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Bad Faith Lawsuit in America and Improvement of Chinese Insurance Law

Qinghua Huang

School of Law, the University of Sheffield

DG 10 Bartolome House, Winter Street, Sheffield, S3 7ND, UK

Tel: 44-75-1744-6298 E-mail: huanqinghua188@163.com

Abstract

This article discusses the main differences in dealing with insurers' bad faith under American and Chinese insurance law, and recommends Chinese Government introducing the American bad faith lawsuit to China. For this purpose, the nature, essence, and the general and specific requirements of bad faith lawsuit in America is firstly presented. Then, the article states how insurers' bad faith in China is handled in accordance with the Chinese insurance law: remedy for breach of the contractual obligation, and public law sanction. Further, new practices of legislation, justice, administration, and self-discipline of the insurance industry for preventing and handling insurers' bad faith in China, are also represented. Finally, through the analysis of jurisprudence and comparative law, the article analyzes the necessity of introducing American bad faith lawsuit into China, and the requirements of the legal reform for the introduction.

Keywords: Bad faith lawsuit, Fair dealing, Insurance law, Comparative law, American law, Chinese law

1. Introduction

All insurance policies contain an implied obligation applicable to insurance company of "good faith and fair dealing" towards its insured. This is a basic rule in both Chinese and American insurance law. The rule requires that an insurance company can not simply look for reasons not to pay when a claim is presented. Instead, an insurance company must make a thorough investigation of the claim, must consider all reasons and circumstances that might sustain the claim, and must give as much consideration to the financial interest of the insured as the insurer gives to its own financial interest.

It is generally recognized that an insurer's conduct may constitute bad faith if the insurer violates the foregoing stated duty in dealing with an insured's claim. If the bad faith conduct took place in USA, the insured in most states, pursuant to respective state's insurance law, may bring bad faith litigation against the insurance company for damages. The legal basis supporting bad faith lawsuits is that an insurance company would break its implied obligation of good faith and fair dealing, if the insurer refuses or denies paying a claim that should be paid, or offers to settle a claim for less than it knows the claim is worth, without adequate investigation or without reasonable grounds.

The fundamental principle of bad faith lawsuit under the American insurance law provides us a reference, by which we could, in solving the problem of Chinese insurers' bad faith, to compare and contrast the provisions of the Insurance Law of People's Republic of China (hereafter referred as the Chinese Insurance Law) and its practice. Thus, this article will, firstly, introduce bad faith lawsuit under the American insurance law in detail; then, represent the problem of insurers' bad faith in China, and describe the endeavors that Chinese government, consumers' institute and insurance industry have made for resolving the problem; finally, suggest to introduce the legal mechanism of bad faith lawsuit into China, and provide corresponding reasons, from the perspective of reforming Chinese legal system and improving the Chinese Insurance Law.

2. Bad Faith Lawsuit under American Insurance Law

2.1 Nature and Essence of Bad Faith Litigation

Bad faith litigation is designed, in the majority of state courts, to protect the interests of insured in their dealings with insurance companies (Dobbyn 2001). In the U.S., bad faith involves something more than negligence, and implies conscious wrongdoing for a dishonest purpose. If an insurance company is found to have acted in bad faith in its handling of a claim, the insured is entitled to all damages resulting from that action, including certain types of damages that would not be available just for breach of contract. In cases of extreme or outrageous misconduct by an insurance company, the insured also may be entitled to receive punitive damages. This is called bad faith litigation. Courts often have held bad faith on the part of insurers, even though when their dispute with plaintiffs over the existence or amount of coverage was reasonable, and courts have awarded damages to claimants many times over the disputed amount in some cases (Harrington and Niehaus 2003). This is because many state courts have accepted claims for punitive damages against insurers based on bad faith, although not all jurisdictions allow such actions (Dorfman and Hall 1998).

The phenomenon results from that insurer's bad faith---unfair insurance practices are governed by individual state laws rather than federal laws or statutes.

According to the American law, if a business entity is a named insured, then its owner, partner or executive likely are an "additional insured" under the insurance policy to which the insurer owes an implied contractual obligation of good faith and fair dealing. This means unsupported denial of any insurance claim, including claims under policies covering auto, disability, life, health and property -- such as homeowners or casualty claims, may subject the insurer to damages that go far beyond the amount that the company should have paid under the insurance policy in a civil action. Therefore, if an insurance company fails or refuses to honor its contractual obligations and pay a valid claim, the insured have the right to bring a civil action for damages against that insurance company. In addition to suing for a "breach of contract", through which courts order the insurers to pay the claims; the insured might be able to bring a "tort" claim seeking damages based upon the insurer's bad faith in handling of the claim. This means that besides what the insurer owes the insured under the policy (plus interest), if the denial can be shown to have been "unreasonable", the insured might also recover "consequential damages" (monies the insurer had to pay out-of-pocket because of the denial), and "extra-contractual damages" to compensate for mental and emotional distress. In such cases, courts have ordered claims payment, covering indirect damages and damages for mental and emotional distress, plus the recovery of pretrial interest, and legal fees.

Additionally, in some cases, for example, the cases of outrageously offensive behavior, such as: (1) elements of fraud (a deliberate attempt to deceive); or (2) a deliberate refusal to fulfill a contractual duty prompted by an honest mistake, punitive damages would be imposed on the insurer (Dorfman and Hall 1998). This is because, in these circumstances, usual legal remedies are insufficient to achieve society's goals, and thus, "punitive" or "exemplary damages" is designed to punish an insurer and deter the insurer and its employees from wrongfully denying similar claims in the future. Therefore, punitive damages are not as compensation for injuries suffered, but as a means of punishing defendants for offensive acts. In order to recover punitive damages, one must prove that the insurer has acted with "oppression, fraud, malice or despicable", which are specified in local state statutes. Where the plaintiff satisfies the statutory burden of proof in first or third-party insurance cases, courts may award punitive damages in accordance with the following three criteria in fixing the amount of punitive damage (Neal v. Farmer's Ins. Exchange Cal. 1978):

- (1) The degree of reprehensibility of the insurer's act;
- (2) The amount of actual harm as measured by the amount of compensatory damages; and
- (3) The over-all wealth of the insurer for purposes of judging the deterrent effect to be achieved by a particular amount of punitive damages.

In essence, the legal system of bad faith lawsuit is designed to against an insurer's conduct that is in inconsistent with what a reasonable policyholder would have expected, hence, such behavior is not in good faith (Harrington and Niehaus 2003). Under the American insurance law, the economic reasons supporting bad faith lawsuits are based on such justification:

"Market incentives and normal judicial remedies for breach of contract may be insufficient to prevent some insurers from behaving opportunistically by refusing to pay claim costs or by offering to pay too little for claims." (Harrington and Niehaus 2003).

It should be noted that insurer's duty of "good faith and fair dealing" with insured under a policy, is implied by the law, instead by the contract. Therefore, the breach of this non-consensual duty constituted a tort separate, and distinct from any action in contract under the policy. This is primary reason why the cause of action for bad faith litigation is an insurer's tortious action instead of breach of contract.

2.2 The Requirements for Establishment of Bad Faith Lawsuit

There are two requirements for the establishment of bad faith lawsuit. The first is procedural requirement, which requires an insurer's adequate investigation to insured's claim. The second is substantive requirement, which require insurer's denial or refuse should be sustained with reasonable grounds. Thus, if an insured desires to win bad faith litigation, he/she must prove that an insurer's refusal or denial to his/her claim has been in unreasonable grounds or inadequate investigation. In other word, a legitimate dispute or disagreement over coverage or benefits will likely not give rise to a bad faith lawsuit. For example, insurance claims are denied for many legitimate reasons, including fraud committed by an insured.

Turning first to the procedural requirement, what is adequate investigation? Timely and thorough investigation is required. The procedural requirement emphasizes that an insurer shall investigate carefully, by collecting both evidences that are in non-favorable for and in favor of the insured; particularly important, the insurer shall gather those evidences that are in helpful for the insured. Therefore, the essence of the procedural requirement is that, when dealing with insured's claim, an insurer must give as much consideration to the financial interest of the insured as the insurer gives to

its own financial interest. This is why any refusal or denial to an insured's claim resulting from an insurer's negligent investigation may constitute bad faith lawsuit.

As far as substantive requirement is concerned, "reasonable grounds" for denying or refusing insured's claim, should satisfy following two conditions: (1), the refusal or denial should be sustained with sufficient evidences; otherwise, mere suspicion and speculation for new evidence may fall within bad faith; (2), sufficient evidences should at least include three kinds of evidences as follows: one is the evidences that prove whether or not the insurance accident or event has been actually happen; another is the evidences that prove whether or not the insured is entitled to obtain the indemnity or proceeds under the policy; and the third, is the evidences that prove the exact amounts of indemnity or proceeds that shall be paid under the insurance policy, if the insured has right to receive the indemnity or proceeds.

The case of *Livingstone v. Auto Owners Insurance Co* (1988) provides us a good illustration as to what are unreasonable grounds. In this case, the plaintiff was an insured, on May 1988, whose residence was destroyed by fire. The defendant, an American insurance company, as plaintiff's insurer, suspected arson by the insured, and thus, engaged in investigators to check the fire scene. On July, the report made by the investigators stated that it is believed that the fire was intentionally set, but failed to identify who was the arsonist. According to the report, the insurer delayed the payment of the claim. Consequently, on August, the insured brought a litigation to recover the profits of the policy. The judgment made by the Alabama Supreme Court was in favorable for the insured:

"Where evidence of arson by the insured was slight, mere suspicion and speculation the new evidence will present it at some future date is not reasonable grounds upon which to deny a claim."

When discussing what are reasonable grounds for refusing or denying insured's claim, a particular important issue is to correctly understand the relationship between an insured's right to recover the full value of his/her loss and an insurer's settlement against insured's claim for less than the full amount. One hand, the principle of utmost good faith empowers an insured the right to recover the full value of his/her loss; on the other hand, insurers often seek to settle claims for less than the full amount that an insured is entitled to recover. It is believed that no bad faith can be shown if the offer for settlement is a reasonable one. However, if an insurer, in order to save its money, offers a settlement that is completely out of line with insured's actual damage, or tries to take advantage of a difficult financial situation that the insured are in, may be found to be a conduct of bad faith. Intentional low-balling is simply a type of bad faith.

Particular attention should be paid that, under American insurance law, in addition unreasonable grounds as a general standard for determining an insurer's bad faith, there are separately certain specific criteria for determining bad faith under third or first-party insurance. This is because, under a third-party claim, the bases for the causes of action in bad faith and the available remedies are quite different from that under a first-party claim. In third-party claims, the insured is seeking defense and indemnification from liability to a third party, whereas in first-party claims, the insured is seeking indemnification from the insurer for a loss suffered by the insured personally (Dobbyn 2001).

2.2.1 Specific Criteria for Determining Bad Faith in Third-Party Claim

Under a third-party claim, according to, there are eight factors listed by American court for a comprehensive consideration concerning whether or not the insurer's refusal constitute a bad faith (Dobbyn 2001). They are:

- (1) The strength of the injured claimant's case on the issues of liability and damages;
- (2) Attempts by the insurer to induce the insured to contribute to a settlement;
- (3) Failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured;
- (4) The insurer's rejection of advice of its own attorney or agent;
- (5) Failure of the insurer to inform the insured of a compromise offer;
- (6) The amount of financial risk to which each party is exposed in the event of a refusal to settle;
- (7) The fault of the insured in inducing the insurer's rejection of the compromise offer by misleading it as to the facts; and
- (8) Any other factors tending to establish or negate 'bad faith' on the party of the insurer.

The eight factors was specified by California court in the seminal case of *Brown v. Guarantee Insurance Company* (Cal. App.1957), which give a concrete guidance in actual fact situation, for deciding what an insurer's "good faith and fair dealing" is or "what the practical definition of bad faith should not be" under a third-party claim. In this case, the insured had been sued in tort for \$15,000. The insurer under an automobile liability policy assumed the defense and rejected an offer of settlement at the policy limit of \$5,000 without even informing the insured of the offer. The insurer expressly took the position that it had no reason to settle the case unless could save some money on the settlement. It was held by the court that the insurer failed to consider the interests of the insured in refusing to settle an action by a third party, and therefore constitute bad faith.

2.2.2 Specific Criteria for Determining Bad Faith in First-Party Claim

The principal examples of first-party insurance that have been the subjects of bad faith actions are insurances of life, health, fire, accident, disability, medical payments, hospitalization, theft, and uninsured motorist.

The leading precedent for a cause of action in bad faith in first-party claim is *Gruenberg v. Aetna Ins. Co.* (Cal. 1973). In this case, the California Supreme Court held that “the duty of good faith and fair dealing required not only that the insurer accept reasonable settlements in third-party insurance cases, but also that the insurer not unreasonably withhold payments due its insured under a policy of first-party insurance”.

When deciding what kinds of conducts constitute bad faith under first-party insurance, in *Chavers v. National Security Fire & Casualty Ins. Co.* (Ala.1981), the applicable criterions have been defined as the existence of “no lawful basis for the refusal coupled with actual knowledge of that fact” or “intentional failure to determine whether or not there was any lawful basis for such refusal.”

According to *National Security Fire & Casualty Ins. Co. v. Bowen* (Ala.1982), the following specific elements can be applied for further definition regarding “the lack of a lawful basis” or “the lack of reasonable grounds” for refusal to pay:

- (1) An insurance contract between the parties and a breach thereof by the defendant;
- (2) An intentional refusal to pay the insured’s claim;
- (3) The absence of any reasonably legitimate or arguable reason for that refusal(the absence of a debatable reason);
- (4) The insurer’s actual knowledge of the absence of any legitimate or arguable reason;
- (5) If the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer’s intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

2.3 Insurers’ Delay to Insureds’ Claim and Bad Faith Lawsuit

When discussing bad faith lawsuit, it is necessary to mention an insurer’s delay to an insured’s claim. If an insurance company appears to be simply dragging its feet on the insured’s claim, the delay do not usually constitute a bad faith conduct and the insured can send a written complaint to the insurer’s adjuster. The better manner for dealing with this problem is to politely ask who the claim adjuster’s supervisor is and send him/her a detailed and direct letter. If the delay does not appear to stop, and the delay is obviously beyond the reasonable time within which the insurer’s answer to the claim should be responded, then, the insurer’s delay may constitute a bad faith. This is because under this circumstance, the insurer’s behavior constitutes an omission that harm the insured’s right to obtain indemnity or benefit from the insurer. The insured may need to contact a lawyer, through whom, with lawyer’s letter, politely and rationally, but directly and firmly, ask for a written response within a (reasonable) specified time. Such kind of warning or threatening to sue them for their delay is necessary for further launch of bad faith lawsuit. In such a circumstance, because of the insurer’s delay in claims payment, the court will impose the insurer to a bad faith claim for punitive damages, which is likely many times of compensatory damages awarded.

3. Chinese Insurance Law and Practices for Solving Insurers’ Bad Faith

The above statement and discussion on bad faith lawsuit in the U.S., is for solving the problem of insurers’ bad faith in China. The problem in China is still serious. According to a report issued by the China Protection Association of Consumers’ Rights and Interests (2005), in recent years, insurance consumers’ main complaints against China’s insurance industry, focus mainly on insurers’ bad faith. For example, for the intention of refusing payment, some insurance companies one-sidedly and unfairly explain the stipulations of insurance clause and policy, or when investigating an insured’s claim, simply collect the facts and evidences that are unfavorable for the insureds, whereas neglect favorable one. These conducts infringe not only policyholders’ right for indemnity or benefit; also impede healthy development of Chinese insurance industry. In order to efficiently resolve the problem, Chinese government and insurance industry itself have implemented a number of measures, including legislative, judicial, administrative and industrial measures; but, better legal mechanism for against the bad faith is still needed to be studied.

3.1 Traditional Legal Mechanisms for Solving Insurers’ Bad Faith in China

Unlike USA, statute in China is the sole legal source, which including laws, regulations and rules, and judicial explanation of Supreme People’s Court (SPC). The Chinese Insurance Law is a basic statute in the field of insurance law. To solve the problem of insurers’ bad faith, the Chinese Insurance Law adopts two legal approaches: the first is remedy for breach of contractual obligation, a method of private law; the second is punishment, the method of public law, covering criminal sanction and administrative penalty. For the intent of the legislation, these two methods are designed to be applied together.

3.1.1 Remedy for Breach of Contractual Obligation

In the respect of private law, articles 23, 24, 25 and 26 of the Chinese Insurance Law, as general provisions, deal with the affairs of claim and payment under an insurance policy. The purpose of these obligatory provisions is to ensure an insurance company dealing with insureds' claim in good faith. Among these provisions, the most important one is paragraph (1) and (2) of article 24, which provides:

"The insurer shall, after receipt of a claim for indemnity or for payment of the amount insured from the insured or the beneficiary, determine the matter without delay, and inform the insured or the beneficiary of the result of the determination. Where responsibility lies with the insurer, the insurer shall fulfill its obligation for such indemnity or payment within 10 days after agreement is reached with the insured or the beneficiary on the amount of such indemnity or payment. If there are stipulations in the insurance contract on the sum insured and on the period within which indemnification or payment should be made, then the insurer shall fulfill its obligation accordingly.

If the insurer fails to fulfill its obligations as prescribed in the preceding paragraph in a timely manner then, in addition to payment of the amount insured, the insurer shall compensate the insured or the beneficiary for any damage incurred thereby."

