be specific enough to state what the exact limits on their actions are. In addition to the room given in the constitution for players to refine their constitutional positions with the accompanying winning goals and the constitutional powers (their game resources) they have in the game, there is also room for players to apply their understanding to the constitutional limits on their actions and refine these actions so that they may act beyond what the constitution expressly allows.

Because of the constitutional space accorded to players to refine their positions and powers, providing an interpretation of the constitutional text is the main form of action that all players can take in a constitutional game. This action may precede all their other actions in the constitutional game as players need to offer an interpretation of certain provisions in the constitution to justify their specific actions. In most cases, the interpretations are related with how they understand the constitutional provisions in relation to their positions and powers.

However, the player cannot arbitrarily choose any legal method of interpretation and meaning for the text. She is still under internal and external constraints as determined by the institutional contexts of the constitution. The constitutional text provides room for different interpretations but it also sets boundaries for interpretations a player can give. Each player will adopt a certain legal approach of interpretation and a particular meaning for the constitutional text that can best advance her constitutional position but this position will also impose constraints on the approach of interpretation and specific interpretation she will adopt. This is the internal constraint. The interpretation chosen cannot conflict with the specific constitutional position adopted by the player.

The language of the constitutional text is an external constraint. It would be very difficult for a player to justify an interpretation if the meaning adopted is a meaning that the language cannot bear. Another external constraint is the pressure generated from the interpretations by the other players who are also under their internal constraints. Depending on the relative powers and limitations in a constitutional game, a player may have to adjust even her legal approach to interpretation as a result of strategic interactions with the interpretations of other players. Constitutional interpretation is, therefore, part of a player's winning strategy in a constitutional game. (Note 113)

4.6. Playing Fields

Players' game actions must happen within the boundary of a certain defined playing field. As the game actions of players in a constitutional game are all related with constitutional decision making, it is natural to find the playing fields of a constitutional game in venues where the making, implementation, interpretation, adjudication and amendment of the constitution take place. The playing field of a constitutional game may be a constitutional convention, a meeting of the constitution's drafters, a cabinet meeting, an administrative official's office, a meeting with citizens by administrative officials, a legislature's chamber, a courtroom, or a referendum.

One common thing about all these playing fields is that they are all basically legal platforms. The consideration of legality plays a very important role in a legal platform in the sense that decisions made in the platform are expected

either to be expressed in legal terms or reached on the basis of certain legal codes. A legal platform is a process where legality plays a major role in legitimizing an action and an action's legality will be determined. Legality here is the concern expressed by the legal paradigm of constitution stated above. (Note 114)

Different playing fields or legal platforms may involve different kinds of game actions. Some players may only be allowed by the constitution to act in certain game fields. Different legal platforms may also have different processes of legitimization and specific requirements in determining an action's legality.

After a constitution is made and the constitutional game starts, the main playing fields of a constitutional game are in the implementation, interpretation and adjudication stages. In these playing fields, based on how they see their own constitutional positions and winning goals, players will utilize the constitutional powers which they understand to be available for them to use and make constitutional decisions which they believe to be within the limits set by the constitution.

The nature of the playing fields as legal platforms imposes further constraints on the actions of the players in a constitutional game. Even though a player may have some room to determine her constitutional positions, powers and limits, any action taken must be recognized as a legitimate act by other players. As the actions are taken in a legal platform, they must at the end find legal authority from the constitution and this must likewise be recognized by the other players in accordance with the specific requirements on legality of that particular legal platform.

Though political bargaining and strategies may still be needed in constitutional decision making, other players of the game will apply and enforce the legal terms of the constitution and the specific requirements on the legality of that legal platform and determine whether the action in question is legal and therefore legitimate.

As mentioned above, players will have to give an interpretation to the constitutional text before they take other actions in the game so as to justify those actions. Therefore, the interpretation given by a player will also have to be considered by other players to be a legitimate interpretation in the legal platform in which the need for constitutional decision making arises.

Illegitimate actions by any player may be counteracted by other players. Such a player may be paralyzed from taking further action in the game or be forced by other players to abandon her illegitimate action and get back on the right track if she still wants to stay in the game. This is how the players interact in a constitutional game.

A typical example is how a constitutional court in a constitutional adjudication applies the constitutional provision to determine whether a legislative act is unconstitutional. The constitutional court exercises its constitutional review power under the constitution to determine whether the legislative act is unconstitutional, but the manner of how the constitutional court exercises this power must also be considered as legal and legitimate by other players in the sense that the constitutional court is acting within the goals, powers and limits set by the constitution.

4.7. Interaction between the players

Interaction between the players is the key to any game, including a constitutional game. Players act within the playing field but they do not act alone. Any action by a player will immediately attract reactions from the other players and their actions are to block her way to obtain her winning goal if it causes a conflict with their winning goals or would cause them to lose the game. A player must also immediately respond to the reactions of other players. Therefore, interaction in a game is a continuous process of actions and reactions between the players.

The interaction in a constitutional game is the same. As mentioned above, the main form of action of players in a constitutional game is to provide constitutional interpretations of the constitutional text to justify their specific actions. These specific actions are needed for obtaining their winning goals in the game. As the playing fields of a constitutional game are legal platforms, other players can react by considering these acts as legally illegitimate. The main form of reaction from other players will include their competing interpretations of the constitutional provisions and accompanying specific actions.

If a player makes certain constitutional decisions on the basis of her interpretation of the constitution which is related to her position or powers but is considered to be legally illegitimate by some other players, they will respond by making another constitutional decision to cancel out the first decision on the basis of their constitutional interpretation of the constitution in pursuance of their positions and powers.

A law passed by the parliament may be vetoed by the president who believes the law is unconstitutional. The parliament may override the veto by a special majority but the constitutionality of the law is further challenged in the constitutional court. The constitutional court may declare such a law as unconstitutional but a referendum may be held to amend the constitution with the effect of endorsing the invalidated law. All these interactions between the players happen within the framework of the constitution, but they also originate from the different readings of the constitution by the players.

As a constitutional game emphasizes legality, players in the game fields all apply a notion of legality to judge the legitimacy of the other player's action. However, legal legitimacy is only one aspect of legitimacy. Fallon suggests that in addition to legal legitimacy, there are also sociological legitimacy and moral legitimacy. (Note 115)

Legal legitimacy looks at the legality of an action and if an action is considered to be illegal or to have contravened legal norms, the act will be illegitimate. Legal legitimacy may be the basic requirement of legitimacy. The mere fact that an act has complied with the legal requirements on content and process will already bestow on it at least a certain level of legitimacy no matter what the actual content is. However, a legally valid act may still be considered as illegitimate or an illegal act may be legitimate if we see legitimacy beyond legality.

The notion of sociological legitimacy does not refer to what makes an act legitimate but only captures the actual attitude of a person towards an act. A person's acquiescence to an act may indicate that she accepts the legitimacy of that act no matter what causes her acceptance.

Sociological legitimacy can have different degrees. People may accept the legitimacy of an act because they personally support the act. People may accept by convention because most other people also accept. They may accept out of habit or accept merely out of indifference. People may accept but only reluctantly if their negative sentiment is not strong enough to cause them to object to it. Even people who do not accept the legitimacy of an act may still give an impression that they accept the legitimacy until and unless they take any overt action to object to it. (Note 116)

Moral legitimacy goes back to examine what causes a person to accept the legitimacy of an act. It looks at legitimacy from the perspective of moral justifiability. As Fallon points out: "Even if a regime or decision enjoys broad support, or if a decision is legally correct, it may be illegitimate under a moral concept if morally unjustified." (Note 117)

There is no space to examine the different theories of moral legitimacy here. What is relevant to our discussion is that beyond legal legitimacy, which is very much emphasized by the game fields in a constitutional game, considerations of sociological and moral legitimacy may also cause reactions from other players in the game.

The room in a constitution for players to refine their positions, powers and limits provides space for the consideration of sociological and moral legitimacy to influence actions and reactions of players. There may be situations in which an action of a player may not seem to be legally legitimate, but the degree of illegitimacy to another player may not be strong enough that she may choose not to react against it and accommodate it by giving an alternative reading to the constitution which may not be her preferred one.

In another situation, a player's act may be legally legitimate, but there may be another player who considers that the act is morally illegitimate according to her theory of moral justification and she will react against the act. However, in all these situations where the legality of act cannot resolve the differences between the players, (Note 118) all players must still put their views in legal terms as legal legitimacy is still the ultimate standard on legitimacy to be applied in the game field. They will utilize the room for alternative interpretations of the constitution to justify their actions, inaction and reactions. If we do not include these other notions of legitimacy in our analysis, we will fail to see the political aspects of a constitutional game and cannot explain the behaviour of players in the game. (Note 119)

4.8. Strategy

In a game, players will develop strategies that can maximize their chance of winning. All players in a constitutional game will also have their winning strategies. Players will strategically use their resources in their interactions with other players in order that their winning goals can be attained. A player may need to adjust or refine her original strategy and in some cases, may even have to adopt a completely different strategy.

In making constitutional decisions in a constitutional game, players will try their best to justify their actions by giving an expansive reading to the constitution which can best fit their winning goals and accompanying actions. All players will play according to their understanding of the constitution and strive to win the game through exerting influence upon other players by their game resources to accept their reading of the constitution in the legal platforms. This may be a player's basic strategy. However, such actions of a player may attract reactions from other players who will block her way to achieve her goals. She must also develop a strategy in the game that can avoid other players who are trying to prevent her from winning the game.

As we can see, the understanding of the constitutional provisions by a player on her own positions, powers and limitations may not be the same or may even be in conflict with how other players in the game perceive these things. Owing to the ambiguity inherent in constitutional provisions, players will tolerate a certain degree of differences in their understanding of each others' role, powers and limitations. As a result, there is always a varying degree of room for each player to fine tune their winning strategy which will not immediately attract a reaction from others. However, if a player moves beyond that, reactions from other players are expected though the exact dividing line is drawn differently.

If a player perceives that her act will be considered illegitimate by other players but still insists on taking that action, she will have to take the risk that she may be paralyzed by other players from playing the game further or be forced to

abandon the action she has taken if she wants to stay in the game unless her game resources make her so strong that she can ignore any reaction from the other players. A rational player will not take an action if she perceives that the action will be considered as illegitimate by other players. This is a more advanced strategy. However, to do so a player must know what would be the reactions of the other players to her actions. If a player could have complete information about the other players, her chance of winning will surely be much greater. However, no player in a game could have complete information. She must then base her decisions on the incomplete information she has and predict what may be the action of the other players.

Therefore, it is important to players in a constitutional game to gather as much information as possible about the other players. (Note 120) Such information may be gained through mutual interaction. The first piece of information that a player must have is about the interpretative approaches adopted by the other players. As the approach of interpretation to be adopted by a player is determined by her perceived constitutional position which, in turn, is influenced by the player's ideological values and institutional contexts, all these are also relevant information. Another piece of information that a player needs in a constitutional game is whether the other players will consider her action to be illegitimate especially from the perspectives of sociological and moral legitimacy.

As a player's information and perception of the reactions of the other players reveal themselves to be wrong, her actions or reactions may be over-conservative or over-aggressive. After many rounds of playing this game, a player may forecast the possible reactions of other players to her acts. If she can learn from that, her chance of winning the game increases.

4.9. End of the game

In most games, there is a clear end to the game. But there is no end to a constitutional game. Players in a constitutional game want the game to be played continuously. A constitutional game will only end when some players are no longer willing to be bound by the constitution as they perceive that they can never win in the game. They would then like to reset the whole game by enacting a new constitution or revoking the constitution. Therefore, in a constitutional game, no matter what the winning goals of the other players are, every player will share at least one winning goal in common, that is to have the game maintained. To do so, each player must play in such a way that all other players can achieve their winning goals at least to a certain extent. If not, some players may be so frustrated that they may choose to end the game by quitting/leaving it. In another words, a constitutional game is a win-for-all game if it is played well.

Such a state may be called the equilibrium of a constitutional game. If all players have almost equal game resources in the game, equilibrium will be achieved through give and take interactions between the players in the legal platforms. Equilibrium will be maintained through the operation of such a balancing mechanism. This illustrates how the legal paradigm integrates with the political paradigm, especially the strategic approach. However, if all players fail to follow or honour the constitution, the constitutional game will collapse. Either another constitution is made and a new constitutional game with a new constitution will replace the collapsed one or a constitutional game will regress to a pure political game.

5. Conclusion

Even if I can convince you that a constitutional game can successfully integrate the legal and political paradigms of a constitution, I must still explain what values this analytical framework has which cannot be observed by having the two paradigms of constitution analyzed separately.

First, using a game framework allows us to understand a constitution not just from one political actor's perspective but to consider it from the perspectives of all political actors, old and new or existing and potential. The problem of the legal paradigm is that it only focuses on one political actor, i.e. the court, and ignores how other political actors would understand the constitution.

Second, a major function of this game analytical framework is to demystify the "sacredness" of the so-called "legal meaning" of constitutional text. Many people believe that the key to the resolution of constitutional disputes is to discover the "legal meaning" or the "right answer" of the relevant constitutional text by using the proper rule of interpretation to interpret the relevant constitutional provision. However, a constitutional game framework shows that there is no such "one" proper rule of interpretation or "one" right answer. Different legal meanings may be arrived at after applying the same rule of interpretation and different rules of interpretation may arrive at the same legal meaning.

Third, the constitution remains to play a central role in a constitutional game as the rules of the game. The significance of law in constitutional politics is reemphasised. If the second reason is a response to the over-legalistic approach of the legal paradigm, then this is a response to the under-legalistic approach of the political paradigm. It avoids the problem of the political paradigm which sees everything only from the perspective of rational calculation, power struggle, or self interest. There is a fundamental difference between a constitutional game and a pure political game but this might have been overlooked by the political paradigm.

Fourth, the complexity in the interaction between the constitutional text and the political actors is exposed. They have a dialectical relationship. On the one hand, the constitution is the source of authority of the political actors and sets the legal boundaries for the political actors. On the other hand, political actors enjoy a certain degree of freedom to redefine the legal boundaries by making use of the inherent language indeterminacy of the constitutional text. The process of interpretation is not as rigid or mechanical as putting in the right coin and receiving the right product from a slot machine. However, it also does not mean that the constitutional text can be manipulated by a political actor to bear any meaning in the interpretation process. The first view arises from the legal paradigm and the second view arises from the political paradigm. The reality is that political actors interpret within the boundaries set by the constitution but they will make use of the room available in the constitution to achieve what they can achieve on the basis of their readings of their constitutional positions assigned by the constitution.

Fifth, the constitutional game analysis provides a framework broad enough to accommodate various strands of institutional influences upon political actors (legal and non-legal, formal and informal, symbolic and substantial, internal and external) together with their ideological values in accounting what cause political actors to adopt a particular interpretation of the constitution. The constitutional game accepts the important role that institutions play in influencing the decisions of political actors but it also does not need to adopt a form of institutional determinism excluding the autonomous and creative role individual political actors could play in the constitutional process.

Sixth, the notion of rationality in constitutional interpretation is uncovered which is often hidden in legal analysis. The interaction between the political actors and their strategic planning provide a lot of explanation on how they formulate their actual stances and behaviors in constitutional decision making. Though the explanation may still solely be focused on the external aspects of the institutional impact, this is already much more than what has been achieved in the past. Going deeper into the mind of the political actors may need the integration of another discipline, psychology, in the study of constitutional politics. Constitutional game analysis does not over-emphasize the role of rational choice as it is considered to be only one of the many factors that affect the actions of political actors though it may be a very important one. In addition, it does not limit itself to instrumental rationality and actions taken to fulfill duties or to serve symbolic functions can be accommodated in the strategic planning of the political actors.

Seventh, the interaction between political actors and the development of strategies in a constitutional game open an understanding of the dynamic aspect of constitutional interpretation and practices. This dynamic nature of the constitution process has long been discovered by the political paradigm but is just ignored by the legal paradigm. Legal scholars tend to only see the constitutional process, and in particular the interpretation process, as a static process. Their sole concern is whether the political actors, especially the judges, have found the right method of interpretation and arrived at the correct meaning. However, the political paradigm may also have a limitation in this aspect. It looks mainly at the outcome of the dynamic constitutional process but very often overlooks the detailed reasoning in the interpretation provided by the political actors. If we accept that the legal text is still a major force influencing the choices of the political actors, a fuller picture can be arrived at if legal scholars can introduce a dynamic view in their understanding of the interpretation of the constitution and this is how the constitutional game analysis can contribute to this discourse.

Eighth, even though the constitutional game analysis does not explicitly mention what substantive values political actors should read into the constitution, some substantive constitutional values are already embedded in the constitutional game analysis like rule of law, constitutionalism, separation of powers and autonomy. Also, this framework does not prevent researchers (legal or political) from recommending what substantial values should be embedded in the constitution and the framework may be broad enough to accommodate many substantive values. Constitutional game analysis only gives a warning to such normative projects to beware of any institutional constraint which may make any such prescription unworkable. Normative scholars could then refine their proposals to have a practical dimension (Note 121) as well as an evolutionary dimension. (Note 122)

One may still be dissatisfied that a study following this constitutional analytical will be too disorganized as it is not structured according to major court decisions or legal principles that one may find in typical legal analysis. For those who have an interest in legal history, they may also be frustrated that a constitutional game analysis will usually not follow a chronological order.

I admit that a constitutional game analysis will not be a typical legal analysis. Actually, if it looks too much like a typical legal analysis, my purpose in writing this article would have failed. Political scientists may also find that this analytical framework does not apply typical methodologies and skills in political science. However, as I am not trained in political science, one should not have such expectations.

The reality may be fragmented and we often apply our analytical framework to force out a coherent picture of the reality which may not be the "real". The constitutional game analytical framework may look fragmented because I am not using the traditional approaches under the legal and political paradigms of constitution but an integrated paradigm.

The reality that sees through this analytical framework must also be a distorted picture of the reality but it may still have its value if it can expose some phenomenon that other analytical frameworks have failed to reveal.

Therefore, if the constitutional game analytical framework can shed new light on traditional doctrines such that lawyers and political scientists can reexamine their doctrinal biases through the lens of the other, the objective of constitutional game analysis would have been achieved.

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Notes

- Note 1. Vick, Douglas W. (2004). Interdisciplinarity and the discipline of law. *Journal of Law and Society*, 31, 163, at 178.
- Note 2. Rubin, Edward L. (1997). 'Law And' and the methodology of law. *Wis. L. Rev.* 521, at 522 and Friedman, Barry. (2005). The politics of judicial review, *Texas Law Review*, 84, 257.

Note 3. The word “paradigm” has been very popular in academic study since Thomas Kuhn published his book, *The Structure of Science Revolutions* in 1962. Kuhn defined a paradigm as “an entire constellation of beliefs, values and techniques, and so on, shared by the members of a given community.” See Kuhn, Thomas. (1996). *The structure of science revolutions* (3rd ed.) (p. 175). Chicago and London: The University of Chicago Press. In legal study, the concept of paradigm has also been used. See Habermas, Jürgen. (1996) Paradigms of Law. *Cardozo Law Review*, 17, 771 in which Habermas has used paradigm to refer to the social ideal or social vision that guides making and applying law.

Note 4. I have not provided a very elaborate description of the different approaches as I assume that the readers of this article are mainly lawyers and they are familiar with these approaches of the legal paradigm. For the detailed description of the different approaches, see Bobbitt, Philip. (1991) *Constitutional interpretation* Oxford, UK & Cambridge, USA: Blackwell; Fallon Jr., Richard H. (1987) A constructive coherence theory of constitutional interpretation. *Harvard Law Review*, 100, 1189; and Post, Robert. (1990). Theories of constitutional interpretation, *Representation*, 30, 13-41.

Note 5. Bobbitt, Note 4, pp. 13-14. Bobbitt preferred to use the term, modality, which is defined as “the way in which [one] characterize a form of expression as true.”

Note 6. Ronald Dworkin put forward his controversial “one right answer thesis” in Dworkin, Ronald, (1977). No Right answer. In Hacker, P. M. S. and Raz, J. (Eds.), *Law, morality, and society: essays in honour of H. L. A. Hart*. Oxford: Clarendon Press. The thesis is much disputed. See Woosley, A.D. (1979). No right answer. *Philosophical Quarterly*, 29, 25, and Bix, Brian. (1993) *Law, language, and legal determinacy*. Oxford: Clarendon Press, (Chapter 4).

Note 7. Segal and Spaeth provided a comprehensive critique on the legal paradigm. See Segal, Jeffrey A. and Spaeth, Harold J. (2002). *The supreme court and the attitudinal model revisited* (Chapter 2). Cambridge University Press.

Note 8. Dahl, Robert A. (1957). Decision-making in a democracy: the supreme court as a national policy-maker,” *Journal of Public Law*, 6, 279 at 281.

Note 9. Sweet, Alec Stone. (2007). The politics of constitutional review in France and Europe. *International Journal of Constitutional Law*, 5, 69, at 72.

Note 10. The three central issues in politics are “the selection of society preferences, the enforcement of the choices that reveal them and the production of goals or outputs that embody the choices.” Different decisions concerning a constitution all involve these three central political issues. See Riker, William H. and Ordeshook, Peter C. (1973). *An introduction to positive political theory* (p. 2). Englewood Cliffs, New Jersey: Prentice-Hall, Inc. William Riker is the pioneer of the positive political theory which is one of the major approaches (the strategic approach) to study constitutions from a political perspective. See discussion below.

Note 11. Friedman, Note 2 (p. 258).

Note 12. For the different approaches of political science, see Marsh, David and Stoker, Gerry. (1995). *Theory and methods in political science* (Chapter 1-6). Basingstoke: Macmillan.

Note 13. Maveety, Nancy. (2003). The study of judicial behavior and the discipline of political science. In Maveety, Nancy (Ed.). *The pioneers of judicial behavior* (p. 5). Ann Arbor: The University of Michigan Press.

Note 14. These approaches are developed by political scientists in their study of judicial behaviour. Among all political actors in a constitutional system, judges are more likely to adopt a legal paradigm in understanding a constitution. If judges are also found to have been applying a political paradigm of constitution, the other political actors must also be using a political paradigm to understand a constitution though the political factors influencing their understanding would be very different from those of judges.

Note 15. See Part 3 and Part 4.

Note 16. If it is considered from a wider perspective of political science rather than just within the context of constitutional politics, this approach can be referred to as the behavioural approach.

Note 17. Segal and Spaeth, Note 7 (p. 86).

Note 18. Earlier works on the attitudinal approach include Pritchett, Herman. (1948). *The Roosevelt Court: a study in judicial votes and values 1937-1947*. New York: Macmillan and Schubert, Glendon. (1974). *The judicial mind revisited: psychometric analysis of supreme court ideology*. New York: Oxford University Press. The significant difference between the more recent work of the attitudinal approach and the earlier works is that later works have based their analysis more from the rational choice analysis borrowed from economics. See the discussion below.

Note 19. Note 7.

Note 20. Segal and Spaeth, Note 7 (p. 86).

Note 21. There are eight main claims for behavioralism: (1) There are discoverable regularities in politics which can lead to theories with predictive value. (2) Such theories must be testable in principle. (3) Political science should be concerned with observable behaviour which can be rigorously recorded. (4) Findings should be based on quantifiable data. (5) Research should be made systematic by being theory oriented and directed. (6) Political science should become more self-conscious and critical about its methodology. (7) Political science should aim at applied research that can provide solutions to immediate social problems. The truth or falsity of values is not its proper concern as it cannot be amenable to empirical investigation. (8) Political science should become more interdisciplinary and draw on the other social sciences. See Burnham, Peter, Gilland, Karin, Grant, Wyn, and Layton-Henry, Zig. (2004). *Research Methods in Politics* (p. 15). Basingstoke, England; New York: Palgrave Macmillan.

Note 22. Pritchett, Note 18 (pp. xii, xiii) cited in Segal and Spaeth, Note 7 (p. 87).

Note 23. Spaeth, Harold J. (1972). *An Introduction to Supreme Court Decision Making* (p. 65). San Francisco: Chandler.

Note 24. A different understanding of object and situation is provided in Segal and Spaeth, Note 7 (p. 91). Further elaboration of their understanding can be found in Spaeth, Harold J. (1995). The Attitudinal Model. In Lee Epstein (Ed.), *Contemplating Courts* (p. 307). Washington, D. C.: Congressional Quarterly Inc.

Note 25. Like the strategic approach, the attitudinal approach also incorporates rational choice analysis into its analytical framework. Attitudinalists do not believe the institutional and strategic context could impose too much constraint on political actors in making decisions concerning constitution. However, they agree that the pure form of the approach, i.e. political actors can decide according to their unconstrained preferences, is only applicable to supreme court judges in deciding issues on merits in constitutional adjudication. In those cases, they are insulated from institutional and strategic constraints because the judges have lifetime tenure, no ambition for higher office and control over the court's agenda. For other situations faced by supreme court judges and other political actors, attitudinalists' stance may not be too different from the strategic approach. See Segal, Jeffrey A. (1999). Supreme Court Deference to Congress: An Examination of the Markist Model. In Clayton, Cornell W. and Gillman, Howard (Eds.), *Supreme Court Decision-Making* (pp. 237-239). Chicago and London: The University of Chicago Press.

Note 26. Segal and Spaeth, Note 7 (p. 92-97). See further Rhode, David W. and Spaeth, Harold J. (1976). *Supreme Court Decision Making*. San Francisco: W. H. Freeman.

Note 27. Knight, Jack. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 5-6.

Note 28. Smith, Rogers M. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 8-9.

Note 29. Clayton, Cornell W. (1999). The Supreme Court and Political Jurisprudence: New and Old Institutionalisms. In Clayton, Cornell W. and Gillman, Howard. (Eds.) *Supreme Court Decision-Making* (pp. 28-29). Chicago and London: The University of Chicago Press. This is the major criticism from the institutional approach. See discussion below.

Note 30. Rubin, Note 2. Rubin believes that legal scholarship is characterized by its prescriptive and normative quality. Removing such discussion from constitutional study, the attitudinal approach would have no interest for lawyers.

Note 31. This is the major criticism from the strategic approach. See Maltzman, Forrest, Spriggs II, James F., and Wahbeck, Paul J. (1999). Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making. Clayton, Cornell W. and Gillman, Howard. (Eds.) *Supreme Court Decision-Making* (pp. 47-48). See discussion below.

Note 32. Lawrence, Susan. (1994). Symposium: The Supreme Court and the Attitudinal Model. *Law and Court*, 4, Spring Issue, 3.

Note 33. Clayton, Note 29 (p. 32).

Note 34. It is actually the most traditional approach in political science and has an intellectual history even earlier than the behaviorism behind the attitudinal approach which only prospered in the 1950s and 1960s.

Note 35. Some authors include the strategic approach within new institutionalism and refer to this new institutional approach as the historical institutional approach. See Clayton, Note 29 (p. 31) and Gilman, Howard. (1996). More or Less than Strategy: Some Advantages to Interpretative Institutionalism in the Analysis of Judicial Politics. *Law and Courts*, 7, Winter Issue, 6.