According to these provisions, an insurer has an obligation to act in good faith, which requiring an insurer to make a proper investigation to an insured's claim concerning both the extent of loss and whether the event is covered under an insurance policy. Thus, the insurer is obligated to adjust the insured's claim, even if the insured do not know the extent of the claim or terms of coverage which might apply, assuming the insured have not gone by the time specified in the policy to submit a claim.

Under paragraph (1) of article 24, there is no doubt that an insured may seek contractual remedies if an insurance company fails or refuses to pay the amount that should be paid pursuant to the terms and conditions of an insurance policy.

In practice, the key issue is, under paragraph (2) of article 24, what is exact meaning of "any damage"? In other words, "any damage" in this provision whether or not includes "extra-contractual damages" for mental damage and emotional distress plus legal fees, and punitive damages for deterring insurer's wrongful doing if an insurer's refusal or deny to insured's claim is outrageously offensive behavior? If covering these, it has not doubt that this provision provides a legal basis of tort litigation, exactly like bad faith lawsuit under the American insurance law.

Regretfully, According to existing judicial practice, "any damage" in this provision fails to cover "extra-contractual damages and "punitive damages" mentioned above. This is because, under PRC legal system, article 24 (2) of Chinese Insurance Law should be applied by combining with the corresponding provisions of the Contract Law of PRC. It is general held that, if an insurer fails to act in good faith in responding an insured's claim in accordance with paragraph (1) of article 24, the insured is only entitled to bring a lawsuit for enforcing the policy, and to seek all available legal remedies for the breach, including court-compelled performance and damages. If successful, the insured will be able to recover a payment by the insurer. The payment covers: (1) the amount that is equal to the insurer should have paid under the terms of the policy, and (2) the damages, including the expenses that were incurred because of the breach and court's administrative expenses for the lawsuit, but, dose not includes extra-contractual damages for mental and emotional distress, punitive damages, and other damages, such as attorney's fee.

The mechanism of contract law and the scope of compensation for handling insurer's bad faith demonstrate that there is not legal system of bad faith lawsuit in the Chinese Insurance Law. Therefore, it can be further concluded that the legal basis supporting article 24(2) is the theory of breach of contract instead of tort. This is why, as we said forgoing, there is not legal mechanism of bad faith lawsuit in China.

3.1.2 Criminal Sanction and Administrative Punishments under the Law

In the side of punishments based on public law, both criminal law and administrative law are applied against insurers' bad faith. Article 139 of the Chinese Insurance Law provides:

"Where the insurance company refuses to fulfill its obligation agreed to in the insurance contract to pay indemnity or insurance benefits, if the violation constitutes a crime, the insurance company should be investigated for criminal responsibility in accordance with law; if the violation is not serious enough to constitute a crime, the insurance supervision and control authority shall impose on the insurance company a fine of not less than 50,000 yuan but not more than 300,000 yuan; the staff member who violates the law shall be fined not less than 20,000 yuan but not more than 100,000; and if the circumstances are serious, restrictions shall be imposed on the business scope of the insurance company or the company shall be instructed to cease accepting new insurance business."

Reviewing practical effectiveness of the article after the Chinese insurance law has been carried out more than ten years, it could be concluded that its legislative purpose has failed to be achieved. This has been proved by the annual report (2004-5) of China's Protection Association of Consumer's Rights and Interests. Moreover, there are following obvious

shortcomings in applying the punishment based on public law to solve the problem of insurer's bad faith, which, in nature, should be regulated and adjusted by the remedy of private law, including both remedy under contract law and damages under tort law (Huang QH 2007a): (1) the punishment of public law can not provides fully remedies for insured, the reason has been entirely stated as above; (2) the punishment of public law is more expensive than remedy of private law, furthermore, the cost for deciding and executing the punishment of public law is paid from public finance rather than the insurers acting in bad faith, which observably increase the payment of public finance; (3) the punishment of public law can not be carried effectively out for its legislation purpose in such a country where rule of law is not prevailed; (4) the punishment of public law may empower government and its staffs obtain more opportunities to intervene with economic activities and social life, which often results in the abuse of public power.

Reviewing these disadvantages from jurisprudence, insureds' right that is infringed by insurers' bad faith belongs to private right, therefore, it can be, more importantly, shall be governed by private law instead of public law. Consequently, it is obviously better to solve insurers' bad faith with fully compensation and civil fine than criminal or administrative punishments. This is because there are many advantages in the remedy of private law than the penalty of public law: first of all, remedy of private law can provide enough compensation for insureds, hence, can encourage people to struggle with bad faith; moreover, the cost of remedy of private law shall be borne by defendant rather than public finance, therefore, can save the payment of public finance; furthermore, the approach of remedy of private law can effectively restrict the applicable scope of government's public power; finally, the remedy of private law may cultivate individuals' legal beliefs and legal feeling because the remedy can provide effective protection to the individuals' legitimate right (Huang QH, 2007b).

In addition, observing article 139 of the Chinese Insurance Law from legislation technique, it is difficult to define the distinction between crime and non-crime in the case of insurers' bad faith. Hence, there is also trouble in practicability of the provision. This is another reason why the problem of insurers' bad faith in China can not be effectively solved for long time.

3.2 New Practices for Preventing and Handling Insurers' Bad Faith in China

In order to efficiently resolve the problem of insurers' bad faith, "Certain Opinions on Reform and Development of China's Insurance industry" (hereafter referred as "Certain Opinions") issued by China's State Council in 2006 requires that, the operation of Chinese insurance industry shall be in good faith and standard. For this purpose, "Certain Opinions" require establishing insurance credit system, pushing the construction of good faith culture, and creating an excellent environment for the development of Chinese insurance industry. Specific measures for fulfilling the goal include providing intensive education of good faith for insurance staffs, strengthening the construction of self-disciplined organizations in insurance industry, and introducing effective mechanism of punishment and warning against the bad faith.

Under the direction of "the Certain Opinions", the China's law section is discussing the amendment and betterment of the Chinese Insurance Law. In addition, China's courts and governmental agencies, such as the insurance supervision and control authority (ISCA), as well as insurance companies themselves are respectively taking the measures of justice, administration and self-discipline.

3.2.1 Amendment of the Chinese Insurance Law

In the respect of amendment of the Chinese Insurance Law, as far as the legal issues of insurer's post-contractual obligations are concerned, particularly, the insurer's duty of good faith in the performance of insurance contract, it has been realized by the Chinese Insurance law sector that the following problems of legislation should be solved:

(1) It is necessary to define that insurers' post-contractual obligations concerning good faith, including 1) insurer's illustration obligation on contractual terms and conditions involved in the stage of performing policy; 2) insurers' inform duty on requiring an insured to supplement evidences and relevant materials when dealing with the insured's claim; 3) insurers' duty of timely and properly investigating an insured's claim; 4) insurers' inform duty on dissolution of insurers' contractual liability because of an insured's violation to warranties clause on the truth of information provided; 5) insurers' inform duty when an insured violating good faith duty (for example, fails to pay premium pursuant to the stipulation of a policy); 6) the disposal of insurers' negligent liability of concluding contract discovered; and 7) insurers' inform obligation on modification and renewal of a policy after the insurance policy is concluded.

(2) Relation to an insured's obligation of "timely inform" after the happen of an insurance accident, it is necessary to describe that, 1) after an applicant, insured or beneficiary knows the happen of a covered accident, the information concerning the accident to the insurer within reasonable time, should belong to the governing scope of the insured's obligation of "timely inform" provided by Article 22(1) of the Chinese Insurance Law (note 1); 2), an applicant, insured or beneficiary's failure to timely inform the insured accident do not influence insurer's insurance liability, except for otherwise stipulation in the contract; and hence, 3) an insurer's defense that it should not bear insurance liability

because of a plaintiff's failure to timely notify the insurance accident in question, should not be sustained by people's court.

(3) By reference to the UK's case law, the Chinese Insurance Law should add a provision that both parties' post-contractual obligation on good faith will/shall be ended after court accepts the case filed. After that, the relationship between parties to an insurance policy is regulated by civil procedure law.

3.2.2 Judicial and Administrative Measures

In the side of judicial measure, The SPC is drafting the judicial explanation concerning how the dispute of the performance of insurance contracts should be judged, and meanwhile, local people's courts at all level have sentenced a number of cases concerning the complaints of insurers' bad faith in accordance with article 24 of the Chinese Insurance Law and the Chinese Contract Law.

The Commerce and Industry Administration Agency, together with the Protection Commission of Consumers' Rights and Interests, have co-issued several reports commenting on insurers' good faith and fair dealing in recent years. The reports is playing active role in directing consumers' acceptance of insurance service.

3.2.3 Self-disciplinary Measure of insurance industry

In the side of self-discipline of insurance industry, on June, 2006, the China Pingan Insurance Share Limited Corporation ("Pingan") issued a report, whose title was "Good Faith, The Pathway for 'Pingan' To Be A Citizenship", and through publishing the report, "Pingan" made a promise to the world that she will regard good faith as a basis and without it, "Pingan" believes that, insurance enterprise can not develop and progress. Therefore, she will actively perform corporate social responsibility for the community, and willingly defense all kind of conducts of bad faith.

After reviewing all above existing opinions and practices for preventing and handling insurers' bad faith in China, two basic conclusions can be made: first, Chinese government, law section, consumers' society and insurance industry, as well as insurance companies themselves, have made great efforts to deter the bad faith. Second, unfortunately, it is discovered that there is not a tort law mechanism of bad faith lawsuit, like bad faith lawsuit in USA, to develop and promote insurance industry's good faith culture in China. Consequently, in the next subsection, the article will discuss the suggestion regarding the introduction of the American legal system into China from the perspective of comparative law.

4. Analyses of Jurisprudence and Suggestion

4.1 Analyses of Jurisprudence

The fundamental differences between the lawsuit of bad faith and the lawsuit for breach of insurance contract are as follows:

Firstly, the legal basis supporting bad faith litigation is the provision of law, whereas in the lawsuit for the breach of insurance policy, relevant legal basis is the stipulation of contract. Therefore, without the provision of law on bad faith lawsuit, there is not legal authority by which, an insured can commence bad faith litigation against an insurer.

Secondly, since bad faith lawsuit based on tort law, the purpose of such kind of litigation is to punish a tortuous conduct rather than a behavior of breaking contract. Consequently, very important remedies in bad faith lawsuit cover extra-contractual damages for mental damage and emotional distress and punitive damages, while in the lawsuit of breach of contract, punitive damages is rarely applied.

The essence of bad faith lawsuit in USA is that American law emphasizes using the remedy of private law, particularly, extra-contractual damages and punitive damages, (the latter is a kind of civil fine), to protect private rights, including individuals' property right and personal right. In contrast, Chinese law stresses applying public law means, such as administrative fine and other administrative penalties. The difference of legal mechanism is outstandingly displayed in the American Insurance Law and the Chinese Insurance Law in preventing and handling insurers' bad faith, which stems from their distinction in legal philosophy. It is believed that American law stresses citizens' self-autonomy while Chinese law values governmental power of administration.

As foregoing statement, in China, many disadvantages existing in using public law methods to "protect" private right and to deal with legal affairs that shall be governed by private law. The present situation is obviously represented in the Chinese Insurance Law. This embodies the characteristics of Chinese law in transition period, during which China's economic system is reformed from plan-oriented economy to market-oriented economy.

4.2 Suggestion for Introduction of American Bad Faith Lawsuit into China

It should be realized that, as a guideline for the reform and development of China's insurance industry, "certain opinions" provides an opportunity for the introduction of American bad faith lawsuit to China. The importance of the introduction is embodied not only in that it can improve the Chinese Insurance Law and promote insurers' good faith, but also in that it can offer a scientific legal mechanism for the progress of Chinese legal system.

It should also be realized that there are a great number of specific measures of legal reform should be adopted if the legal system of bad faith lawsuit is introduced:

First of all, to amend the Chinese Insurance Law by adding a provision: “where an insurer improperly treats an insured or beneficiary’s claim or deny the claim without justified reasons, the insured or the beneficiary may bring a bad faith lawsuit against the insurer.”

Second, the legislation on extra-contractual damages and punitive damages should be absorbed systematically into Chinese law, including their applicable scope, applicable conditions, and decisive factors by which the amount of extra-contractual damages and punitive damages in different circumstances of bad faith lawsuits can be decided.

In the final, for introducing the legal system of bad faith lawsuit into China, and for effectively implementing the legal system, the improvement of Chinese torts law is also required, and through which, major concepts such as “gross negligence”, “malice”, and “fraud” and their legal requirements for their establishment in law can be identified. Otherwise, the legal systems of extra-contractual damages and punitive damages can not be operated well in China.

5. Conclusion

Bad faith lawsuit in America, as a cause of action and a legal thinking, provides an effective legal mechanism for China to prevent and handle insurers’ bad faith. Through the introduction of the litigation mechanism, Chinese legal system will be reformed significantly.

“Certain Opinions” present a guideline or provide an opportunity for China’s law society to introduce the legal mechanism of bad faith lawsuit in America into China.

After the legal system is introduced into China, an insured can claim his/her right to indemnity or benefit, from both of stipulation of insurance policy and provision of Chinese insurance law directly, can obtain fully compensation than of that under existing legal mechanism, if insurers fail to deal with the insured’s claim in good faith and fair dealing. The introduction has great value in China’s modernization constructions in legal system, market-oriented economy and democracy (note 2).

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Notes

1. Article 22(1) provides:” the applicant, the insured or the beneficiary shall, in good time, notify the insurer the occurrence of an insured event soon after they knew it.”

2. This article was written during May 2006---June 2007 when the author studied as a visiting scholar of legal English at the Department of Legal English, Guangdong University of Foreign Studies and served as a senior (international) lawyer at Shanghai HaihuaYongtai Law Firm.



The Relationship of Accountable Governance and Constitutional Implementation, with Reference to Africa

Peter Burnell

Department of Politics and International Studies

University of Warwick, Coventry, CV4 7AL, England

Tel : 44-24-7652-3304 E-mail: peter.burnell@warwick.ac.uk

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Abstract

This article offers a framework for analysing the interrelationships between democratic accountability and constitutional implementation with specific reference to sub-Saharan Africa. It opens by noting the subject's importance and the contested meaning of key terms, before proceeding to elaborate the significance that constitutional implementation and accountability have for one another. The main purpose is to suggest an agenda lying at the interface between constitutional law and politics that is worthy of further research. The article argues there is considerable scope for analysts of law and politics to collaborate for the purpose of shedding light on many questions that cut across issues of both democratic accountability and constitutional implementation in Africa.

Keywords: Accountability, Constitutional implementation, Africa

1. Introduction

The most recent 'wave' of democratisation around the world, Africa in particular has seen a flurry of new constitution-making and constitutional revision. In some places this has been greeted as a second liberation or second coming of independence. In a parallel trend ideas of governance and the importance of 'good' governance have been in the forefront of debates about development, with the African continent again featuring prominently. Accountability is central to the theory and practice of both democracy and better governance. In Africa the importance of accountable governance to achieving economic and social development, lasting peace and political stability as well as democracy is widely assumed to be virtually axiomatic.

Accountability has been called the defining feature of modern liberal democracy: 'scholars now tend to perceive public accountability as a key attribute of democracy and democratic quality, as well as an ingredient of democracy's long-term sustainability' (Schedler 1999a: 2). Accountability makes the abuse of political power less likely, while at the same time helping to empower governments to serve the ends that democratically elected governments are legitimately asked to pursue. In 2005 the Economic Commission for Africa acknowledged in its *African Governance Report* (2005:116) that in the past constitutional mechanisms to contain executive dominance 'were systematically weakened, revised, suspended or replaced with ones that had a concentration of power in the executive branch'. Now, strengthened accountability arrangements including some brand new institutions are in place in many African countries. Alongside the parliaments other bodies such as Human Rights Commissions, Anti-Corruption Commissions, Public Audit Offices, National Prosecuting Authorities and of course the courts - constitutional courts included - now have more prominence compared to earlier constitutional arrangements.

However, although the idea of accountability is not new to politics there is confusion about its meaning and practice. Furthermore, the relationship of accountability to constitutionalism, constitution-building and more specifically constitutional implementation is barely addressed: the connections are rarely spelled out. For example, does the way in which constitutional choices were originally made and the reasons for those choices have an important bearing on the state of accountability later? Are some constitutional choices and institutional mechanisms more likely to secure accountable government than others? Ideas of constitution building and constitutional implementation may not be easy to separate, but does a country's experience of accountability play clearly into theories of constitutional failure and success? Before these and related questions can be addressed the analytical terrain must be surveyed first. Only then is

it realistic to set about collecting comprehensive data about the actual performance of accountability mechanisms and connecting the evidence to constitutional implementation, in Africa's constitutional democracies. The paper surveys the terrain; the intention is that readers from law and from politics are both exposed to propositions that they find new.

2. Ideas of accountability

Legal, political, administrative, financial, managerial, parliamentary, moral, market, societal and, even, celestial or heavenly are just some of the prefixes that have been attached to the word accountability. In politics accountability has been called 'perhaps, the most vexing problem within contemporary democracies' (Moncrieffe 2001: 26). One of the reasons is confusion over the term itself, an aspect that Schedler (1999b: 14) captures well when he says accountability 'represents an underexplored concept whose meaning remains evasive, whose boundaries are fuzzy, and whose internal structure is confusing'.

In fact there are several interlocking debates over what accountability means and how it works in the domestic context – and even that context does not describe the full reality facing many African governments that have to account also to external bodies, such as foreign aid donors, as well as the legal constraints provided by international law. In a globalising world the phenomenon of external accountability is becoming increasingly important. Domestic accountability however is essential to democratic accountability. But curiously, the question of what delineates democratic accountability from the larger field of domestic accountability is rarely posed. Rakner and Gloppen (2003: 79) say democratic accountability is a special case where the 'principal is "the people" and the parties owing accountability are those entrusted with political power'. A tighter specification would say something more about how the people are to function as an instrument of accountability. For example democratic accountability can be said to refer in the first instance to making government accountable to society through a democratically elected body that is representative of the people and that itself endorses democratic norms and values, or to the assigned agents of such a body, operating within the framework of the rule of law. Terms of reference like these would exclude mobocracy and show trials, among other things.

Clearly, accountability requirements may be found to apply in the relationships between different institutions and also in the relationships that exist within a single organisation. There may be a lengthy chain of principal-agent connections or nested accountability relationships coexisting alongside one another: junior officials accountable to their line managers; the civil service heads of departments accountable to their political masters; the government accountable to parliament; parliament accountable to the people. But while general questions asking who is accountable to whom and for what look straightforward enough, discourse becomes more convoluted once the relationships of such issues as enforcement, responsibility, institutional typologies, and sanctions to notions of accountability are brought into closer focus.

2.1 Answerability and enforceability

A commonly made distinction is between answerability and enforceability (also 'correction' or redress). On the answerability side a distinction is sometimes made between the obligation to provide information about activities (transparency) and a requirement to give reasons that should be offered as justifications for the conduct. On the enforcement side, the sanctions or threatened penalties vary greatly, from criminal charges and dismissal from office to reprimand, public embarrassment or damage to reputation. An important difference lies in the asymmetry between liability to sanction for legal misdemeanours and the enforcement of political accountability. Where the law has been complied with in full there is no case for legal sanctions. But with political accountability an agent may do what was demanded and yet still could be legitimately brought down; conversely political agents may be able to escape penalties even though their performance is poor. The predictability that sanctions will be imposed counts in determining how agents choose to act. But while in many cases the form or mode of sanction is particular to the type of accountability relationship, the more general question of which sanctions are the most effective and in what circumstances can only be established empirically.

2.2 *Ex ante* and *ex post*

A further common distinction is between *ex ante* (also 'prospective') accountability and *ex post* (retrospective) accountability. The former is close to the idea of *responsiveness*. For instance society expects government to do what society wants government to do. This is different from the *ex post* idea of critically examining the government's performance after the event and, where relevant sanctioning an abuse of power, maladministration or some other failing. In order to be responsive an agent must have its responsibilities clearly defined. Accountability rules aim to ensure that agents take their responsibilities seriously and act on them in a way that the principals find acceptable: 'The requirement that agents be accountable to their principal for the way they act on their responsibilities by exercising authority and carrying out their duties indicates the interrelationship of accountability and responsibility' (Dunn (1999: 300). However not every relationship of accountability hinges on a direct relationship between an agent and the principal that authorised or created that agent (Mainwaring 2003: 14-16). Accountability can mean answerability even in circumstances where the body that feels entitled to receive answers may not itself have the power to invoke

immediate dismissal.

Within the field of oversight of the executive a similar distinction is made between *ex ante* and *ex post* scrutiny. The former examines the government's proposals and the latter looks at implementation and outturns. The precise mechanism for oversight can take different forms. Hence there is a useful distinction derived from US experience between so called 'police patrol' mechanisms (the routine scrutiny of executive action by legislative committees, for example) and the 'fire alarm' interventions that such institutions as an auditor-general or an Ombudsman make, perhaps only after suspicions about executive conduct have already been aroused. A fundamental difference throughout is between arrangements designed to check up on lawfulness and those whose remit is to examine performance. The potential for conflict between these is obvious, namely unlawful actions that deliver real benefits, and lawful conduct that leads to mediocre performance.

Where there are multi-linked chains of accountability operating at different levels and cutting across inter- as well as intra-institutional relations, the interactions and interdependencies that prevail among the various accountabilities and the potential for tension to arise between the different agencies offers intriguing scope for detailed investigation. A plausible hypothesis is that accountability relationships perform most effectively when they benefit from mutual support and reinforcement. Conversely they may be weakest when they work in isolation. Constructive disagreements could be optimal, but passing judgment on which disagreements are constructive may be problematic. These too are matters for detailed empirical investigation.

2.3 Institutional distinctions

Significant possibilities for empirical research in Africa are certainly present in regard to the relations between the institutions of what O'Donnell (1998) called vertical and horizontal accountability - a distinction that is now widely recognised in the study of democratisation but which carries a different meaning from the way 'horizontality' is understood by legal scholars. (There, horizontality refers to claims about rights in relations among non-state actors, in other words private relationships, as distinct from claims against the state). In O'Donnell's framework the electoral sanction is the main instrument of vertical accountability; the judiciary is a prime example of horizontal accountability. A major illustration of the way different instruments might work together combines legislative scrutiny of the public finances and investigations conducted by the national audit office: each is dependent on the other if they are to have a good chance of being fully effective.

However, the grounds for an alternative distinction, between electoral accountability and intrastate accountability (Mainwaring 2003: 18-19) are strong. It highlights the difference over to whom or to what account must be rendered (citizens, and voters in particular, versus state organs) without conveying any misleading notions about hierarchy or independence among the different institutions. Thus Mainwaring's (2003: 20) distinction between three types of intrastate accountability is extremely helpful: (i) principal-agent relationships, where the principal has control over the agent; (ii) situations where one actor does not create or control another but does have sanctioning power towards it; (iii) oversight, which is where no *direct* sanctioning power exists, but where the overseeing body may refer complaints to yet another body that does have such power. For example a legislative scrutiny committee may be authorised to pass its findings to the Public Prosecutor. And yet even oversight institutions might have the capability to inflict informal sanctions directly (for example, embarrassment) or to invoke sanctions more indirectly, such as when their findings end up influencing the general electorate to vote the government out of office at the next available opportunity. In a democracy the extent and ways in which these different elements of intrastate accountability interact with direct forms of accountability to the citizenry becomes extremely important.

2.4 On sanctions

The above in turn suggests that it could be important to make distinctions not just between the possession/non-possession of official or formal sanctioning powers but also over the different kinds of damage that can be inflicted and by whom. This is not just a distinction between imposing sanctions and invoking others to impose sanctions. Crucially, neither of these necessarily means that the sanctions will actually be carried out: in Africa, 'slippage' is thought to be not unusual.

Informal and indirect sanctions are distinctive in that they may be triggered without the consent or even the intent of the original institution of accountability. Indeed voters may choose to take action against their political representatives because of what they perceive to be a failure of the official sanctioning mechanisms to follow through with inflicting justifiable punishment, provoked by evidence brought to light by the formal mechanisms for transparency and answerability.

2.5 Accountability to society

More wide-ranging than the idea of accountability to voters is the idea of accountability to society (social or societal accountability). This embraces a number of ways whereby social institutions and groups endeavour to monitor and reveal the performance of government, alongside but separate from the workings of the electoral process. Where

citizens engage directly with horizontal accountability mechanisms in efforts to provoke better oversight of state actions, by-passing more formal procedures along the way, one source calls this diagonal accountability (DFID 2007). None of this substructure of accountability comprising the independent media and civil society associations is captured fully in the clauses of countries' constitutions, although the constitution might provide underpinnings in the form of guaranteed freedoms of association, expression and so on.

Political sociologists are likely to seize on the potential significance of societal accountability more readily than are legal scholars. Surprisingly, perhaps, Mainwaring (2003: 7), who is a political scientist, believes that because accountability implies not just answerability but also a legal obligation to provide answers and/or the institutional right of an actor to impose sanctions then the idea of societal accountability looks rather suspect. And yet as Smulovitz and Peruzzotti (2003) have countered, the people may wield a form of 'soft power'; their scrutiny can have material consequences for the politicians. The potential value of this to maintaining democracy is enhanced in the absence of effective parliamentary opposition to the government of the day, such as where one party is dominant (like the African National Congress in South Africa) or government is a coalition of all main parties (Kenya in 2008). However the practice of societal accountability may not be fully compatible with democratic accountability, once we note that civil society organisations themselves may well not be representative and few are democratically accountable; moreover private media's interests are driven by profit and can be politically very biased or highly partisan. Nevertheless the effectiveness of institutions which in principle do have formal sanctioning powers may depend at least in some measure on their standing and support from these and other actors in society. This is where Gloppen (2003) found the courts in Tanzania to be fundamentally weak, for instance. In contrast the role of independent budget groups in Africa generally (Krafchik 2005) and South Africa and Uganda specifically (Robinson 2006) are claimed to offer support that strengthens the budgetary oversight capabilities of parliament. In 2006 an Affiliated Network for Social Accountability in Africa (ANSA-Africa) was established jointly by the Human Sciences Research Council (South Africa) and the World Bank for the purpose of developing collaboration on social accountability ('demand-side governance initiatives') across Africa as whole.

Goetz and Jenkins (2004) detect from evidence in India a new accountability agenda in the making. This provides for a more direct role for ordinary people to demand accountability across a diverse set of jurisdictions, but in a radical departure from existing notions it does this on the basis of a more exacting standard of social justice than has applied hitherto. In their judgment India's power-holders are increasingly being held accountable to norms of social justice, which goes beyond the narrower confines of process integrity and the formal substance of the constitution. While it may be premature to say that something like this is taking hold anywhere in Africa, Klare's (1998: 150) description of 'transformative constitutionalism' in South Africa – 'a long-time project of constitutional enactment, interpretation, and enforcement committed...to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction' – maybe comes close, by capturing the notion that adjudicative methods should contribute to egalitarian change. Certainly the idea of accountability to society becomes more complicated if a country's constitution makes a point of giving guarantees to certain groups in society such as women, ethnic minorities, indigenous peoples, and disabled persons so as to ensure equal – or, in the case of affirmative action/positive discrimination legislation, privileged – treatment

To sum up, democratic accountability can be understood in different ways: it encompasses answerability to the law and responsiveness to the people; it can entail both the direct and indirect application of sanctions, examples of which may vary greatly in severity and certainty of application. The conventional distinction between *ex ante* and *ex post* mechanisms of accountability can be supplemented by distinctions between intrastate accountability, electoral accountability, and accountability to society; external accountability adds yet a further, albeit non (or anti-) - democratic dimension. The constitutional and political relations that obtain between the different instruments of accountability may be as important as each institution taken singly. Although the idea of measuring democratic accountability in a country, or performing a country-based accountability audit, sounds attractive, before going on to conduct inter-country comparisons or construct an entire African league table, all such endeavours would be highly ambitious: the multi-dimensionality of accountability presents challenges as formidable as the disputations over its essential meaning.

3. Constitutions and accountability

In a state that adheres to constitutionalism the power of government must be sourced in the constitution. Nowadays this nearly always means a written constitution. Even in countries that do not have one such foundational document there are constitutional rules and conventions that have been codified in various ways. A constitution then is an instrument for making government accountable.

Although a word-by-word analysis of actual constitutions would probably show that few make extensive use of the word accountability, constitutions clearly do provide for and authorise institutions of accountability: they ground the powers of such institutions, most notably those that are supposed to hold the executive to account. However, constitutions do not implement themselves, any more than the fact that certain rights are enshrined in a constitution or

accompanying Bill of Rights will guarantee that those rights can be exercised. Constitutions are implemented by and through the actions of the institutions they help create. And yet these very institutions are accountable to the constitution – their powers are limited and defined, even though the specification may not always be crystal-clear or precise. Thus while judicial power is normally considered the bedrock of constitutional protection- and to that extent its status is quite distinctive and superior to all the other institutions of accountability - even the courts are not above the constitution or the law.

Although in modern democracies constitutions and governmental accountability are intimately connected, the first is not a sufficient condition for the second. Other notable instruments of accountability are extra-constitutional: some may have been created separately by executive action or by legislation; others may be set up directly by initiatives of society. Political parties for example are central to making accountability arrangements work effectively but not all constitutions mention them. But of course such freedoms as speech, assembly, association and access to information, which tend to be written into the constitution or associated declarations of rights, are indispensable to helping extra-constitutional actors call people in power to account. The exact relationship between the constitutional status of an accountability instrument and its actual effectiveness is something that can only be determined empirically. In Africa a starting point is to discover whether the performance of roughly similar organisations (Human Rights Commissions for instance) in different countries or at different times varies significantly quite independently of their constitutional status, and to investigate the reasons.

4. Constitutional choices

The embedding of institutions of accountability in choices over the constitution cannot be understood fully without reference to how constitutional choices come about. The background situation that gives rise to an opportunity to make constitutional choices varies greatly, from peace to internal or external war, and from the confidence offered by a period of political stability to the catalyst provided by an experience of state collapse or the tribulations of a failing state. The African continent has examples of all of these in recent times.

Constitutional choices are always made by someone for some purpose. Bastian and Luckham's (2003:3) judgment is that 'aspirant democratic Machiavellis, who introduce or reform democratic institutions in specific historical situations, are just as likely to be swayed by short-term political priorities and demands from narrow political constituencies as by strategic visions of the nature and purposes of democratic governance'. That may be an exaggeration, but a reasonable assumption is that the constitutional choices will reflect the distribution of power existing in society at that time. In societies that have recently witnessed dramatic social and economic change or undergone political turmoil the new distribution of political power can be very different from the one that underpinned the previous constitutional order and its provisions on accountability. Violent revolution is not a necessary condition for this to happen, as South Africa's political transformation with the end of apartheid demonstrates.

However, an obvious question to ask where a new constitution emerges and is not then implemented in the way that was intended or expected is why? While one line of response could be to concentrate on what developments took place subsequent to the making of the constitution, another would be to look for reasons why the original choices proved unworkable - reasons that date back to the way in which the choices were first made, or the circumstances prevailing at that time. Some deviation in the course of implementation may be inevitable, but the presence or absence of birth defects also makes a substantial difference.

4.1 Inevitability of constitutional change

Constitutional choices and their effects do not invariably freeze the distribution of power, either among elites or between the elites and society. The institutional choices might be expected to cast a long shadow, because they create vested interests in maintaining those institutions and in resisting further change. However, the premise that institutions are 'weapons in the struggle' (Geddes 1996: 18-19) for personal and party political survival/advancement may not prevent actors other than intended beneficiaries taking advantage. Moreover the so-called 'transformative constitutionalism' (Klare 1998) is expressly intended to have consequences that will effect profound changes in the distribution of social and economic power, and thereby in political power, even though neither the constitution nor its makers probably envisage that the constitutional document itself will be altered in any fundamental way.

Where the patterns of power in society do change over time, the groups or forces that are on the rise may well seek to bring in constitutional changes that reflect more accurately the new situation. The political forces that were previously dominant too might seek constitutional changes, in order to further strengthen their position where they see threats developing on the ground. The different scenarios serve to remind us that although in Africa the task of holding the executive (presidential power specifically) to account tends to be seen as one of the major political challenges, the requirement for democratic accountability must extend to other organs of state too, the legislature included. For example government should ensure that parliamentarians make only a proper use of the publicly funded allowances that are in place to subsidise their legitimate expenses. A national audit office will often have the power to scrutinise the

accounts of other state institutions of accountability.

A special situation where the constitutional bargain is likely to obsolesce over time, even where the distribution of power in the country that gave rise to it remains the same or is reinforced, is where the nationally dominant actors did not at first obtain everything they wanted but had to make concessions as a result of international pressure. Zimbabwe and the Lancaster House Agreement (1979) is a specific example. Others are post-conflict settlements where the United Nations for instance has helped to broker the peace and mediate a political solution. The external actors relax as their attention then moves on to other theatres. Continued external intervention in their domestic politics is not usually accepted by sovereign independent states, even if support for the norms of democracy or human rights would seem to make it desirable in cases like Zimbabwe or Sudan. However it is also the case that constitutional choices agreed by domestic political forces may subsequently come under outside pressure to adopt or adapt to evolving regional and global understandings - including on such matters as fundamental rights - even in the absence of manifest implementation failure. Taking on the obligations of membership of the International Criminal Court (currently 29 African states are signatories) actually introduces a new external accountability.

4.2 Birth defects

A scenario that can arise almost anywhere is when the locally dominant actors' own understanding of the kind of constitutional choices that would serve their own or the country's interests changes after the constitution has been put into effect. This may be just a consequence of a learning experience. Or it could be due more to developments in the surrounding political, social and economic circumstances. Either way, it can lead the elites to seek to reopen the process of constitution making. In the more extreme situations a constitution may simply prove impossible to implement in the way that was intended or is incapable of realising the desired effects. How can this be explained?

The actors who are designated to put constitutional choices into practice and those who actually implement them will not coincide for long with the actors who bore responsibility for the initial decisions. The institutions and people in charge of implementation may have been given too few powers. They may not have the requisite competence and expertise. Their resources may be inadequate - a common problem in Africa. Instances of maladministration can owe to these shortcomings without wilful negligence or intentional failure. But it is also entirely plausible that institutions and actors will come to acquire interests that conflict with the agendas that were uppermost in the constitution-making process, if only because the original constellation of political forces fractures or constitutional implementation becomes caught up in political conflict among rival groups, as happened in newly independent Zimbabwe. For all these reasons constitutional choices and the structures they create may soon come to be seen as flawed, or are disregarded or disowned.