Note 36. Ibid. But see Burgess, Susan R. (1993). Beyond Instrumental Politics: The New Institutionalism, Legal Rhetoric, and Judicial Supremacy. *Polity*, 25, 446, at 450. Burgess believed the distinction between the old and new institutionalism is more than that: "At its most fundamental level, the new institutionalism posits an understanding of

man that moves beyond narrow self-interest, a conception of politics broader than mere decisional outcomes or aggregated preferences, and a conception of law and legal rhetoric that encompasses more than manipulation or mystification.” See also March, James G. and Olsen, Johan P. (1984). The New Institutionalism: Organizational Factors in Political Life. *The American Political Science Review*, 78, 734, at 738.

Note 37. Smith, Roger M. (1988). Political Jurisprudence, the New ‘Institutionalism,’ and the Future of Public Law. *American Political Science Review*, 82, 89, at 91. See the definition adopted by Smith which included “not only fairly concrete organizations, such as governmental agencies, but also cognitive structures, such as the patterns of rhetorical legitimation characteristic of certain traditions of political discourse or the sorts of associated values found in popular ‘belief systems.’”

Note 38. Ibid.

Note 39. Clayton, Note 29 (p. 33).

Note 40. The strategic approach also places more emphasis more on the individual political actor.

Note 41. Smith, Note 37 (p. 95). See also March and Olsen, Note 36 (p. 739).

Note 42. Smith, Note 37 (p. 95). See also March and Olsen, Note 36 (p. 739): “Without denying the importance of both the social context of politics and the motives of individual actors, the new institutionalism insists on a more autonomous role for political institutions. The state is not only affected by society but also affects it. Political democracy depends not only on economic and social conditions but also on the design of political institutions....they are also collections of standard operation procedures and structures that define and defend interests. They are political actors in their own rights.”

Note 43. March and Olsen, Note 36 (pp. 738-739). Coherence of a political institution means that it makes choices on the basis of some collective interest or intention, alternatives, and expectations. Political institutions may have varying degree of coherence but institutionalists believe that the collective interest is substantial enough to view an institution acts as a coherent collectivity.

Note 44. March and Olsen, Note 36 (pp. 739). The claim of autonomy means that processes internal to political institutions, although possibly triggered by external forces, affect how they make decisions.

Note 45. March and Olsen, Note 36 (pp. 739-741).

Note 46. This is the major difference between the institutional approach and the strategic approach.

Note 47. March and Olsen, Note 36 (pp. 741-742).

Note 48. Epstein, Lee and Knight, Jack. (1997). The New Institutionalism, Part II. *Law and Courts*, 7 Spring Issue, 4, at 7.

Note 49. Hall, Peter A. and Taylor, Rosemary C. R. (1996). Political Science and the Three New Institutionalism,. *Political Studies*, XLIV, 936, at 950.

Note 50. Clayton, Note 29 (p. 34).

Note 51. Immergut, Ellen M. (2006). Historical-Institutionalism in Political Science and the Problem of Change. In Wimmer, Andreas and Kössler, Reinhart (Eds.), *Understanding Change: Models, Methodologies, and Metaphors* (p. 254). New York: Palgrave Macmillan.

Note 52. The earliest work on the strategic approach may be Murphy, Walter. (1964). *Elements of Judicial Strategy*. Chicago: University of Chicago Press. For the development of the strategic approach, see Epstein, Lee and Knight, Jack. (2000). Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead. *Political Research Quarterly*, 53, 625-661.

Note 53. Some attitudinalists do accept that political actors may take into consideration the preferences of other actors but just believe that they are not substantial enough to cause the political actors to compromise their ideological values. See Clayton, Note 29.

Note 54. Epstein and Knight, Note 48 (p. 4). This is drawn from the rational choice theory. For rational choice theory in general, see Elster, Jon. (1986). *Rational Choice*. New York: University Press.

Note 55. The strategic approach includes intra-institutional (i.e. between different political actors or organs of the same institution like the interaction between different judges in the same court and between the supreme court and the court of appeal) and inter-institutional constraints as the external constraints while the institutional approach sees the constraints as originating internally from the institution as an entity in itself.

Note 56. Maltzman, Spriggs II and Wahlbeck, Note 31 (p. 47).

Note 57. See Eskridge, William N. Jr. (1991). Reneging on History? Playing the Court/Congress/President Civil rights Game. *California Law Review*, 79, 613 (United States); Knight, Jack and Epstein, Lee. (1996). On the Struggle for Judicial Supremacy,” *Law and Society Review*, 30, 87 (United States); Vanberg, Georg. (2001). Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review. *American Journal of Political Science*, 45, 346-361 (Germany); Epstein, Lee, Knight, Jack, and Shevetsova, Olga. (2001). The Role of Constitutional Courts in Establishment and Maintenance of Democratic Systems of Government. *Law and Society Review*, 35, 117-163 (Russia); Ginsburg, Tom. (2003). *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Chapter 3). Cambridge: Cambridge University Press (Asian Countries). For other methods of the strategic approach, see Epstein and Knight, Note 48 (pp. 641-651).

Note 58. Most studies in this field involve a constitutional court with certain degree of constitutional review power.

Note 59. Gillman, Howard. (1996). More or Less Than Strategy: Some Advantages to Interpretive Institutionalism in the Analysis of Judicial Politics. *Law and Courts*, 7 Winter Issue, 6, at 9.

Note 60. Gillman, Howard. (1997). Placing Judicial Motives in Context: A Response to Lee Epstein and Jack Knight. *Law and Courts*, 8 Spring Issue, 10, at 11.

Note 61. Ibid.

Note 62. Jonathan Sacks calls this presupposition ‘Plato’s Ghost’. See Sacks, Jonathan. (2002). *The Dignity of Difference: How to Avoid the Clash of Civilizations* (Chapter 3: The Dignity of Difference: Exorcizing Plato’s Ghost). London, New York: Continuum.

Note 63. Ludwig von Bertalanffy is generally regarded as the pioneer of the general system theory. See Bertalanffy, Ludwig von. (1950). An Outline of General System Theory. *British Journal for the Philosophy of Science*, 1, 134-165.

Note 64. Bertalanffy, Ludwig von. (1968) *General System theory: Foundations, Development, Applications* (p. 3). New York: George Braziller.

Note 65. Bertalanffy, Note 63 (p. 143).

Note 66. This is a dictionary definition adopted by Lopucki, Lynn M. (1996). The Systems Approach to Law. *Cornell Law Review*, 82, 479, at 482.

Note 67. See Laszlo, Ervin. (1996). *The Systems View of the World: A Holistic Vision for Our Time* (pp. 10-12). New Jersey: Hampton Press, Inc.

Note 68. These are the political actors.

Note 69. The constitutional norms incorporated in the constitutional text setting the goals or ideals of the constitution.

Note 70. These are the choices of the political actors made under the constitutions.

Note 71. Cilliers, Paul. (1998). *Complexity and Postmodernism: Understanding Complex Systems* (pp. 3-5). London: Routledge.

Note 72. Hommes applying the theory of Herman Dooyeweerd identifies the following dimensions (aspects) in any matter in the world: numerical, spatial, kinematic, physical, biological, sensory, logical-analytical, cultural-historical, symbolic or linguistic, social, economic, aesthetic, legal (juridical), ethical and fiduciary. See Hommes, Hendrik Jan van Eikema. (1979). *Major Trends in the History of Legal Philosophy* (Chapter 15). Amsterdam, New York, Oxford: North-Holland Publishing Company, and Dooyeweerd, Herman. (1953). *A New Critique of Theoretical Thought, Vol. I: The Necessary Presuppositions of Philosophy* (Prolegomena and pp. 22-165). Amsterdam: H. J. Paris; Philadelphia: Presbyterian and Reformed Pub. Co.

Note 73. They might ignore certain periods of the constitutional process since the element of the constitution which is the orientation of their research might not be too active during those periods. As a result, those periods would not be interesting enough for them to conduct in-depth analysis.

Note 74. The concept of incommensurability was first raised by Thomas Kuhn, the historian on science, claiming that different paradigms are incommensurable. See Kuhn, Note 2, p.148. Derek L. Philip provides a critique of the incommensurability of paradigms and concludes that different paradigms need not be incommensurable on the condition that the paradigms are not postulated as totally closed systems. See Philip, Derek L. (1975). Paradigms and Incommensurability. *Theory and Society*, 2, 37, at 60. Kuhn later modified his position on incommensurability in “Commensurability, Comparability, and Communicability,” *Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Vol. 1982, Volume Two, pp. 669-688.

Note 75. If the conflicts between the approaches or paradigms involve some fundamental values that are incommensurable other than on the philosophical methods, the approaches and paradigms might be more difficult to be incorporated into one analytical framework. For the concept of incommensurable values, see Alder, John. (2001).

Incommensurable Values and Judicial review: The Case of Local Government. *Public Law*, pp. 711-735 and Raz, Joseph. (1986). *The Morality of Freedom* (Chapter 13: Incommensurability). Oxford: Clarendon Press. However, even if the approaches and paradigms are developed on the basis of some incommensurable values, this does not mean that there is no possibility that these could not be compatible with each other at least in the sense that people with incommensurable values could still live peacefully within the same community and cooperate to build the community together.

Note 76. See Bobbit, Note 4 (Chapter 5: Justifying and Deciding) and Griffin, Stephen M. (1994) . Pluralism in Constitutional Interpretation. *Texas Law Review*, 72, 1753, at 1767.

Note 77. Griffin, Note 76.

Note 78. Segal, Jeffrey A. and Spaeth, Harold J. (1993). *The Supreme Court and the Attitudinal Model* (Chapter 2). Cambridge University Press.

Note 79. Segal and Spaeth, Note 7 (Chapter 3).

Note 80. Segal, Note 25 (p. 239).

Note 81. Knight, Jack. (1997). The Supreme Court and the Attitudinal Model. *Law and Courts*, 7 Spring Issue, 5 and Smith, Rogers M. (1997). "The Supreme Court and the Attitudinal Model. *Law and Courts*, 7 Spring Issue, 8.

Note 82. Gillman, Note 59 (p. 10).

Note 83. Skocpol, Theda. (1995) Why I am an Historical Institutional. *Polity*, 28 103, at 106.

Note 84. Fiorinal, Morris. (1995). Rational Choice and the New (?) Institutionalism. *Polity*, 28, 109, at 110.

Note 85. Rogers M. Smith, "Ideas, Institutions, and Strategic Choices" (1995) 28 *Polity* pp.135-140.

Note 86. Gillman, Note 59 (p. 10).

Note 87. Friedman, Note 2 (p. 333).

Note 88. Friedman, Note 2 (p. 262).

Note 89. Friedman, Note 2 (p. 337).

Note 90. Friedman, Note 2 (p. 336). See also Fallon, Richard H. Jr. (2001). *Implementing the Constitution*. Cambridge, Massachusetts, and London, England: Harvard University Press.

Note 91. Friedman, Note 2 (pp. 331-337).

Note 92. See Ferejohn, John A. and Weingast, Barry R. (1992). A Positive Theory of Statutory Interpretation. *International Review of Law and Economics*, 22, 263-279.

Note 93. Friedman, Barry. (2006) Taking Law Seriously. *Perspectives on Politics*, 4, 261-276.

Note 94. Harris, Pickens E. (1937). Philosophic Aspects of Integration. In Hopkins, L. Thomas (Ed.), *Integration: Its Meaning and Application* (p. 50). New York, London: D. Appleton-Century Company.

Note 95. Nissani, Moti. (1995). Fruits, Salad, and Smoothies: A working definition of Interdisciplinarity. *Journal of Educational Thought* , 29, 121, at 125.

Note 96. For the four methods used in integration or interdisciplinary study, see Klein, Julie Thompson. (1990). *Interdisciplinarity: History, Theory, and Practice* (pp. 64-65). Detroit: Wayne State University Press.

Note 97. Moran, Joe. (2002). *Interdisciplinarity* (p. 182). London and New York: Routledge.

Note 98. Ibid.

Note 99. Nissani, Moti. (1997). Ten Cheers for Interdisciplinarity: The Case for Interdisciplinary Knowledge and Research. *The Social Science Journal*, 34, 201, at 210.

Note 100. From the title, one can already see the influence of the strategic approach of the political paradigm. See Note 57.

Note 101. The strategic approach is very much close to the game theory which is a branch of applied mathematics studying strategic interaction of individuals. These studies start off as scientific projects aiming at giving explanation to structures and rules for how individuals' decisions and acts are interrelated or predicting what strategic options are available to an individual in a specific situation of strategic interaction. Based on certain assumptions on rationality of individual choices, these game theoretical models or applications of these models specify the relevant parameters that will be manipulated by the players in the game and adopt deductive analysis to gain an understanding of specific aspects of different social phenomena. However, for this study, I will only follow the game theory to the extent of constructing a game framework where different players in the constitutional process interact with the other players strategically. I

will not follow the path of developing game theoretical models or applying a game theoretical model to predict the choices of players in a particular circumstance as in most studies using game theory.

Note 102. For definitions of game, see Crawford, Chris. (1984). *The Art of Computer Game Design* (Chapter 1: What is a Game). Berkeley, Calif.: Osborne/McGraw-Hill; Avedon, E.M. (1971). "The Structural Elements of Games. In Elliott M. Avedon and Brian Sutton-Smith (Eds.), *The Study of Games*. New York: John Wiley & Sons, Inc.; Langdon, Kevin. (1979) What is a Game? [Online] Available: <http://www.polymath-systems.com/games/whatgame.html> (12 December 2009); and Kramer, Wolfgang. (2000). What is a game, really? [Online] Available: <http://www.thegamesjournal.com/articles/WhatIsaGame.shtml> (12 December 2009).

Note 103. For an example of how different constitutional institutions interact in a constitutional game, see Segal, Jeffrey. (1997). Separation-of-Powers Games in the Positive Theory of Congress and Courts. *American Political Science Review*, 91, 28-44.

Note 104. The prominent role to be played by institutions in a constitutional game is borrowed from the institutionalists of the political paradigm.

Note 105. See Note 57. See also Ferejohn, John and Shipan, Charles. (1990). Congressional Influence on Bureaucracy. *Journal of Law, Economics, and Organization*, 6, 1-20; Macey, Jonathan R. (1991). Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies. *Geo. L. J.*, 80, 671-703; and McCubbins, Mathew D. and Schwartz, Thomas. (1984). Congressional Oversight Overlooked: Police versus Fire Alarms. *American Journal of Political Science*, 28, 165-179.

Note 106. In this understanding, there is no condition on how the constitution was made. When the constitution is respected by all players so that it has a binding effect upon their acts, a political game becomes a constitutional game. However, as will be illustrated by Hong Kong's constitutional game, a player in a game may set the rules of the constitution in such a way that it is vested with almost all powers under the constitution. This kind of constitutional game will be played quite differently from games where no player in the game has such overwhelming powers. It will be very easy for this kind of game to relapse back to a pure political game where win or lose is decided only by crude power. In other words, the rule of law and constitutionalism are conditions for a constitutional game.

Note 107. This is also the presumption of the legal paradigm and its relevance in constitutional analysis is therefore clearly demonstrated.

Note 108. This idea of making a constitutional decision as if it is a player who plays to win in a game clearly originates from the strategic approach of the political paradigm.

Note 109. Winning a game is closely related to how a game ends. As the winning goals of players in a constitutional game may not be the same, there may be more than one winner in a constitutional game and a constitutional game may not end when a player wins. Please see the discussion below on the end of the game.

Note 110. It is not difficult to see the influence of the institutionalists of the political paradigm in this relationship between a constitution, institutions established by the constitution, roles of the players, constitutional positions of the players and the winning goals of the players.

Note 111. The influence of the attitudinalists and the institutionalists can be felt here.

Note 112. The significance of the constitution as a set of rules setting out what game actions are allowed originates from the legal paradigm.

Note 113. See further discussion below on game fields, interaction and strategy in a constitutional game. The emphasis of using legal platforms as the game fields is also under the influence from the legal paradigm.

Note 114. The emphasis of using legal platforms as the game fields is also under the influence from the legal paradigm.

Note 115. Fallon, Richard. (2005). Legitimacy and the Constitution. *Harvard Law Review*, 118, 1789-1853.

Note 116. Held, David. (1987). *Models of Democracy* (p. 238). Cambridge: Polity Press.

Note 117. Fallon, Note 115 (p. 1796).

Note 118. These situations may not be common in a constitutional game or in the day-to-day operation of a constitutional system, but we cannot deny that they often arise when there is constitutional controversy or dispute and often may have a long-lasting impact on the development of the constitutional system.

Note 119. The political paradigm has a very important contribution to this part of the analysis.

Note 120. For the importance of information in constitutional politics, see Vanberg, Georg, Note 57 and Rogers, James R. (2001). Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction. *American Journal of Political Science*, 45, 84-99.

Note 121. Normative scholars can provide practical advice on how to overcome the institutional obstacles to the successful application of their proposals.

Note 122. With the understanding of the institutional constraints, normative scholars can provide an evolutionary plan for their proposals and the implementation of their proposals can be divided into stages with each stage having more limited goals. Each stage can aim to transform the institutional contexts only to an extent just to prepare for a later stage of development to enter.



A Study on the Strategic Changes in Australian Lobbying Industry Since the 1970's

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Abstract

Despite the criticisms of lobbyists as a parasitical growth on the business of government, exploiting public ignorance or reticence about the best ways to make approaches and put particular cases to political agenda, with the changes in policy advocacy environment, lobbyists have now gained wide acceptance in Australia as a legitimate and necessary channel of communication between the executive government and the community. While organized special interests are not new in Australian politics, the last decades of the 20th century has witnessed dramatic changes in the lobbying industry in several important aspects, including the emergence of single-issue groups, the shift to research-based lobbying and the changes in lobbying strategies. This paper argues that the most extraordinary change in Australian lobbying industry seems to be that lobbying has moved from the corridors and backrooms of the Parliament to become a 'public affair'.

Keywords: Lobbying, Interest group, Pluralistic society, Agenda setting, Outsider strategies, Public relations campaigns

Introduction

Once public protest and activity intended to attract media coverage was thought to be an indirect and difficult to control strategy best suited to resource-poor outsider groups with no direct access to decision-makers. Now it seems that insider groups have increasingly resorted to these outsider methods to gain influence on media reporting, public opinion and political decisions. No single event can fully explain this strategic change in lobbying industry, but the rise of new social movements, the rapid development of new technologies, and the resultant expansion of government responsibilities into new domains or previously unregulated areas are undoubtedly three of the most prominent contributing factors. The pluralization and fragmentation of social life and individual interest in particular has made the political arena "more turbulent, less predictable, less structured and more difficult to control" (Blumler and Kavanagh 1999: 211) and hence provided an incentive for more special interest groups to engage in political lobbying to make strategic gains by influencing the regulation context in which they operate.

Pluralization of Australian Society and the Emergence of 'Single Issue' Groups

The origin of political lobbying practice in Australia can be traced back to the early 19th century when "the emergence of powerful pastoral and mercantile interests established the basis for organized pressure group activities" (Lloyd 1991: 6), but the proliferation of lobbying groups, undoubtedly occurred only by the late 1970s when "societies has become more individualistic and people are more conscious of their individual rights"(Keating 2004: 7) with the rise of new social movements. From the 1960s onwards, "[t]here are at least nine major movements: environment, ethnic, consumer, Aborigines, women, gay, peace/third world, animal rights and the New Right or neo-liberal movement, all representing a concern at some level of generality below, or different from, that of socio-economic class" (Marsh 2001: 162). These profound changes in social life not only offered people new forms of political identity but also gave rise to a great many new issues on the public agenda and accelerated the resultant formation of groups with varying size, budgets, political skills, organizational sophistication and campaigning capacities. These groups tend "to coalesce around a single issue" and often "look to a fundamental change, usually with a cultural dimension" (Lovell 1998: 354), making Australia a more pluralistic society than ever before.

The most prominent change in lobbying industry brought about by these movements is the tactics pioneered by environmentalists, feminists, gay and other activists who moved their advocacy campaigns onto the public arena. Although much of the lobbying of the new movements involved old-fashioned administrative lobbying (Warhurst 2007: 18), the range of strategies and tactics was broadened, with increasing use of grassroots lobbying and public relations campaigns (Thomas 2005: 288). Outsider strategies such as boycotts, hunger strikes, and mass marches, combined with the increasing use of modern communication technology including mass media and the Internet, are widely adopted by established interest groups who are well resourced and have ready access to policy makers. However, as is suggested by

Kollman (1998), these strategies are adopted not for the traditional purpose of generating new members or creating the impression of popular support but because these groups understand that with the grassroots support they already have, raising issues of concern in the public arena would be a more effective strategy to push the issues onto the increasingly crowded public agenda, dramatizing long-ignored grievances, generating media attention, and getting the general public thinking about things they had not thought about before.

Expansion of Government Responsibility and Research Based Lobbying

Another important factor that has contributed to the increasing competition and policy complexity of the lobbying arena is “the historical expansion of the state’s role in economy and society” (Bell 1994: 145) since the late 1970s. Despite the prevailing influence of neoliberal agenda on public policy and institutional reform across all levels of government and the commitment of neoliberal thought to smaller government, lower social spending, lower and flatter taxes, Australian federal government has maintained its influence on economic activities and become deeply involved in most aspects of life, shaping the direction and interests of outsourced businesses through regulation, assuming new responsibilities for administering biological and information technologies, moving into previously unregulated policy areas such as environmental and consumer protection or even progressively intrude into such state governments policy domains as health, education and industrial relations.

As a result, by the late 20th century, businesses ‘are drowning in a sea of acts of parliament, delegated legislation, forms, non-essential procedures, licenses, cumbersome judicial interpretations, rules, regulations and administrative policy’ (Ronaldson 2005: 2). With large amounts of information literally thrown at them by those clamoring for policy change or defending the status quo, policymakers feel a greater need for more professional knowledge and expertise to appropriately fulfill their legislative responsibilities than ever before and tend to focus on ‘connecting solutions to problem’ instead of debating whether the problems themselves deserve a response (Baumgartner and Jones 1993: 150-71). However, densely packed policy agenda, the diverse, fragmented and complex interests of the population, combined with increased public expectations for services has made policy making such a sophisticated knowledge-intensive process that the bureaucrats find themselves no longer enjoy the monopoly of specialized expertise over public policy or being capable of managing policy issues with their own skills, knowledge and expertise.

On the other hand, this proliferation of legislatures has resulted in a great expansion in the scope of lobbyists’ work and dramatic changes in the way they seek to wield influence on policy outcomes. One of the challenges in the 1980s for Australian business interests was to lift their intellectual resources and capacities to a point where they could successfully challenge the bureaucracy and, indeed, other interest groups, many of which saw the need to win arguments based on solid research intellectual rigor (Bell 1994: 146). The key point for policy advocates to retain the ear of government and to win influence is to provide not only useful information in a timely fashion but also coherent, carefully worked out policy solutions based on solid research and expertise to assist in the development of public policies. The resultant formation of the new breed specialized consulting firms with strong capacities for research, government and public relations and lobbying ‘in-house’ or ‘for hire’ consultancies alike, has well demonstrated the new trend of policy advocacy since the 1970s. This is a strategic move of lobbying from the traditional ‘old boy’ network to a highly specialized research-based arena, though many resource-poor ‘outsiders’ – community activists, street protestors and radicals – remain largely dependent on the mobilization and demonstration of public support to put pressure on politicians.

Agenda Setting and Allocation of Policy Attention

However, given the unprecedentedly crowded public agenda, the solid base of research and expertise of an argument does not necessarily guarantee its entrance into the decision making process. Policymakers are constantly bombarded with information of varying uncertainty and bias, not on a single matter, but on a multitude of potential policy topics (Jones and Baumgartner 2005: viii). What issues or dimensions of issues could successfully get on the table and become the focus of attention is in most cases characterized by uncertainty and unpredictability and will to some extent based on the group’s understanding of policy agenda setting process and their capacity “to spot and seize opportunities to transform their policy ideas into public sector practice” (Mintrom 1997: 740). However, according to Pedersen and Wilkerson (2006:1041), explanations proposed by agenda-setting studies for why decision-makers focus disproportionate attention on some issues while ignoring others are wide-ranging: some are structural, emphasizing how institutions are organized to advantage some alternatives or issues over others; some are cognitive, emphasizing how individuals or even institutions process information in ways that limit what will be addressed at any given time; others emphasize the role of external events or publics, and how they can combine with political incentives to quickly shift attention in a new direction.

Undoubtedly, this complexity and uncertainty in agenda setting process make it essential for lobby groups to recognize how in specific policy context information gets interpreted through the policy process and understand that decision makers, like all people, often ignore important changes until they become severe or until policy entrepreneurs with an interest in the matter highlight such changes (Jones and Baumgartner 2005: 7). One of the compelling reasons for even

'insider' advocacy organizations to re-evaluate and appreciate grassroots campaigns as the theory and practice of effective strategic political communication is the realization that there are different venues, arenas, or sites that could be used to launch new policy ideas and 'highlight' their policy preferences within national policy systems and beyond. However, with interest groups, policy entrepreneurs, think tanks, political leaders, and mobilized citizens all attempting to bring different policy frames to the table, uncertainty abounds in policy process which often bears a closer resemblance to a 'garbage can' model (Cohen et al. 1972). What can be 'shook up' to the surface and been picked up by decision makers to a large extent depend on the group's strategies to make the issue politically attractive to vote-seeking politicians. It is understandable that instead of waiting patiently with well-researched proposals ready for a 'policy window' to open, a more effective way for interest groups to gain competitive advantage over other equally well-prepared policy initiatives is to actively interpret the extent and nature of environmental changes and experiment with different techniques from the public relations tool box, ranging from taking the issue to different governments or the court, to bringing the issue to the public for news coverage, public support and ultimately political attentions.

Publicity Campaigns Conducted via Media

Advances in mass communication and global technology have expanded the impact of media on the social system, increasing access to a wider range of information and decreasing the lag time between action and opinion formation (Schoenbach and Becker 1995). With their ability to rapidly and extensively transmit information across national boundaries, mass media have undoubtedly exerted substantial influence on individual's perception of world issues and the nature of their social environment especially when the information content of the media is outside the experience of individuals and others in their social network. The amount of information in modern society is so huge that people need to orient themselves in a complex world full of complex issues (Mutz 1998: 11). The charm of mass media, TV in particular in the case of Australia, is that with the expertise of a reliable source of information, they could actually shape people's preferences and orient them to the perception of which issues are important and which problems they want their government to do something about. There is plenty of evidence that people can be taught to appreciate serious news (McCombs and Reynolds 2002: 440).

During the last several decades of the twentieth century, being fully aware of the power of mass media, lobbying groups have made another change and shifted a considerable amount of their focus away from the direct contact with politicians to the mobilization of public support with the help of modern technology – the mass media and the Internet, which have made it a lot easier to organize and much cheaper to send political messages across the country overnight. To effectively push a policy issue onto the media agenda, apart from the challenge of understanding the ways in which journalists and newsrooms operate, the framing of the policy issues will in all likelihood hold the key to favorable media coverage and most importantly the attention of policy makers. As is argues by Edelman, professionals and organizations can gain power by defining the issue in such a way as to make it a serious threat to the public interest and at the same time claiming their expertise in fighting this danger. Those able 'to control definitions' of social problems have a power to 'make serious social problems seem trivial, and trivial problems seem serious' and ultimately 'benefit politically' (1988: 36). This position is so attractive that numerous interest groups are competing fiercely for gaining recognition for their particular social problem, including their particular definition of it, and having this issue placed high on the media agenda (Fog 2004: 27), with some even manufacturing artificial grassroots campaign known as 'Astroturf' to marshal support and media coverage.

It is not surprising that the media, when being attracted by the potential profit, would be more than willing to cooperate with such an interest group and run a highly emotional and attention-catching campaign about a particular social problem (Fog 2004: 27). But the risk is that once the issue debate is pushed onto the media agenda, no lobbying group could guarantee that its perception of the social issue and related policy discourse be transmitted in totality to the public. Media alteration in the message structure and rhetoric and distortions of the theme of a lobbying issue spin are very likely to occur owing to the profit seeking nature of media coverage and its need for novelty and sensation. Nevertheless, as is noted by Craig, "pressure groups will rely on the media to different degrees, depending on their institutional links, but the declining authority of institutions and the parliamentary domain has meant that the media have become increasingly the site of political struggle." (2004: 138) The ultimate goal of putting issues on this unstructured and somewhat amorphous media agenda is to effectively mobilize key groups of constituents to influence or even "force the authorities to place the issue high on the political agenda and to implement quite drastic measures against the risk that they originally tried to downplay" (Fog 2004: 22). No politician wanting re-election could afford to ignore a sensationalist media campaign with the support of key constituents. They need to do something or to be seen doing something to satisfy the public opinion even in the rare cases when they could resist the emotional appeal and have already learned the hard facts behind the stories.

Conclusion

As is discussed above, lobbying in Australia, with the expansion in its size, range of activities and lobbying strategies and tactics, has now evolved into a highly professional activity carried out by a variety of political actors with

specialized knowledge and expertise. These changes are mostly a direct response to the rapid social, political and scientific development and the resultant policy changes especially in the last decades of the 20th century. Society has become more complex and pluralized and the same is true with the lobbying industry. When adapting themselves to the changed advocacy environment, interest groups have learned to exploit the opportunities presented by a policy process which is increasingly characterized by multiple opportunity structures (Richardson 2000:1006) but on the other hand 'by creating structures to control or adapt to uncertainty ... have contributed to the development of a more complex and rapidly changing policy environment' (Heinz et al. 1993: 371).

It is no longer appropriate to think of the lobbying of government as merely 'insider' activities conducted by former public servants and politicians relying on their 'old boy' connections, or simply the mobilization of grassroots campaigns to press for favorable policy change from outside. As is pointed out by Bell, interest groups no longer operate as 'one-way lobbying conduits' making demands upon government (1994: 146). What really counts for their influence is the specialized knowledge and resources that political authorities could draw upon to appropriately fulfill their policy responsibilities. Whatever changes occur, lobbying will always be a necessary part of the democratic representative political process, providing expert input into the policy making process and at the same time pressing for favorable policy outcomes with constantly modified strategies and tactics.

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A Study on Characteristics of China's Government Reform in Different Stages since the Reform and Opening-Up and Its Prospects

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Abstract

Government reform is not only the current and important issues of public concern, but also a common task that most countries must face. Based on the study of objectives, contents and characteristics of government reform in various stages in China since the reform and opening-up, this article focuses on the analysis of the essentials, characteristics and implications of government reform. The mid- to long-term development trend of government reform in the future is put forward accordingly.

Keywords: Government reform, Characteristics in different stages, Prospects

The government reform is always an important part of China's political system reform. In "Government Work Report" made by Premier Wen Jiabao in the Eleventh National People's Congress, it states clearly that: "...to speed up the administrative system reform and enhance the Government's own construction." Government reform has attracted considerable public concern. In fact, with the socialist market system improved constantly since the reform and opening-up, China's current government reforms have gone through several stages, showing different characteristics in different historical periods. This is of great value in our grasping and understanding of the basic trends of China's government reform and in promoting its reforms and developments in the future.

1. The process and characteristics of China's government reform in different stages

In the early 1980s, Deng Xiaoping, the chief designer of China's reform, made the famous statement: "Institutional reform is revolution". During the past thirty years, we have fully changed the development model from the socialist planned economy to the market economy. Centering on how to set up a suitable government system to the development of China's socialist market system, China has carried out five government reforms. The background and theme of each previous reforms of government's institutions varies. Their results are also difficult to be generalized, since they should be placed in a specific historical background and historical conditions to be examined. However, on the whole, the previous government reforms have achieved remarkable success and also taught us valuable lessons. Summarizing and evaluating the lessons of previous reforms rationally is very necessary for the new round of government reforms which just started. Evaluating the gains and losses of the past reforms accurately is beneficial to government reforms to continue to advance along the existing basis, and to promoting the current new round of reform to achieve new breakthroughs.

Insert Table 1 Here.

Looking back to the previous government reforms in China since the reform and opening-up, we can see the good combination of theoretical innovation and practical exploration, favorable experiences and useful models of government reform: First, the institutional reform: gradually changing from government functions under the planned economic system, canceling special economic management departments and strengthening relevant government agencies in charge of macro management, market supervision and public service; Second, the department establishment: great legal process. From the central to local government levels, departments have implemented the "three fixed" scheme, which is fixed functions, statutory body, setting a quota. In promoting the process of the legal system of the government departments, staff establishing has been significantly streamlined. Institutional reforms in 1998 witnesses the greatest reducing of personnel, about one half of the State Council members by reassigning personnel. These five reforms help reducing financial burden at all levels and improving the work efficiency of government; Third, in the construction of civil servants, in accordance with the requirements of building a high-quality and professional national civil service, we deepen the reform of personnel system, introduce the competitive mechanism, and improve the civil service system. gradually The country have introduced the "*Regulations on Selecting and Appointing Leading Party and Government Cadres*", as well as rules and methods on national civil service evaluation, rewards, serving evasion and avoidance of official business, job rotation, publicity before their appointment." Since January 1, 2006, *Civil Servant Law of the People's Republic of China* "has been taken into effect. The introduction of these regulatory measures has effectively promoted the civil service system with Chinese characteristics to become more mature.

On the whole, along with the establishment and perfection of the socialist market economic system, China's political restructuring get its characteristics gradually, and the past several government reforms also have certain transitional and intermittent characteristics, but each time the reform achievements are difficult to be consolidated lastingly and they can't fundamentally get rid of the circulation of "simplification - - inflation - - re-simplification again - - re-inflation". At present, many divergences and problems remain in the government reform with some deep-level problems becoming more acute and obvious. Firstly, the transformation of government functions is still not thorough. The coordination of internal relations among different government organization and the reasonability of the organizational structure exert crucial impact on the realization of the government function. After previous reforms, the government function of overall allocation can still hardly meet the requirements of the evolving socialist market economy and the public finance system has not been fully established. . Moreover, the government also undertakes a large number of matters which should not be in its charge, not be able to manage or manage well. Secondly, the establishment of government institution is always arbitrary. In the process of government reform, institutions always change whenever the leadership changes, or whenever the leaders change their views; The administrative action of agency management is actually arbitrary, for the local governments at all levels often create empty jobs, set up empty situations and adjusting institutional establishment arbitrarily; Thirdly, pursuit of the interests of government departments and units for their own set back substantive progress of government's reform. The huge potential of public power makes the government put their public benefits first as their target, such as getting a promotion and gaining greater right. Fourth, government functions in decision-making and implementation are not divided, the policy-making and consultation system is not perfect, and the administrative law enforcement system is imperfect. At present, our country's administrative law-enforcing departments are numerous, but of disperse, chaotic and unreasonable management, which cause unhealthy power-benefit and benefit-law relations.

2. Super-Ministry System: The current government reform's innovative exploration

With the deepening of market economy system reform, the government function and the organization establishment require subsequent change. The long-awaited Super-Ministry System reform program of the State Council has been approved and implemented by the First Session of the Tenth National People's Congress this year. Based on transformation of government function and clarification of duties of various government departments, it begins a new round of reform of exploring organic and unified Super-Ministry system of all functions through rationalizing distributing functions of macro-control department in order to improve people's living standard as a key point, and conformity social management and the public services department.

The Super-Ministry System, referring to the government at all levels enlarging horizontal coverage on organization establishment, integrating departments of close or related functions into a super ministry as far as possible. Ministry management is mainly on macro aspects, formulating strategies and providing policy. The preposition of Super-Ministry System has distinctive features of its age. The past several government reforms, although emphasizing the transformation of government function, in reality, put emphasis on simplifying structure and improving administrative efficiency. However, the main goal of this organization reform is transform the government model from economic construction-type and administrative control -type to service-type and public administrative government under established social market system

On a international scale, the appearance of the Super-Ministry System does not only meet the requirement of economic and social development of government management, but also is very necessary for efficient government work. As for the advantages of the super-ministry system, the White Paper "*Reorganization of the Central Government*" which is published by the Heath government in October, 1970, had explained it in detail. Looking from England and France's practice, the biggest advantage of the Super-Ministry System are as follows: related business is submitted to one ministry and gains effective coordination; centralized governance help reduce dispute among separate departments and problems can be easily solved; business staff could be reduced and human resources disposed to front-line business.

In our country, carrying out the Super-Ministry System has many obvious advantages. First, it is beneficial to solve various problems existing in our country's government institution setting. At present, because of our country's government institutions are too complicated, management objects and the administration are overlapped. In addition, organizational overlapping, function overlapping and coordination difficulties are also very popular, and all these problems become the difficulties and focal point of government function transformation and institution reform in China. The implement of the Super-Ministry System serves as a new breakthrough to optimize government institution establishment and function deployment in our country.

Second, it is beneficial to break department barrier and department monopoly and to centralizing and integrating all kinds of resources. According to the Parkinson's law, there exists self expanding trend in administrative function department and employee number and this malady is very common. Carrying out the Super-Ministry System is helpful to people, poverty, resources flowing in a larger department rather than bad competition among previous departments, and it keeps different sectors from taking the internal resources as in a cage.

Third, it is beneficial to strengthen macro-management to cope with realistic social problems. The problem of ecological environment, differentiation of wealth, social emergency crisis and so on need to be solved from a global aspect and with strategic thinking. Implement of the Super-Ministry System is benefit to different government departments making comprehensive decision and getting rid of executive, technical, and service affairs. At the same time, because of the Super-Ministry System narrows down management range of the government, thus government has much more time and energy to decision-making, improving government's integration ability of macro-control.

Fourth, it is beneficial to developing socialist market economy. At present, our government department seems too huge when compared with western developed countries. Implementing the Super-Ministry System, as an organic integration and reconstruction of the original several departments, could avoid many original disadvantages. It is favorable to consolidating the government's status as micro economic subject under market economy, and to government function changes further. Therefore, implementing the Super-Ministry System helps to continuously overcome a variety of disadvantages of the current system, and create good system atmosphere and environment for the economic and social development of our country.

But on the other hand, the Super-Ministry System reform may create new problems while helping solve many problems. One is that the reform pressure may be gathered to the administrative department officer. The Super-Ministry System reform involves benefits of many department and personal benefits. Reform needs to cut and merge some departments from the original ones, especially the benefit departments. This will absolutely influence the benefits of some departments, which will be the biggest resistances and difficulties to the reform. Meanwhile, reform will increase the administrative span of the department chief officer, so department heads will strengthen the supervision and control of his subordinate units and staff. Benefit drives the government power to a smaller scale, thus puts more challenges to the leadership and supervision ability of department chiefs.

The second problem is that the difficulty and cost of internal coordinative may rise rapidly. Along with the increase of inside component units of super-ministry, coordination task of department inside will also increase. At the same time, the Super-Ministry System is a kind of new system, and each unite division needs to experience a running-in period and establish cooperative relations among each other. If Super-Ministry fails in this running-in period and coordinate the contradiction promptly, it will most possibly and necessarily be separated. Our department has experienced "on and off" periods and it also happened in foreign countries. For example, Britain held Super-Ministry System reform in 1960-1970, at that time, the environment department merged many departments and become the super large department of British government, but due to internal coordination difficulties, it was forced to separate.

Thirdly, the contradictory relationship between central and local governments may aggravate. In accordance with the original system design, the relationships among the various functional departments of the central government are between segmentation and constraints of power. After the implementation of Super-Ministry System, this type of segmentation and friction are gone. The new construct ministry's management power and range has greatly extended. At the same time, it means that the central government department has more power and range to manage and control the local, while the local government will have more chance and frequency controlled or intervened by the central government, thus the enthusiasm of the local will greatly influenced. Obviously, it will lead to a new round power game between central government and local governments, but in the process of game lacking legalized and programmed, the possibility of friction and contradiction will be greatly increased.

Fourthly, lacking scientific planning of departments integration, it may lower government governance performance. The success of the super-ministry system reform is not measured by the degree of functional sectors simplification and the separation between decision-making bodies and executive bodies. Actually, setting up government organization is influenced by many factors, such as history and reality. In our country, government departments number, decision-making bodies and executive bodies must be made according to our situation and modernization process, such as the number and quality of current social public business and public demand, the development and mature degree of civil society and government governance ability. Therefore, due to numerous public businesses, huge public demands, lower integration degree, limited social autonomy ability, immature development, and low department leading level, cooperative consciousness and inability, blind combination without scientific planning may lead to the loss of government authority, damage of government public trust, and more resistance and difficulty in improving government public governance performance.

3. Prospecting Development Trend of China's Government Reform

Taking a wide view of the whole process of government reform since China's reform and opening-up, the experiences and lessons are of great importance to promotion of our government reform and governance in the future. To sum up, the current reform has accumulated some basic experience: First, we must insist on having socialist market economic system as the first aim, put the transformation of government functions as a key government reform; Second, we must adhere to the principle of simplification, unification and efficiency, streamlining and optimizing the organizational structure of the government as the central task of government reform; Third, we must adhere to the principle actively,

steadily and unswervingly towards the pace of reform, but also give full consideration to all aspects of the extent of affordable, prudent advance; Fourth, we must adhere to institutional reform and the reform of personnel system combined to develop complementary policies and measurements to optimize the cadre structure; Fifth, we must adhere to a unified leadership and grade responsibility, and analysis of the truth from the reality, then carry out reforms step by step according to local conditions.

Each reform of government institutions under certain historical conditions are the products of subjective and objective results of the interaction between history and reality. The present proposition and process of Super-Ministry System reform is also based on the complex interaction of subjective and objective, history and reality factors as well as drawing on the experiences of foreign governments on major reforms. It can be expected that the future government reforms will face more complicated environment and conditions and will bear more distinctive characteristics of the times and trends.

First, the government reform will increasingly focus on support and promotion of innovation theory. Mill proposed in "Representative Government", the main principles which the service department set should be the establishment of the executive branch to handle the administrative unity of purpose and a means-based. In the past, China's institutional reform was always carried out under the pressure which was compelled by the situation from a policy point and always lacked of a more systematic and rational, forward-looking theory to guide practical reform. The reform of government institutions is a complicated systematic project, to promote reform of government institutions to success. First, we must actively promote relevant theoretical innovation. In the future, one important base to promote the reform of the government is from the perspective of clarifying the relationship between government reforms and market economy development and between institutional innovations and government capacity improvement. At the same time the government reforms should be deepened from full functional government to limited functional one; from administrative government to law-oriented government; and from a closed government to transparent government. And we should also deepen the understanding of the relationship between government and the market, and between the government and society, putting forward new concept of building the Government's new public service. We must change from government-oriented management to public-oriented services, from government standard, official standard system to social standard and people standard system.

Secondly, the Government reform will increasingly focus on legislation. Due to the lack of effective legal constraints and high arbitrary and subjectivity in the past successive reforms in China, the government often trapped in the cycle of "simplification – inflation- re-simplification – re-inflation ", the results achieved in the reform are often quickly lost. Therefore, the legalization of institution reform is the key point in the current and future reforms. To realize this, it is imperative to conduct a comprehensive and systematic change or necessary addition to the existing laws and regulations according to the international requirements. We need to modify and improve the "Organic Law of the State Council" and the Local Government Organization Act, make laws on establishing conditions, approval procedures, task nature, inter-relationship among executive authorities and their responsibilities, authority, division of functions and the exercise of powers a basic form of duties. Meanwhile, we should establish the appropriate accountability system to ensure that the various violation of law punishable be dealt with according to law, if necessary, to the decision of institutional reform laws made by the NPC Standing Committee.

Third, government reform will increasingly focus on its functions as the core proposition. Government functions are the basis for government institutions, while government agencies are the carrier of government functions. As the basis and prerequisite of government organizations, government functions decide the establishment, scale, level and operation mode of the government agencies. In implementing "super-ministry system" as well as the future reform, we must combine transformation of government functions with government institutions reform. Transformation of government functions is the basis and conditions of smooth implementation of super-ministry system. International experience shows that the more developed decentralized public governance structures, the more successful the government reform will be. Otherwise, super-ministry system will become dysfunctional. However, only by truly carrying out the transformation of government functions can government's institutional reform get rid of the "simplification – inflation-re-simplification – re-inflation" cycle. Practice has proved that in a complex society, the fundamental solution is to explore effective coordination mechanisms which will be a difficult and long-term task.

Finally, the Government will increasingly emphasize on institutional reform and comprehensive reform. The reform in the past is ineffective, the main reason of which is that they are only limited within the established system of partial adjustment of the government agencies within the system, only change in the size and number of personnel but without actual institutional reforms. If we want to successfully promote government reform, we need a systematic and comprehensive consideration of development costs and benefits. The promotion of reform can not be accomplished over night, deepening the reform is an ongoing process which involves complex relationships and power relations in the interests. It must adhere to the principles of the reform package as a whole, so that most of the reform and other reform should be coherent and mutually promoting. It is now particularly important to accelerate the reform of public

institutions category, innovative delivery mechanisms of public goods and attach importance to public welfare institutions in the provision of public goods and public services. In accordance with the principle of public affairs separating from government and government separating from intermediary organizations, the government must grant a large number of technical and service functions to the institutions and intermediary organizations; standardize and develop trade associations, chambers of commerce and other social intermediary organizations to provide a good social environment for the transformation of government functions.

In short, the government system is the joint points which connects the economic system, political system and social system and is the key links to push forwards the whole reforms. China has already acquired the basic practical conditions for the transition from a government under planned economy to a modern government under the market economy after 30 years' reform and opening-up makes. However, government reform still faces great difficulties of power-oriented, benefit-oriented department now and in the future. "Super-ministry reform is a new beginning for our government reform, and government stitutional reform and innovation is of great importance to the gradual realization of the organic and comprehension combined governance of the government, market and social organizations.

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Table 1. Since the reform and opening up of the previous Government Reform

TIME	TARGET	CONTENT	CHARACTERISTICS
1982	Solve the leadership system issues in the process of economic development , enforce cadres to become younger in average age	Ministries and Commissions under the State Council, Organizations directly under the State Council, office under the State Council are reduced from 100 to 61.	First, start to abolish the system of life tenure in leading posts; Second, simplify the administrative structure; Third, Accelerate the ranks of cadres younger in average age. But did not move high degree of concentration planned economy system, the government's functions has not transformed.
1988	Accelerating the transformation of government functions, Government's management of economy department transformed primarily from the direct management into the indirect supervision, strengthening macroscopic management function but abating the micromanagement function.	Ministries and Commissions under the State Council reduced from 45 to 41, Organizations directly under the State Council from 22 to 19, non-standing body reduced from 75 to 44,the subordinate departments and bureaus reduced by 20%	The historical contribution was firstly proposed that the transformation of government function is the key to institutional reform. As a result of a series of complex political and economic reasons, in reality this proposition have not solved later
1993	In accordance with the requirements of the socialist market economy to transform government functions	Ministries and Commissions under the State Council established 41,adding to 18 offices and institutions, in all 59,reduced 27 from the original 86,and the staff reduced 20%. Implements the Central Commission for Inspecting Discipline institution and the ministry of supervision jointly work, and further rationalize the relationship between the discipline inspection and administrative supervision.	The historical contribution was firstly proposed the purpose of the restructuring of government institutions to meet the requirements of an evolving socialist market economy
1998	Eliminating the organization foundation of the functions of the government and enterprises mixed up	According to the reform program, Ministries and Commissions under the State Council reduced from 40 to 29.After 1999, provincial government and the party's institutional reforms were launched separately; 2000, City county township corporate reform were comprehensive started. Up to June, 2002, Party and government organs at all levels altogether simplify the administration to establish 1,150,000 people.	This involves the most extensive and the biggest reform of government institutions. The historical progress lies in the transformation of government functions have made the significant development, the prominently manifestation is abolished nearly all of the industry-specific economic agencies.
2003	Featuring standardized behaviors, coordinated operation, fairness and transparency, honesty and high efficiency	Except for the General Office of the State Council, Ministries and Commissions under the State Council reduced from 29 to 28, eliminating MOFTEC, the State Economic and Trade Commission, and their function merge into new established the Board of Trade.	The significant historical progress lay in holds at that time the socio-economic development stage prominent question, further transformed the government function.



After the Ice Melts: Conflict Resolution and the International Scramble for Natural Resources in the Arctic Circle

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Abstract

It is a well-known fact that global warming is melting the Arctic ice cap. As this happens, the natural resources in the Arctic will become available for exploitation. As such, the five countries with major claims to the region—the United States, Canada, Russia, Denmark, and Norway—are looking to extend their claims to the natural resources beneath the ice-covered ocean. The size of the Arctic Shelf is about 4.5 million square kilometers, and the U.S. Geological Survey posits that 25 percent of the world's undiscovered gas and oil reserves may be there. Clearly, there are large amounts of untapped resources that these five countries could use to satisfy their increasing demand for development and economy.

This paper will try to explore the current disputes over Arctic seabed resources surrounding the five states in North Pole, evaluate the regimes for resolving the conflict in UNCLOS. Furthermore, the paper will introduce the appropriate points of view and discuss the alternative dispute settlement mechanism (DSM) for this significant problem caused by global warming in the coming future.

Keywords: Global Warming, Arctic Ocean, Continental Shelf, UNLOS, DSM

1. Introduction

This paper provides an overview of the legal issues posed by the melting of the ice in the Arctic region and clarifies a number of issues concerning sovereignty, territoriality, and sovereign rights in the Arctic Ocean. All these issues are of primary concern to the five states bordering the Arctic Ocean: the United States, Canada, Russia, Denmark (via Greenland), and Norway.

Geographically, the Arctic consists of land, (Note 1) submerged lands, (Note 2) and the ocean of Arctic Circle. (Note 3) There exist different maritime zones in the Arctic Ocean, including territorial seas, exclusive economic zones (EEZ), continental shelves, and the deep seabed beyond the limits of national jurisdiction known as the high seas.

Each of the five states bordering the Arctic Ocean has claimed an EEZ in the waters adjacent to its territorial sea, in which it enjoys exclusive rights for the purpose of surveying, exploiting, conserving, and managing natural resources. Each of these states has also laid claim to the adjacent continental shelf, over which it has exclusive sovereign rights for the purpose of surveying and exploiting its natural resources. According to the criteria set out in Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), a state's continental shelf extends between 200 and 350 nautical miles (nm) from properly established baselines.

It is very clear that the Arctic region stands at the threshold of significant changes. The increasing rate at which the Arctic ice is melting will surely have a major impact on local ecosystems and the potential exploitation of natural resources. By virtue of their sovereign rights and jurisdiction, the five countries with claims to the Arctic region are presently at a critical juncture for addressing their current and future conflicts of interest. This paper explores the current disputes over Arctic Ocean resources and evaluates the mechanisms in UNCLOS for resolving these kinds of disputes. Furthermore, this paper introduces the viewpoints and discusses the alternative dispute settlement mechanisms (DSM) which can be employed to solve this kind of significant problem.

2. Overview of the Arctic Region and its Importance

There are five countries with coastal territory within the Arctic Circle: the United States (via Alaska), Canada, Russia, Denmark (via Greenland), and Norway. (Note 4) Most of the important natural resources lie to the north of the Arctic

Circle. (Note 5) Geographically, the Arctic serves as a northern epicenter, bringing together the borders of the United States, Russia, Canada, Norway, and Denmark. Finland and Sweden also have territory inside the Arctic Circle, but do not have littoral zones. (Note 6) Although it lies just south of the Arctic Circle, Iceland's territorial waters extend into the Arctic Circle.

Historically, the Arctic region has been open to all nations for fishing and navigation. The strategic importance of the Arctic region was first recognized during WWII, and after the War the United States and its allies initiated defense projects in the Arctic region to forestall Soviet military threats. (Note 7) Throughout the Cold War, the Arctic Circle served as a strategic area from which to monitor nuclear submarine movement, but the strategic importance of the Arctic has faded as a result of the collapse of Soviet Union. (Note 8) Nevertheless, the Arctic region remains significant, primarily because of its abundant natural resources and navigable waterways. In recent years the Arctic environment has witnessed unprecedented changes. Although scientists disagree when it comes to predicting the rate at which the polar ice cap will melt, there is general consensus that by the end of this century the Arctic region will very likely have much less permanent ice. (Note 9) Thus it is apparent that global warming has thrust a number of issues relating to sea routes and natural resource exploitation into the laps of the five states with large stakes in the region. In terms of navigation, a prolonged shipping season would create new shortcuts and allow increased traffic, and Canada and America are already disputing navigation rights in the Northwest Passage. (Note 10)

Recently, international developments in the Arctic have become frequent topics in the news, as neighboring countries attempt to lay claim to the region in order to reap the benefits of increased access to its natural resources. The five major players have already begun to formulate potential legal claims under UNCLOS. For instance, in 2001 Russia laid claim to virtually half of the Arctic Circle, based on a proclamation once made by Joseph Stalin. (Note 11) Afterwards, the Russian claim to Arctic territory turned on the assertion that Russia's continental shelf extended far into the Arctic Circle via a submarine mountain range called the Lomonosov Ridge. (Note 12) This ridge, cutting across 1,200 miles of the Arctic basin, holds an estimated 10 billion tons of gas and oil deposits, as well as significant stores of diamonds, tin, and platinum. (Note 13)

3. The Impact of Warming and Legal Regime in the Arctic

The Arctic is the only place on Earth where a number of different countries encircle an enclosed ocean. (Note 14) Yet there is a significant conflict of interest between the five Arctic states, and the relationship among them is characterized by tension. (Note 15) By September 2005, the Arctic ice cap had shrunk to the smallest size ever recorded, and scientists predict that continued melting will open up a seasonal sea nearly five times the size of the Mediterranean. (Note 16) As the Arctic ice recedes, vast new areas are becoming available for the exploitation of natural resources. (Note 17)

Currently, the states surrounding the Arctic are applying various strategies to establish legal claims of sovereignty in the region, principally by attempting to demonstrate that their continental shelves extend beyond 200 nm. However, modern political and technological developments have begun to foment a paradigm shift in the approach to UNCLOS, which was wrought out of issues framed by exclusive sovereignty rather than the traditional principles. (Note 18) UNCLOS has met with international approval since it went into force in November of 1994. This marine regime has become a comprehensive and authoritative constitution of the sea, governing every aspect of maritime affairs, including limits of territorial sovereignty, navigation, natural resources in the seabed, rights of passage, and environmental safeguards. (Note 19) UNCLOS has already been ratified by all of the Arctic nations except the United States. (Note 20)

Prior to UNCLOS, a state could legally advance its national interests to the extent that it was able to enforce its jurisdiction. However, the high seas—the area outside of any national jurisdiction—have long been considered *res communis* and governed by the “law of the commons,” i.e., (Note 21) they belong to everyone. For all intents and purposes, the exploitation and use of ocean resources functioned entirely independently from claims of national sovereignty. Recognizing the international concerns over sovereignty over parts of the oceans, as well as the need for peaceful and communal exploitation of certain resources, in 1958 the United Nations General Assembly issued a resolution that convened the first United Nations Conference on the Law of the Sea (UNCLOS I). Four multilateral conventions were negotiated regarding the high seas, international fisheries, and continental shelves. (Note 22) However, when these proved insufficient to meet emerging issues, it became clear that a more effective problem-solving regime was necessary. Two years later, UNCLOS II sought to address a number of issues relating to the breadth of the territorial sea and the classification of international straits, but finally proved fruitless. (Note 23) UNCLOS III was held between 1974 and 1982, and UNCLOS was passed on December 10, 1982. (Note 24) Hereafter, one unified international maritime legal regime has been in effect.