Beyond the question of resources and design-related explanations for 'slippage' in constitutional implementation, then, lies the issue of 'ownership'. This in turn is closely connected with the process by which the decisions on a constitution emerge and the way the choices were sealed. If the constitution-making process has been confined to just a small political elite, especially one that is unrepresentative, then persuading society at large to accept ownership could be problematic. The people's willingness to cooperate in the smooth day-to-day running of the institutions that are essential to making the constitutional choices a success cannot be guaranteed. They may simply carry on their lives in ways that leave the constitutional choices redundant. More radical strategies of resistance to constitutional implementation develop. This scenario is captured by the notion of disengagement from the state, and resort to parallel structures of authority even. In many parts of Africa the development of an informal or second economy that defies official attempts at regulation is widespread. Tax evasion is a well-known manifestation: it takes encouragement (if not legitimacy) from widespread suspicion that there is too little accountability in the way the government handles the public finances.

In consequence informal institutions - whether defined in terms of shared values or shared expectations - can have a heavy bearing on how the formal institutions actually work, causing them to depart from their official purpose and producing results that were not intended by the formal institutional design. The political science literature on Africa suggests that informal institutions comprising neo-patrimonialism and patron-client networks are widely and deeply entrenched. However, although the burden of commentary tends to be highly critical, Helmke and Levitsky (2004) rightly draw attention to the potential for exploring the more constructive side: informal structures that lend weight to compliance with the formal institutions and give them stability, or stimulate reform efforts to improve on the design of poorly-performing formal institutions and, even refine the constitution itself.

The merit of 'ownership' is widely cited in a variety of literatures on problem-solving approaches in political as well as economic development. It is another way of saying that inclusive participatory arrangements can give processes of deliberation access to a broad base of knowledge; even more important they help create a strong sense of commitment to the outcome. That means a feeling of obligation to make the solutions work. A participatory approach to constitution-making seems then to be an obvious recommendation (see for example Ghai and Galli 2006). However there is little consensus on how inclusive and how participatory constitutional processes must be: such details usually escape close specification, notwithstanding their importance. Listening to the people is one thing; envisaging them

having the power to sanction is another. One of the more familiar devices in this context is the referendum on a constitution in its entirety or on selected proposals for constitutional change. However African constitutions vary widely in how far certain provisions in the constitution such as those pertaining to basic rights can be altered, and the procedural requirements. But even if 'ownership' secured through inclusive participation in the process of constitutional choice-making really is a necessary condition for constitutional implementation to succeed, it is not a sufficient condition.

In sum, the degree to which constitutional choices are implemented will bear some relationship to how they were made, by whom and under what circumstances. As to what that relationship is, only wide-ranging comparative research can provide the answer. In the meantime informal institutions that are not codified in the constitution may shed much light on how formal institutions of accountability mandated by the constitution perform in practice.

5. Constitutional choices and institution building

Even after separating out the occasions where reforms officially styled an *interim constitution* have figured in processes of political change, constitution building is unlikely to be a one-off event confined to a single instant in time. In fact the idea of constitution-making appears to shade into constitution-building, which seems not to have a sharply separate identity. In Ghai and Galli's (2006: 9) words, constitution building 'refers to the process whereby a political entity commits itself to the establishment and observance of a system of values and government...Constitution-building stretches over time...an almost evolutionary process of nurturing the text and facilitating the unfolding of its logic and dynamics'. Clearly this process can be as important as the act of writing a constitution. At minimum it will include formal amendments made in accordance with procedures laid down in the constitution - although the possibility of there also being *unconstitutional* constitutional amendments cannot be discounted, and as Hilbink (2008: 243) observes, 'really does set constitutional court judges up as guardians'.

5.1 Judicial interpretation

Building on the constitution can happen in several ways. Most notable are processes of judicial and constitutional review (by the judiciary and by a special constitutional court respectively), leading to constitutional interpretation. Review includes rulings in cases that are brought under and, perhaps even against the constitution, and cases brought against institutions of accountability established by the constitution. The last can include the parliament, whose legislative provisions might be annulled by the courts exercising the power of judicial review. In Africa there are at least 29 constitutional courts and 12 countries with judicial review (Sweet 2008: 221).

The large literature on judicial interpretation naturally touches on the potential for conflict between the idea of judicial independence and the accountability of the judiciary itself, or what is sometimes called the problem of 'second order accountability'. The question comes to life most intensely, perhaps, in cases where interpretation of the constitution collides with an exercise in defining the national interest, which is an area normally deemed the prerogative of (elected) politicians. Here the question of who determines whether the issue at stake really does concern the national interest is as crucial as determining how far and in what way the national interest is being put at risk. The usual line of defence for the courts when charged with being unaccountable lies in being transparent, in the sense of sharing the legal reasons for their judgments and showing imperviousness to politically partisan or ideological grounds. A similar concern for transparency can be commended to other instruments for making government accountable, even where the requirement or the potential to explain their actions in apolitical terms need not apply. Thus expectations in regard to how an Anti-Corruption Commission, say, must couch its findings will differ from the exercise of legislative oversight that endeavours to bring the executive to account for its political decisions.

5.2 Winning and losing in politics

In politics a rational expectation is that organisations including those created by the constitution as instruments of accountability will aim to make a creative construction of their powers, for bureaucratic as well as political reasons. Put differently, they are budget maximisers. Of course not all such institutions will do so with equal vigour or skill: personal factors and quality of leadership may be decisive, and no constitution can predict these. Indeed, in so far as there is a system of checks and balances among institutions of accountability it is plainly impossible for them all to increase their power vis-à-vis the rest at the same time: jurisdictional conflicts and 'turf wars' have losers as well as winners. However it is quite feasible for the absolute power of the organs of state as a whole to grow in relation to the freedom of the citizens, without anti-democratic implications. This can happen even while the balance of power between institutions shifts and some institutions see their former position in the institutional hierarchy descend in relative terms.

Changes like the above can happen following a formal amendment to the constitution, or because of separate legislation or due to less formal developments. But none of this necessarily betokens a failure of constitutional implementation. On the one hand constitutions can intentionally allow for such developments. The periodic updating of a country's constitution may be a normal feature of constitution building: it is not necessarily a sign of a constitution under stress.

Yet it is important to distinguish situations where changes to the power of the state and in relations among institutions of accountability offer clear evidence of limitations and defects in the constitution. Reading the situation correctly calls on political as well as legal judgment; accuracy might require the benefit of hindsight.

Of course what should be judged a weakness in the constitution and what counts instead as a failure of implementation could be hard to disentangle. To illustrate, an institution might have been given powers that are inadequate to the functions it is mandated to perform but this dilemma becomes apparent only with experience and the passing of time. More easy to read are situations where constitutional provisions are altered largely in order to meet personal or partisan political ambitions. The very principle of constitutional rule would then appear to be in peril. A prominent example in Africa is where term limits on holding presidential office are removed or relaxed (attempted examples range from Nigeria to Malawi) or conversely tightened (Zambia in 1996) so as to serve an *ad* or *contra hominem* cause respectively. But even here it may be argued that making correct use of the established legal procedures for changing the rules is a democratic advance of sorts: it reinforces respect for the rule of law, and may successfully curb overweening political ambition. Posner and Young (2007) argue in this way when calculating that of the 18 directly elected presidents in Africa who faced term limits in 1990-2005, nine stood down and nine attempted to change the constitution, of whom only six were successful.

A moot point is how many of the accountability institutions must be judged wanting in their performance, and to what extent, before we can infer that constitutional implementation has failed or there is a fundamental weakness in the constitutional design, or both. A systematic examination of the evidence is likely to reveal that different institutions vary in their track record and their effectiveness fluctuates over time, both inside a country and when considered across comparable countries. If some accountability institutions perform badly in the presence of other institutions that seem to perform quite well then the reasons for the discrepancy certainly merit close inquiry. But a prior question will involve determining whether heavy traffic through instruments of accountability, the Office of Public Prosecutor or Ombudsman for example, denote a failure of constitutional implementation or, on the contrary, furnish evidence of foresight in the framing of the constitution and give testimony to the public's confidence in their efficacy.

More serious still would seem to be the formal states of emergency that involve suspension of provisions of the constitution, especially those which give effect to certain civil liberties or political rights. But if these departures are declared - and subsequently brought to an end - in line with the terms of the constitution and the political consensus is that the situation provides adequate justification (e.g. *force majeure*) then neither the constitution nor its implementation may be seriously at fault. In practice, however, full consensus usually does not exist; and responsibility for bringing about the situation that is advanced as grounds for calling the emergency is often disputed. The two emergencies called by President Chiluba in Zambia in the 1990s are examples. What is less ambiguous and more easy to pass judgment on is where the mechanisms of accountability themselves are subjected to arbitrary political interference. Nepotism and the making of partisan political appointments (and dismissals), attempts at bribery and other external pressures such as harassment or intimidation are examples of what is sometimes called '*politicisation*' - a pejorative term that in theory could be used in relation to all kinds of accountability institutions.

Executive encroachment apart, the formal legal and actual political relations between the different institutions of accountability and the way these relations work out in practice are crucial to the larger question of how accountable the state is to society. The role of the legislature is usually thought to be paramount here, because of its place at the nexus of vertical and horizontal accountability. Legislatures are pivotal to the intrastate accountability of the executive and (via the electoral sanction) its accountability to voters too - although more so in parliamentary systems and hybrid variants than to systems where an executive president is directly elected. But while all the mechanisms of accountability are supposed to be checks on the abuse of power (not just by the executive but by other state organs too) there is no presumption that they always can or should try to prevent an increase in concentration of power in the hands of the state. In other words, the stipulations for democratically accountable governance and a well-functioning constitution tell us nothing about how large or small the state should be. In what measure the state should take on responsibilities for managing the economy, for example, or what the optimum size of the law enforcement agencies is, are political and technical decisions more than constitutional issues. The answers will vary greatly depending on the circumstances of the country and on the values of its people and their political representatives. Thus, while the typical picture that is painted in Africa of rule by 'big men' may look anathema to the end of constitutionally limited government, that end does not of itself preclude the possibility that 'big government' might be (judged to be) desirable. Africa's cult of the 'big man' may be problematic for accountability, but small government is not necessarily best for Africa.

To summarise, just as constitutional choices do not cease with the making of the constitution, so constitution building both shapes and is shaped by processes of constitutional implementation. Constitutional choices lay the groundwork for institution building but they offer no guarantee of good institutional performance. In a democracy the actual performance of institutions of accountability is likely to be a notable influence on public satisfaction or dissatisfaction

and hence on the likelihood of (renewed) demands for constitutional change.

6. Stages of constitutional implementation and the development of a constitutional culture

Although constitutional implementation does not happen all at once it could be useful to distinguish analytically at least two (maybe overlapping) phases. After the constitutional document as such has received final authorisation, the first real stage of implementation involves setting up the organisations and developing the rules and procedures that were designated in the constitution. The standing orders of parliament are an example. The constitution and other foundational legislation may not be entirely clear about translating words into deeds. But such matters as who controls the appointments to agencies of accountability and on what terms and conditions and who decides the budget can be crucial to subsequent performance. Implementing the constitution may also require the law-makers to remove old laws from the statute book or replace existing institutions whose existence could frustrate the new constitutional order. Not all the contradictions may be apparent immediately; but if action is delayed because the legislature is already overburdened by a large policy reform agenda then conflicts can be expected to emerge later.

The second stage of implementation comprises the actual performance of the new organisations. This may have to be measured against benchmarks which are constructed only after the institutions were created - benchmarks that may end up being devised whole or in part by those very same institutions. The designing of performance indicators can have major implications for any assessments that are carried out later. In an African context it is unwise to assume that all the requisite information will be collected, stored and made easily available. Deficiencies here, whether due to lack of resources, negligence or more sinister motives can have debilitating consequences both for accountability and research into the subject later.

6.1 Constitutional culture

The theoretical meaning of 'constitutionalism' may be contested (Sweet 2008: 219-20) just as is the definition of accountability, but in practice a distinctive aspect of constitutional implementation that may be crucial to how well the institutions of accountability perform is the development of a constitutional culture. While not a stage in constitutional implementation this can be considered an important aspect of constitution-building in the largest sense. It is a process that may be under way before the emergence of a democratic constitution. For instance concerted efforts by lawyers to shape something like a human rights culture might start long before the adoption of a constitution that finally secures legal recognition for those rights.

A constitutional culture is not synonymous with a democratic political culture (sometimes called 'civic culture'). There can be respect for a constitution that is not a democratic constitution, just as there can be a strong parliament whose procedures and whose members do not respect democratic values. But in a constitutional democracy the development of a constitutional culture would appear to be indispensable to the stability of constitutional rule, even though it cannot predict the constitution's adequacy as an instrument of political accountability. Also, it involves more than just knowledge of the constitution and the values it purports to represent. Attitudinal variables, most notably respect for constitutional rule are integral. And in turn that should protect the agencies of accountability from arbitrary external interference in their internal working. That the attitudes shown by constitutional lawyers and leading politicians obviously matter a great deal here does not mean the development of a constitutional culture throughout society as a whole is less important - although longer term cultural change there may take its cue from the constitution and the conduct of the institutions and leaders' behaviour. However, acceptance of the permanence of constitutional rule - of the idea that rule should be and must continue to be in accordance with the constitution - does not require complete agreement with all the features of the constitution. Rather it means recognition that alterations should be made only through the properly sanctioned procedures.

A point worth repeating is that constitutions *empower* the institutions of government and may even bestow extensive and far-reaching powers on public officials, as well as introduce mechanisms of restraint. Even so, a constitutional culture recognises that the constitution is not the property of those who made it or of the people who are currently in power. The development of such a culture, then, implies an acknowledgment that governing must be rules-based. And with the culture comes the habit of looking to the constitution to help resolve certain kinds of problem, to head off certain kinds of dispute. But far from rendering politics redundant it serves to make democratic politics possible; it enables disagreements to be resolved by political or other peaceful means. Thus while constitutional rule needs experts in public law it does not eliminate the need to find political solutions to political problems. It can enhance the role that elected politicians play even as it aims to constrain (and does constrain) the way they conduct their activities.

A constitutional culture of this sort can extend well beyond the sphere of the state, and encompass a wide range of political and social organisations. For example it is common for political parties, labour organisations and many types of non-governmental or civil society organisation to have a constitution, 'articles of association' or set of rules. These devices structure their internal affairs and determine major issues relating to who in the organisation can do what. A culture that respects constitutional rule for the entire polity should benefit from there being similar agreements

embedded in a variety of such associations. Membership of international bodies that require respect for their constitution can be yet another source of reinforcement.

7. Institutional performance and constitutional implementation

While the impact that constitutional choices have on the prospects for implementation with respect to the performance of institutions of democratic accountability is a question worth pursuing, a parallel and no less intriguing question is what lessons implementation tells us about the scope for making effective choices in the first place. To address this requires passing judgment on institutions of accountability, but that may be no straightforward matter. Even with reliable information the same body of evidence is often capable of different interpretations, akin to the 'glass half empty, half full' metaphor. And the correct inference to draw from weak accountability may not be obvious: is it unsatisfactory implementation, or defective design, or some third factor outside both of these? How robust is the view (from a legal scholar writing about Africa) that many legal texts particularly constitutions are 'shot through with apparent and actual gaps (unanswered questions), conflicting provisions, ambiguities and obscurities' (Klare 1998: 157)? And how many of the difficulties can be put down to the continuing presence of a substantial body of traditional law? To illustrate, although South Africa's constitution rules out arbitrary discrimination against women, the institution of customary law which is recognised in the constitution combined with traditional patterns of land ownership rights appears to marginalise women in this domain.

A constitution that for any or all of the above reasons fails in the sense of not giving rise to effective institutions of accountability might be rescued by judicial adjudication or other means of effecting constitutional change that were envisaged in the constitution, whether on a gradual incremental basis or by occasional big set-piece events. Clearly the weak performance of one or another institution of accountability does not necessarily imply that the constitution or implementation has failed. Problems experienced in setting up organisations for rendering government accountable and the shortcomings that come to light in their operation later may owe to many factors, some that constitutional bargains can never control and which could not have been foreseen (but which might surface as a consequence of judicial review). In order for constitutional implementation to be effective, however, the legal means to address such weaknesses must be identified in the constitution. At minimum they should be enabled by the constitution.

Neither constitutional remedies nor better resourcing, improved training and higher levels of remuneration at the institutions of accountability are likely to remedy all the shortcomings in implementation. As shown later, contextual issues to do with the political system can bear a heavy responsibility. A focus that examines just the internal workings of institutions and ignores their environment would be too limiting a site of explanations and potential remedies.

8. Constitutional failure in democracies: some explanations

Changes to the constitution do not mean implementation failure any more than implementation failures will necessarily bring about formal changes to the constitution. But failures of implementation, a failing constitution, and inability to develop a culture of constitutionalism are all signs of constitutional weakness. The degree to which they are seen to be politically significant and the reasonings about why that matters are likely to be context sensitive and case specific. In many cases the evidence of failure will be uneven, although constitutions sometimes do fail absolutely. And causal connections between the different weaknesses are worth looking for. From what Ghai and Galli (2006: 17) say constitutions are especially vulnerable in complex and divided societies, where 'a new constitution is like a delicate plant which needs careful nurturing' One of the questions that empirical research should be able to settle is whether the incidence of constitutional failure is inversely related to the provision for judicial or constitutional review and other ways of lawfully amending the constitution. Of course there must also be a point beyond which the ease of change and constant tinkering with the constitution or gyrating interpretations signify a failed constitution and, possibly, the absence of a constitutional culture too. But it is worth considering that not all constitutional failure is necessarily bad: the abandonment of bad (not to say undemocratic) constitutions in Africa has been a positive development. But equally, not all democratic constitutions are meant to succeed: some of the contracting parties at least may be unshakeably committed to agendas that are bound to prove fatal to the constitution sooner or later.