UNCLOS set out substantial new sovereign rights over various parts of the ocean, most of which were secured at the expense of the traditional concept of universal freedom of the seas. (Note 25) The most novel of these was a provision granting exclusive rights over an area extending to 200 nm from a state's coastline. Within this so-called exclusive economic zone (EEZ) a state has jurisdiction and maintains exclusive economic rights to exploit, conserve, and manage the natural resources on and below the seabed and the superjacent waters. (Note 26) Resource rights may also be

exercised with regard to other forms of economic exploitation and exploration of the zone, such as the production of energy. (Note 27) Another important concept defined by UNCLOS is that of a coastal state's continental shelf. In general, entitlement to submarine mineral resources under UNCLOS is based on the delimitation of the continental shelf and the idea that the shelf is a natural prolongation of a coastal state's territory. (Note 28)

According to UNCLOS, the continental shelf is comprised of the seabed and subsoil of the submarine areas and extends beyond a state's territorial waters to the outer edge of the continental margin, or to a distance of 200 nm from the coastal state's baseline, whichever is greater. (Note 29) Under UNCLOS, a state is afforded a continental shelf of 200 nm regardless of technological capabilities and geological formations. (Note 30) Should a state's actual continental shelf extend beyond 200 nm, it may claim an extension up to the outer edge of the continental margin. However, such a claim cannot exceed 350 nm, as measured from the same coastal baseline as the territorial sea, or, alternatively, 100 nautical miles beyond the 2,500 meter isobath. (Note 31)

As stated by UNCLOS, any territory lying beyond the outer boundary of 200 nm is referred to as the Area. (Note 32) The Area and all of its seabed resources are considered the common heritage of mankind. (Note 33) As the International Court of Justice has noted, the continental shelf itself is a stretch of submerged land governed by a legal regime that focuses on soil and subsoil. (Note 34) Since under UNCLOS the rights to the continental shelf emanate from its conception of the continental shelf as a natural extension of sovereign territory, the rights to its resources are justified in terms of a state's sovereignty over land. Accordingly, a state's sovereign rights are restricted to resources that would be analogous to those harvested from land, for instance resources found on and in the seabed rather than the waters above it. Indeed, the rights of a coastal state do not depend on occupation or on any express proclamation. (Note 35) Nevertheless, the rights are not limitless, and a state's exercise of sovereign rights cannot interfere with the legal status of the superjacent waters, the airspace above, or the rights of other states. (Note 36)

Part XI of UNCLOS addresses deep seabed mining for areas beyond national jurisdictions, and established the International Seabed Authority (ISA) to administer and regulate the natural resources of the Area on behalf of all nations. (Note 37) The ISA established three principal organs: the Council, the executive organ; the Assembly, a fully-representative policy-making body; and the Secretariat, which fulfills the administrative functions. (Note 38) In addition to these principal organs is the Enterprise, an entity charged with regulating the mining activities in the Area and meant to serve as the operating arm of the ISA, subject to the control of UNCLOS. (Note 39) However, the original provisions of the mining administration were found objectionable for various reasons, such as a lack of compatibility with free market principles. For this reason, while the number of ratifications increased throughout the 1980s, there was a lack of participation by industrialized countries. (Note 40) The United States, for example, was unwilling to compromise its vital national interests for the sake of participation in what it considered a protectionist regime with an institutional bias weighted disproportionately in favor of developing states.

In response to the general reluctance of industrialized countries to ratify the convention, the UN Secretary General put forth an implementing agreement which addressed the original objections of the developed states by emphasizing incentives rather than obligations. (Note 41) The principle of the common heritage of mankind was nominally retained, but its essence was removed. Further, it was stipulated that the changes made by the implementing agreement would prevail over UNCLOS in the event of any inconsistency. (Note 42) As a reflection of its success, the implementing agreement was signed by over 50 countries, including the U.S. (Note 43)

4. Problems under UNCLOS and Disputes in the Arctic

Any state seeking to mine resources in the Arctic region would be required to adhere to the procedures established by UNCLOS. At a minimum, these would entail abiding by the financial requirements, mapping a single continuous area and dividing it into two separate areas of equal commercial value, and submitting all the data obtained with respect to these areas. (Note 44) To circumvent these requirements, the Arctic states are seeking to remove resources in the Arctic region by claiming a continental shelf beyond 200 nm.

Since the extent of a state's continental shelf essentially determines the extent of its sovereign rights over the seabed, one would assume that UNCLOS provides conclusive legal guidelines. Thus, within the context of global warming in the Arctic, the vagaries of continental shelf boundaries are fraught with much potential for conflict. (Note 45) In delimiting the continental shelf under UNCLOS, signatory states can establish sovereign rights beyond the EEZ by presenting scientific evidence that their territorial shelf is connected to the seabed, up to a maximum of 350 nm. (Note 46) Therefore, in order to assert jurisdiction in what would otherwise be part of the Area, a state must base its claim on an extension of its territorial jurisdiction based on the extent to which its continental shelf extends into the Arctic region. Yet, determining the extent of a broad shelf based on the natural prolongation of territory is hindered by the ambiguous legal language stated in UNCLOS.

UNCLOS employs the concept of the continental shelf as an extension of a coastal state's continental land mass, but without much concern for its possible impact. Consequently, the definition of the continental shelf is far from clear.

(Note 47) The term “continental shelf” assumed several variegated and politicized meanings during UNCLOS negotiations, eventually coming to refer to the relatively shallow underwater sea floor states sought to control. (Note 48) Article 76 of UNCLOS defines it using legal criteria mixed with imprecise scientific language to justify the rights conferred. Furthermore, under Annex II of UNCLOS, a number of experts were empowered to make recommendations regarding the continental shelf and help resolve disputes. (Note 49) In order to extend the outer limit of the shelf beyond the 200 nm maximum, a coastal state must substantiate its claim with scientific evidence and make a formal submission to the Commission on the Limits of the Continental Shelf (CLCS). (Note 50) Thus, the outer limit of a state’s continental shelf beyond 200 nm is not fixed under UNCLOS until a claim is researched, submitted to the CLCS, approved, and then officially promulgated by that state. However, the CLCS has not yet ruled affirmatively on any continental shelf proposal and suffers from a lack of transparency. (Note 51) Moreover, the CLCS doesn’t have the authority to settle continental shelf disputes; it only has an advisory role, and its recommendations are binding only if they are incorporated into a member state’s official submission. (Note 52) And what is more, the submission process is conceivably infinite, and does not promote reliability. If the CLCS finds the claim unsubstantiated, it can reject it, but the state can make as many subsequent submissions as it desires within a given time limit. (Note 53)

Thus it is apparent that while Article 76 of UNCLOS provides a legal framework for solving Arctic disputes, it fails to specify the nature of the scientific evidence necessary to identify continental shelf boundaries. Even more problematic in the Arctic region is the inability of UNCLOS to adjudicate any claims of sovereignty based on an extended continental shelf. Part XV imposes an obligation on all states to settle their disputes by peaceful means. (Note 54) For disputes that cannot be settled amicably, UNCLOS provides a limited compulsory dispute resolution mechanism, allowing the concerned states to select one of four alternatives. (Note 55) Although each procedure is straightforward, the result will depend on whether or not opposing states have agreed to be bound by the same measures.

In fact, territorial issues are neither completely nor comprehensively regulated by UNCLOS, and it is unlikely that disputes arising from claims of Arctic sovereignty based on continental shelf will be addressed adequately by UNCLOS. Even though Section 2 of UNCLOS fleshes out the compulsory dispute resolution process, (Note 56) Article 297 omits from the compulsory binding procedure precisely the type of jurisdictional disputes likely to arise in the Arctic. (Note 57) Only the freedoms and rights pertaining to navigation, overflight, submarine cables, and certain other lawful uses are subject to compulsory dispute settlement. (Note 58) Any dispute involving jurisdiction in extended maritime zones, such as overlapping continental shelves, is very likely exempted from compulsory resolution. (Note 59) The absence of an effective legal regime will inevitably complicate the drawing of maritime boundaries in the Arctic. Indeed, disputes over the boundaries of a continental shelf in the Arctic should be subject to a single professional and effective dispute settlement mechanism. Yet, by sacrificing certainty to preserve a vestigial element of the freedom of the seas in extended maritime zones, UNCLOS has made itself vulnerable to the claims of, and conflicts among, the five major Arctic states.

5. The Alternative Dispute Settlement Mechanism

Currently there are five states disputing claims in the Arctic, and the situation could go from bad to worse in the near future. Since these disputes involve a multitude of parties, each of which has competing national interests and complex legal claims, it is unlikely that they can be effectively resolved through UNCLOS. These disputes require consideration of highly technical scientific evidence, such that few judges would have the expertise to analyze the geological evidence and make a reliable judgment. Further, there are potential jurisdictional issues, as not all of the Arctic states have signed UNCLOS.

An alternative DSM would seem to be a better way to equitably resolve disputes among Arctic states, especially if there were to be overlapping claims without conclusive scientific information. It is well known that the Dispute Settlement Understanding (DSU) reached in the Uruguay Round of the GATT—a cornerstone of the WTO since 1995—resulted in a fundamental change in the way trade disputes are settled. Prior to the WTO, trade disputes among states were dealt with under a pure veto (and thus voluntary) system. In contrast, the WTO/DSM features automatic adoption of Panel or Appellate Body (AB) rulings, which can be avoided only by means of a unanimous vote of the Dispute Settlement Body (DSB). Thus, member states can no longer block adoption of a Panel or AB ruling in which a state’s trade policies are in violation of the WTO and its agreements. (Note 60)

Under this new dispute settlement regime, the DSB automatically adopts the Panel or AB ruling, unless members unanimously agree otherwise. In addition, the procedural steps are laid down in more detail by the legal system. From an economic point of view, the most important substantive point of the whole DSM in the WTO is its reference to the “nullification or impairment of benefits,” which is the prime target of dispute settlement. (Note 61) If one member state suffers such nullification or impairment through another member state’s violation of any WTO rules, it may seek direct compensation, or respond with retaliatory sanctions in the form of a (temporary) suspension of concessions granted under that agreement. (Note 62)

Furthermore, if the Panel convenes, its membership (ranging from three to five individuals) will investigate the details of the case and present a formal analysis with suggestions for the proper course of conflict resolution. In order to facilitate the investigation, the panel may convoke an Expert Review Group (ERG). These bodies are analogous to epistemic communities in that their members are qualified experts in the field of inquiry relevant to the dispute. Yet the Panel's decisions often fail to satisfy both parties, and if the disagreement persists the case can be brought before the AB. The decision of the AB is final and binding. (Note 63)

The WTO/DSM model is appropriate in the Arctic region because it offers what the legal regime in UNCLOS doesn't have. As well as this, a DSM can reduce costs and delays associated with litigation. (Note 64) What is more, the relationship-building aspect of a DSM is very important. Generally speaking, the confrontation that occurs in litigation such as the territorial cases in the ICJ may drive the parties further apart. While there may also be confrontation within a DSM, the parties involved are more inclined to work together to find a solution to their common problem. In sum, a DSM gives the parties involved more power and greater control over resolving their dispute, encourages problem-solving approaches, and also tends to enhance cooperation and preserve relationships.

Since the disputes between the Arctic states usually involve conflicting claims, there is a distinct possibility that, after submission to the CLCS, there could be overlapping results. For example, if the Lomonosov was shown to be a part of the continental shelf of all of the Arctic states, then according to Article 83 the disputing parties would have to come to an agreement on their own. If they could not do so, UNCLOS would point them to other settlement options laid out in Part XV of the Convention. Although UNCLOS creates its own legal regime, the Tribunal, the contracting parties are not required to submit to it, as UNCLOS allows for the use of other arbitral tribunals. (Note 65)

It is obvious that a dispute over Arctic Ocean resources similar to the competitive land grab would not be beneficial for any state. What this paper would like to particularly point out is that the dispute in the Arctic is not a situation well-suited for any kind of zero-sum game scenario. The way of thinking here, using an established DSM which draws lessons and merits from the WTO is the most likely way to help these contending states enter into a more conciliatory atmosphere that will lead to useful, proactive, and agreeable settlements.

6. Conclusion

Global warming has not only challenged the authority of UNCLOS and its legal regime for resolving disputes relating to the continental shelf under the Arctic Ocean, but has also marked the beginning of the end for freedom of the high seas in the Arctic region. In addition to its environmental implications, global warming has caused a shift in the way the international community regards the Arctic, shifting the paradigm away from physical dominion and towards control over resources on the sea floor. The unprecedented access to untapped resources brought about by the receding permafrost in the Arctic Circle may soon cause an international gold rush as well as a variety of conflicts.

The conflicts over the Arctic region are unlikely to be resolved within the very near future. With five major states making claims to extensive parts of the Arctic seabed, there is a lot of scientific and professional work that needs to be done. Fortunately, there has been one good development since the conflict began. On May 28, 2008, Canada, Denmark, Norway, Russia, and the United States came together for the Arctic Ocean Conference in Greenland. (Note 66) The goal of the Conference, initiated by Denmark's Foreign Minister, was to foster unity and cooperation in the Arctic area so as to prevent an environmental catastrophe. The result of the Conference was the Ilulissat Declaration. This document states that no new legal framework will be set up to govern the Arctic. Instead, the parties agreed to proceed using the guidelines set forth in UNCLOS. (Note 67) While this Declaration is not necessarily ground-breaking, it is encouraging in that it signals a willingness of the involved Arctic states to work together in settling their disputes.

In accordance with UNCLOS, a DSM can be used to find alternative solutions to the problems which arise among the five Arctic states. By forming a panel which consists of specialized geoscientists with the ability to analyze the scientific evidence and make an equitable decision, it will be more possible to settle disputes among Arctic states. Optimistically, a peaceful and cooperative resolution is not out of the question, but, as already noted, it will require an untraditional legal regime similar to that used by the WTO to settle trade disputes and an enormous amount of willingness on the part of the disputing states.

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Notes

Note 1. Land territory of the Arctic Circle includes northern Alaska, the northwest territories of Canada, the Canadian Arctic islands, Greenland (Denmark), Svalbard (Norway), northern Sweden, northern Finland, and the Russian territories (for instance the northern Siberia).

Note 2. Submerged lands consist of the continental shelf and the deep seabed. The continental shelf is the natural prolongation of the land mass, out to 200 nm automatically, and beyond where it meets the geological criteria of Article 76 of the UNCLOS.

Note 3. There is a definition adopted by the International Hydrographic Organization (IHO); it defines the Arctic Ocean by a series of segments that includes all the waters, whether or not frozen, seaward of the northern limits of the United States, Canada, Denmark, Norway, and Russia. This definition includes several seas, such as the Beaufort, Chukchi, Norwegian, Barents, Laptev, and Greenland Seas, as well as Baffin Bay. See IHO, *Limits of Oceans and Seas 3rd edition*, available at http://www.iho.shom.fr/publicat/free/files/S23_1953.pdf. (last visited: 2010/1/5)

Note 4. Stephanie Holmes (2008), "Comment: Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty," *Chicago Journal of International Law*, Vol. 9, pp. 323-326.

Note 5. The region has extensive untapped gas, petroleum, and mineral deposits, and several commercially and strategically important waterways are located in the Arctic region, but are only free of ice and open to navigation for a few scant weeks during the late summer. Global warming will expand access to the Arctic's seasonal waterways, including the renowned Northwest Passage north of Canada and the Northern Sea Route north of Eurasia. See James Kraska (2007), "The Law of the Sea Convention and the Northwest Passage," *International Journal of Marine and Coastal Law*, Vol. 22, No. 2, pp. 258-259.

Note 6. In consideration of this, the paper only focus on five major states with littoral coasts.

Note 7. *Supra* note 4, p. 328.

Note 8. James Stuhltrager (2008), "Global Climate Change and National Security," *Natural Resources and Environment*, Vol. 22, No. 3, pp. 36-39.

Note 9. Mark Jarashow, *et al* (2007), "Note: UNCLOS and the Arctic: The Path of Least Resistance," *Fordham International Law Journal*, Vol. 30, pp. 1587-1652.

Note 10. Michael Byers and Suzanne Lalonde (2006), "Who Controls the Northwest Passage?" *Canada's Arctic Waters in International Law and Diplomacy*, National Arts Centre, Ottawa, June 14th.

Note 11. He drew a line from the northern Russian port of Murmansk to the North Pole and declared it to be the Soviet Union's polar territory. See Paul Reynolds, "The Arctic's New Gold Rush," *BBC News*, October 25th, 2005, available at <http://news.bbc.co.uk/2/hi/business/4354036.stm>. (last visited: 2010/01/12)

Note 12. *Supra* note 8, p. 39.

Note 13. "Putin's Arctic Invasion: Russia Lays Claim to the North Pole," Daily Mail (London), June 2007, available at <http://www.daily-mail.co.uk/news/article-464921/Putins-Arctic-invasion-Russia-lays-claim-North-Pole-gas-oil-diamonds.html>. However, when the Commission on the Limits of the Continental Shelf rejected this assertion, Russia began compiling more evidence to corroborate its continental shelf proposal, which is scheduled to be resubmitted in 2009. See: American Geological Institute, "Cold Wars: Russia Claims Arctic Land," *Geotimes* (August 1st, 2007), available at <http://www.geotimes.org/aug07/article.html?id=WebExtra080107.html> (last visited: 2010/01/12).

Note 14. *Supra* note 11.

Note 15. *Ibid*.

Note 16. Andrew King (2007), "Note: Thawing a Frozen Treaty: Protecting United States Interests in the Arctic with a Congressional-Executive Agreement on the Law of the Sea," *Hastings Constitutional Law Quarterly*, Vol. 34, pp. 329-331.

Note 17. *Supra* Note 8, p. 37.

Note 18. Accordingly, UNCLOS responded in comparable terms, devoting significant effort to differentiating the nature of the rights pertaining to different areas of the Arctic Ocean.

Note 19. Louis B. Sohn and Kristen Gustafson (1984), *The Law of the Sea in a Nutshell* (St. Paul, Minn.: West

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Note 23. *Ibid.*, p. 18.

Note 24. available at <http://www.un.org/Depts/los/index.htm> (last visited: 2010/01/8)

Note 25. R. P. Anand (1993), "Changing Concepts of Freedom of the Seas: A Historical Perspective," in Jon M. Van Dyke, Durwood Zaelke, and Grant Hewison eds., *Freedom for the Seas in the 21st Century: Ocean Governance And Environmental Harmony* (Washington, D.C.: Greenpeace, Inc.), p. 75.

Note 26. UNCLOS, art. 56.

Note 27. S. Fletcher (2003), "Managing Marine Resources: The Role of GIS in EEZ Management," in David Green and Stephen King, eds., *Coastal and Marine Geo-Information Systems: Applying the Technology to the Environment* (New York: Kluwer Academic Publishers), pp. 97-103.

Note 28. UNCLOS, art. 76, para. 1 and art. 77, para. 3.

Note 29. UNCLOS, art. 76, para. 5

Note 30. *Supra* Note 22, p. 130.

Note 31. An imaginary contour line drawn along the continental shelf at a constant depth of 25,000 meters.

Note 32. UNCLOS, arts. 133-135.

Note 33. UNCLOS, art. 136.

Note 34. See *North Sea Continental Shelf*, available at <http://www.icj-cij.org/docket/files/51/5537.pdf> (last visited: 2010/01/14).

Note 35. UNCLOS, art. 77, para. 3.

Note 36. UNCLOS, art. 79.

Note 37. UNCLOS, art. 156.

Note 38. UNCLOS, art. 158.

Note 39. *Supra* Note 22, p. 324.

Note 40. *Ibid.*, p. 321.

Note 41. Bernard H. Oxman (2001), "Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea," in Hugo Caminos, ed., *Law of the Sea* (Ashgate: Dartmouth), p. 343; also see *Agreement Relating to the Implementation of Part XI of the UNCLOS on the Law of the Sea of 10 December 1982* (August 17th, 1994), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindxAgree.htm (last visited: 2010/01/14).

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Note 43. *Ibid.*

Note 44. *Supra* Note 22, p. 326.

Note 45. Vladimir Frolov (2007), "The Coming Conflict in the Arctic," *Global Research*, July 17th, available at <http://www.globalresearch.ca/index.php?context=va&aid=6344> (last visited: 2010/01/14)

Note 46. UNCLOS, art. 76, para. 5.

Note 47. Vivian L. Forbes (2001), *Conflict and Cooperation in Managing Maritime Space in Semi-enclosed Seas* (Singapore: Singapore University Press), pp. 20-21.

Note 48. Suzette V. Suarez (2008), *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (Berlin: Springer), pp. 39-72.

Note 49. UNCLOS, Annex II, art. 2, para. 2.

Note 50. UNCLOS, Annex II, art. 4.

Note 51. CLCS only has completed evaluating the submissions of two states: Russia and Brazil. While the recommendations were revealed, CLCS has yet to publish any legally binding ruling. More details can see *Supra* Note 48, pp. 2-3.

Note 52. UNCLOS, art. 76, para. 8; Annex II, art. 3, para. 1.

Note 53. Peter Prows (2007), "Tough Love: The Dramatic Birth and Looming Demise of UNCLOS Property Law," *Texas International Law Journal*, Vol. 42, No. 2, p. 274.

Note 54. UNCLOS, art. 279.

Note 55. UNCLOS, art. 287 states the four acceptable judicial bodies: (a) The International Tribunal for the Law of the Sea (established under Annex VI); (b) The ICJ; (c) an arbitral tribunal constituted pursuant to Annex VII; or (d) a special arbitral tribunal for certain categories of disputes under Annex VIII.

Note 56. UNCLOS, arts. 286-296.

Note 57. UNCLOS, art. 297.

Note 58. *Supra* Note 22, p. 141.

Note 59. All of the Arctic nations, save Norway, have indicated that they would not accept any of the procedures if conflicting claims of jurisdiction arose in the Arctic.

Note 60. Ernst-Ulrich Petersmann (1997), *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (London: Kluwer Law International).

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Note 62. *Supra* Note 60.

Note 63. *Ibid.*

Note 64. John Jackson (2001), "The Role and Effectiveness of the WTO Dispute Settlement Mechanism," in Susan M. Collins and Dani Rodrik, eds., *Brookings Trade Forum 2000* (Washington, DC: Brookings Institution), pp. 179-219.

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Note 67. *Ibid.*

Table1. Maritime Zones and Summary of Coastal State Rights

Maritime Zones	Distance from Territorial Sea Baseline	Summary of Coastal State's Rights
Internal Waters	n.a.	Comparable to sovereignty on land
Territorial Waters	12 nm	As for internal waters, but granting innocent passage to vessels of other states
Contiguous Zone	24 nm	As for the EEZ, plus laws pertaining to customs, taxation, immigration, and pollution
EEZ	200 nm	Resource ownership; structures on the seabed; scientific research; and environmental preservation
Continental Shelf	200 nm–350 nm	Jurisdiction over non-living resources on and beneath the seabed
High Seas	n.a.	Freedom of the high seas
Area	n.a.	Mineral rights managed by international seabed authority

Source: the author



Consideration of Obscene Speech in Prejudication in US Constitution

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Abstract

Under the dimension of US constitutionalism, freedom of speech is imprescriptible, while limitation to obscene speech in judicial practice becomes exception of the stipulation of US Constitution “prohibiting laying down the law”. Furthermore, coordination of conflicts between the two turns to be the target sought by the Federal Supreme Judicial Court. Prejudication on games between the two by the Supreme Court approximately went through three periods, namely, “Hicklin Norm” period, “Roth Norm” period and “Miller Norm” period, transiting from the standards of “those who are most likely to be influenced”, and “sort of obscenity”, to standards of “normal people” and “totally not redeeming social value”, and then to the standard of “serious value”. The Supreme Court attempted to seek for a balance between implementation of freedom of speech guaranteed by the Constitution and obscene speech.

Keywords: Obscene speech, Hicklin Norm, Roth Norm, Miller Norm

US is a nation in which freedom is highly upheld, and the characteristics of its constitutional system are to establish and guarantee individual freedom and right, and to define and restrict authority and privilege of the government. It is definitely stipulated in the First Amendment of US Constitution, the Congress prohibits formulating a law related with any of the following items, that is, to establish a religion or prohibit freedom of worship; to restrict freedom of speech or freedom of publication; to restrict the right of peaceful assembly and the right of petition to the government (namely, the stipulation of “prohibiting laying down the law”)

However, American government falls into perplexity in judicial practice for the extensive protection of the freedom of speech: Whether obscene speech falls within the scope of protection of the First Amendment? How to define obscene speech? ... All these problems have always perplexed Lord Chancellors with high intelligence in the Federal Supreme Judicial Court, and they promoted American judicial circles’ tolerance to and respect on freedom of sexual expression with legal precedents one by one, with severe games behind. During judicial practice for more than a hundred years, America has gone through approximately three historical periods in the judgment on obscene speech, that is, “Hicklin Norm” period, “Roth Norm” period and “Miller Norm” period.

1. “Hicklin Norm” period

American laws are deeply influenced by the tradition of the British Common Law. The first definition on obscenity by US Courts took its source in the case of Hicklin sued by the Queen in 1868. In the case, British Royal Family expounded how to assert obscenity as for the books about anti-Catholicism with sexual content distributed by Hicklin.

Hicklin Case confirmed the fundamental principle of obscenity: firstly, any publication should not offend or violate those who were mostly likely to be influenced, including juveniles, adults with ill tendency and all lower class people. Secondly, whether a publication was obscene was not based on the entire content, but based on part of its content. If part of a publication was confirmed as obscenity, then the entire publication would be asserted as obscenity. Thirdly, assertion of obscenity was based on the intention of a publication, and simultaneously, any works that might contain unclean and obscene thought should be prohibited. What judges took into consideration was reflection after reading a publication, totally regardless of whether it would actually result in any antisocial behavior.

This norm was universally applied in US until 1930s. However, during that period, all courts held different views upon application of this norm, and the general direction was to abide by Hicklin principle, but to negate the right of freedom of speech endowed by the First Amendment of the Constitution. US Federal Supreme Judicial Court took a strict attitude towards any obscene speech. According to the Lord Chancellor F. Murphy of the US Federal Supreme Judicial

Court, “indecent, obscene, profane, infamous, contemptuous or aggressive speeches” fell within the scope of speeches without any social value, so they should not be under protection of the Constitution, because such a sort of speeches would not constitute any important ingredient of expression of a thought; from the perspective of seeking for truth to benefit the society, their social value was infinitesimal, so the social interest in terms of order and morality went far beyond their social value. Thus, it is obvious to find out the method of American judicial circles to “hate bitterly” obscene speech and the way of “cutting at one stroke”.

2. “Roth Norm” period

It was in 1957 when Roth sued United States that the Federal Supreme Judicial Court really overthrew “Hicklin Norm”. In this case, the Supreme Court formally made an assertion on definition of obscenity for the first time, and required to make clear the standard of obscene publication. The Supreme Court began to attempt to define “obscene speech”, and “made a distinction” among such a sort of publications, but not “totally repudiating” as before.

The Judge Brennan publicly discarded Hicklin principle and emphasized the new principles to assert obscenity, namely, whether it exerted influences upon normal people, whether it adapted to contemporary community standard; and whether it would stimulate the lust if the entire subject of a publication was considered. That is, firstly, a publication should be asserted to be obscene, and whether it would arouse the lust or any unclean thought, which should be based on the standard of normal people in a community, which was judged on influences of a publication upon all people it contacted, but not influences on a particular group of people in the community. Secondly, a publication should be assessed in terms of its whole thought, but not merely a certain detail. Furthermore, the assessment should be based on the contemporary community standard, because with changes of the times, people held a more and more tolerant attitude towards sex. Therefore, definition on obscenity should be dynamic.

This viewpoint diminished constraints on publications, and enlarged the scope of protection upon them. However, at that time, it aroused doubt from quite a large majority of people, so it was difficult for it to be adapted for quite a long time. In 1959, Kingsley International Film Company sued the Board of Directors of New York State University, which was the first case to apply Roth Case principle. This case overthrew prohibition on the film “Lady Chatterley’s Lover”, approved film projection license, asserted the film was no longer within the scope of obscene publications considering the whole purpose, and obviously broadened scope of examination on obscene publications. In addition, the case provided guarantee for the Supreme Court to protect freedom of speech pursuant to the Constitution and to protect publications with different value, standards and ethical concepts. However, Kingsley Case did not make a further discussion on the definition of obscenity established in the Roth Case and was ambiguous about definition of obscenity, which was an obvious limitation in the case.

However, newly emerging issues challenged Roth Norm, such as, how to define meaning of “community”, how to make a distinction between “normal people” and “ordinary people” and how to establish value of obscene publications.

In the Case of Day sued by Manual Company in 1962, Manual Company published a special magazine for berdaches which was attached with photos of completely naked male models, and was suppressed by the Post Office. Finally, the Supreme Court was in support of this publication behavior. The Lord Chancellor Harlan pointed out that this magazine was not obscene. According to him, the so-called obscenity was obviously disgusting and would arouse the lust of one, but in this case, the publication merely involved part of people, namely, berdaches, not all citizens. Furthermore, he pointed out, the standard of “graceful norm of contemporary community” applied to the whole country, but American society was a nation with diversified culture, so there didn’t exist a unified community ethical norm, which, as a matter of fact, had enlarged the connotation of “community” randomly, and had diminished sphere of application of the definition on obscenity in the case of Roth. This, without doubt, was to protect freedom of speech to a greater extent on the part of some special citizens. Afterwards, in the Case of Jacobellis v. Ohio in 1964, the Lord Chancellor Brennan reaffirmed that the connotation of “community” should be judged according to the norm all over the country. However, the Chief Justice Warren still insisted on Roth principle, and thought community standard was not a nationwide standard at all and there didn’t exist a nationwide standard. According to him, even if such a situation happened, the task of the Supreme Court was to coordinate conflicts of rights among communities within the scope of the society and individuals. As a matter of fact, what Warren insisted on was a local community standard. Controversy on the connotation of “community” among these judges led to ambiguous assessment on obscene speeches later.

In the Case of New York State sued by Mishkin in 1966, the Supreme Court once again was confronted with difficulties to define “ordinary people” and “normal people”. According to Mishkin, the publication merely aroused interest of particular groups of people and didn’t arouse the lust of ordinary people, not even leading to disgust of ordinary people, so it didn’t violate the law. Since Roth Case didn’t make clear a definite distinction between “ordinary people” and “normal people”, in practical operation, the similar result was caused as in Hicklin Case (that is, almost all people were taken as a standard). However, the concept of ordinary people changed continually with tolerance of the society, so definition of justice on “ordinary people” and “normal people” should also be upgraded, while the standard of “ordinary people” applied in this case was still the one applied in the Hicklin Case period several decades ago, namely, the

standard of “people who were most likely to be influenced”. This, as a matter of fact, diminished the scope of protection of obscene publications by the Constitution.

Brennan emphasized that, the only reason why obscene publications were excluded from the First Amendment was that obscene publications could not redeem social importance. However, in fact, some publications with sexual description were not totally without any social value. In the “Memoirs of a Woman of Pleasure” by John Cleland which sued the Attorney General of Massachusetts and the Case of New York State sued by Redrup, Brennan pointed out, a book should not be prohibited unless it was totally without any social value, even if it was proved to have aroused the lust. That is, so long as a publication was proved to have a wee bit of social value, it would be under protection of the Constitution, and should not be prohibited with the excuse of arousing the lust and obviously violating community ethical standard, which obviously discarded the standard of Hicklin Case, namely, people who were most likely to be influenced.

Thus, it can be seen, there exist great distinctions between “Roth” Case and “Hicklin” Case. Firstly, in the Case of “Roth”, “ordinary people” were chosen as a target for assessment, whereas in the Case of “Hicklin”, “people who were most likely to be influenced, including juveniles” were chosen as a target for assessment; secondly, in “Roth” Case, “the whole leading subject of a publication” was the basis of judgment, whereas in “Hicklin” Case, “obscene tendency” of a publication was the basis of judgment, that is, the entire publication would be considered obscene so long as part of its content was obscene; thirdly, in the Case of “Roth”, the standard of “contemporary community” was put forward, and contemporary sexual ethical concept was employed as a measurement standard. In addition, obscenity was confined to the scope of pornography, excluding other content from the concept of obscenity, and the standard of “totally not able to redeem social importance”, enlarging the scope of protection of obscene speeches. From all the above distinctions, it can be seen, in terms of protection on obscene speeches, great progress had been made in “Roth” Case compared with “Hicklin” Case, and the former exhibited justicial tolerance and gradual rationality. Of course, there still existed many problems open to be resolved, such as, definition of “community”, “ordinary people” and “obscenity”, etc.

3. “Miller Norm” period

Definition on obscenity had always been perplexing all judges, and, as a matter of fact, this was to define those that could not be defined at all (the Lord Chancellor Stuart). The Supreme Court headed by Warren felt pessimistic and discouraged to define on obscenity. Afterwards, the Supreme Court headed by Burger drew back from the viewpoint of guaranteeing freedom of expression in the First Amendment. Of course, it was god-given that, Burger gathered together most of opinions of the other four judges about obscenity for the first time since 1957, that is, “Miller Norm”.

In 1973, Mawi, Miller from California sent five booklets to a restaurant in the NewPort Beach in this State. In the booklets, advertisements about four pornographic books and one film were posted, including photos and pictures of sexual behaviors. Receivers of the booklets reported this case to local police office, and Miller was under an accusation to violate criminal code in California, and was sentenced by local relevant authority. Finally, the Supreme Court passed the adjudication written by the Chief Justice Burger with a proportion of five to four, which required the State Court to retrial the case according to the new definition on obscenity. It was stipulated in Miller Norm, obscenity should contain the following conditions: (1). As for common people, according to contemporary local social standard, a publication can be proved to arouse obscene desire from an overall perspective; (2). Description of a publication about sexual behavior obviously violates stipulations of relevant law of local State. (3). A publication was short of serious literature, arts, political or scientific value.

It is obvious that there were differences between Miller Case and Roth Case. On one hand, the former discarded the standard of “totally not able to redeem social value” established in “Roth” Case, and it was replaced with the standard of “serious literature, arts, political or scientific value”. US Constitution Scholar Hixon thought, this was obvious a throwback in terms of guaranteeing freedom of sexual expression for Constitution. According to Roth Case, so long as a publication was considered to have a wee bit of social value, it might be exempted from being regarded as obscenity. However, the current Miller Norm required a publication to prove to have serious value for itself to break away from obscenity, which caused an actual result that, most of publications about sexual expression were no longer under protection of the Constitution, but were considered obscene publications. Furthermore, judges, such as Brennan, called into question about this principle. After recollection, Brennan confirmed, the judicial tradition to define obscenity in the Case of Roth should be eliminated with decision, and should be substituted for the standard of “merely stipulating to prohibit disseminating obscene publications to juveniles or exposing in a disgusting way to dissenting adults”, so as to protect juveniles and dissenting adults. It might be an optimal choice to interpret “obscenity” in such a wide and ambiguous way, but not defining “obscenity” in a rigid way.

On the other hand, it is confirmed to substitute community standard for the nationwide standard, which got strengthened in the later case of Hamling appealing United States in 1974 and the case of Smith appealing United States. In the case of Hamling, the Supreme Court emphasized, California had the authority to prohibit obscene publications with a standard applied in the State according to the Federal Constitution, and the Court allowed a jury to decide an obscene

publication according to the standard of community. In the case of Smith, a jury also had the free discretion to determine “contemporary community standard” of “arousing the lust” and “being obviously disgusting”. This standard meant that different districts in US might apply different judicial standards according to actual local situations. However, since it was “serious value” that had essential significance, as a matter of fact, the scope and width of publications about expression of sex was restricted.

In sum, from the standard of “people who were most likely to be influenced” in the case of Hicklin, to the standard of “ordinary people” and “totally not able to redeem social value” in the case of Roth, then to the standard of “serious value” in the case of Miller, US Federal Supreme Court really resorted to every conceivable means to attempt to seek for a balance between implementation of freedom of speeches guaranteed by the Constitution and freedom of sexual expression disgusted by a particular group of people. With controversy for over a hundred years, it was finally discovered that even an agreement upon definition of “obscenity” was still not reached. Just as the Lord Chancellor Douglas said, obscenity that could not be defined exactly by the Supreme Court was really a hodgepodge. Based on this elusory feature, each definition on obscenity by the judges seemed to be rational, but finally would declare bankruptcy all without exception. However, the tradition of US Liberalism called for US Government to amount to something in formulation of the law and in implementation of public policies so as to reach a balance between social interest and individual freedom. As for constraint imposed by the society on individual freedom, Mill put forward a general principle, that is, “One only need take responsibility for the part of his behaviors that involves others. His independence is absolute in terms of rights as for the part of his behaviors that merely involves himself. And he is the highest sovereign to himself and to his body and mind.”

From the perspective of relation between social progress and development of human rights, social tolerance and self-restraint of human being are the two wings of a bird. Constraint of a nation on personal affairs should present a declining trend, whereas conscience and self-restraint of human kind should upsurge day by day, and become the internal factor to guarantee his rights. Therefore, administrative management is necessary to deal with the so-called “obscene speeches”, but the means of participation and penetration of national rights should be changed, not completely negating blindly or “cutting even at one stroke”. From the perspective of persuasion, appropriate entertainment and a healthy and positive living way should be advocated to gradually cultivate people’s sentiment to appreciate gracious cultural life, to vigorously promote the concept of scientific sex education and to establish people’s correct sex concept and good sex ethics. With development of the times and openness of ideology and culture, dissemination of prohibiting obscene speeches with differentiation can not only protect freedom of speeches of a particular group, but can guarantee good customs of the society and security of ideology. All in all, discussion of the scope of obscene speeches also involves the elementary proposition of constitutional system, that is, relation between national authority and right of a citizen, or limit problem of a national authority. However, delimitation to the two concepts is exactly the primary issue to be resolved in a constitutional country, and is also what a country needs to attain the harmonious state of benign recycling.

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Comment on Chinese Limited Liability Company's Stock Rights Transfer System -----In perspective of Article 72 in Company Law of the People's Republic of China

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Abstract

Article 72 in Company Law of the People's Republic of China (Company Law for short) regulates the limited liability company's stock rights transfer under common conditions. However, it can not solve all practical issues effectively. In perspective of Article 72 of Company Law, this paper probes into the progresses and the defects of limited liability company's stock rights transfer system, and analyzes some hot issues, including how some shareholders actualize their preemptive right to purchase the stock rights in practice, and how to evaluate the effect of articles of association as there is a conflict concerning stock rights transfer with Company Law, with the hope of benefiting the study of limited liability company's stock rights transfer and the settlement of practical corporate issues.

Keywords: Limited liability company, Stock rights transfer system, Validity of articles of association

Article 72 in Company Law of the People's Republic of China (Company Law for short) regulates the limited liability company's stock rights transfer under common conditions. This article is more accurate and more practical than relevant regulations in former Company Law. It will benefit the healthy development of China's company system and the settlement of corporate conflicts, which will undoubtedly drive the update and the progress of idea of Company Law. However, as more conflicts concerning the stock rights transfer of limited liability company and people's deepening recognition to company system, amounts of new issues emerge. Article 72 of Company Law can not solve all relevant issues in practice effectively.

In perspective of Article 72 of Company Law, this paper probes into the progresses and the defects of limited liability company's stock rights transfer system, and analyzes some hot issues, including how some shareholders actualize their preemptive right to purchase the stock rights in practice, and how to evaluate the effect of articles of association as there is a conflict concerning stock rights transfer with Company Law, with the hope of benefiting the study of limited liability company's stock rights transfer and the settlement of practical corporate issues.

1. The regulation of Company Law on limited liability company (limited company for short) transferring stock rights

According to Article 72 of Company Law, the first term regulates that all or some of the stock rights of the shareholders of a limited liability company may be transferred between the shareholders. Literally, it uses the word "may", which means that Company Law does not set compulsory limits for transferring stock rights between shareholders. It is a random term. Therefore, under the condition of without restrictive regulations in article of association, only when shareholders reach an agreement, they can transfer stock rights internally and other shareholders can not necessarily agree. To transfer stock rights internally is free in a sense.

The second term and the third term use the word "shall" respectively. They set strict procedure restriction on external transfer of stock rights (Xudong Zhao, 2003, p16). Whether this procedure restriction is a kind of legal compulsory regulation? If it is, the behavior that breaches this term in transferring stock rights externally is invalid. There is no other choice. But in practice, other shareholders may recognize and give up the preemptive right to purchase or can not afford the stock rights, what makes the activity that breaches this term in transferring stock rights externally valid. Therefore, it is not a compulsory term in law.

However, in order to actualize the interest balance of shareholders who transfer stock rights and the shareholders who continue to hold stock rights, legalization sets up three rules, namely "the approval right of other shareholders", "the compulsory obligation of purchase", and "the preemptive right of purchase", for the sake of maintaining the people combination of limited company.

1.1 The approval right of other shareholders

For this Article, two issues deserve notices. Firstly, "the approval of more than half of the other shareholders" means that the transfer of stock rights is based on the number of shareholders instead of the quantity of stocks. It is an

exception of “capital-based decision principle”. Secondly, the regulation of “more than half of” focuses on “the other shareholders” and the shareholders who transfer stock rights should follow the avoidance principle, according to the Company Law. Apparently, this Article in Company Law adopts the avoidance principle of stakeholders in decision making.

This change in Company Law means to embody the people combination of limited liability and protect the interests of small and medium-sized shareholders. The author holds different opinions. This change presents a higher requirement for the number of shareholders who agree the decision, improving the legal entrance for transferring stock rights externally. In detail:

Suppose X --- shareholders who plan to transfer stock rights, Y --- other shareholders who agree to transfer stock rights externally (agreement shareholders for short), and Z --- other shareholders who disagree to transfer stock rights externally (disagreement shareholders for short”).

(1) In the old Company Law, requirements for the number of shareholders who plan to transfer stock rights and the number of shareholders who agree to transfer stock rights externally are:

$X+Y>(X+Y+Z)/2$, namely $X+Y>Z$;

(2) In today’s Company Law, requirements for the number of shareholders who plan to transfer stock rights and the number of shareholders who agree to transfer stock rights externally are:

$Y>(Y+Z)/2$, namely $Y>Z$.

Apparently, today’s Company Law puts forward a higher requirement for the number of shareholders who agree the transfer of stock rights, which adds more difficulties on transferring stock rights externally. A quite lot of shareholders choose to transfer stock rights externally because the poor interpersonal relationship between shareholders or the suppression from controlling shareholders. They can not get expected economic interests. To make some shareholders to avoid decision making is not the real mean of law makers. The Article 35 in old Company Law is more reasonable in a sense.

1.2 The compulsory obligation of purchase

According to the new Company Law, in transferring stock rights externally, other shareholders must make a choice between agreeing the transfer and purchasing the stock rights. Therefore, the purchase is an obligation under a special condition. This Article means to set up restrictions for transferring stock rights externally in procedures, for the sake of protecting the legal rights of other shareholders. Meanwhile, in order to maintain the principle of free transfer of stock rights, impose a special obligation on shareholders who disagree with the external transfer of stock rights, which reflects the interest balance between the shareholders who transfer stock rights and the other shareholders.

The new Company Law does not regulate the price of shareholders who disagree with the external transfer in purchasing the transferred stocks. In practice, the shareholders who intend to transfer stock rights externally price the stock highly. Then, the shareholders who disagree with the transfer can not afford the price. As a matter of fact, in the author’s opinion, as other shareholders disagree with the transfer, they can purchase these stocks by themselves or be allowed to ask the third party to make the purchase. Then, it can stop the possibility of other unfamiliar joiners in the company. By this way, it ensures the free transfer of stock rights and maintains the trust between shareholders. As for the price, it can be regulated by the articles of association or other rules. As shareholders intend to transfer stock rights externally, the company or other shareholders can predetermine a price standard or calculation formula for the purchase. By this way, it can effectively avoid the illegal transfer between shareholders and external parties (Xudong Zhao, 2003, p16).

Many countries have more perfect regulations concerning this condition.

For example, the Article 5 in the Company Law of France regulates: “..... if the company does not agree with the transfer, shareholders must purchase or ask others to purchase these stocks at the price established by the Article 1843-4 of Civil Law in three months since the refuse.” The fifth term of Article 19 in the Limited Company Law of Japan also regulates that: “as other shareholders disagree with the transfer, the shareholder meeting can ask a party to purchase the stocks at the price established by the fourth term of Article 204 in the Business Law of Japan.” (Baoshu Wang, 2004, p34)

These regulations balance well the conflict of legal values between shareholders’ freedom of dealing with stock rights and maintenance of limited company’s people combination. The Company Law of China can learn a lot from them.

1.3 The preemptive right of purchase

The second term of Article 72 in Company Law: Under the same conditions, the other shareholders have a preemptive right to purchase the stock rights to be transferred upon their approval.

It does not regulate when and how other shareholders execute their preemptive right to purchase the stock rights. In

order to drive the obligee to exercise the right and protect the interests of shareholders who transfer the stock rights, laws should regulate the deadline for the exercise of preemptive right. If the obligee does not exercise the right, it can be regarded as giving up purchasing the stock rights to be transferred. For this point, some countries, such as France, regulates a term of three months. If the court allows, the time can be six months at most. Therefore, company participators can complement this issue by article of association. For example, other shareholders enjoy the preemptive right to purchase the stock rights for three months, less or more. Without exercising the right in the period, they are regarded as giving up the right of purchase. The shareholders can transfer the stock rights to the third party (Weili Huang, 2006, p153).

Secondly, the “same condition” is the essential element for the exercise of preemptive right. As for the standard of “same condition”, there are disputes in practice. In the author’s opinion, the best way is to establish a way judging whether other shareholders prefer to purchase the stock rights to be transferred or not before signing a transfer contract between the shareholder who transfers stock rights and the third party, based on with confirming the standard for “same condition” (Xudong Zhao, 2003, p8). In practice, the transfer happens under the two conditions. Firstly, the assignor presents the condition of transfer. Under this condition, the assignor informs it to other shareholders by written files, together with other necessary materials. Other shareholders must give feedback in written files in thirty days. If other shareholders would not like to purchase, they should not claim for the preemptive right to purchase as the third party signs a transfer contract with the assignor at the same condition or better condition. Surely, as the assignor decreases the condition, he or she should inform other shareholders and confirms whether they want to purchase or not. Secondly, the third party presents the condition of transfer. Under this condition, the assignor should inform the transfer and the condition to other shareholders, and confirms whether they want to purchase or not, before promising to the transfer. If other shareholders want to purchase the stock rights, they should inform the assignor in three days since they receive the written notice. Then, the assignor should refuse it even if others present better conditions. Besides, in the transfer process, the assignor or the third party may present a higher price for the stock to be transferred. They mean to exclude other shareholders. At this circumstance, other shareholders can question the stock price. All related parties must evaluate the company’s assets and debts before establishing the price of stock to be transferred.

Thirdly, whether shareholders’ preemptive right to purchase can be exercised partially is always a confusing problem in the law field. The Company Law does not regulate it clearly. In the author’s opinion, shareholders’ preemptive right can not be exercised partially. First of all, according to the term “Under the same conditions, the other shareholders have a preemptive right to purchase the stock rights to be transferred upon their approval”, the preemptive right to purchase targets on “the stock rights to be transferred upon their approval”. Here “the stock rights to be transferred upon their approval” are the same thing with the stock rights to be transferred by certain shareholder. Then, the precondition of exercising the preemptive right is the “same condition”. Quantity is also one of elements of “same condition”. Finally, shareholders are allowed to exercise the preemptive right to purchase partially, it may affect the expected profits of assignor. Suppose a shareholder holds 51% of company stocks. He or she has the absolute control over the company. The third party wants to get the controlling right and would like to purchase his or her stocks. Under this condition, if other shareholders exercise the preemptive right partially, such as purchasing 10% of the stock to be transferred, then only 41% of stocks can be purchased by the third party. As a result, the third party may refuse to purchase at last since it can not get the controlling right. So, the assignor’s expected profits are losing.

2. Regulations in article of association on limited company transferring stock rights

The fourth term of 72 Article in Company Law regulates: “Unless it is otherwise provided for of the transfer of stock rights in the articles of association, the articles of association shall be followed”. Law makers emphasize the adjustment effect of articles of association on the transfer of stock rights in perspective of encouraging company self governance and shareholders self governance.

How to understand this term? For the issue of stock rights transfer, as there is a conflict between the regulations of Company Law and the articles of association, do the articles of association have the priority? Or, with the precondition of following the Company Law, could articles of association embody the wisdom of shareholders and do they have the priority in practice? The author prefers to the later. According to the Article 11 in Company Law and the Article 23 in Rules for Company Register and Management, articles of association are based on laws. Once there are contents betraying the law or administrative regulations, company register agency can ask the company to amend them. Therefore, although articles of association, as the product of interest game of shareholders, embody the self governance of shareholders in essence, articles of association should be regulated by present law. The former exaggerates the effect of articles of association improperly. According to the later, shareholders can embody their wisdom in the transfer of stock rights by articles of association. And articles of association must be exercised in the field of law. In other words, whether the articles of association, especially concerning the transfer of stock rights, are effective or not is based on whether the articles are in accordance with the regulations in Company Law, whether the articles benefit the balance of interests, and whether the articles maintain the people combination of company. On one hand, it is not allowed to

transfer stock rights unlimitedly since it can destroy the people combination of company, affecting company's stability and development. On the other hand, it is not allowed to stop the transfer of stock rights on the excuse of company's people combination.

In a word, as a contract model, the Company Law has lots of imperfect regulations. Just as what was said by Professor Cheffins: "even the most carefully built restrictions on legal transfer may not be in accordance with the preferences of most shareholders" (Weili Huang, 2006, p155). Therefore, company's rule makers should completely understand the regulations of Company Law, and make articles of association benefiting the transfer of stock rights based on self conditions, which can complementing the imperfect part of Company Law or has the priority over the Company Law in practice.

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The Censor in the Late Republican Empire and His Meaning for Modern Democracy

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Abstract

In the Late Republican time, the censor was involved in maintaining and enforcing moral conduct amongst the citizenry. It had to guard the morals of the populace. The question to be asked now concerns the implications, for humanity in a modern democracy, of censuring the censor. This study determines that the functions of the censor display similarities with that of the Public Protector in a modern democracy. However, the functions of the censor belonged to the Late Republican time. Only centuries later, a bureaucracy, the Public Protector, appeared with functions similar to those of the censor. However, because of the constitutional demands of a modern democracy, the Public Protector had to fulfil additional and wider-ranging functions. Despite these larger and wider-ranging functions, the influence of the censor is clearly to be seen in the functions of the Public Protector.

Keywords: Censor, Public Protector, Roman Empire, Late Republican period, Human rights.

1. Introduction

Governments are seen as the protectors of the interests of the citizens and of its own interests. A democracy can only survive if the citizens have the assurance that their safety and other rights vis-à-vis other people and the government will be protected and respected. This will best be done if maintaining morally good acts amongst the citizenry as well as the bureaucracy is enhanced.

The censors of the Roman Empire display similar functions as government officials (for instance, the Public Protector) in a modern democracy. For purposes of this article, a study concerning the term, jurisdiction, and powers of the censor in the Late Republican period is hugely important. The article further aims at making relevant the role of censor for the modern democracy (under the Public Protector). The influence of the censor in the Late Republican Empire is still relevant and serves as the ground for maintaining morally good acts. On this basis, the protection of human rights in a modern democracy has been made possible.

2. The origin of the censor

The census was introduced by Servius Tullius, the sixth king of Rome. After disposing of the kings and founding the Republic, the census was replaced by the consuls in 443 BC. “Idem hic annus [443 BC] censurae initium fuit, rei a parva origine orate, quae deinde tanto incremento aucta est ut morum disciplinaeque Romanae penes eam regimen [...]” (Note 1) Because the census was labour intensive and beneath the dignity of a consul, the need arose for an appropriate bureaucracy, i.e. the censor, to fulfil this task. “[Cui] scribarum ministerium custodiaeque tabularum cura, cui arbitrium formulae censcendi subiceretur.” (Note 2) The first censors were Papirius and Sempronius. (Note 3)

Up until 442 BC, no more consuls were elected, but only military tribunes. Because the military tribunes could also be plebeians (ordinary workers class), the patricians (nobility) feared that the plebeians would in due course obtain control over the census. The patricians thus terminated the tribunes and entrusted the job of census to two officials, the censors. They had to be elected from the patricians.