Approaches to explaining constitutional failure can be divided into broad, analytically distinct clusters: internal problems (poor design); process-related weaknesses (how the choices came to be made, by whom and the historical background); and context-related (unfavourable features of the larger political system, the economic environment). The explanations are not mutually exclusive and their incidence may be closely connected to one another; different permutations of reasons might be required in different cases.

8.1 Design weaknesses

Lack of clarity, confusion, incoherence, inconsistency, contradictions and incompleteness in the basic documents can all fatally undermine a constitution. While some such shortcomings might have to be knowingly accommodated in the constitution-making process in order to reach a political settlement acceptable to all, they can undermine democratic accountability later. The cascade of accountability between ministers and officials may be poorly defined, creating

opportunities for one set of actors to hide behind another; alternatively the same actor may be invested with multiple lines of accountability that make it impossible to honour each and every one. In Zambia for example the constitutional arrangements for effecting collective and individual ministerial responsibility are weak, but they have provided the executive with convenient grounds for resisting the introduction of more robust arrangements (Burnell 2003: 56). In general terms the impact that key constitutional omissions have on the course of future politics could be just as important as anything the constitution actually prescribes, although like so much this insight too awaits confirmation by broad-based empirical research. At the same time some vagueness in the wording of a constitution could allow the flexibility that future generations require if arrangements are to be adaptable to changing circumstances and avoid the risk of a growing irrelevance or complete break-down.

8.2 Inauspicious origins

Inauspicious circumstances surrounding the making and building of a constitution can be responsible for weaknesses that persist or come to a head long afterwards.

For example, in societies that have been rent by violent conflict the act of creating a new constitution is sometimes approached primarily as a means to sealing the peace, in haste and with insufficient reflection given to the needs of the longer run. Reynolds (2002) explored these dilemmas through an examination of such institutions as electoral arrangements and multi-level governance. Solnick (2002: 205) summed up the predicament well when he said that theorists of constitutional design 'must consider not only whether a particular institutional design is attractive for a given polity but also whether the transitional environment makes it likely that the given design would be adopted'. Awkward compromises can become the order of the day – to be repented at leisure later. International actors involved in brokering the peace may set timetables for completion that are governed by their own interest in making an early exit. External advice on the constitutional substance may carry undue weight even though not wholly appropriate to local circumstances – increasing the risk of what Bastian and Luckham (2003: 314) called an 'iron law of the perverse consequences of institutional design'. Post-Saddam Iraq is perhaps the most prominent example of this kind of scenario currently being played out, with consequences that could yet bring the state's destruction, but Africa has examples too.

8.3 (Pre)Historical path dependence

Throughout much of Africa the idea that democratic constitution-building is hampered by inauspicious origins takes on special resonance connected with the time before independence.

Colonial rule was not a good introduction to democracy. One view is that the institutional and cultural legacy has left an indelible impression on the way African societies view government today. Where local legislatures or other political instruments of consultation did exist in the colonial era they were advisory at best, possessing no real oversight powers. Modern ideas of democratically accountable government and many of the devices for translating that idea into reality (institutional checks and balances; the concept of a 'loyal opposition', and so on) can seem foreign in their inspiration and lack local roots. In the colonial era the authorities governed as they saw fit, which meant paternalism at best, or self-serving authoritarian rule at worst (at its very worst predatory and extractive, as in the Belgian Congo). Bouts of *de jure* one-party rule and/or military (-backed) government after independence did little to implant the idea that society should hold government to account. Constitutions were repeatedly ignored, amended or replaced when it suited the executive. Old ways of thinking die hard. Indeed, where colonial power governed through indirect rule, historical path dependence may reach back even to pre-colonial exemplars, which resembled not legal-rational authority but traditional power structures and patterns of behaviour such as (neo-) patrimonialism, that persist to the present day.

Mohamed Salih (2005: 8-12; 249) provides an example of this perspective when he argues how the servile relationship of parliamentarians to the head of government and ruling party in Africa's former one-party states (Tanzania and Zambia for instance) still haunts African legislatures in today's multi-party dispensation. This is reinforced where a dominant party bears the credentials of a liberation movement, as in South Africa, Namibia and Zimbabwe.

One drawback with this line of analysis is that the experience of constitutional rule and democratic government in African countries with a broadly comparable exposure to colonial rule (the same colonial power, even) varies greatly. Countries like Botswana and Mauritius have been stable democracies since independence; Ghana is now one of Africa's leading liberal democracies although before the 1990s it endured successive coups and military rule; Zimbabwe has experienced increasing autocracy and erosion of judicial autonomy and rule of law. Notions of path dependence may not be able to explain fully such diversity of trends.

8.4 Participation and its drawbacks

If constitutional proposals can generate controversy then the same is true of the process by which constitutions become law. On the surface the failure to adopt a participatory approach to making constitutional choices would seem to deny legitimacy to the outcome. Participation should generate stakeholders in ownership. Legitimacy and ownership ground a commitment to abide by the constitutional bargain, a willingness to cooperate in trying to make it work. This reasoning rather than design weaknesses could explain why some constitutional settlements that relied heavily on

international cajoling may face compliance problems later (Harris and Reilly 1998: 348).

However, the value of participation should not be viewed uncritically (Cleaver 1999). And as Ghai and Galli (2006: 5; 15) note, the people may pull in different directions, ending up with a constitution that is complex and hard to implement – increasing the chances that the politicians will disown the constitution later. In Kenya politicians across the board backed away from the findings of widespread consultation on constitutional reform when they realised that the peoples' demands would make them more accountable (Cottrell and Ghai 2007). Constitutional referenda that reveal society is badly divided create further problems. Ghai and Galli (2006:11) note correctly that even an inclusive participatory process that is free of manipulation by self-serving leaders will not guarantee implementation if the constitution itself does not open up spaces and mechanisms for the people to engage in public affairs thereafter. A sense of ownership by founding fathers is not obliged to travel down subsequent generations, for whom the constitutional settlement is something to read about in history books, not a personally lived experience.

In addition to ownership and opportunity society must of course be capable of rising to the challenge of implementation too. But amidst all the uncertainty one moral that probably commands broad agreement is that politicians can be counted on to wreck a constitution that is made by lawyers alone. In other words, in order for politicians to make a success of constitutional implementation the constitution building must be a political process, regardless of how broad or narrow is society's participation. The intelligibility of constitutional documents and mutual comprehension between lawyers and politicians are vital considerations, but their existence should not be presumed. Even so, a useful exercise would be to map the routes by which Africa's present day constitutions came about and match the participatory content of the process against the results framed in terms of effective implementation, public satisfaction, and the extent to which the constitutions have since undergone significant change by way of judicial review, referenda or other forms of amendment.

8.5 *Unfavourable economic context*

Structuralist arguments ground the weaknesses found in both accountability and constitutional implementation in poverty in society and restricted opportunities for economic betterment. Extensive or deep socio-economic inequality are reinforcing factors. Circumstances like these are conducive for politicians – especially those with access to government funds – to try to secure votes through offering patronage. In Africa it is often said that society's expectations of their elected representatives focus on meeting constituents' (in other words, clientelistic) demands for public spending addressed to sectional and particularist needs. Notions of holding the executive to account for serving the larger public good come far behind. Economic scarcity also fuels the practice of bribing government officials, which may corrupt even officers working in the intrastate agencies of accountability. Accordingly anti-corruption commissions have become widely established in Africa: they are a major part of the 'good governance' agenda. But senior politicians often escape serious sanction even where corruption at low to middling levels in the bureaucracy is pursued, except where corruption charges are yoked to partisan or personal political feuds.

In many African countries the instruments of accountability (anti-corruption commissions included) have difficulty competing for resources with stronger claims on the state's limited revenue base. Severe under-funding is commonplace, and can be deliberate. However, although sustained economic development might offer a panacea it is also true that some countries which are marked by the 'resource curse', Angola for instance, also find that accountability is undermined. Where thanks to the windfall rents from a valuable commodity like oil (or foreign aid) society is not taxed heavily, a strong pattern of evidence suggests that the public's demands for accountability tend to be weak (see Rakner and Gloppen 2003). That said, Botswana is an example of a country that has a relatively favourable record of democracy and effective governance while enjoying great benefits from diamonds exports. And Ghana receives substantial international aid in part because the donors are now relatively satisfied with the country's political and economic management. Once again, then, only more extensive empirical testing can shed further light on theoretical claims that link the record of accountable governance and sound constitutional implementation with economic and financial conditions. Nevertheless it is probably no coincidence that Botswana and Mauritius both of whom have enjoyed sustained development appear to be among the countries with the most enduring democratic rule.

8.6 *Unhelpful party politics*

Democracy is not defined solely in terms of elections and the competition for votes. But the political party system and the way the parties are structured internally are important features of representative democracy that can have a significant bearing on constitutional implementation and accountability. In countries like South Africa and Mozambique the constitution explicitly guarantees a space for political parties (via the Bill of Rights); in Nigeria a regulatory framework prohibits narrow ethnic or regionally based parties. Basedau *et al.* (2006: 630) calculate that in 22 African states there are bans on particularistic parties, the majority being written into the constitution. The legal case for constitutionalising all of Africa's political parties in such a way as to enshrine both their responsibilities and their status and rights has been made in Africa by Fombad (2007).

The political science literature on political parties identifies at least three situations that can be problematic. The first is where one main party is dominant – a situation where Fombad (2007) says constitutional guarantees and protection of the rights of parties are especially needful in order to prevent the danger of majoritarian tyranny. A second, less prominent in Africa is when the party system is highly fragmented and unstable (as in Kenya and Malawi), which makes it difficult for parties to connect state and electors in a clear and sustained way. A party escapes being held to account for governance by shuffling onto others the responsibility for achieving results. A yet third situation, which may also be found in the presence of the other two, is where political competition is strongly oriented around personalism and clientelistic behaviour. Throughout much of Africa parties function more as vehicles for the personal ambitions of political leaders (often a major source of the party's funds) than to pursue a programmatic mission, thereby removing one of the anchors of public accountability. Parliamentary oversight is usually one of the most visible casualties, where according to Mohamed Salih (2003: 253) competitive politics 'is the critical factor'. In some cases the party (system) weaknesses can be traced back to the electoral system. For instance proportional representation list systems translate into strong central control of the elected representatives, as in the African National Congress (ANC): by 2001 it seemed the ANC would no longer permit 'even internal debate about its lack of internal debate' (Butler 2005: 732). In a dominant party system presidential power is the beneficiary. Political interference in the electoral process can be another contributory factor – where the courts often become involved in passing judgment. Floor-crossing in the legislature also can have a bearing on the ability of opposition parties to remain competitive between elections: constitutional rulings on this in Malawi and South Africa have caused controversy. But how far all the mechanisms of horizontal or intrastate accountability can compensate for the drawbacks of a weak or non-competitive party system has to be established by more detailed research.

9. Conclusion

A recent attempt to investigate democratic accountability in Latin America said that 'the meaning of accountability is about as muddled as concepts get in social science' (Mainwaring 2003: 6). The idea of constitutional implementation has received much less attention in the (political science) literature and is similarly obscure. A major source of confusion for accountability is the endeavour to capture both (il) legality or (un) lawfulness and a more strictly political relationship. A parallel source of confusion in regard to implementation is the sense that constitutional choices do not stop with the making of the constitution. Instead they carry on into constitution-building through the ways in which a constitution is revised, interpreted and reinterpreted and applied thereafter and the development of a constitutional culture.

Accountability and constitutional implementation occupy a very broad terrain; clearly, relations between them are complex. Sweet (2008: 235) gives a clue to the lie of the land when he states that the reason why some countries are able to fulfil 'the conditions necessary for effective constitutional review is an important question that scholars have not been able to answer'. Many more questions just as relevant as Sweet's obtain and still await convincing answers. A manageable research agenda that aims to draw on the combined insights of legal scholarship and political science would have to select its focus carefully. An obvious starting point would be to catalogue what the region's constitutions actually say about accountability. A census of the mechanisms for accountable governance and identifying how far they reflect constitutional choices or conversely arose outside that framework could be the next systematic knowledge-gathering step. Comparing the background political circumstances and the process by which the present generation of constitutions came to be made, and assessing the performance of accountability instruments against an objective body of indicators in the light of that information, represents an ambitious but worthwhile task.

For some analysts it perhaps goes without saying that the 'accountability deficit' should be seen as 'a product of feeble sanctions' (Mainwaring 2003: 22). But is it really the case that the existing sanctions are inadequate, or does the problem not lie more with incentive structures and the reasons for weak enforcement? The motto 'prevention is better than cure' may have much to offer here: in the long run sound constitution-building on *the ex ante* side could prove more cost-effective than relying *ex post* on punitive applications of tougher laws. And while full accountability is an ideal that can never be achieved anywhere, that goal might not be desirable anyway. Just as Lonsdale's (1986: 129) pronouncement on Africa (made more than two decades ago) has validity still today - 'however much accountability may be a universal value, in actual political practice it is continually striven for and obstructed rather than achieved' - so there is merit in Schedler's (1999b: 19-20) more recent reminder that accountability is about rendering power to account, not about eliminating or substituting for power.

Governments, especially democratically elected governments must be allowed to govern. The implication is that power-holders need to have powers to exercise; and must enjoy some discretion. The scope to exercise choices means an opportunity to make mistakes - which is why adequate institutions of accountability must exist and function well. But we cannot expect those institutions to eliminate the condition that makes their existence necessary. This reflection comports with the reasoning that says there can be no such thing as a perfect constitution. Implementation failures and the response they provoke, then, may be viewed at least in part as an ineluctable form of market correction: they are

ways of enabling constitutions to be kept relevant and alive. That constitutional implementation and accountability will exist in tension may be normal. The prize is to understand what can make this tension work best in terms of what society expects from democratic governance. The idea of governing in accordance with the spirit and not just the letter of the law is an old one: it could mean that no more weight should be given to largely procedural-based measures of accountability than is given to accountability tests related to constitutional process, performance and results.

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Procedural Control over Transaction Cost

Chun Chen

College of Law, Political Science and Public Administration

Zhejiang Normal University, Jinhua 321004, China

Tel: 86-579-8480-1686 E-mail: fz59@zjnu.cn

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Abstract

Coase and his followers have not pointed out the effects of transaction procedure on transaction cost saving. Using transaction procedure to control transaction cost is a kind of procedural method differing from traditional ways (defining property rights, and constructing enterprise system). Coase and other scholars' neglects over the procedural method are not casual but for the absence of transaction procedure theory in the traditional private laws. The procedural method is significant for researches on economics and private laws.

Keywords: Transaction cost, Transaction procedure, Procedural method

Commercial act is a kind of business behavior. The business nature of commercial act indicates it is a sort of repetitive and regular act. Therefore, it is a procedural and professional act. From a view of business law, this procedural character means transaction procedure. Based on the contract procedure, the implementation procedure, the security exchange procedure, the business conference (shareholders' conference, board conference, and creditors' conference) procedure, the business election (the election of the president, the directors, and the supervisors) procedure, and the negotiable instrument procedure, the author makes systematic researches on the procedural theory of commercial act (Chun Chen, 2006). Then, in order to study the function of transaction procedure, the author tries to find out the causes from Coase and his followers' theories. However, the author finds that Coase and his followers have not clearly pointed out the effects of transaction procedure on transaction cost saving.

It is acceptable that Coase's theory serves as a bridge for economics and laws. If the study of Coase and his followers does not concern the relationship between the private law's transaction procedure and transaction cost, the bridge is incomplete. In fact, it is well known that "a clear property rights can save transaction cost". However, nobody has even mentioned that "to design transaction procedure can help to save transaction cost". In the field of private law, the Coase Theorem has never been applied to the transaction procedure field. This paper tries to discuss the effects of private law's transaction procedure on transaction cost saving and its meanings in economics and law.

1. Limitation of traditional method

According to Coase's theories, minimizing the transaction cost is an important way to improve transaction efficiency. The legal scholars in England and America emphasize on the economic analysis of laws. They even agree that minimizing the transaction cost is a pillar of modern legal scholarship in modern legal studies (Peter H. Schuck, 1992, p18). For private law, what are the ways of saving transaction cost?

From the angel of private law, Coase advanced two ways of saving transaction cost. One is to define the property rights, namely saving transaction cost by optimizing the definition of property rights. In *The Problem of Social Cost*, Coase put forward the concept of transaction cost (or transaction expense) and the "Coase Theorem". Coase declared that with the precondition of transaction cost, the initial definition of legal right would generate effects on the efficiency of economic system's operation (Coase, 1990, p92). Therefore, the reasonable definition of property rights can help to save transaction cost. The other is to save transaction cost by enterprise system. In *The Nature of Firm*, Coase pointed that the price mechanism would consume costs, including the cost of finding relative prices and the cost of negotiation and signing contract, what are the transaction costs. The theme of his thesis is: to replace the market transaction with firms is a way of saving transaction cost; the nature of firm is a substitution of market mechanism; the aim is to save transaction cost (Coase, 1994, p355).

According to analysis above, we can conclude two ways for transaction cost saving, namely the definition of property rights and the construction of enterprise system. It seems that people emphasize particularly on the great effect of property rights definition. That is the origin of economics of property rights. Today, economic scholars have already reached an agreement on that to save transaction cost can improve economic efficiency. Meanwhile, how to design

property rights system to save transaction cost has also become an important subject studied by economic scholars. Coase's theories agree with China's public property rights reform. "To save transaction cost by define property rights clearly" has become a popular saying at present.