The patricians dominated the office of censor until 351 BC, when Gaius Marcius Rutilus was appointed as the first plebeian censor. (Note 4) Approximately 12 years later, a Publilian law decreed that at least one of the censors had to be a plebeian. (Note 5) In 131 BC, both censors were plebeians for the first time.

There were usually two censors. Should one of them die during his term of office, the other one replaced him. This happened only once in 393 BC when the Gauls occupied Rome. However, the Romans viewed this as “an offense against religion”. (Note 6) Since then, if one of the censors were to die, his colleague had to resign and two new censors were elected to replace them. (Note 7)

The censor was involved in the regulation of the moral acts and discipline of the Roman citizens. (Note 8) There had to be no motive for financial gain from the office. For instance, Cato travelled from one village to the other in the mornings

to hear cases. He then returned to his farm and worked in the fields with his slaves. (Note 9) He received no financial gain for his services.

2.1 *The term of office of the censor*

The Romans believed that the biggest protection of the freedom of citizens lie in the fact that positions of power were not to be of a lengthy nature, but that a time limitation had to be placed on them. (Note 10) Owing to ancient legislation, the term of office of the censor was initially determined as five years. Ten years after setting up the office, the term of office was reduced to 18 months by the dictator, Mamercus Aemilius Mamercinus by means of a law, the Aemelian law. (Note 11) Mamercus wrote: “*Ut re ipsa*” inquit “*sciatis, Quirites, quam mihi diuturna non placeant imperia, dictatura me abdicō.*” (Note 12) As far as the tension between the ancient legislation and the Aemelian law is concerned, the latter won because it was ordained after the ancient precept and practice required that later legislation should replace earlier legislation. “[*Et*] ideo Aemiliae potius legi paruerunt quam illi antiquae qua primum censores create errant, quia hanc postremam iusserat populus, et quia, ubi duae contrariae leges sunt, simpler antiquae obrogat nova.” (Note 13) On the one hand, this gesture by Mamercus was received favourably by the Roman citizenry. On the other hand, prominent patricians criticised this limitation on the term of office of the censor. The Aemelian law was binding on the censor and it remained valid for approximately 100 years after its proclamation. For example, the censor Appius Claudius was threatened with imprisonment if he did not obey the Aemelian laws. (Note 14)

3. The election of the censor

Censors were elected in the Centuriate meeting, with a consul as chairperson. (Note 15) Both censors had to be elected on the same day. If the election was not completed on the same day, it was considered invalid and a new meeting had to be held. (Note 16) Once the censors were elected and the censorial powers were granted to them by the decree, *Lex Centuriata*, they were thus installed in their office. (Note 17)

Only someone who has been consul was fit for the office of censor. (Note 18) There were no laws prohibiting someone from standing for censor twice. However, only one person was elected to the office of censor twice, namely Gaius Marcius Rutilus in 265 BC. In the same year, the latter decreed a law that entailed that now one could be elected as censor twice. For this, he received the nickname *Censorinus*. (Note 19)

4. Features of the office of censor

The office of censor was regarded as the highest in dignity in the Roman Empire. It was regarded as “*sanctus magistratus*” (sacred magistracy) worthy of the highest respect. (Note 20) Persons filling this office had to bestow it with power and dignity. (Note 21)

The dignity of the office of censor was entrusted to this office on account of their maintaining and enhancing morally good acts amongst the citizenry. Based on this, the censors had at their disposal the *regimen morum* (the general control over the moral behaviour of citizens of the state). On basis of dignified features entrusted to this office, the censors had to allow themselves to be led by their own views (*ad arbitrium censoris*) and were not required to be responsible towards any other office in the state. (Note 22) This – responsibility towards other offices – could leave a loophole for the abuse of power.

5. Duties of the censor

The duties of the censor can be divided into three classes. Firstly, they had to register the citizens and their property; secondly, they had to guard over the *regimen morum* (maintaining the moral conduct of the citizens); and lastly, they had to supervise the finances of the state. (Note 23)

For purposes of this article, only the second duty of the censor will be discussed.

After the censors were relieved from the duty of public administration because of a lack of funding (in the state coffers), they then focussed their attention on maintaining public morality (*regimen morum*). (Note 24) The latter (duty) will be regarded as one of the most important duties of the censor. This made the office of censor into one of the most remarkable and feared in the Roman state. As far as the latter is concerned, the censors were also known as *castigatores* (chastisers). In terms of this description, they were viewed as the maintainers of the public mores and morality. (Note 25) They were not only to prevent or punish crime or immoral acts by way of censure, but they also had to maintain the traditional character, ethics, and habits (*mos majorum*) of the Roman population. (Note 26)

6. Censure (punishment by the censor)

The punishment imposed by the censor (censure) was preceded by the *nota* (mark, letter) or *notatio*, or *animadversio censoria* (censorial reproach) or *praefectura* (command). The Roman population habitually associated the rebuke (*nota*) with punishment and it would later be known as the *nota censoria*. Because, as previously noted, the censor was not required to report to anybody, the suspicion existed that they could abuse their power by being prejudiced. That the censors allowed themselves to be led by their discretion strengthened this suspicion. It was thus decided that censors

were to perform an oath stating that they would not be prejudiced. The practical implication of this oath caused the censors to be bound in every case (on their list) to be able to name (*subscriptio censoria*) the name of the guilty person(s) and the punishment about to be meted out to him. (Note 27) This was most probably done to curb the prejudice of censors and to prevent the abuse of power.

The *nota* was only *ignominia* and not *infamia*. (Note 28) This meant that the punishment were not eternal in nature but could be undone by following censors or by way of a *lex*. *Ignominia* was of a transitory nature and most probably did not remove someone (who were preparing for an office) of his office, or disqualified him. (Note 29) For instance, *Mamercus Aemilius* was raised to dictator by the censor despite an official transgression and the following reproach. (Note 30)

However, the *nota* was not valid unless both censors agreed on the punishment.

The *nota censoria* was used to punish the following transgressions: if, for instance, and individual lived in celibacy during a time which citizens were forced by the state to marry in order to live as citizens of the state, (Note 31) the breaking up of a marriage, or engagement in an untoward way or for insufficient reasons, (Note 32) inappropriate behaviour towards women and children as well as insubordination of children towards parents, (Note 33) a luxury lifestyle or exorbitant waste of public funds, (Note 34) neglect or failure by and individual to cultivate his fields, (Note 35) cruelty towards slaves or clients and the perpetuation of scandalous trade or career, such as playing in theatres. (Note 36)

6.1 Effect of the punishment (censure) of the censor

By way of the *nota censoria*, a perpetrator could be excluded from or released of the rank of senator (*ejection e senatu*) by means of *motio* (removal). (Note 37) The punishment could entail the mere exclusion from the list of senators or a perpetrator could be demoted to an agriculturalist. (Note 38) By means of an *ademptio equi*, the state-subsidised horse of a guilty person (*equestrian*) was taken back from him in public. (Note 39) The punishment could be combined with both of the abovementioned. (Note 40) The *motio e tribu* entailed that a perpetrator was ostracised from his family. (Note 41) Lastly, the *referre in aerarios* or *facere aliquem aerarium* was imposed on any person whom the censors though deserving of such a punishment. This punishment included all other forms of punishment: “for an *equestrian* could not be made an *aerarius* unless he was previously deprived of a horse, nor could a member of a rustic tribe be made an *aerarius* unless he was previously excluded from it.” (Note 42)

The Latin phrases *iudicium censorium*, *gravitas censorial*, and *auctoritas censoria* are indicative of the fact that the censors were persons endowed with power and thus able to make judgements and ascribe punishments. The censors usually put a mark (the *nota censoria*) behind the name of a (public official) senator who was found guilty of misconduct. Thomas wrote: “By affixing their mark of disapproval [*nota censoria*] to the name of an enrolled person, they could degrade him in rank and remove him from his tribe [...]” (Note 43) Wolf wrote about the *nota censoria*: “[It] [...] became [the censors] dreaded weapon.” (Note 44) Because of the impact of the *nota censoria*, the censor was also vested with the competence to end the career of a senatorial official. (Note 45) They also maintained the right not to reappoint former members of the senate who, in their eyes, were unworthy. “[The] censors [...] deleting the names of those who had [...] in their opinion [...] by reason of misconduct, [be] unworthy to hold the senatorial dignity.” (Note 46) The *nota censoria* also adversely affected the credit standing of a convicted senator. However, this did not hold for women because they were not tax payers, soldiers, or enfranchised citizens. (Note 47)

7. The end of the censor

The censor existed for 421 years, i.e. from 443 BC to 22 BC. This office was terminated by *Lucius Cornelius Sulla*. No census was performed between the time of *Sulla*’s dictatorship and the first consulship (82-70 BC) of *Gnaeus Pompeius Magnus* (*Pompey*).

The strict maintenance of moral behaviour amongst citizens, which was supported by *Sulla*, was, however, disregarded by the aristocracy. This is proof of the fact that, during this period, the censor did not figure anymore. However, the censor revived again under the next consuls, i.e. *Pompey* and *Marcus Licinius Crassus*. Thus the power and influence of the censor could not be reinstated. (Note 48)

During the civil wars in Rome, no more censors were elected. After a long interlude, censors were once again appointed in 22 BC, when Augustus caused *Lucius Munatius Plancus* and *Aemilius Lepidus Paullus* to fill this office. (Note 49) This was the last time that censors were appointed.

8. Practical application: the duties of the censor vis-à-vis the Public Protector

The powers of the censor resemble that of the Public Protector (*Ombudsman* in the previous dispensation, *Ombudsman Act*, Act 118 of 1979) in the current dispensation. The Public Prosecutor, however, has more powers than the censor had. In contrast to the censor, the Public Prosecutor can investigate “unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a function connected with his or her employment by an institution or

entity contemplated in paragraph (a)” (Note 50) According to this, it is clear that the Public Protector covers a much wider field than mere complaints concerning prejudice consequent upon the unlawful or improper conduct by the state or an official of the state in public capacity. The South African Legal Commission subsequently recommended that the Public Protector should also have the powers to investigate complaints that deal with the violation of environmental rights, fundamental rights and freedoms, complaints pertaining to corruption, bribery and the theft of state money. These recommendations of the Legal Commission are supported by sections 177(3) and (4) of the Constitution of South Africa, Act 108 of 1996. Apart from the Public Protector’s duty to maintain moral acts, s/he also acts as the champion for the protection of basic human rights.

9. Conclusion

It is clear that the Public Protector performs similar functions to those of the censor. The duties of the censor were characteristic of the circumstances of the Late Republican period in the Roman Empire. The Public Protector’s functions are requested by the demands of a modern democracy in order for the Protector to fulfil a wider-ranging function than that of the censor. Common to both offices is the fact that they are involved in maintaining morally good acts that serve as the basis for the protection of basic human rights. On this basis, the Public Protector can thus be regarded as the successor of the censor, despite the wider-ranging duties of the former. As said earlier, the larger duties of the Public Protector were necessitated by the need of a modern democratic dispensation. Apart from the wider-ranging duty, both offices have as common denominator the maintenance and enhancement of morally good acts amongst the citizenry. In this, the influence of the censors can be seen in the functions of the Public Protector when it concerns the maintenance of morally good acts amongst the citizenry amongst each other and vis-à-vis the public administration (state).

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Notes

Note 1. Livy iv: viii. "This same year saw the adoption of the censorship, an institution which originated in a small way but afterwards grew to such dimensions that it was invested with the regulation of the morals and discipline of the Romans."

Note 2. Livy iv: viii.

Note 3. Livy iv: viii.

Note 4. Livy vii xxii. "C. Marcius Rutulus, qui primus dictator de plebe fuerat [...]"

Note 5. Livy viii: xii. "Dictatura popularis et orationibus in patres criminosis fuit, et quod tres leges secundissimas plebei, adversas nobilitati tulit: unam, ut plebiscite omnes Quirites tenerent; alteram, ut legume, quae comitiis centuriatis ferrentur, ante initum suffragium patres auctores fierent; tertiam, ut alter utique ex plebe – cum eo ventum sit ut utrumque plebeium fieri liceret – censor crearetur."

Cf. Wylie 1948: 41.

Note 6. Livy v: xxxi. "C. Iulius censor decessit; in eius locum M. Cornelius suffectus, quae res postea religioni fuit quia eo lustrum Roma est capta; nec deinde unquam in demortui locum censor sufficitur. Consulibusque morbo implicitis placuit per interregnum renovari auspicia. Itaque cum ex senatus consulto consules magistratu se abdicassent, interrex creatur M. Furius Camillus, qui P. Cornelium Scipionem, is deinde L. Valerium Potitum interregem prodidit. Ab eo create sex tribuni militum consulari potestate ut, etiam si cui eorum incommode valetudo fuisset, copia magistratuum rei publicae esset."

Note 7. Livy vi: xxvii; ix: xxxiv; xxiv: xliii; xxvii: vi. "Creati censores C. Sulpicius Camerinus Sp. Postumius Regillensis, coeptaque iam res morte Postumi, quia collegam suffice censori religio erat, interpellata est. Igitur cum Sulpicius abdicasset se magistratu censores alii vitio creati non gesserunt magistratum; tertios creati velut dis non accipientibus in eum annum censuram religiosum fuit."

Livy ix: xxxiv. "[Omnes] deinceps censores post mortem collegae se magistratu abdicarunt [...]"

Note 8. Livy iv: viii.

Note 9. Plutarch, M. Cato, I.4-5

Note 10. Livy ix: xxxiv.

Note 11. Livy iv: xxiv. "[Alios] magistratus annuos esse, quinquennalem censuram; grave esse iisdem per tot annos magna parte vitae obnoxios vivere; se legem laturum, ne plus quam annua ac semestris censura esset. Consensu ingenti populi legem postero die pertulit et 'Ut re ipsa' inquit 'sciatis, Quirites, quam mihi diuturna non placeant imperia, dictatura me abdicō'. Deposito suo magistratu, imposito fine alteri, cum gratulatione ac favore ingenti populi domum est reductus. Censores aegre passi Mamercum quod magistratum populi Romani tribu moverunt octuplicatoque censu aerarium fecerunt."

Cf. Kunkel 1966: 18

Wylie 1948: 33.

Note 12. Livy iv: xxiv. "Mamercus explained, 'That you may have positive proof, Quirites, how little I approve prolonged authority, I lay down my dictatorship.'"

Note 13. Livy ix: xxxiv. "[And] they obey the Aemilian law in preference to that ancient ordinance which governed the first elections of censors, precisely because it was the latest which the people had enacted, and because in a conflict of two laws the old is ever superseded by the new."

Note 14. Livy ix: xxxiv. "[Et] nisi Aemiliae legi parueris, in vincula duci iubebo [...]"

Note 15. Livy xl xlv. "Censuram inde comitia habita: create M. Aemilius Lepidus pontifex maximus et M. Fulvius Nobilior, qui ex Aetolis triumphaverat [...]. Comitibus confectis, ut traditum antiquitus est, censores in Campo ad aram Martis sellis curulibus consederunt; quo repente principes senatorum cum agmine venerunt civitatis, inter quos Q. Caecilius Metellus verba fecit."

Note 16. Livy ix: xxxiv.

Note 17. Livy xl: xlv; Cicero De Lege Agraria ii.11. "[Comitiis confectis, ut traditum antiquitus est, censores in Campo ad aram Martis sellis curulibus consederunt [...]"

Note 18. Wylie 1948: 31-2.

Note 19. Plutarch Life of Coriolanus 1.

Valerius Maximus iv: a.3

Note 20. Plutarch Life of Cato the Elder 16.

Thomas 1976: 15.

Note 21. Livy iv: viii.

Vgl. Suolahti 1963: 14.

Thomas 1976: 15. "[Their] office became more august than even that of the consuls."

Note 22. Livy iv: xxiv. "[Mamercum] inquit 'Ut re ipsa, 'sciatus, Quirites, quam mihi diuturna non placeant imperia, dictatura me abdicō [...] Censores aegre passi Mamercum quod magistratum populi Romani minuisset tribu moverunt octuplicatoque censu aerarium fecerunt [...] populi certe tanta indignatio coorta dicitur ut vis a censoribus nullius auctoritate praeterquam ipsius Mamerci deterri quiverit."

Livy xxix: xxxvii. "[In] invidia censores cum essent, crescendo ex iis ratus esse occasionem Cn. Baebius tribunus plebis diem ad populum utrisque dixit. Ea res consensu partum discussa est, ne postea obnoxia populari aurae censura esset."

Note 23. Cicero De Legibus iii 3. "Censores, populi aevitates, soboles, familias, pecuniasque censento: urbis templa, vias, aquas, aerarium, vectigalia tuento: populi que partes in tribus distribuunt: exin pecunias, aevitates, ordinis patiunt: equitum, peditumque prolem describunt: caelibis esse prohibent: moris populi regunt: probrum in senatu ne relinquunt."

Note 24. Livy xxiv: xviii.

Note 25. Suolahti 1963: 39.

Note 26. Livy iv: viii. "[...] quae deinde tanto incremento aucta est ut morum disciplinaeque Romanae penes eam regimen, senatui equitumque centuriis decoris dedecorisque discrimen sub ditione eius magistratus, uis publicorum privatorumque locorum, vectigalia populi Romani sub nutu atque arbitrio eius essent."

Livy xxiv: xviii. "[...] ad mores hominum regendos animum adverterunt castigandaque vitia quae [...]"

Livy xl: xlvi. "Non oblitus sumus, censores, vos Paulo ante ab universo populo Romano moribus nostris praepositos esse, et nos a vobis et admoneri et regi, non vos a nobis debere."

Livy xli: xxvii.

Livy xlii: iii.

Suetonius Life of Augustus 27. "[...] sed reputans, et se privatum non sine periculo fore et illam plurimum arbitrio temere committi, in retinenda perseveravit, dubium eventu meliore an voluntate. Quam voluntatem, cum prae se identidem ferret, quodam etiam edicto his verbis testatus est: 'ita mihi salvam ac sospitem rem publicam sistere in sua sede liceat, utque eius rei fructum percipere, quem peto, ut optimi status auctor dicer, et moriens ut feram mecum spem, mansura in vestigio suo fundamenta rei publicae quae iecero. Fecitque ipse se compotem voti, niscus omni modo, ne quem novi status paeniteret. Urbem, neque pro maiestate imperii ornatam et inundationibus incendiisque obnoxiam, excoluit adeo, ut iure sit gloriatus marmoream se reliquere, quam latericiam accepisset."

Note 27. Livy xxxix: xlii. "Patrum memoria institutum fertur ut censores motis senatu adscriberent notas."

Cicero Pro Cluentio Oratio 42-8. "Video igitur, iudices, animadvertisse censores in iudices quosdam illius consilii Iuniani, cum istam ipsam causam subscriberent."

Note 28. Cicero De Re Publica iv: 6.

Note 29. Livy xxiv: xviii.

Note 30. Livy iv: xxxi. "A. Cornelius dictatorem Mam. Aemilium dixit et ipse ab eo magister equitum est dictus; adeo, simul fortuna civitatis virtute vera eguit, nihil censorial animadversio effecit quo minus regimen rerum ex notata indigne domo peteretur."

Cicero Pro Cluentio 42. "C. Getam, cum a L. Metello et Cn. Domitio censoribus ex senatu eiectus esset, censorum esse ipsum postea factum: et cuius mores errant a censoribus reprehensi, hunc postea et populi Romani et eorum, qui in ipsum animadverterant, moribus praefuisse."

Note 31. Valerius Maximus ii: 9. "Camillus et Postumius censores aera poenae nomine eos qui ad senectutem caelibes pervenerant in aerarium deferre iusserunt, iterum puniri dignos, si quidem de tam iusta constitutione queri sunt ausi, cum in hunc modum increparentur: 'Natura vobis quemadmodum nascendi ita gignendi legem scribit, parentesque vos alendo nepotum nutriendorum debito, si quis est pudor, alligaverunt. Accedit his quod etiam Fortuna longam praestandi huiusce muneris advocacionem estis adsecuti, cum interim consumpti sunt anni vestri et mariti et patris nomine vacui. Ite igitur et nodosam exsolvite stipem, utilem posteritati numerosae."

Note 32. Valerius Maximus ii: 9. "L. enim Antonium senatu moverunt, quod quam virginem in matrimonium duxerat,

repudiasset nullo amicorum consilio adhibito. At hoc crimen nescio an superiore maius: nam illo coniugalia sacra spreta tantum, hoc etiam iniuriöse tractata sunt. Optimo ergo iudicio censores indignum eum aditu curiae existimaverunt.”

Valerius Maximus ii: 9. “Repufium inter uxorem et virum a condita urbe usque ad vicesimum et quingentesimum annum nullum intercessit.”

Note 33.Plutarch Life of Cato the Elder 17; Cicero De Re Publica iv 6.

Note 34.Plutarch Life of Cato the Elder 18.

Valerius Maximus ii: 9. “Narravit omnis aetas et deinceps narrabit ab eo Cornelium Rufinum duobus consulatibus et dictatura speciosissime functum, quod decem pondo vasa argentea comparasset, perinde ac malo exemplo luxuriosum in ordine senatorio retentum non esse.”

Valerius Maximus ii: 9. “M. autem Antonius et L. Flaccus censores Duronium senatu moverunt, quod legem de coercendis conviviorum sumptibus latam tribunus plebi abrogaverat.”

Cary and Scullard 1975: 82.

Forde 1975: 16. According to Forde, Cato had greatly respected Dentatus and imitated the latter’s lifestyle: “[The] Samnite ambassadors found Dentatus cooking turnips for supper and attempted to bribe him. Dentatus threw the envoys out, saying that a man who could be satisfied with turnips for supper had no need of gold; even if he did, it was more honourable to conquer those who had gold and gain it that way than merely possess gold – and conquer them he did. Meditating on the heroism of this man, Cato would return to his own hard work with renewed zeal.”

Note 35.Valerius Maximus ii: 4. “Per quingentos autem et quinquaginta et octo annos senatus populo mixtus spectaculo ludorum interfuit. Sed hunc morem Atilius Serranus et L. Scribonius aediles ludos Matri deum facientes, posterioris Africani sententiam secuti [...]”

Valerius Maximus ii: 9. “Equestris quoque ordinis bona magnaue pars, quadrigenti iuvenes, censoriam notam patiente animo sustinuerunt, quos M. Valerius et P. Sempronius, quia in Sicilia ad munitionum opus explicandum ire iussi facere id neglexerant, equis publicis spoliatis in numerum aerariorum retulerunt.”

Pliny Natural History xviii: 3.

Note 36.Livy vii: ii. “Et cum vis morbid nec humanis consiliis nec ope divina levaretur, victis superstitione animis ludi quoque scenici, nova res bellicose populo – nam circi modo spectaculum fuerat [...]”

Note 37.Livy xxxix: xlii. “Catonis et aliae quidem acerbate orationes exstant in eos quos aut senatorio loco movit [...]”

Note 38.Livy xxiv: xviii. The latter was rarely accepted.

Note 39.Livy xxxix: xlii. “[...] quibus equos ademit.”

Note 40. Livy xxxix: xlii; Livy xxiv: xviii, xliii.

Note 41.Livy xlv: xv. “Hoc cum ita servatum esset, negabat Claudius suffragii lationem iniussu populi censorem cuiquam homini, nedum ordini universo adimere posse. Neque enim, si tribu movere posset, quod sit nihil aliud quam mutare iubere tribum, ideo omnibus quinque et triginta tribubus emovere posse, id est civitatem libertatemque eripere, non, ubi censeatur, finire, sed censu excludere.”

Vgl Cicero Pro Cluentio 43. “[...] in aerarios referre aut tribu movere iubeat [...]”.

Note 42.Livy iv: xxiv; xx: xviii.

Note 43.Thomas 1976: 15.

Note 44.Wolff 1951: 35.

Note 45.Thomas 1976: 15.

Note 46.Wylie 1948: 38.

Note 47.Suolahti 1963: 49.

Note 48.Cassius Dio xl.57.

Note 49.Suetonius Life of Augustus 37.

Note 50.Section 6(4)(b) of the Public Protector Act, Act 23 of 1994.



On the Amendment and Perfection of Legislation of Mortgage

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Abstract

Among all real rights granted by way of security, mortgage, as the “King of Guarantee” has the special advantage. The Guarantee Law of the People’s Republic of China had nothing to start with. Since the application of the Guarantee Law of the PRC ten years ago, the author offers suggestions for perfecting the legislation of mortgage law of China from six aspects, namely setting up legal mortgage, subdividing and perfecting the mortgage of rights, distinguishing the combined mortgage and the common mortgage, creating the mortgage of securities and the mortgage of owners, constituting new consortium mortgage and floating mortgage, and forming the ship mortgage.

Keywords: Mortgage, Guaranty, Legislation, Countermeasure

At the time with prosperous market economy, to maintain the speed and the safety of transactions is the essential task of civil and commercial law. The responsibility of maintaining the safety of transactions and decreasing the risks of transactions falls in the guarantee system. The mortgage-guarantee system is originated from ancient Greek. At the late Roman Empire, the Roman private law has been introduced and gained complete development, which has turned into the most popular guarantee mode (Kunlin Zhao, 1998, p65). Under the imitation of other countries, the mortgage gains more attentions. Especially along with the development of modern market economy, its types and applications have been extended. The continental legal system differentiates the pledge and the mortgage. It adopts three standards to differentiate the two. The first standard is about whether transfer the possession of property or not. For example, the French Code Civil regulates that the mortgage is the real right of fixed assets for the sake of paying off debts. It is sorted into the legal mortgage, the judgment mortgage, and the agreement mortgage. The pledge includes the chattel pledge and the pledge of immovables. Japan Civil Code takes the transfer as the standard. Transferring the possession of property is the pledge, and if not, the mortgage. The second is to take the transfer and the nature of property as the standard. For example, German Civil Code regulates that for the immovables, there is only mortgage. And the mortgage does not transfer the possession of immovables. The pledge is to transfer the possession of property. The third is to take the nature of property as the standard. For example, German Civil Code regulates that the mortgage is for the immovables in guarantee and the pledge is for the movables, not matter whether transferring the possession or not. In contrast, the Anglo-American law system does not distinguish the pledge and the mortgage clearly. It lays stresses on mortgage. The Anglo-American law system divides the mortgage into the mortgage in common law and the mortgage in equity law. In practice, any property can be used for the corpore of mortgage. Conditions in America are similar to that in British. In ancient China, the pledge and the mortgage are mixed together in practice. There is not a strict difference between them in law. The civil and commercial law starts later in China. Till the Third Plenary Session of the 11th Central Committee, it steps into the fast development way. In 1995, China issues the Guarantee Law of the People's Republic of China (Guarantee Law for short), which establishes the standard of distinguishing the mortgage and the pledge.

The Guarantee Law especially regulates the mortgage system in Chapter 3 by 30 Articles. It is the most complete regulations concerning the mortgage in China. Since the issue of the Guarantee Law, it has exerted a positive effect on constituting a legal system for China’s market economy and maintaining trading safety and market order. However, along with the deepening of social practice and judicial practice, some defects of the Guarantee Law are displayed. At the transmission of social and market economy in China, it is urgent to further perfect the legislation of mortgage.

1. Establish the legal mortgage

The legal mortgage happens directly based on laws. “This mortgage has the validity of law without register. It is valid at the day when conditions happen. (Kunlin Zhao, 1998, p73)”

On principle the mortgage is the agreed real rights granted by way of security. It is contracted by parties. Laws also regulate that the mortgage appears naturally as there is certain relation according to the needs of some relations instead of agreements of parties. It is the essential difference between legal mortgage and common mortgage. Take French Civil Code for example. The legal mortgage includes: the wife has the legal mortgage right to husband’s property; the ward has the legal mortgage right to guardian’s property; the state, public community, and state-operated enterprise have the

legal mortgage right to receiving teller and accountant's property; creditors have the legal mortgage right to debtors' property; tax authority has the legal mortgage right to tax payers' property; the exchequer has the legal mortgage right to special taxation for the sake of insuring the success of wars. The legal mortgage right happens due to laws' Articles. The special rules in laws will enjoy the priority in practice. If there are no special rules, relevant regulations on common mortgage right are effective. Besides the legal mortgage right, there is a judgment mortgage, which happens due to the judgment of court. In modern time, in order to guaranteeing the trading safety, many countries set strict limits on legal mortgage. For example, German laws recognize the legal mortgage right to the debts generated from construction contracts. Japanese laws replace legal mortgage system with first-get priority system and unmovable pledge right. Only France recognizes the legal mortgage right to a wider scope and regulates the judgment mortgage right. According to the Guarantee Law of China, there is no legal mortgage right or judgment mortgage right. The agreed mortgage right is dominating. Compared with former review, the defects are clear. Considering China's conditions and referencing from the widely-accepted principles in legislation, China can establish these kinds of legal mortgage rights: the ward has the legal mortgage right to guardian's property; creditors have the legal mortgage right to debtors' bankruptcy property; the tax authority has the legal mortgage right to tax payers' all property.

2. Subdivide and perfect the right mortgage

The right mortgage is a real right granted by way of security that takes the usufructuary right as the object. Viewing from other countries' laws, the rights that can be taken as the object of mortgage are mainly traditional civil superficies (ground usufruct, emphyteusis, and usufruct of farm land). Taiwan province regulates that: the pawning right can also be used as the object of mortgage. Special laws, such as Mining Law, Fishing Law, and Forest Law, in Japan and European countries and American countries, regulate that these non-land usufructs, such as mining right, fishing right, and forest right, can also be taken as objects of mortgage, forming semi- mortgage (Ichiro Kato & Liangping Lin, ?, p155). Similar to Japan, most countries regulate the right mortgage. The object of semi-mortgage is limited to the usufruct of immovables. For example, Japanese Civil Law regulates that the object of right mortgage is limited to superficies and emphyteusis (Ichiro Kato & Liangping Lin, ?, p155). In Taiwan province, parties can set up mortgage rights based on the usufruct of superficies and emphyteusis and the semi-usufruct of mining right, pawning right, and fishing right. Article 47 in The PRC Administration of Urban Real Property Development Tentative Procedures and Article 34 in the Guarantee Law of PRC respectively regulates: Article 34 The state-owned right to the use of land, house and other land fixtures which the mortgagor is entitled to dispose of pursuant to the law and the right to the use of land on the un-reclaimed land such as un-reclaimed mountains, un-reclaimed valleys, unclaimed hills or un-reclaimed beaches which is contracted for management by the mortgagor in accordance with law and is agreed to mortgage by the contractee can be mortgaged. Therefore, in China the mortgage rights merely include the right to the use of land, which can be taken as the mortgage directly (Wusheng Xu, 1999, p393).

However, China's present legislation of mortgage has no relevant regulations. Both present civil and commercial laws and special Guarantee Law do not regulate the usufructuary right. At present, the contracted land in rural areas is mainly operated and defined by contracts. Some usufructuary rights are merely discussed and concerned in legal papers but not clear legal regulations. Some semi-usufructuary rights, such as the mining right, fishing right, and water breeding right, can not be mortgaged because they are not allowed to be transferred. It is an inevitable tendency to establishing the usufructuary right. Therefore, it is necessary to subdivide and perfect the right mortgage in Guarantee Law.

3. Differentiate the combined mortgage and the common mortgage

The common mortgage is in contrast to the single mortgage. The single mortgage is only for certain special property. The common mortgage is based on several different properties. The meanings for differentiating the single mortgage and the common mortgage are: as the gages include several different properties, the mortgagee has the mortgage right. The mutual relations of several properties should be dealt with properly. Otherwise, it will hurt others' interests, whose interests relate with the common gages. The common mortgage is based on parties' contracts that agree to take several properties as the mortgage. In another condition, the common mortgage happens because of the separation of gages after the mortgage. The common mortgage has been widely accepted by most countries. According to the contents of the Guarantee Law, mortgagor can mortgage all kinds of properties together. Here the so-called combined mortgage includes the common mortgage in nature. As for the nature of common mortgage, there are single mortgage, complex mortgage, and compromise mortgage theoretically. According to the theory of single mortgage, the common mortgage only has one mortgage right. Several properties serve as the object of one mortgage right together. Taiwan's famous scholars Youchang Huang in his Explanations for Civil Law's Real Right and Jie Cao in his On China's Civil Law's Real Rights adopt the theory of complex mortgage. According to the theory of complex mortgage, the common mortgage is the collection of several mortgage rights based on several properties. Therefore, it can be named as the general mortgage. Taiwan scholars Shangkuan Shi, Zhaowei Li, and Zaiquan Xie hold this idea. The theory of compromise mortgage agrees that the common mortgage can be single mortgage or complex mortgage. What it is the single mortgage or the complex mortgage is based on practical conditions. Taiwan scholar Yubo Zheng is insisted on the

theory of compromise mortgage. He thinks that the common mortgage can be the single mortgage or the complex mortgage. The same mortgagor mortgages his or her gages, what is the single mortgage. In order to mortgage for the same debt, several properties turn into gages, what is the complex mortgage (Mingyue Xu, 1998, p102). In order to maintain the coherence of laws and reduce unnecessary conflicts and juridical mistakes, we should discard the concept of “combined mortgage” and adopt the single mortgage and the common mortgage that are widely accepted by the world.

4. Create the security mortgage and the owner mortgage

The so-called security mortgage is set up by the land owner. Based on the application of land owner, for the sake of self or others' fulfillment of debts, the register administration gives the mortgaged security to the creditor. As the debtor does not fulfill the debt, the holder of mortgaged security can exercise the mortgage right by presenting the mortgaged security. According to German laws, the mortgage right of mortgaged security has the public power. In Japan, the so-called mortgaged security is far different from Switzerland Civil Law. Japanese mortgaged security combines the creditor's right and the mortgage right together. The guaranteed debt and the mortgage right can not be separated from each other. They must be transferred at the same time. In German Civil Law and Switzerland Civil Law, the mortgaged security is pure representing mortgage right. The mortgage right represented by mortgaged security is separated from the creditor's right. Besides, according to the regulations of Japan Mortgage Security, the guaranteed corporate security with mortgage belongs to the scope of mortgaged security. In German laws, the mortgage right of security is the most common state of mortgage right. But the parties can mortgage for the creditor's right without the transfer of security in contracts. At this time, parties can register the mortgage right in relevant agency, forming the register mortgage right. As a matter of fact, the mortgage right of security should be registered in formation. But when it is to guarantee the creditor's right, it is not necessary to register. For a long period, China does not set put the mortgage right for security. Till Feb. 2000, China issues the Management Rules for Security Company's Stock Pledge Loan. It recognizes and regulates on the mortgage right of security, which creates a better condition for the amendment and the perfection of Guarantee Law.

The mortgage right of owner means the mortgage right enjoyed by the owner on his or her properties. It is also the mortgage right of the debtor. The common goal of mortgage right is the realization of guaranteed debt. Therefore, the mortgage right is usually possessed by other creditors. In France Law, as there are several mortgage rights over the same property, the mortgage right will disappear when the first mortgagee has been paid off. Then, the second mortgagee will get the mortgage right. Therefore, it usually does not recognize the mortgage of owner. The so-called mortgage right is usually the other-owner mortgage right. But in German law, the mortgage right follows the fixed order. As the No.1 mortgagee gets his or her payment, the mortgage right does not disappear. It will be transferred to the mortgagee, which can protect the interests of common creditors well. So the mortgage right is a back-forward owner mortgage right. Besides, the owner can also set up the mortgage right for his or her property or future debts. This mortgage right always belongs to the owner all the time. In nature, the land owner can issue his or her land mortgage security or register self as the mortgagee, which can help him or her enter the circulation field by taking the mortgage right as the investment. However, China's Guarantee Law has no relevant regulations on the mortgage right of owner. Apparently, it needs more regulations.

5. Build new consortium mortgage right and floating mortgage right

The consortium mortgage right is also named as the corporate mortgage right, which takes corporate properties, including the movables, immovables, and rights as the objects and sets up the mortgage right. It takes the corporation's total properties as the object of mortgage right. This special mortgage system appears for the needs of social and economic development, which is especially important for driving corporation's capital financing and exerting the multiple effects of corporate assets. There are no clear regulations on consortium mortgage in traditional civil laws, which is established gradually in practice. The consortium mortgage right takes the independent property as the object, completely in accordance with the mortgage right's requirements for values. Besides, in an economic meaning, the corporation is an independent economic body. Its property is a whole body in law, which forms the physical base for the corporation in business. If set up mortgages for part of properties, its general credit capability will be separated. Then, it can not get the giant capitals and the procedures are complex. If integrate corporate properties together, make its maximum value as the mortgage, namely setting up the consortium mortgage, the effect will be greatly improved.

The consortium mortgage right in continental legal system is originated from German railway consortium system. Later, it is developed by Japan. Viewing from legislation and practice, there are mainly three types of consortium: factory consortium mortgage right, mine consortium mortgage right, and public service consortium mortgage right. These consortium mortgage rights mean to get loans from banks by mortgaging the total property. The so-called total property includes movables, immovables, and rights based on necessary production. In law, the total property is taken as the fixed immovables. Therefore, in setting up the mortgage right, it should be specialized. Only taking some properties as the mortgage is not the consortium mortgage right. It is another mortgage right. Japan and Taiwan province regulate that

the total property, as the object in consortium mortgage right, should not be separated or dealt with at random without the agreement of mortgagee. If the mortgagee agrees to divide or deal with the total property, the divided part should not be taken as the object of mortgage right.

In Anglo-America legal system, the floating mortgage right is similar to the consortium mortgage in the continental legal system. Differing from the consortium mortgage in continental legal system, the floating object is the total property of corporation at present and in future. It can not be specialized till the guaranty has been realized. Before the realization, the mortgagor can change the total property that is taken as the mortgage. There is certain floating. Therefore, the scope of object is wider. Even the corporate debt, though it is changeable, can serve as the object of guaranty together with other properties, and rights. The consortium mortgage in continental legal system is derived from German railway consortium system. It should be specialized at its formation. Therefore, it merely refers to the total property at present. It mainly includes the corporation's important movables, immovables, usufruct right, industrial property right, and leasehold of immovables. The changeable daily movables, future debts, commercial secrets, and business fame are excluded. In contrast, the floating mortgage in Anglo-America legal system sets loose requirements for the object of mortgage. It is more flexible and can reflect the needs for modern commercial economy and credit relations. However, it is only good for mortgagor (corporate debtor or the third party). It is not good for the creditor as the investor. Because the guaranteed base for credit is not sound. Therefore, both the continental legal system and the Anglo-American legal system have clear regulations on the consortium mortgage right or the floating mortgage right. China's Guarantee Law and other laws do not regulate these two mortgage rights. Some scholars agree that the "combined mortgage" in the Guarantee Law can be taken as the consortium mortgage (Wusheng Xu, 1999, p174-175). If apply the single mortgage to the common mortgage, the consortium mortgage should belong to one form of common mortgage. Then, the combined mortgage in China's present law is the common mortgage in nature. If adopt the complex mortgage, then the consortium mortgage does not belong to the common mortgage but one form of mortgage right. Then, the combined mortgage in China's Guarantee Law includes the common mortgage and the consortium mortgage in nature (Wusheng Xu, 1999, p174-175). Although it is reasonable, there are prominent defects and contradictions. As for whether construct the floating mortgage or not, more and more scholars hold a positive opinion (Zongle Huang, ?, p294). As a matter of fact, the floating mortgage and the consortium mortgage have their features, advantages, and disadvantages respectively. Viewing from the development of two systems, the floating mortgage means to overcome the defects of consortium mortgage and make the corporation get more capitals (Huabin Chen, ?, p654). Therefore, China can create the consortium mortgage and the floating mortgage at the same time. How to exercise the two in practice is determined by parties.

6. Set up the ship mortgage right

First of all, it is necessary to set up the ship mortgage right, which can nicely complement the defects of mortgage and pledge. As for whether the mortgage system in civil and commercial laws is right for ships, or, whether there is a ship mortgage system, there is not an established conclusion in the theoretical field and the practical field, what is caused by the fact that the ship mortgage is to take the special property ship as the object. The mortgage of immovables takes the immovables supplied by the debtor or the third party as the object, which does not transfer the possession of object. When the debtor does not perform the debt, the creditor shall be entitled to have right to keep the said property to offset the debt or have priority in satisfying his claim out of proceeds from the auction, sale of the said property. The immovables have large values in general. They are not easy to be moved, destroyed, or ruined. They are capable of guaranty by means of announcement and register. Because it does not transfer the possession, which does not affect others' usufructuary right, it can exert the exchange values and the utility values completely. As for the pledge of movables, when the debtor does not perform the debt, the creditor shall be entitled to have priority in satisfying his claim out of proceeds from the auction, sale of the said property. In civil law, the pledgee must transfer the possession of object. The pledgee should allow the pledgor to possess the object. Once the pledgee loses the possession of pledgings or returns the pledgings to the pledgor, the pledge disappears. The movable pledge system enables the pledgee possess the pledgings. On one hand, it can avoid the creditor to destroy the object, maintaining the value of the pledgings. On the other hand, it serves as a kind of psychological pressure on the debtor, driving him or her to pay off the debts in time. Once the debtor refuses to fulfill the debts, the pledgee can actualize the debt right directly, without worrying the debtor's delay. The pledge system is better for the creditor's interests.

However, no matter what it is the mortgage or the pledge, neither can satisfy the requirements of ships that are so important in shipping. The object of mortgage is limited to immovables, which is not based on the transfer of possession. The object of pledge is limited to movables, which is based on the transfer of possession. Then, no matter what we take the ship as the object of mortgage or the object of pledge is improper. On one hand, the main function of ship is to sail on the sea. Its movement does not hurt its exchange value. Therefore, it belongs to the movables and should not be taken as the object of mortgage. On the other hand, the ship, as a special material, has great exchange values and utility values. To exert the ship's utility value to a great degree depends on the management level of specialists. Once the ship, as the gage, is transferred to the creditor who is incapable of business management, the utility value of ship can not be

exerted completely. Meanwhile, the specialized company that is good at ship management can not gain income to pay off the debts because of losing the possession to the ship. As a result, the repayment of debts loses the economic source. Therefore, to take the ship as the pledging is also improper. At least it is irrational in perspective of economy. As for the application of laws, we should reform the techniques of legislation and seek for the fairness (Guodong Xu, 1992, p137). The special status of commercial laws mainly focuses on these aspects: it amends and reforms individual articles in civil law, it makes special rules based on the common system of civil law, and it creates a special system that is not for the civil law (Junhai Liu & Xinbao Zhang, 1997).

Secondly, we should actualize the integration and the connection of civil law legislation and commercial law legislation. For the sake of satisfying the needs for shipping, China's Maritime Law creates the special real right system, namely the ship mortgage system, based on the special conditions in shipping. Then, the ship, as the movable, can be mortgaged. The ship owner can register the mortgage of ship, but not transfer the possession of ship. By this way, the ship owner can realize the financing and hold the usufructuary right of ship. For the creditor, he or she can guarantee his or her creditor right and avoid the duty of maintaining the ship. The creation of ship mortgage system is a nice legislation indeed. However, "it is unknown for the real origin of ship mortgage. But we know that the Bottomry, in which the captain can mortgage the ship to the creditor, has been effective in Ancient Greek in 4th century BC. The Bottomry has been identified in Roman law and later codes. But in 19th century, because of the emergence of steel ship and the needs for more capitals, this financing mean seems to be improper. (William Tetley, 1985, p205)" At the very beginning of shipping trade, the Bottomry is popular in financing. But along with the continuous development of technologies, maritime shipping is not taken as the "ocean risk" any more. People begin to doubt the Bottomry. On the other hand, the financing subject will be unsatisfied as the large financing loans disappear due to the loss of ships. Therefore, the Bottomry has exited from the history stage gradually. Along with the construction and perfection of modern commercial banks' credit system, financial institutions (mainly commercial banks) aim at seeking for safe, reliable, and profitable investment market for their huge funds. Along with the development of technologies, to build or buy a ship needs a huge amount of capitals. In other words, without commercial banks' loans, ship companies can not collect necessary funds for building or buying ships. Under this circumstance, ship companies choose to sign "loan contracts" with financial institutions. By getting loans from financial institutions, these companies can build or buy new ships. At the same time, the two parties can sign a "ship mortgage contract" that makes the ship in construction or purchase turn into the gage that ensuring the fulfillment of the "loan contract". By this way, financial institutions get amounts of investment chances with guaranties. Ship companies get sufficient funds in operations. Therefore, the ship mortgage that takes ships as gages has been widely accepted and adopted more and more.

Secondly, the ship mortgage, as a legal system, has been adopted by more and more countries. In a sense, the aim of the Maritime Law regulating the ship mortgage system is to solve the financing issue of maritime shipping. Meanwhile, it offers legal insurance for commercial banks investing in shipping. As a matter of fact, the establishment of this system not only solves the difficult financing issue for shipping companies but also generate positive effects on developing countries enlarging domestic shipping business by foreign funds. Meanwhile, the establishment of ship mortgage system has a profound influence on driving the development of shipbuilding industry.

Today, along with the further development of ships, such as the size, the automation, the specialization, and the integration, ships have more values, not mention the guarantee effect of modern ships as guaranties. In order to integrate the ship mortgage system in different countries' maritime laws, many international agreements have been signed, which take the ship mortgage as the main content. Now the ship mortgage system has been adopted by most shipping countries. Therefore, as we amend the legislation of mortgage law, we should follow the trend and set up the ship mortgage right.

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The Global Interests in the Process of Globalization

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Abstract

Global interests are products of globalization. It is also an important subject in globalization studies. For human being, interests are vital as the basic factor determining the living conditions and happiness. Interest relations hold the core position in amounts of social relations. In the process of globalization, we should recognize and build global interests in the world. This paper the issues concerning how to understand global interests, who can stand for global interests, challenges for global interests, opportunities for global interests, and how to improve and maintain global interests.

Keywords: Globalization, Global interests, World politics, International relations

Some countries expand their national interests to the whole world and the governments claim that they have global interests. Those are not real global interests. Real global interests are the common interests hold by all individuals and countries. They are the top human interests.

Global interests are products of globalization. It is also an important subject in globalization studies. For human being, interests are vital as the basic factor determining the living conditions and happiness. Interest relations hold the core position in amounts of social relations. Interests are the core of human political activities, legal activities, economic activities, and all social activities. Interests are the focus of political issues, legal issues, economic issues, and all social issues. In the history of human civilization, the awake of interest consciousness marks the rationality and the progress. Sorts of human activities are driven by interests. In all social fields, such as politics, laws, economy, and military, interests serve as motives for people's value orientation, target choice, behavioral rules, and decisions.

As globalization generates enhancing mutual relations, it does not automatically produce a set of common experiences, views, and values (David Held, Translated by Zhou, Junhua, 2005, p3). Global interests are still unclear today. Under this condition, globalization is similar to a giant ship in an ocean, without fixed goals and planed lines. The potential risks and threats are terrible. If we can not understand global interests clearly, globalization will have more threats and a dark future. In the process of globalization, it is necessary to recognize and build global interests in the world.

1. How to understand global interests?

The process of globalization is an inevitable continuousness of human socialization. It is the top level of human socialization. Global interests come into being along with the process of globalization. Before human being enters the time of globalization, there are only regional interests and regional interest issues but not global interests or global interest issues. The essence of interests is to satisfy the interest subjects and to achieve harmonious internal and external relations of interest subjects. Global interests can be sorted into human living state interests and human living environment interests.

At present we can not define global interests clearly. On the other hand, we can point out what global interests are not and what global interests are about. Global interests are not the sum of all individual interests, not the sum of all nations' and countries' interests, not the maximization of some personal interests, and not the maximization of some nations' and countries' interests. Global interests are human common interests including all individual interests, nations' and countries' interests, and sorts of interest relations.

People's recognition to interests starts from individual interests. Public interests recognition tends to be in an increasing state, surpassing individual interests and recognizing family interests, kindred interests, enterprise interests, and community interests, and surpassing family interests, kindred interests, enterprise interests, and community interests and recognizing nations' interests and countries' interests, and surpassing nations' interests and countries' interests and recognizing global interests. People's recognition to global interests is different. They face barriers and can not overcome them in recognizing nations' interests and countries' interests. In the world, all people regard nations' interests and countries' interests as the top in politics, laws, psychology, and affection. The idea of taking global interests as top interests is not recognized by the world theoretically or practically.

As interest subjects overlaps with recognition subjects, the recognition to interests are self-conscious. The recognition to self interests reflects the level of self consciousness in a sense. The precondition of recognition is attention. And the result is to acquire knowledge. As for the recognition to global interests, both precondition and result are unsatisfying.

The first is insufficient attention. The second is short of knowledge. Compared with knowledge of earth concerning astronomy and geography, knowledge of globalization and global interests seems to be hazy.

2. Who stands for global interests?

Just as there is no earth more than 4 billion years ago, there is no global interest before human enters the time of globalization. In the process of globalization, global interests come into being step by step.

The fuzziness of organizational state is the primary reason for unclear and undefined organizational goals. The trust-agency assumption assumes that the principal is rational, and he understands his interests completely, and he can empower the agent based on self interests (Francis Fukuyama, Translated by Huang, 2007, p51). In perspective of organizational state, the principal and the agent for global interests are not established. The subject of global interests is a complex structure staying at the top of human society. At present, it is still immature. Till today, the global government is still an illusion of few scholars. There is not a global organization and institution that is at the same level with global interests.

UN and other international organizations are products of modern international relations. Their main function is to coordinate international relations, deal with world affairs, and participate or host some world-wide causes, standing for the global interests to certain degree. Any country, party, religious group, trans-national enterprise, and other traditional social institution have relevant interest subjects. That serves as a part of global interests but can not stand for global interests completely. But they can partially stand for global interests as they maintain self interests. Anybody is one particle of global interest subjects. Everyone is responsible for global interests and has a voice in global interests, just as people are responsible for national affairs and have a voice in national affairs.

Global interests can not be represented by few interest subjects intensively. Global interests can be represented by all interest subjects respectively. Global interests can not be represented by few interest subjects completely. Global interests can be represented by relevant interest subjects partially.

3. Challenges for global interests

Some ancient problems, such as wars, poverty, thirsty, hungry, crime, corruption, bribe, and ignorance, are still unsolved, disturbing modern people. Today's new issues, such as nuclear proliferation, warming climate, shortage of water sources, and energy, force people go to the edge. As increasing people are developing local economy, they explore natural sources and pollute ecological environment. The earth is in danger. For the whole human being, it is extremely dangerous. Modern international relations and orders are still in a non-government state. Whether more serious global issues can be solved completely under the state of international relations and non-government will test human political rationality and wisdom.

Kinds of conflicts for interests stop the construction of global interests. Interest invasion, interest cheat, and interest exploitation deepen the dispute between individuals, parties, nations, and countries. The narrow view of interests from individuals to nations to countries is popular. Some people regard their interests to be higher than others. The growth of some people's interests is from occupying or hurting others' interests. Some countries' interests are higher than others'. The growth of some countries' interests is from occupying or hurting other countries' interests. Interest conflicts and gaps stop the process of globalization and the progress of human civilization.

Some people expect more than the limit of fact. Their desires for interests rise unlimitedly, which may cause the emergence of evil interests. In order to satisfy some evil interests, certain illegal activities happen. In the aspect of countries, conditions are similar. Some countries establish their interests based on wild desires in stead of practical needs. Therefore, these countries will pursue for illegal interests and may take all possible illegal actions in order to achieve their aims. Just as the cancer cell threatens the life, local illegal interests will threaten the existence of whole interests. At the time of globalization, countries' illegal activities will not only ruin the world peace but also threaten human safety. The destructive energy created and accumulated by human being can ruin the earth. If countries' illegal activities can not be controlled effectively at the time of globalization, it will result in the die at last. The World War I and II happened at 20th century prove this point. Nobody can exclude the possibility of a global tragedy.

Countries will never quit from the stage of history. In order to sustain self interests, countries may take irrational actions, what can make them win domestic supports but also obtain sympathy in the world. Countries' interests are the top state for most people, which turn into a natural barrier of recognizing global interests. The patriotism focused on being loyal for countries' interests and dedicating to countries' interests is still the common value at the time of globalization. For most people in the world, countries' interests are saint and dominating. After people's personal interests are satisfied, they will feel happy for countries' honor, be sad for countries' disasters, and dedicate themselves for countries' sake. They would not like to input equal passion and energy in other things. Compared with tangible countries' interests, global interests are intangible. The lightest hurt on countries' interests may inspire giant angers. However, the most serious hurt on global interests is ignorable. Countries stand for certain political interests. They are not the top form of human union. Therefore, it is time to consider something surpassing countries (Cornelius. F. Murphy, Jr, Translated by

Wang, Qiliang. Wang, Yahong & Wang, Wen, 2007, p199).

4. Opportunities for global interests

Recognitions to natural phenomena and laws gain fast progresses. With this basis, productivity is improved to such a degree that it can not only satisfy people's living needs but also create necessary material conditions for all people appreciating civilization fruits.

Globalization drives the improvement of global interest values, promoting the formation of global interest community. Firstly, along with the decrease of transportation costs and the reduction of distance limits, an independent economic net is developing in the world. (Joseph S. Nye, Jr. Translated by Zhang, Xiaoming, 2005, p228). Developed and convenient communications and transportations drive people to participate in trans-national economic activities and cultural exchanges frequently, what enhance global economic and cultural associations. The mutual dependence of countries' economic and cultural development is strengthening in the world. The mutually influencing state can generate a strong power, pushing the recognition to common interests to a higher top. Secondly, the progress of science and the popularization of education will make every earth resident to know that everyone is living the same earth with others. Earth is the only one that is right for human being, but it is in danger due to people's illegal activities. For the living space, everyone should acknowledge that there is only one earth and one home. To share, integrate, and balance interests is the must way to build global interests. Thirdly, protection for ecological environment gains a wide attention, which turns into the first field achieving the common recognition in global interests. The consciousness of protecting ecological environment is enhancing and the technologies of protecting ecological environment are developing. To protect ecological environment is not only necessary but also practical.