Although Coase's theories have presented two ways for saving transaction cost, his theories have had a fundamental limitation from an angle of private law. These theories neglected the relationship between private law's transaction procedure and transaction cost. The private law includes not only property rights rules and enterprise rules, but also amounts of transaction procedure rules, such as contract procedure, implementation procedure, business conference procedure, security exchange procedure, and negotiable instrument procedure. The methods mentioned by Coase aim at saving transaction cost by the rights and enterprise system in private law, without considering the effects of transaction procedure on transaction cost. In Coase's essays, most concern the definition of property rights and enterprise system, but never concern how to design transaction procedure.

Coase had never directly pointed out the relationship between transaction procedure and transaction cost in private law. Whether did his followers gain progresses? In James McGill Buchanan's opinion, because Coase had applied the result principles to the analysis of action process' effect and he had never noticed the efficiency of process his researches were not reliable (James McGill Buchanan, 1988, p95). McGill Buchanan's researches focus on the field of public choice theory. The behavior mentioned in his researches refers to public choice. Therefore, he has studied the efficiency of constituting rules (namely the process of legalization) and concluded that the efficiency of legalization is as important as the efficiency of law (James McGill Buchanan, 1988, p105). Although he has noticed the efficiency of process, he has not studied the relationship between private law's transaction procedure and transaction cost (or transaction efficiency). In addition, he has not revealed the meanings of legal procedure to transaction efficiency from a common angle. Therefore, although his theories have gained progresses more or less, his theories can not provide with theoretical causes for the function of transaction procedure.

Later, economic scholars have developed Coase's theories further. But none of them has made progresses in the field of transaction cost saving. For example, Williamson has divided transaction cost into afore-hand transaction cost and post transaction cost. The former includes cost of drafting, negotiating, and guaranteeing certain contract, and the later cost of implementation and quarrel (Dongming Hu, 2002, p52). A. Allan Schmid has classified transaction cost into three types, namely contract cost, information cost, and control cost (A. Allan Schmid, 1999, p136). According to their explanation, these costs consist in the transaction process. However, they have always studied this issue from the aspect of enterprise system and property rights definition and never concerned how to design private law's transaction procedure. Law economic scholars have followed Coase and made more economic analysis on laws. But nobody has discussed the effects of private law's transaction procedure on transaction cost saving. Many articles and works concern the economics of law. Law and Economics, and Economic Analysis of Law are two representatives. Law and Economics states Coase Theorem from an aspect of law, in which nothing concerns private law's transaction procedure (Robert Cooter. & Thomas Ulen, 2000, p82-87). Economic Analysis of Law does not concern the issue of private law's transaction procedure either (This book has made cost-benefit analysis on law of property, law of contract, and law of torts but no part concerns private law's transaction procedure issue. R.A. Posner, 1997, contents). In addition, scholars conclude the legal effect of Coase Theorem. A relatively authoritative theory thinks that Coase Theorem has three legal meanings: Coase Theorem guarantees the necessity of re-allocating the property rights for the state; in choosing the aims of legal value, Coase Theorem gives benefits priority and then fairness; Coase Theorem regulates that the way of law protecting property rights should be based on the principle of benefit (Chunde Gu, 2004, p521). Not mention whether the three conclusions can be concluded from Coase Theorem or not for the moment, it is a fact that these conclusions do not concern private law's transaction procedure and even ignore the important status of modern enterprise system. In 2005, some scholar reconsider the aim of minimizing transaction cost and conclude the present ways for transaction cost saving in law, in which none is to save transaction cost by private law's transaction procedure (David M. Driesen. & Shubha Ghosh, 2005, p71-73).

To sum up, Coase and his followers have neglected the effect of private law's transaction procedure on transaction cost control.

2. Procedural method for transaction cost control

Although Coase has advanced two ways, namely defining property rights and constructing enterprise system, we can find the third way for transaction cost saving from his essays, namely procedural method. In other words, it is to control transaction cost by transaction procedure. Transaction is a process. The cost of finding out relative prices, and the cost of negotiating and signing a contract mentioned in his works are costs of transaction process in essence. A reasonable information disclosure system can save cost of finding out relative prices. A reasonable signing-contract procedure can save cost of negotiating and signing a contract. Then we can conclude that reasonable transaction procedures can save transaction costs. Therefore, it is right for Coase Theorem taking in a new item: only if there is transaction cost, transaction procedure will affect transaction efficiency; reasonable transaction procedures can save transaction costs and

improve transaction efficiency. For the sake of convenience, we name this method as “procedural method”, taking rank with other traditional ways, such as property rights definition mentioned above.

Considering the multiple meanings of transaction and transaction cost, except for special notice, the transaction and transaction cost in this paper merely refer to private transaction and its procedural cost. Just as what was said in the first paragraph in this paper, the transaction procedure refers to the transaction process in law, namely the transaction procedure regulated by private law. Although economics of law always adopts the wide concepts of transaction and transaction cost, this paper defines them from a narrow aspect in order to emphasize on the way of saving transaction cost by private law’s transaction procedure and its meanings. It is necessary and wise to define the transaction procedure as a legal procedure. In a society ruled by law, the law is the most popular and powerful institutional arrangement. If a man who believes in laws and orders fails to consider the transaction issue from the aspect of law, it will be hard for his theory being translated into law system, losing practical meanings.

It is well known that the property rights are an extremely complex concept. Whether the property rights include the transaction procedure mentioned above? Whether the ways of defining property rights include the procedural method? Here, it is necessary to make analysis on this issue in an attempt to recognize the principle of procedural method and its independence further. Considering the evident differences between enterprise system and procedural method, this paper will not make comparison between them.

All concepts of property rights do not concern transaction procedure. Everyone who studies economics of property rights will be bothered by the complication of property rights. However, it is not hard to exclude the subjection relationship between property rights and transaction procedure based on present conclusions. Property rights are a set of rights concerning occupation, use, transfer, and profits. Property rights are the ownership of property. Property rights are the rights of choosing matters which are implemented by force in society. The definitions are various. From these definitions, we can not find any element related with procedure (Xuangong Wu, 2000, p5). According to researches on economics of property rights, we can draw two specific conclusions: firstly, the definition of property rights does not include the design of transaction procedure; secondly, no matter what property rights are, they are rights anyway. In Coase’s theories, property rights are described as “legal rights”. For the sake of conveniently constructing the corresponding relationship between law and economics, and perfecting the legal system, it is necessary to insist to this definition. Only when property rights are equal to “legal rights” or “lawful rights”, can theories of property rights become acceptable in fields of law and economics and serve as a bridge between them. Considering this point, next the paper merely compares the differences among rights, transaction procedure, and relevant methods in law.

In law, rights are different from procedure. The main differences include: rights are certain content of legal relations, and procedure is the content of legal behavior. They belong to different systems. Rights are static and procedures are dynamic; the core of rights theories is “what to do” and “whether to do or not”, and the core of procedure theories is “how to do”; rights emphasize on ownership. In contrast, procedures emphasize on operation. Rights need a designing and applying process in order to realize an operation; rights and procedures are not in a one-to-one relationship. One right includes many acts. And each act has a specific procedure. Take employees’ democratic right for example, it has many acts means relevant act procedures are various; rights have value biases. They express parts of profits, purposes, and other aspects that benefit the subjects. However, procedures can protect many legal values, including not only the self-governance that represents the benefits of act subjects, but also fairness, safety, and other contents that do not directly represent the benefits of act subjects or even restrain the act of subjects. Correspondingly, the primary function of rights theories and system is to protect rights. However, because of the diverse functions of procedure theories and its system, self-governance, fairness, safety, and other value protections are all its aims (Chun Chen, 2006, p66). Therefore, we can conclude that the definition of property rights and the design of transaction procedure are different.

Present rights theories can prove their differences. In law, although rights have many concepts, most concern what rights are, what their expressions are, what they have, or what they can do, such as the interest rights, the purpose rights, and Wesley Hohfeld’s theory of analytical law. No researches are about how to do, what procedures we can follow, though the rights theories keep in further development. Today, the most famous rights theory is Hohfeld’s rights concept. He summarizes eight fundamental concepts and classifies them into four groups: right and duty; no-right and privilege; power and liability; disability and immunity (Yong Wang, 2004, p82). The four groups of concepts reflect what rights do, can do, or can not do. For the issue of how to do, namely the procedures of relevant acts, these concepts do not and can not explain.

Procedural method is to design transaction procedure. Property rights definition is to define property rights. To define property rights and to design transaction procedure are two relatively independent processes. Transaction procedure chiefly includes transaction time, places, procedures, approaches, and sequence. Procedural method is to save transaction cost by designing these items. Property rights focus on occupation, use, profits, and management. Property rights definition is to motivate the subjects of rights and exclude externality by allocating these elements in order to save transaction cost. Property rights are different from transaction procedure. No matter which kind the right is, it is

valid or invalid. As far as transaction time, places, procedures, approaches, and sequence are concerned, they are not and should not belong to the contents of property rights theory.

With the precondition of defining property rights, transaction procedure is optional. At this moment, the choice of different transaction procedure will lead to different efficiency. That is the relative independence of procedural method. For example, property rights are far different from contract procedures in the aspect of civil law. In the civil law, the allocation of property rights and the design of contract procedures are two entirely different systems. With the definition of property rights, contract procedures may be different. Suppose a, b, c, and d are different contract procedures that will cause different costs. Here, the efficiency of property rights system P_0 has no relation with the efficiencies of different contract procedures P_a , P_b , P_c , and P_d . Legislators can choose the relatively better design as the legal contract procedure for the sake of contract cost saving.

In the process cost control, procedural method is more direct than property right definition. Transaction procedure is a direct control over the time, place, process, and approach in the transaction process. People can reduce transaction cost directly by choosing transaction procedure. In contrast, property rights definition is not a direct design for act process. It has to follow a legal transaction procedure. It can generate indirect effects on transaction process by making best use of the free discretion in procedural system. For example, take property rights as motives to accomplish transaction process in a better way in shorter time. Therefore, procedural method is more direct than property rights definition in controlling process cost.

To sum up, design procedures and definition of property rights are two different ways for transaction cost control.

3. Why the procedural method has been neglected

The concept of transaction cost and the ways for transaction cost saving are key issues for economics of property rights. Coase and his followers have noticed that transaction cost is generated from transaction process. Why have they put forward the procedural method directly? So, maybe some scholar regards it as an unintentional neglect. Just as what has been mentioned above, Coase and other scholars have already talked about transaction procedures. What this paper does is to draw more inferences from Coase's theories or make further development of Buchanan's theory from public law to private law.

Things are not easy. Every scholar will face an insurmountable gulf if he or she tries to advance an idea of "transaction cost's procedural control", because traditional private law does not include procedural theory. If Coase wanted to put forward the procedural method, he would firstly be stopped by the issue of private law's procedures. No matter what it is the demonstration of procedural method or the concept of transaction procedure, this issue is unavoidable. If traditional private law has matured transaction procedure theory, former scholars may advance the procedural method. However, the problem is that procedure theory is always the "patent" of public law. Private law is regarded as an edition of rights. It has nothing related with the concept of procedure, not mention the theory of transaction procedure. Because Coase and his followers made researches based on traditional private law theories, they could easily put forward the property right definition method and other ways but not the procedural method.

Traditional private law has never included the procedure concept and theory. On one hand, the Anglo-American private law has not systematic private law act theory. In the Anglo-American law system, the private law seldom concerns researches on abstract behavior. It has little interests in civil legal act theory. Differing from public law, it does not emphasize on act procedure. In stead, it takes practicality as the base, and focuses on solving specific problems, showing no interests in constructing systematic private law's act theory. By this way, it effectively avoids the bugs existed in the conceptual law in the civil law system. But it also causes the imperfection of act theory, which leads to the absence of systematic act theory. Under this background, it is impossible for private law to form the transaction procedure concept and theory. On the other hand, although the civil law system has systematic act theory, it does not include the concept and theory of procedure. In the civil law system, the private law's act theory takes civil legal act as the primary content, including the concept of civil legal act, the theory of intent expression, the theory of intent self-governance, the theory of flawed intent, and the theory of valid document. None of these theories concerns the concept of procedure, or the concept of practical procedure. Among all these theories, the theory of flawed intent comes down to the act process. But it still fails to care about the process. What it cares is the consistency and authenticity of expressions and intents. Therefore, it discusses whether there are cheats or threats during the process of intent expression by way of parenthesis. Limited by this aim, it is impossible to establish the procedural rule for expression. What's more important is that transaction procedure is to regulate the transaction process by law. This fundamental attribute indicates that the more the law demands for transaction process, the more important the transaction procedure is. Reversely, if the law does not regulate the transaction process, the transaction procedure deserves nothing at all. A Germany scholar has made it clear that intent expression serves as the tool for legal act and legal act serves as the tool for private law's self-governance (Dieter Medicus, 2000, p142). Civil legal act theory is for private law's self-governance, which radically excludes the position of transaction procedure in civil legal act theory. Under the guidance of intent self-governance, if the law has certain requirements for transaction process, these requirements are not for the

establishment of transaction procedure. Instead, the law should guarantee the self-governance of transaction procedure but not restrict the steps and approaches of transaction. In the traditional law, commercial act is regarded as a special legal act. Naturally, the theory of commercial act does not concern the concept and theory of transaction procedure.

In correspondence with the phenomenon above, traditional private law takes rights as the core. The Anglo-American private law has developed the theory of rights. And the most famous theory of rights is Hohfeld's concept of rights. Hohfeld and other scholars' researches have enriched the theory of rights in the Anglo-American private law. Because of lacking systematic act theory, rights become its core naturally. In the civil law system, the private law, taking German Civil Code as the representative, has formed the rights-oriented theory and practice, namely the rights-center theory. This theme is deeply reflected by German Civil Codes and relevant other civil law theories. German scholars think that "property rights are the core concept of private law and also the final abstract of various legal lives" (Dieter Medicus, 2000, p62). Similar words appear in many works of civil law. German Civil Codes include general provisions, credit law, real right law, family law, and law of inheritance. Rights are the primary clues in design its structure.

In Coase's essays, law and economics have accomplished a right combination. However, Coase has merely focused on the implementation of former theories in traditional private law system. He has not created a brand-new private law's procedure theory. In *The Nature of Firm*, Coase has advanced a question: since owners of production factors can achieve cooperation by market transaction, why do firms exist? What factors determine the scale of firm? These kinds of questions can help to find out the nature of firms but not the transaction procedure theory. In *The Problem of Social Cost*, Coase has analyzed the relationship between transaction cost and property rights' initial definition but not the relationship between transaction procedure and transaction cost. Anyway, Coase has not surpassed the traditional concepts of rights and legal person in private law. His thinking has been restrained by the rights-oriented theory of private law.

Surely, we should not ask Coase and other scholars to create private law's procedure theory. To break through traditional thinking of private law, complex and tough demonstration would be a must, what is hard to be accomplished by economic analysis method and theory that is the specialty of Coase. The difficulty is: just as what has been mentioned above, traditional private law has perfect rights theories but not transaction procedure theory. In Anglo-American law system, there is even no systematic act theory. Procedure is not the subject of private law for all the time. Coase Theorem and other theories of economics of property rights have been under the influences of traditional private law. What's more important is the procedure study is the advanced level of act study. In general, the three questions, what to do, what can not to do, how to do (how is the procedure), are in a sequence. The first two have priority over the third. In law, theories of rights, and act abilities chiefly solve the first two questions. Because the third question has to be solved at an advanced level, deepening researches may help to solve it. Traditional private law's act theory does not reach this level apparently.

If we want to put forward the procedural method for transaction cost saving, it is a must to form the private law's transaction procedure theory. That is the key for the problem. Commercial act procedure theory rightly solves this issue. In essence, commercial act means transaction act in private law. Commercial act procedure theory is transaction procedure theory. The appearance of private law's transaction procedure theory breaks the tradition that procedure is the patent of public law, and removes the barrier to procedural method theoretically. That is the theoretical base for the method advanced in this paper.

Evidently, why Coase and his followers have not brought forward the procedural method is because they have been restrained by the private law's theories and ideas at that time. Once the private law's transaction procedure theory has been established, to advance the procedural method would become easy.

4. Procedural method deserves emphases

Procedural method is nothing but an extension of classic theory after removing barriers. This study seems too easy indeed. However, procedural method still deserves emphases.

Firstly, it has developed the transaction cost theory and the view and method of relevant economics of property rights, and new institutional economics. Conceptions and theories of transaction cost have contributed a lot to economics and law. But for a long time, people have taken the reasonable allocation of rights, and the construction of enterprise system as the ways for transaction cost saving. People seldom or even nobody has ever thought over the transaction procedure that could be used to save transaction cost. The economics of property rights have just taken property rights as the core, ignoring the procedure issue. Although the new institutional economics has considered the efficiency of institution from a wider aspect, it has not advanced the proposition of using transaction procedure to save transaction cost. The appearance of procedural method can help to enlarge the view of relevant theories and serves as new way for transaction cost saving. Economics of property rights emphasizes on the allocation of property rights and neglects the transaction process, emphasizing static method and ignoring dynamic control. Procedural method emphasizes a dynamic process cost control, which can rightly make up the shortage of economics of property rights. It seems that

new institutional economics overcomes the bug that economics of property rights merely emphasizes the design of property rights. As a matter of fact, ways for transaction cost saving advanced by new institutional economics are only the design of property rights and the design of enterprise system. Although new institutional economics tries to bring about comprehensive theories in general, it does not work at all. There is interaction between law and economics, what is not new discovery of Coase and his followers. The contribution of new institutional economics is to knit a dense net of theories for the relationship between law and economics for the sake of catching more specific and practical details. Procedural method may provide with a specific way that is equal to the design of property rights and other traditional ways for transaction cost saving. By this way, the new institutional economics may possess more novelties and realize its aim of comprehensive institutional design in a sense.