In the process of globalization, global market, global trade, global net, global governance, global cooperation, and global alliance are only means adopted by human being. Only global interests are the target of human activities. The common axis of economic globalization, political globalization, social globalization, and cultural globalization is interest globalization. As globalization makes people feel that earth is smaller and smaller, it is urgent for human being cooperate together.

5. How to enhance and maintain global interests?

Although it is not the fact that everyone can feel, recognize, and care about global interests, or everyone is the same important for global interests, global interests are indeed associated with everyone. Nobody is an exception. To enhance and maintain global interests needs everyone participation. Facing global interests, the principle is right for everyone: one earth, one duty.

Since everyone is equal, the just interests of everyone, any group, and any country deserve equal treatments and cares in the world. All individuals and nations should pursue for and enjoy just interests. The just interests include two parts: just interest expectation and just interest acquirement. The former is the just motive and the later is the just activity. On one hand, set interest expectation according to practical needs. Prevent and stop the growth of illegal and evil interests. On the other hand, activities taken by people, in order to satisfy self interests, should not hurt others' interests objectively.

The academic field advocates the idea of global interests surpassing nations and countries. Scholars get rid of their backgrounds and statuses, and start the humanism exploration on public credit, standing on the side of whole human being, instead of certain nation, country, or civilization. Only with same recognition to interests, can it avoid continuous conflicts. The essence of solving conflicts requires for academic input because the solution of conflicts is a process of analysis and exploration (John. W. Burton. Translated by Tan, Zhaojie & Ma, Xueyin, 2007, p168).

Under present conditions, make best use of talent sources, and absorb all kinds of talents. Build a global wisdom base based on global interests, surpassing nations and countries. Make top studies on globalization and relevant issues. Supply intelligent and wisdom supports for enhancing and maintaining global interests and developing effective global actions. We need such a mechanism in which experts can exert their effects completely and hold academic conferences continuously. And this mechanism can achieve a trace studies on scholars' views and opinions concerning world affairs (John. W. Burton. Translated by Tan, Zhaojie & Ma, Xueyin, 2007, p170-171).

All nations, countries, and international organizations should combine together to make up a global goal based on global interests. In the framework that global energy matches up with global governance, global needs match up with global supply, and global development matches up with global environment, follow the fundamental principle of labor creating values, allocating properties fairly, and using sources reasonably, forming a global value system and target system based on popular human nature and civilization.

Prospecting for the future and the fast developing globalization, only by seeking for common positions and goals, coordinating common recognition and tactics, adopting common measures and actions, and enhancing and maintaining global interests continuously, can human being get rid of the evil circle from global disaster to re-construction to new disaster to extermination, and step into the harmonious and prosperous bright future, with civilization and progress.

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Constitutional Democracy for Divided Societies: The Indonesian Case

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Abstract

To build a democracy is to choose a model of democracy. Countries that are building their democracy have often been faced to choose a model of democracy that is suitable to their particular needs. Theoretically and practically, there are some models of democracy. This article discusses the prospect of constitutional democracy for divided societies by putting constitution as a social contract for them. It argues that if a common consensus for a constitution has been reached, then the prospect of a harmonized society can be realized since people have a common platform that binds them legally, politically and socially. By taking Indonesia as a case, it argues that constitutional democracy is relatively able to overcome potential conflict in a divided society. Thus constitutional democracy should be considered as a resolution for divided societies.

Keywords: Constitution, Democracy, Constitutional Democracy, Divided Society, Multicultural, Horizontal Conflict

1. Introduction

The attention to democracy, both theoretically and practically, has been increasing significantly since ‘the third wave’ of democratization has begun in 1974 (Huntington 1991). According to Samuel Huntington (1991), during 1970s to 1990s, more countries have moved to democracy, hence it emerges the optimistic view about the future of democracy, or more precisely liberal democracy. For Francis Fukuyama, it expresses the victory of liberal democracy over its ideological rivals (authoritarianism and totalitarianism), by which he believes that ‘the end of history’ is coming (Fukuyama 1992). Since then democracy has been becoming more popular and even to be an influential factor in international relations.

Apart from the emerging democracy in the world, it is thought that enforcing democracy is not an easy task for a country which is divided deeply into race, ethnicity, religion, language, culture, gender, and social stratification differences. Rather than offers a positive thing, moving to democracy potentially stimulates tension and even horizontal conflicts among societies who have such different backgrounds. Jack Snyder, for example, shows that the early phase of democratization has triggered nationalistic conflicts in some countries (Snyder 2000). This is a reason why democracy fails in countries which have a plural society. Moreover, democracies also tend to fail in weak capacity states as it has been occurring in third-wave democracies (Dominguez and Jones 2007, 7; Tilly 2007, 15-21).

Given this fact, what kind of democracy is more suitable for a divided society? The scholars of political science have been discussing such a question and some of them have tried to offer a remedy for a divided society. This essay will review briefly this discussion and then take a standing point that constitutional democracy should be considered for a divided society. It begins by discussing the suitability of several types of democracy for a divided society and then examining it in the case of Indonesia.

2. Types of Democracy

There are various types of democracy that has been introduced by scholars that indicates there are many views on democracy (for example, Held 1987; Heywood 1997).

Electoral democracy emphasizes the importance of universal suffrage right in which one person has one vote. Electoral democracy defines democracy merely as giving vote in elections in order to choose public officers to represent people’s interests (Schumpeter 1987). In this regards, electoral democracy has a close relation with representative democracy. The problem with these democracies is inclined to benefit majority and neglect minority. In such democracies, the will of the majority must be obeyed (Mueller 1997, 84). It is believed that if a competition is solely based on the number of votes then minority will lose. Therefore, these kinds of democracies are not enough for a divided society.

For this reason, electoral democracy should be combined with another type of democracy so that it is suitable for a divided society. Arend Lijphart (1977) offers what he calls consociational democracy for divided societies. He sketches favourable conditions for consociational democracy. He and other scholars pay much attention to the importance of constitution to make democracy works properly (Lijphart 2004; Horowitz 2000; Issacharoff 2004; Reynolds 2005).

Deliberative democracy is another type for a plural society. Theorists of deliberative democracy argue that democratic process should open spheres for public involvement in policy-making that related to public interest or common good (Chambers 2003). Deliberative democracy is useful to prevent the domination of majority group in democratic process and give an opportunity to minority or marginalized groups to voice their interests. Deliberative democracy is a remedy to reconcile the clash between democracy and right as well as between the majority will and individual rights (Chambers 2003, 311). Some theorists of deliberative democracy stress the importance of rule of law and constitutional rights (Chambers 2003, 309-11), but less attention has been paid to the relationship between deliberative democracy and constitution. Although between deliberative democracy and constitutional democracy seems has a similar idea, the main attention of deliberative democracy is not to constitution, but rather to how people have an equal opportunity in democratic process.

No doubt that democracy is a complicated one so it is somewhat difficult to claim that one type of democracy is better than the other types. In practice, it is common to apply a mixed type of democracy to complement each other. However, democracies for divided societies should be poured clearly into a constitution. A well-functioning democracy in a divided society requires a constitution.

Constitutional democracy is necessary for divided societies as it regulates and guarantees the enforceability of democracy for a divided society. Any type of democracy can be called constitutional democracy as long as it is stipulated by a constitution. Constitutional democracy is a big umbrella and the other types as its branch. Democracy constitutional is as *primes inter pares* among other types.

3. Constitutional Democracy

Literally, constitutional democracy is the combination of constitutionalism and democracy terms. Thus it is useful to see what constitutionalism and democracy are.

The *Oxford English Dictionary* explains that the first use of the word “constitutionalism” was in 1832 (Gordon 1999, 5). According to Jon Elster, constitutionalism is “to limits on majority decisions, more specifically, to limits that are in some sense self-imposed” (Elster, 1988, 2). Scott Gordon argues that the notion of constitutionalism refers to “the coercive power of the state is constrained” (Gordon 1999, 5). For Gordon, what is the most important of constitutionalism is “the problem of *controlling* the power to coerce” (Gordon 1999, 7 original emphasis).

Meanwhile, the original of word “democracy” is from the Greek which consist of two words, these are *demos* (the people) and *kratos* (rule or authority) (Gordon 1999, 60). The simple and popular definition of democracy has been introduced by Abraham Lincoln who argued that democracy is a government from people, by people, and for people. According to Charles Tilly, “*a regime is democratic to the degree that political relations between the state and its citizens feature broad, equal, protected and mutually binding consultation*” (Tilly 2007, 13-4 original emphasis).

In discussing constitutional democracy, some scholars argue that there is a tension between democracy (democrats) and constitutionalism (constitutionalists). Such a tension has appeared in 18th century and probably earlier than that (Holmes 1988, 198). One of the historical debates on constitutionalism and democracy is the debate between Thomas Jefferson and James Madison (Sunstein 1988, 327).

Democracy allows a political competition by which a decision is made based on majority power. By contrast, constitutionalism limits majority rule which potentially lead to majority tyranny. Moreover, to use Walter Murphy words, “whereas democratic theory turns to moral relativism, constitutionalism turns to moral realism” (Murphy 1993, 6). Therefore, those who believe that there is a tension between the two argue that “constitutional democracy is a marriage of opposites, an oxymoron” (Stephen Holmes 1988, 197).

However, other scholars rebut such a view. Cass Sunstein argues that “there is no inevitable tension between democracy and constitutionalism” (Sunstein 1988, 353). Similarly, Jon Elster also believes that constitutional constraints on democracy are the way to strengthen democracy itself (Elster 1988, 9). Stephen Holmes comes to the same view that “constitutionalism and democracy are mutually supportive” and therefore he argues the tension between two is a myth of modern political thought (Holmes 1988, 197). I agree with these views because between the two should not be contrasted or, to quote Walter Murphy, “one must not exaggerate their differences” (Murphy 1993, 6). Basically, constitutional democracy tries to complement the weaknesses of constitutionalism and democracy by combining them. In addition, as Dennis Mueller argues, “all democracies have constitution” (Mueller 1997, 64) which indicates that has a close relation between constitutionalism and democracy. (Note 1)

Constitutional democracy is able to overcome potential conflicts in divided societies. However, it is important to note that what is meant by constitutional democracy here is not only based on the existence of a constitution, but also a constitution that regulates and guarantees the balance of majority and minority relationship. (Note 2) It is needed to prevent the potential tension and conflict in divided societies. Thus the existence of a constitution is a necessary condition, but it is not a sufficient condition unless it is not intended to enforce the harmony and stability of divided societies.

Constitutional democracy has a more power in enforcing the stability and harmony in divided societies compared to other types of democracy because constitution is a supreme law. As the fundamental and the highest law, constitution is the heart of power. Constitution is very important for all parties in divided societies because, as Dennis Mueller argues, “the constitution is a sort of social contract” and “the rules under which all future political games are to be played” (Mueller 1996, 61 & 63). In addition, as Walter Murphy argues, constitutional democracy “accept the centrality of human dignity” (Murphy, 1993, 6) which is very useful for divided societies. In short, constitutional democracy implies that democracy should be based on constitutional legitimacy, and, conversely, constitution should be a democratic constitution.

Constitutional democracy has been a global phenomenon. Walter Murphy argues that “many countries have adopted a mix of constitutionalism and democracy theory” (Murphy 1993, 6). Most countries around the world which so-called democratic systems basically should be sorted as constitutional democracies (Murphy 1993, 6). It obviously shows the omnipresence of constitutional democracy.

A good constitutional design affects the enforceability of constitutional democracy in divided societies. In this regards, a constitution should be a democratic constitution in which fulfil the principles of constitutional democracy. Democratic constitution is needed to provide the framework of a good relationship among societies in the future. Constitutional drafters should consider the plurality of society in making a constitution. A constitution should be made by accommodating different interests and perspective in divided societies, both majorities and minorities (Dominguez and Jones 2007, 7). There should be the recognition of pluralism as well as the recognition of minority rights.

Constitution is a crucial aspect of enforcing and stabilizing new democracy. The process of transition to democracy should be followed by the (re)construction of democratic constitution. The (re)construction of a democratic constitution is a starting point to democracy. This is a reason why almost all new democratic states put constitutional amendment into the top priority to build and maintain democracy. These states reform their constitution soon after the fall of the authoritarian regimes. The undemocratic constitution that inherited from an authoritarian regime is replaced by a democratic constitution.

An effort to anticipate potential conflict in divided societies should be started from constitution. However, the constitutional making in transitional democracies is not easy task to do. All parties have to agree to achieve constitutional settlements in which it requires constitutional negotiation among them. The constitutional negotiation can lead to the deadlock (constitutional crisis) if each party only focus on their own interests, particularly if there are adversarial interests between the majority and minority. To be clear, it is hard to reconcile between the need for constitutional constraints on the majority and the desire the majority to become dominant. It is also difficult to balance between “empowering majorities and ensuring the representation and participation of minorities in national decision making” (Simeon and Turgeon 2007, 87). The experiences of democratization process in Eastern and Central Europe and in Africa have showed that the most important challenge for deeply divided societies is to balance properly between unity and diversity (Simeon and Turgeon 2007, 82), and it is commonly related to the relationships between the majority and minority.

The failure of reconciling the tension between the majority and minority potentially lead to what Richard Simeon and Luc Turgeon call *insecure majority*, a condition in which the majority “represses or dominates the minority” and *insecure minority*, a condition in which the minority “rebels or secedes” (Simeon and Turgeon 2007, 82 original emphasis). Conversely, the success of reconciling the tension between majority and minority will guarantee the consolidation of democracy. This is why, as Richard Simeon and Luc Turgeon argue, “making a constitution, especially in divided societies, warrants careful statecraft” (Simeon and Turgeon 2007, 93). If a common consensus for a constitution has been reached, then the prospect of a harmonized society can be realized since people have a common platform that binds them legally, politically, and socially. Based on this, the abuse of a common platform will be judged unconstitutional.

4. The Case of Indonesia

The following sections try to examine such a thesis for Indonesian case. Constitutional democracy has played a key role in the making and preservation of the Republic of Indonesia but it is still a problem to cope with horizontal conflicts among divided societies. Firstly, it describes the portrait of the Republic of Indonesia as a multicultural country. Secondly, it highlights historical context in which constitutional consensus has played an important role in Indonesian history. It also draws that the living constitution, which indicates that constitutional consensus is working in reality, is now still far from ideal hope.

4.1 A Multicultural Country

Indonesia is an archipelagic country which is located in Southeast Asia. There are several ways to identify Indonesian characteristics. Seen from its population which is estimated at about 220 million today, Indonesia is the fourth largest

country in the world as well as the most populous Muslim country around the globe with approximately 90 per cent of its population is Muslims.

Regarding its geographic region, Indonesia is composed of 19,000 islands, both large and small islands, across the equator. Adrian Vickers analogizes that “[a]s a country joined by water, Indonesia covers an area as wide as Europe or the United States” (Vickers 2005, 1). Historically, the territorial boundaries of Indonesia are based on the islands that had ever been colonized by the Netherlands.

In political development context, following the fall of the authoritarian power of President Suharto on 21 May 1998, Indonesia now is also mentioned as the third largest democratic country in the world after the United States and India. In this context, it should be noted that politically and historically Indonesian politics has been fragmented by a number of ideologies or political streams (Feith and Castles 1970; Bouchier and Hadiz 2003) which representing the diversity of culture of Indonesia. To be sure, ideological conflicts have been a challenge to the prospect of Indonesian democracy. As Bouchier and Hadiz (2003, 2) note, “[c]onflict over ideology has been a feature of political life in Indonesian since the early days of the nationalist movement”. Such a conflict had occurred during 1950s in which there was a strong competition between those who wanted “to reform society along Islamic or communist lines” and “who wanted to follow the example of a Western Democracy” (Dijk 1990, 102).

In dealing with the plurality of culture, Indonesia is well-known as a multicultural country in which there are at least 300 ethnic groups and 200 different languages on the islands (Geertz 1967, 24 cited in Dijk 1990, 101). Each of these ethnic groups has its own cultural life including music, theatre, the visual arts, poetry and literature, and so on (Vickers 2005, 2). There are some religions in Indonesia which consist of the major religions such as Islam, Catholic, Protestant, Hindu, and Buddha, and other spiritual faiths or religious sects. This is the cultural richness of Indonesia. However, like other multicultural countries, it can be a source of tension and conflict.

According to Vickers, “[t]his diversity and depth of Indonesian culture is a product of openness to new ideas and practice” (Vickers 2005, 2). Similarly, Dennis Lombard (1996) has revealed that Indonesian cultures had been influenced by India, Chinese, the West, and Islamic civilizations. Such a view has also been expressed by historians J. D. Legge (1977) and M. C. Ricklefs (1993). Indonesia, indeed, is a country that welcome to other cultural influences.

4.2 Constitutional Consensus and Horizontal Conflicts

As a multicultural country, the diversity of ethnic groups has been a crucial issue. J. D. Legge has noted that “[o]ne of Indonesia’s major problem in the modern world is that of merely preserving the unity of the nation” (Legge 1977, 3). No doubt that it is difficult to unite them in a nation-state as well as to accommodate their values, ideologies, and interests in which sometimes opposite sharply to each other. In the words of Vickers, “it has struggled to balance the interests of different groups and maintain coherence against both the pressure of its own diversity and tensions created by international politics” (Vickers 2005, 3).

Indeed, how to reconcile the big (the majority) and the small (the minority) ethnic groups so that they can live side by side peacefully and equally is an enduring question in Indonesian history. Such an issue had emerged since the very beginning when a nation-state called Indonesia was being discussed by the founding fathers and mothers in 1940s. It was, therefore, an extraordinary achievement since they were able to persuade and unite people with different backgrounds in order to create an, to use the phrase of Benedict Anderson (1983), “imagined community” namely the Republic of Indonesia.

There are two factors, at least, that has contributed to achieve a unified Indonesia. Firstly, the similar feeling among Indonesian people that the Dutch colonialist was a common enemy for them. Such a sentiment, which was raised frequently by nationalists during the Independence Revolution, had united people to against the Dutch colonialist. Today, this factor has become history.

Secondly, Indonesian language, called *Bahasa Indonesia*, has an important role in unifying Indonesian people who have different languages. It is important to note that Indonesian language was and is not taken from the largest number of speakers, such as Javanese, but it was adopted from Malay language which was used by minor people on the Riau islands. Malay is as the *lingua franca* at that time and, unlike Javanese, an egalitarian language which was relatively easy to be learnt and accepted by other ethnic groups. The use of Malay as a national language is the way to avoid the dominance of major culture in Indonesia. Although Malay has long been accepted as national language, it is just recently, in the Second Amendment in 2000, its status has been incorporated into the 1945 Constitution of the Republic Indonesia. To be certain, *Bahasa Indonesia* has been a constitutional consensus for Indonesian people.

Looking back to the history, it can be argued that the constitutional consensus has played a very important role in the making of a nation-state namely the Republic of Indonesia. Soon after the Independence Proclamation had been proclaimed by Sukarno and Mohammad Hatta on 17 August 1945, which marked the Republic of Indonesia has just been established, the founding fathers and mothers had discussed seriously about the Constitution for the new Republic. They almost failed to achieve a consensus because there was a disagreement over the national ideology. Some strongly

defended Islam as national ideology, while others endorsed the *Pancasila* (the Five State Principles) which are consist of believe in one supreme God, just and civilized humanity, national unity, democracy led by wisdom and prudence through consultation and representation, and social justice. In such a constitutional crisis, the prospect of the new Republic was under serious threat because “regions where Christian or Hindus formed the majority of the population would refuse to join the Republic” (Dijk 1990, 107). Fortunately, constitutional consensus eventually could be achieved and, as a result, Indonesia is not an Islamic state though ninety per cent of the population is Muslims. Moreover, other religious minorities did not feel like second-class citizens (Cribb and Brown 1995, 38). The constitutional consensus, in this case, was a remedy for divided societies as Indonesia.

It is useful to note that the proponents of an Islamic state keep struggling tirelessly to achieve their vision. They have been urging a constitutional amendment or re-apply the Jakarta Charter “which would have obliged the state to impose Islamic law on all its Muslim citizens” (Cribb and Brown 1995, 38). The Jakarta Charter has been believed by them as the justification of an Islamic state for Indonesia.

There were two momentums in Indonesian history after the Independence Revolution in which the proponents of an Islamic state have tried to reach their vision. Firstly, it had emerged in the second half of 1950s in which the Constituent Assembly members were drafting a permanent constitution to replace the 1950 provisional constitution (Legge 1977, 155). These members could not reach a constitutional consensus of national ideology as it had ever occurred in the early year of the new Republic in 1945. As a result, there was the deadlock of constitution-making which means the national unity was in a serious threat. To cope with this, President Sukarno who was supported by the Indonesian Military and moderate Muslims dissolved the Constituent Assembly and promulgated a return to the 1945 Constitution—the Constitution which had been adopted by the new Republic after its Independence Proclamation—by the presidential decree on 5 July 1959, which brought Indonesia into Sukarno’s “Guided Democracy” after that date. Even though the presidential decree was unconstitutional decision (Legge 1977, 156; Nasution 1992; Ricklefs 1993, 266), in fact it is widely admitted that it was an acceptable solution to get out of the constitutional impasse and prevent national disunity.

Secondly, the proponents of an Islamic state had also echoed their vision when constitutional amendments were taking place from 1999 to 2002. However, it was only voiced by a few people and not supported by the vast majority of Indonesian people, even by Muslims themselves. Consequently, they have failed again.

Even today there are still people who think that Indonesia should be an Islamic state because the majority of the population is Muslims. Nevertheless, it seems that the majority have agreed with the *Pancasila* ideology compared to other ideologies as it is generally believed that the *Pancasila* is able to facilitate a unity in diversity, called *Bhinneka Tunggal Ika* in Indonesian language. The *Pancasila* is, essentially, the middle way to accommodate all Indonesian people who have different cultures. Generally speaking, most Indonesian people today believe that such a constitutional consensus is final and, therefore, no more ways to change it. They believe that the 1945 Constitution is necessary to preserve the national unity, although the 1945 Constitution was not truly a democratic constitution until it has been amended from 1999 to 2002. As a consequence, the opponents of the *Pancasila* are alienated and they are judged unconstitutional because they reject the constitutional consensus.

However, it is not saying that the constitutional consensus is the panacea and therefore able to stop horizontal conflicts as such conflicts remain potential as well as actual even today, although the constitutional consensus has been reached.

Many horizontal conflicts, which were triggered by religious, ethnic, economy, and political reason, have occurred which indicates that such conflicts are still a big issue. Historically, each different ethnic group has lived together in harmony and peaceful for a long time. Sociologically, they have a sense of toleration of differences. Because of this, Indonesia has been well-known as a tolerant country. However, many people have been shocked by violence conflicts that had suddenly erupted in some regions in the years following the fall of President Suharto who had banned to discussing sectarianism issues—called SARA, an acronym for the words *suku*, *agama*, *ras* and *antargolongan* (ethnic group, religion, race and intergroup relations)—in the media during his power era for more than three decades.

Gerry van Klinken’s study illustrates communal violence that occurred in several places across Indonesia between 1997 and about 2002, these are West and Central Kalimantan, Central Sulawesi, Maluku/Ambon and North Maluku (Klinken 2007). Similarly, the study of Chris Wilson focuses on the bloody religious conflicts between Christian and Muslims in North Maluku from 1999 until 2000 (Wilson 2008). All these are evidence that horizontal conflicts are still a serious matter in a multicultural country like Indonesia. However, it is too narrow to conclude that all horizontal conflicts were triggered solely by cultural differences. In some cases, horizontal conflicts have been triggered by the competition of the resources, particularly dealing with economy and political issues, among societies. Undoubtedly, such a competition has likely been to bring them into conflicts. In some cases, primordial and religious sentiments are exploited to cover such a motive. Indeed, primordial and religious sentiments are likely to be effective ways to mobilize the mass solidarity.

After all, horizontal conflicts show the paradox of Indonesian country because they have been occurring when the democratic process was going and people have more liberties and equalities than before, in which they have been guaranteed by the 1945 Constitution and laws. Furthermore, the guarantee of constitutional rights has been extended both its quantities and qualities after the amendment of the 1945 Constitution for four times (from 1999 to 2002). Besides, the establishment of the new state body namely the Constitutional Court of the Republic of Indonesia in 2003 allow people to defend their constitutional rights before the Court. In short, there is no more reason for horizontal conflicts under such constructive conditions. In fact, it shows that the constitutional consensus “is not conceived as a binding instrument” (Hassall and Saunders 2002, 3).

In the context of the constitutional consensus, it obviously shows that the living constitution is still a struggle in Indonesia. The Constitution is very good in theory but remain very poor in practice. Moreover, the constitutional awareness tends to be limited to the elite level, but it does not reach the mass level. As in the period of constitutional democracy between December 1949 and March 1957 in which “[m]ost members of the political elite had some sort of commitment to symbols connected with constitutional democracy” (Feith 1962, xi)—although they had faced challenges to applied it in a reality—, elites today also have the same commitment to constitutional democracy. Unfortunately, such a commitment has not been disseminated widely to the mass level. It indicates that, in the words of Hassall and Saunders (2002, 241), “[t]he language of the law’ is not that of ‘the people’”.

5. Conclusion

This article has argued that there is a strong reason to weigh constitutional democracy for divided societies. Seen from its status as the supreme law, constitution is a starting point to building a mutual-understanding relationship among divided societies. But it is, indeed, not an easy task to reach a constitutional consensus in divided societies.

This article has also attempted to examine how constitutional democracy has been applied as well as how the constitutional consensus has been achieved in Indonesia. Indonesia is a relevant country to see the application of constitutional democracy for divided societies since it is a multicultural country in various aspects. Such a multicultural reality can bring both positive and negative impacts. In a positive view, it is a rich diversity of cultures. In negative view, it is a potential source for horizontal conflicts.

If it is dealing with the making and the preservation of the Republic of Indonesia, people could come to the constitutional consensus. In this context, to use Dijk’s words, ‘Indonesia remain[s] an unbreakable political entity’ and ‘has forged a remarkably strong unity from the diversity of separate ethnic groups’ (Dijk 1990, 106 & 125). Even so, it is hard to bring the constitutional consensus into the social relationships among divided societies because horizontal conflicts which exploit religious and primordial sentiments are still appear in Indonesian societies. In sum, to some extent, constitutional democracy for divided societies has been working in the case of Indonesia. Yet it still needs a time to celebrate it.

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Notes

Note 1. By saying “all democracies have constitutions” it does not mean that Mueller denies that there are democratic countries that have not a written constitution, for example Great Britain. Mueller wants to stress that a written constitution is “an essential feature of constitutional democracy” (Mueller 1997, 65 & 85).

Note 2. Although I agree with Dennis C. Mueller that a written constitution is important in constitutional democracy (Mueller 1996, 43; 1997, 85), I tend to argue that it does not necessary whether a country has a written or unwritten constitution as long as there are regulations and guarantees for harmony and stability in a divided society. For the context of this essay, I agree with Scott Gordon who argues that “constitutionalism has little to do with the existence of a written constitution” (Gordon 1999, 5).

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