Secondly, procedural method can provide with efficiency theory for private law's transaction procedure or even whole procedure law. Fairness and efficiency is always a pair of conceptions in law. Reviewing the public law's procedure theories, people will find that the theory of justice procedure and John Rawls' theory of pure procedural justice supply sufficient theoretical bases for procedural justice (John Rawls, 1988, p85). Few theories concern procedural efficiency. "To design legal procedure is supposed to save transaction cost", what should supply the theory of efficiency for procedure. However, because of the absence of private law's procedure theory, people can not draw this conclusion in a common sense. As a result, Coase Theorem fails to serve as the common cause for legal procedure's efficiency. Private law's transaction procedure theory gives "legal procedure" a general meaning in public law and private law. Procedural method may be developed into a popular conclusion that "reasonable legal procedure design will help to save transaction cost". Therefore, it can supply theoretical bases for all legal procedures in public law and private law, serving as directions for procedure's design, explanation, and implementation.

Thirdly, procedural method makes it clear that to design transaction procedure is one of primary tasks of private law, which can benefit the researches on private law's transaction procedure design. The task of private law is not only to allocate rights properly but also to design transaction procedure scientifically. In the field of public law, procedure design has already aroused attentions. But in the field of private law, procedure design has not listed in the schedule. A society without transaction cost is similar to a nature without friction. It is impractical. Similarly, a private transaction without transaction procedure is not practical. Traditional private law neglects procedure design. Today, what it faces is not whether to consider transaction procedure design or not but how to design transaction procedure to save transaction cost. The neglect of transaction procedure will lead to such a result that transaction may follow worse procedure. For specific procedure design methods, private law is poor. In this aspect, it needs summarization, references, and improvement.

Fourthly, it reveals the bugs in traditional private law and warns that economists should pay more attentions on private law theories. Public law emphasizes on procedures and private law rights. As far as transaction cost saving is concerned, the allocation of rights and the design of procedures are both important. They deserve equal attentions. To equalize rights and procedures is an overall private law idea. Coase has ever repeated that he was not a lawyer and what he knew about law was very superficial (Many law articles take references from Coase's arguments, which makes Coase surprise and uncomfortable more or less. R. H. Coase, 1996, p3). Surely he was modest more or less. But we should take his words as constructive advices for economists. In order to study the issue of property rights or institutions, we should make deep researches on private law's theories. Coase has not advanced the procedural method because he had been restrained by private law's rights-oriented theory indeed. Although his innovations are wonderful, his limits and advices deserve more reflections.

This paper emphasizes the procedural method, which does not mean the better, the more procedures. Similarly, to emphasize property rights definition or enterprises' existence does not mean to advocate certain institutional arrangement without any precondition. Law and economics should emphasize the procedural method in order to design and choose the best transaction procedure.

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The Emergence of the Concept of Unjust Enrichment in New Zealand, Its Relationship to the Remedial Constructive Trust and the Development of the Status of Joint Ventures in Equity

Sue Tappenden

School of law, University of Waikato, Private Bag 3105 Hamilton, New Zealand

Tel: 64-7-838-4466 E-mail: suetapp@waikato.ac.nz

Abstract

From the 1970s onward there have been numerous attempts to persuade the courts of New Zealand that unjust enrichment might be an acceptable basis for imposing equitable remedies. The foundation for this proposition rests upon the supposed existence of a broad principle that the imposition of a constructive trust is justified in any circumstances where it would be against equity or good conscience to allow the retention of property by one who has an ostensible legal title. So the unjust enrichment, once established, becomes the cause of action and the constructive trust follows as an equitable remedy of a proprietary nature which is available to prevent the unjust enrichment. This has important ramifications for the development of the law pertaining to restitution in this country. This paper will show that the acceptance of the remedial constructive trust is linked to the development of a law of restitution founded upon the principle of unjust enrichment. It will also be shown that, while the roots of the conceptual distinction between law and equity remain intact, in many courts the practical ramifications of that distinction are being eroded, particularly in commercial cases.

Keywords: Restitution, Constructive, Trust, Unjust, Enrichment, Equitable, Remedial, Commercial

1. Introduction

In England, in *Hussey v Palmer* (1972) 3 All ER 744, Lord Denning's proposal that a "new model" constructive trust may be imposed "whenever justice and good conscience require it" was overturned at the first opportunity by the House of Lords. In 1975 the New Zealand court declared, in *Carly v Farrelly* (1975) NZLR 356, that a general concept of "unjust enrichment" aggregating various heads of liability in equity did not form part of the law of England or New Zealand. However in some New Zealand judgments the remedial constructive trust has been adopted by which the court can enable an aggrieved party to obtain restitution.

In the New Zealand case of *Carly v Farrelly* counsel relied heavily on Lord Denning's stance and proposed that unjust enrichment is one of the elements that should rightly be taken into account in deciding whether the facts of a particular case were such as to support the inference of a constructive trust in favour of the plaintiff. This is a very liberal approach founded on large principles of equity in its basic sense without reference to the established rules of the Court of Chancery. Lord Denning's approach to equity was extremely liberal to the extent that he blurred the distinction between resulting and constructive trusts saying, "By whatever name it is described it is a trust imposed by law whenever justice or good conscience require it.....It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution". This was not a novel approach for Lord Denning. In 1948 in the English High Court Denning J said in *Nelson v Larholt*: (1948) 1 KB 339. "It is no longer appropriate, however, to draw a distinction between law and equity.....Remedies now depend on the substance of the right, not whether they can be fitted into a particular framework. The right here is not peculiar to equity of contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires".

The House of Lords, in subsequent cases did much to reduce the force of Lord Denning's words. In New Zealand we have embraced the notion of fusion between law and equity more readily than in England or Australia and the courts are more likely to be ready to find a remedial constructive trust based on unjust enrichment in order to give a remedy when principles of justice and good conscience require it. The remedial constructive trust is a very attractive device. Lord Browne-Wilkinson has hinted that the way forward for English law may involve the recognition of remedial constructive trusts and in the *Westdeutsche* case (*Westdeutsche Landesbank Girozentrale v Islington Borough Council* (1996) AC 669) he went so far as to explain the difference between the institutional and remedial constructive trusts. The former arises as at the date of the circumstances that give rise to it. The court merely acknowledges that the constructive trust has come into existence. On the other hand the latter is a judicial remedy which gives rise to an equitable obligation. It is at the discretion of the court and if the remedial constructive trust acts to the prejudice of

third parties, this also is at the discretion of the courts. The main difference is that in the circumstances of the institutional constructive trust the proprietary interest exists before the plaintiff comes to court and the court just gives effect to a trust which arose out of specific circumstances. However, the remedial constructive trust gives rise to a previously non-existent proprietary interest at the discretion of the court to reverse some injustice, which is best described as an unjust enrichment.

2. Fiduciary Duties in Commercial Relationships

It is a big step for a court to assume the discretion to create an interest in property in favour of one who is not the legal owner as a remedy. Having taken such a step in assuming such a powerful discretion the court might also be willing to abandon the strict boundaries that have traditionally existed between different causes of action and be ready to accept a broader based foundation for a cause of action in unjust enrichment. In New Zealand the conceptual distinctions between law and equity are being eroded. This erosion of boundaries between law and equity has allowed the court to find that fiduciary relationships exist in commercial joint ventures where the parties were bound by contract, resulting in the award of an equitable remedy. In two recent cases the Supreme Court of New Zealand considered the links between commercial relationships and fiduciary duties. Even in cases where the parties have chosen to use an incorporated company as a vehicle for the joint venture, when it cannot be said that their relationship is wholly fiduciary, there may still be aspects of the relationship that engender fiduciary obligations. In *Paper Reclaim Ltd v Aotearoa International Ltd* (2007) NZSC 26 it was said that the “characterisation of a commercial arrangement as a joint venture can be unhelpful as a guide to whether the parties owe each other fiduciary obligations”. In *Maruha Corporation v Amaltal Corporation Ltd* (2007) NZSC 40, it was held that even in a commercial relationship of a generally non-fiduciary kind, there may be aspects leading to fiduciary obligations; ACL owed M fiduciary duty with regards to accounting and taxation functions undertaken and M was entitled to recover losses that resulted from the breach of duty.

In the earlier case of *Dickie v Torbay Pharmacy* (1986) (1995) 3 NZLR 429, the remedial constructive trust was applied after a fiduciary relationship was found to exist between potential joint venturers and the breach of the fiduciary duty occasioned the proprietary remedy. Hammond J considered the nature of a constructive trust and concluded that “functionally constructive trusts can, and do, serve a variety of purposes”. He came to the conclusion that abstract theory should give way to the circumstances of a given case, the nature of the wrong and whether proprietary relief is appropriate. This approach gives rise to less criticism than cases where there is no fiduciary relationship and instead of a breach of fiduciary duty the only basis for the constructive trust is unjust enrichment.

2.1 The Availability of Equitable Remedies

Equity affords the judge the opportunity to protect property by way of a constructive trust and force the disgorgement of money to the party who has been wrongly denied it. In New Zealand it makes no difference whether the parties were engaged in a commercial enterprise which would normally have been governed by a contractual relationship, the equitable remedy is available. This is particularly evident in case involving joint ventures. In a recent example the Supreme Court heard the appeal from the Court of Appeal in the case of *Chirnside v Fay* (2006) NZSC 68. It was accepted by all members of the court (albeit for slightly different reasons) that parties to a joint venture owe each other fiduciary duties. The duty in question here was that of loyalty. The duty arose when Mr Chirnside participated with Mr Fay in plans for a business venture. It was agreed in the High Court, the Court of Appeal and the Supreme Court that the two men had embarked upon the venture by sharing an opportunity which each of them had identified independently, by doing calculations as to the feasibility of the project, by working on plans with architects and by negotiating for the purchase of a building site. The parties had also worked together to encourage a retailer to give a commitment that it would become a tenant on the site. This mutual participation created a duty of loyalty.

In excluding Mr Fay from the venture with Harvey Norman in the development of the site in Dunedin, Mr Chirnside breached the duty he owed Mr Fay. Whereas the High Court and the Court of Appeal referred to an award of damages to compensate Mr Fay for his loss, the Supreme Court declared that an account of profits was the most appropriate remedy. It was said by Elias J (at paragraph 17) that damages should be measured by what the plaintiff has lost whereas an account of profits would measure what the defendant had gained. In this case the account of profits would entitle Mr Fay to half the profit made by the venture. There was some disagreement between Elias J and the other members of the Court over an award to Mr Chirnside for his expertise in negotiating the deal. But this does not detract from the decided principle that the breach of his fiduciary loyalty had caused Mr Chirnside to disgorge half of his profit to Mr Fay. The award was calculated on the value of the completed project, even though when Mr Fay had been excluded the value of the site was much less. The profits were unauthorised and so could not be retained by the defaulting fiduciary. Because this is equitable relief the fiduciary needs not to have acted in bad faith or to have consciously done wrong and no loss needs to have resulted to the plaintiff.

In the *Chirnside* case it was shown that there had been a breach of fiduciary duty and the duty existed because of the parties' joint activities towards a common goal. The appropriate constructive trust in this case would have been an institutional constructive trust, rather than a remedial one, since the constructive trust would have arisen over the

property at the time of the breach, not when the court declared it to have come into being. The obligations between the parties were quite distinct from any contractual obligations that may have bound Mr Chirside and Mr Fay. It was not necessary to show that their relationship was akin to a partnership, and to find a fiduciary relationship through that route. There was no need to find any kind of unevenness between them in their business experience or capabilities, so it was not necessary to explore whether one party was vulnerable to the other in any way. This is in contrast to the earlier case of *Auag Resources Ltd v Waihi Mines Ltd* (1994) 3 NZLR 571 which was heard in the High Court in Auckland in 1994 by Barker J. The judgment was based on a detailed consideration of whether or not the joint venture agreement was a partnership agreement. Barker J cited many authorities, both academic and judicial, to support his proposition that if there is no fiduciary duty imposed by status, such as partnership, then some other factual basis for the fiduciary duty must be found, such as vulnerability of the complainant. After Chirside this would appear to be the wrong approach. While many arms-length commercial transactions may not give rise to fiduciary obligations, the fact that the basis for the transaction is commercial does not preclude a fiduciary duty from arising.

2.2 Differences and Common Origins

In this area New Zealand is developing its law in a different direction to that of Australia, despite the fact that we rely on many of the same accepted authorities. The authorities relied on in both jurisdictions appear to have a common origin in a case from the US. In 1928 the Court of Appeals in New York decided a case in which the parties were engaged in a joint venture, the main object of which was to lease the Bristol Hotel on Fifth Avenue for 20 years from 1902, and convert it for use as offices and shops. Towards the end of the lease one of the parties was offered the chance to renew the lease on the hotel site in addition to neighbouring property with the object of destroying all the existing buildings and to build one new building to occupy the entire site. The rent would be \$350,000 to \$475,000 per annum as opposed to the \$55,000 paid for the Bristol site. The case was *Meinhard v Salmon* (1928) 249 N.Y. 458. The original 20 year lease had had four months to run when Salmon was approached by Gerry, who owned the entire tract of land on Fifth Avenue and Forty-Second Street. The new lease had a potential duration of 80 years, so the difference in the value between the old and the new was considerable. Although Gerry approached Salmon only there was no question of any fraud on his part because he was unaware of the connection between Salmon and Meinhard. Salmon's company, Midpoint Realty Company, and Gerry agreed the terms of the new lease in January 1922 and a month later Meinhard found out about it and claimed an interest in the new venture.

The case was decided by a narrow majority of 4 to 3. The majority judgment was handed down by Cardozo Ch.J., Pound Lehman and Crane JJ concurring. At the outset Cardozo described the parties as "co adventurers, subject to fiduciary duties akin to those of Partners". He said that: "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place."

From the outset Cardozo recognized that parties engaged in a joint venture are bound by fiduciary obligations in the same way as partners are bound, even though the joint venture agreement falls far short of a partnership agreement. While he considered that there was little to be gained "from a dissection of the precedents" and in fact saw no precedents to precisely fit the facts, he did find an "animating principle" in many of the decided cases. The cases he referred to concerned partners who had acted inequitably and Cardozo made it clear that there is no limit in equity to the types of transaction that attract undivided and unselfish loyalty. Once a fiduciary has acted in a way that promotes a selfish outcome at the expense of that relentless and supreme duty of loyalty a constructive trust is the remedial device through which "preference of self is made subordinate to loyalty to others".

3. Joint Venturers and Partners

Although Cardozo clearly differentiates between partners and parties to a joint venture he continues to refer to the principles of the laws relating to partnerships to support his conclusion that Meinhard was the beneficiary of a trust over the new lease and its opportunities. The dissenting judgment was based on the fact that there was no partnership, merely a joint venture for a limited object which would end at a fixed time. Without a partnership there could be no fiduciary relationship. The correlation that was felt to exist between joint venture and partnership prevailed across the decades and indeed was reiterated in the case of *Auag Resources* to which I previously referred.

In 1985, in *United Dominions Corporation v Brian Pty Ltd* (1985) 60 A.L.R. 741, the High Court of Australia considered a joint venture agreement as though it were some form of partnership agreement, although a very limited sort of partnership for one venture only. Gibbs CJ said there was, in the circumstances of the case, a "...relationship between UDC and Brian based on the same mutual trust and confidence, and requiring the same good faith and fairness, as if a formal partnership deed had been executed."

In the same way that Meinhard had been left out of the negotiations for the new lease in the first case, so too had Brian been kept in ignorance – this time about a clause in the mortgage agreement that would make Brian liable for debts

under other mortgages that bore no relation to the project in which the company was engaged. The judgment delivered by Mason Brennan and Deane JJ referred in passing to the case of *Meinhard v Salmon*. In agreeing that UDC had breached its fiduciary obligations to Brian, the judges come to the conclusion that the term “joint venture” is not a technical one that has a settled common law meaning and these judges consider that a joint venture may be undertaken in the form of a partnership but the term is also “apposite to refer to a joint undertaking or activity carried out through a medium other than a partnership.” The judges were not prepared to accept Cardozo’s proposition that the relationship between those in a joint venture is necessarily a fiduciary one. Instead they came to the conclusion that whether or not a relationship is a fiduciary one will depend on the form of the particular venture and the obligations which the parties have undertaken.

3.1 Fiduciary Obligations

This approach to fiduciary relationships was later seen in the dictum of Millet J (as he then was) in the case of *Bristol & West Building Society v Mothew* (1998) Ch 1 when he said, “A fiduciary is someone who has undertaken to act for another in a particular matter in circumstances that give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.”

It has often been said by judges and academics that one is not subject to fiduciary obligations because one is a fiduciary; it is because one is subject to them that one is a fiduciary.

In the case of *Brian* the relationship between the parties was one of prospective participants in a joint undertaking who had embarked upon the conduct of the venture before the precise terms of the agreement have been reached. In fact the court went on to say that the fiduciary nature of the parties in these circumstances may be easier to see than afterwards when the fine detail of their obligations towards each other have been expressly defined in a formal agreement. This is not, in my opinion, to suggest that once the formal agreement has been reached the fiduciary obligations cease to exist, but simply that the formal agreement may obfuscate the fiduciary relationship. If a fiduciary duty had been found to exist in these circumstances in New Zealand an institutional constructive trust would have been the appropriate means by which to protect the claimant’s entitlement. The precise stage of the agreement in *Brian* was that the parties had all agreed to participate in the venture and each of them had agreed to make financial contributions to the cost of the project. The relationship was already based on mutual confidence.

In the case of *Meinhard* the test can be applied in the same way: the parties were already acting together in a joint venture. They were already participating in a joint venture and the proposed renewal of the existing lease should have been revealed to Meinhard to avoid a breach of fiduciary duty. The fact that this was a new venture with the new lease of the Bristol coming together with the lease of the new premises does not negate the relationship that continued to exist between the parties. Cardozo did not put his proposition into these terms but I believe this was the upshot of his general proposition that those in a joint venture are under fiduciary obligations. To paraphrase Finn’s words, they are fiduciaries because they are under obligations of good faith and those obligations arose out of their relationship as participants in a joint venture.

3.2 Good Faith and Fiduciary Obligations

Turning now to a New Zealand case of 1991, *Kiwi Gold No Liability v Prophecy Mining No Liability* CA30/01, which was heard in the Court of Appeal on 1 July 1991, I would like to compare the approach to the fiduciary obligations arising out of joint ventures seen in this case with the previous judgments of *Meinhard* and *Brian*. In *Kiwi Gold* judgment was delivered by McKay J and, after reviewing the facts carefully, it was held that the relationship between the parties was not enough to establish fiduciary obligation but that the parties were under duties to act reasonably and in good faith but these duties were implied from the terms of the contract. Taking the first point, that there was no fiduciary obligation, it appeared from the facts that there was no formal joint venture agreement, although the terms for the proposed agreement had been clearly set out. One of the parties was working towards fulfilling the terms of the agreement by preparing a budget and work programme which were submitted to Kiwi Gold for approval. If we apply the reasoning in the case of *Brian* to these circumstances it would seem that there is evidence to support the existence of a fiduciary obligation. However the Court of Appeal decided that the judge at first instance had been wrong, that there was in fact no fiduciary relationship but there were duties of good faith and loyalty owed by each of the parties to the other which arose out of the contract itself. So in this instance a relationship that arose out of the contract, imposing duties of good faith and reasonably towards each other was insufficient to be termed a fiduciary relationship. However the Court of Appeal does not specify why the relationship that imposed the duty of good faith fell short of constituting a fiduciary relationship.

Dr. Finn tells us that when parties are under a duty of good faith between each other, a fiduciary relationship has come about. In fact it is only the existence of the duty of good faith that characterizes the fiduciary. McGechan, McKay and Casey JJ in *Kiwi Gold* clearly disagree, but in the judgment there is no discussion of when a fiduciary relationship may come into existence. The judge at first instance, Thomas J, held that the fiduciary obligation arose as a result of the

relationship of the joint venture partners. The position held by the High Court of Australia in *Brian* was that joint ventures did not necessarily give rise to fiduciary relationships but in that case the test applied was whether the parties had agreed to be a participant in the joint venture and had promised to contribute towards the cost of the project in which each had agreed to participate. It would seem that the facts of the *Kiwi Gold* case and *Brian* are very similar on this point. The Court of Appeal in *Kiwi Gold* did not refer to *Brian* or any decided cases on fiduciary relationships, preferring to rely on the contract to underpin the parties' duty towards each other. The appropriate remedy therefore would be damages based on the loss suffered by the plaintiff whereas a breach of fiduciary duty would have led to a disgorgement of a proportion of the profits made by the defendant.

3.3 The Element of Vulnerability

In 1995 the High Court in Auckland reviewed and applied the case of *UDC v Brian* when deciding the case of *Dickie v Torbay Pharmacy (1986) Ltd* (1995) 3 NZLR 429. *Brian* was used to support the proposition that it is now established that a fiduciary relationship can exist in a co-ventureship "on the facts of the particular manner". In *Brian* it was said that the fiduciary nature of the relationship will depend upon the form which the joint venture takes and upon the obligations to which the parties have committed themselves. It was agreed in *Dickie v Torbay* that all the criteria which are routinely looked for in a fiduciary relationship were there: mutual trust, dependence and reliance. However Hammond J added another criterion when he referred to the "vulnerability of some parties (the doctors)" and the exercise of power by B. The elements of vulnerability and use of power over one party by another arises out of consideration of the case of *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14.

While the use of power over vulnerable parties may be a suitable criterion for finding a fiduciary relationship to exist in some circumstances, I believe it is unnecessary and misleading to introduce this element in cases involving joint ventures. It is only necessary to show a mutual reliance in the joint venture, an intention to be bound by obligations to each other, for example the obligation to supply finance or expertise. There is no need to show any particular vulnerability by one party to another because by the mere fact that they are relying on each other in the joint venture makes each one vulnerable to the others. By including this new element the Court is leaving the case open to misinterpretation that vulnerability is a requirement for finding a fiduciary relationship, whereas in fact it is just one of a number of considerations that may lead to the finding of a fiduciary relationship – commitment to a joint venture is another. In fact, the court in *Auag Resources* stated that if there is no fiduciary duty imported by status such as partnership, then any fiduciary duty must usually be based on the vulnerability of the complaining party.

In the case of *Arklow v MacLean* the Court found that there was no breach of fiduciary duty because the parties had not entered into a relationship characterized by a mutual reliance upon each other which gave rise to a duty of loyalty. There was never any question of vulnerability of one party to another. It was very well summed up in the case of *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 at page 176: "...the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered when making this determination..."

In the light of the reasoning in *Hodgkinson v Simms* it is clear that participants in a joint venture may be considered to be in a fiduciary relationship with each other, in the same way that partners are understood to be fiduciaries. Moreover, the finding of the fiduciary relationship does not arise because the participants in the joint ventures look a little like partners, albeit for a single venture only, but they are fiduciaries because the relationship between the parties enjoys the same degree of mutual trust and expectation of good faith as is present in a partnership.

3.3.1 Misinterpretation of the law

Returning to the reasoning in the case of *Auag Resources Ltd*, I suggested that some of the misinterpretation of the law in this area arose, in my opinion, out of the misplaced reliance on the finding of vulnerability on the part of one party and that it is only this vulnerability that attracts the protection of equity. This is simply not true. While equity may well impose a trust to restore property to the rightful beneficiary in cases where a position of trust has been abused, it is equally appropriate for equity to recognize fiduciary relationships between persons who have voluntarily undertaken obligations between themselves to act in good faith. The Court's role is to discover which commercial transactions do attract such undertakings of good faith and which do not. For example a simple sale and purchase agreement may be immune from a finding of a fiduciary obligation, as was found in *Norbrook Laboratories v Bomac* Unreported High Court judgment in 2002(CP241-SW02), where the court declined to find fiduciary obligations to exist, saying that the issue of confidentiality was wholly governed by the contract. The court said that once parties have agreed the extent of any obligation of confidence then equity should not impose an obligation that was more stringent than that which had been agreed. However the court by no means ruled out the possibility of fiduciary obligations should the circumstances merit them.

4. Appropriate Remedy for Breach

Once the fiduciary obligation has been found to exist and it has been established that a breach has occurred the court must then undertake to establish the remedy that would be appropriate. In some cases it has been said that it is appropriate to discover what has been lost by the claimant and find what has been described as a “pragmatic solution to the whole problem” (*Dickie v Torbay Pharmacy* (1986) (1995) 3 NZLR 429). In some ways this approach reflects principles relating to equity’s historical power to dissolve partnerships applying an inherent “restorative” power over contributions to the enterprise. In *Baumgartner v Baumgartner* (1987) 164 CLR 137 per Mason J at 148, Mason J referred to a “general equitable principle which restores to a party, contributions, which he or she has made to a joint endeavour which fails”. However these principles may not provide an adequate solution when what is lost is not contributions but an opportunity to increase wealth. The question then arises as to the nature of this compensatory remedy – whether it is truly compensatory or whether damages are being imposed in a punitive way to represent a punishment for breach of fiduciary duties.

In *Joseph Bailey v Namol* in 1994 the Federal Court of Australia said that there are authorities in Canada (such as *Norberg v Wynrib* (1992) 92 DLR (4th) 440) and in New Zealand which suggest, as a general proposition, that punitive damages may be awarded for breach of fiduciary duty. The authority for this proposition in New Zealand is *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* (1990) 3NZLR 299 which has been described by Paul Finn (1998) as providing a “basket of remedies” where appropriateness is the arbiter of the remedy to be awarded. In the UK, Law Commission Report 247 recommended that the law should be changed to permit a judge to award punitive damages for any tort or equitable wrong. Examples from Canada and New Zealand were cited in support of this recommendation, despite the lack of English authorities for awarding exemplary or punitive damages for an equitable wrong.

In the more recent decision by the New Zealand Supreme Court in *Chirnside v Fay* (2006) NZSC 68 Tipping J delivered a judgment on behalf of himself and Blanchard J. The separate judgment stems from their disagreement with Elias CJ on the point of allowances that were due to Mr. Chirnside. In other respects, however, the three judges were *ad idem*. Tipping J said that the remedy of damages for loss of chance preferred by the Court of Appeal was inappropriate in this case because it was inconsistent with the finding that the parties were joint venturers and already bound by fiduciary duties in a profitable scheme. He said “the case must be dealt with on the same basis as that which was adopted by the High Court. This basis represented equitable compensation or damages by analogy with disgorgement of profits.” He explained that because there had been no sale of the property in question a valuation figure for the project had to be used as a substitute for the sale price. He was happy to speak in terms of equitable compensation or damages even when discussing the remedy for a breach of a duty imposed equity.

4.1 The Award of Equitable Damages

It was stated in the UK Law Commissioner’s Report that the position in Australia was less clearly in favour of awarding damages in cases founded on equitable principles. The case of *Harris v Digital Pulse Pty Ltd* (2003) NSWCA 10, gives considerable insight into Australia’s position on the matter. At first instance the judge reasoned that there was no authority which decides that exemplary damages cannot, as a matter of principle, be given by a court of equity for breach of fiduciary duty. However the majority in the Court of Appeal disagreed, Mason J dissenting. In his judgment Spigelman CJ considered a point that had been raised by the Court of Appeal in New Zealand In *Chirnside v Fay* (2004) 3 NZLR 637 on the relationship between equitable compensatory relief and common law damages, where the two were said to be similar but different. Spigelman CJ says that the monetary award known as “damages” in common law cannot and should not be reflected in equity and he goes on to say, at paragraph 20, that the “integrity of equity...is not well served by adopting a common law remedy” that has been developed in a different context and on a different conceptual foundation. He refers to the fusion fallacy in Australia; the proposition that the joint administration of two distinct bodies of law means that the doctrines of one are applicable to the other. This can be compared to the approach taken by the New Zealand Court of Appeal in *Chirnside*, where it was said that the distinction between law and equity has effectively lost its force.

The Supreme Court of New Zealand in *Chirnside* did not make a final ruling on the applicability of damages in such cases because there was no need to do so. The parties were found to be in a joint venture relationship where one of them had breach his fiduciary duty to the other. However the property, as pointed out by Tipping J, had not been sold so the payment made to Mr. Fay was based on the value of the property, this being seen as analogous to the profit made by Mr. Chirnside. Payment was to be made to Mr. Fay amounting to half the calculated profit with some allowance deducted for Mr. Chirnside’s additional work. It seems that Mr. Fay was to have his proprietary interest in the joint venture recognized but his proprietary interest was to be satisfied by a payment equivalent to his entitlement. Without being clear on this point it would appear that the Court imposed a constructive trust over the property based on the unjust enrichment of Mr. Chirnside. His action in excluding Mr. Fay from the project rendered his profit from the venture unjust. He was entitled to some extra profit because of his extra work and risk and in juridical terms this

proportion of the profit was not unjustly retained. Monetary awards to satisfy constructive trusts are not uncommon.

5. Constructive Trust based on Unjust Enrichment

There is a line of New Zealand cases which supports the proposition that the proper basis for the constructive trust is unjust enrichment. This line of reasoning begins at *Gillies v Keogh* (1989) 2 NZLR 327. It was heard in the Court of Appeal and Cooke, sitting as President of the Court of Appeal, said, “This case is another stage in the evolution of the New Zealand law of constructive trusts and the like. It enables the court to add expressly one element of certainty in a field where it is sometimes said to be lacking and complaints of ‘palm tree’ justice are voiced”.

The case itself dealt with relationship property held in the name of one party only in a de facto relationship at a time before the law was changed in NZ to give separating de facto partners in a relationship of more than three years duration the same rights over the disposition of property as married couples. Cooke P commented, “Normally makes no difference in the result whether one talks of constructive trust or unjust enrichment, imputed common intention or estoppel” and he referred to “the leadership of Dickson J” in Canada where, he says, the concept of unjust enrichment has continued to be developed. The Canadian case that he was referring to, *Sorochan v Sorochan* (1986) 29 DLR (4th), was also one where the relationship assets were solely in the hands of the male partner and where there was enrichment, a corresponding detriment and an absence of juristic reason for the enrichment. Lord Denning, whose comments were quoted earlier in *Nelson v Larhol* (above), was dealing with cheques, fraudulently drawn on a trust account, that were cashed by a third party to whom the fraudster owed gambling debts. It is not surprising that these ‘hard’ cases, where there was obviously potential for injustice if a proprietary remedy were not found, should give rise to a tendency for the judiciary to exercise flexibility if possible.

Cooke P saw no reason why the Canadian approach should not be adopted in New Zealand despite the fact that the law in Australia appeared to be settled on a contrary course. For example in *Baumgartner v Baumgartner* (1987) 164 CLR 137 the High Court of Australia looked for unconscionable conduct by the defendant rather than unjust enrichment, although one member of the court in that case (Toohey J) accepted unjust enrichment as an alternative basis for the same point. By the time *Gillies v Keogh* was heard the use of unjust enrichment as the basis for the finding of a remedial constructive trust in Canada had been accepted for about 9 or 10 years. It had been well established since *Pettus v Becker* (1980) 117 DLR (3rd) 257, where the court, per Dickson J, placed unjust enrichment at the heart of the constructive trust. Dickson J relied on the 1760 English case of *Moses v Macferlan* (1760) 2 Burr 1005, where it was said that “the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money”. Dickson J went on to say that it would be both undesirable and impossible to define all the circumstances in which an unjust enrichment might arise. This has certainly proven to be true in New Zealand where the concept of unjust enrichment has been instrumental the success of demands for the return of money from a widening range of bodies. It has been said that the great advantage of ancient principles of equity is their flexibility so the judiciary can take advantage of their malleability to accommodate the changing needs and mores of society to achieve justice.

5.1 Proprietary Interests

The quest for justice may be seen as dangerous as it can lead to a loosening of the bonds linking equitable remedies with a proprietary interest that had existed before the behaviour that led to the unjust enrichment. An institutional constructive trust recognises the necessity of some previously existing fiduciary duty, that has been breached, or some proprietary rights that had been established before the actions that gave rise to the unjust enrichment. A remedial constructive trust, imposed in the name of justice, requires neither a subsisting proprietary interest nor any established fiduciary duty. Instead the remedial constructive trust is imposed where there is an enrichment, a corresponding detriment where there is no juridical reason for sustaining the enrichment. It was this sense of danger, of losing the structure of the traditionally accepted criteria underlying constructive trusts, that led the court in 1975 in *Carly v Farrelly* (1975) NZLR 356 to declare adamantly that the remedial constructive trust based on unjust enrichment was not the law in NZ. In 1979 Mahon J set a long face against the proposition in *Avondale Printers v Haggie* (1979) 2 NZLR 124 so some intervening event must have led to the change in judicial attitudes between 1979 and 1989. In my opinion the answer lies in a case heard in 1990 by the NZ Court of Appeal.

Aquaculture Corp v NZ Green Mussel Co Ltd (1990) 3 NZLR 299 was decided by the Court of Appeal and in this case the court formulated the ‘basket of remedies’ approach. The aim was to make as full a range of remedies available as possible so that a remedy might be chosen because it is appropriate without having to consider whether its origin was in common law, equity or statute. This decision signalled the New Zealand Court of Appeal’s willingness to focus on the outcome of a particular case rather than the theoretical foundations of the remedy so the remedy could be chosen on the basis that it provides the best outcome not because the antecedents of the remedy arose out of equity or the common law or even indeed from statute. Around that same time, in 1989, the Supreme Court of Canada heard *LAC Minerals Ltd v International Corona Resources* (1989) 61 DLR (4th) and invoked a constructive trust based on unjust enrichment.

When the courts in a particular jurisdiction move away from distinctions like relief in common law versus relief in

equity they appear to be signalling a willingness to derive remedies from any source that achieves the desired outcome. So proprietary relief, by way of a constructive trust, can be awarded, without first finding the proprietary interest or breached fiduciary duty that would traditionally have been at the heart of the remedy. For example in *Lankow v Rose* (1995) 1 NZLR 277, the institutional constructive trust was established through elements that the plaintiff had to prove. There had to be contributions made to the property claimed, either direct or indirect. There had to be an expectation on the part of the plaintiff that these contributions would give rise to an interest in the property and that expectation had to be a reasonable one. The defendant should also reasonably expect to yield to the claimant and give the interest. Sometimes this acquiescence on the part of the defendant to yield an interest to the claimant may be evidenced by a promise or some kind of agreement. So the proprietary interest in the property was vested in the claimant before the court became involved, through the contributions, reasonable expectation of an interest that the defendant would reasonably expect to yield. The court merely acknowledges that the institutional constructive trust exists.

5.2 Remedial Constructive Trusts without Pre-existing Proprietary Interests

The remedial constructive trust, on the other hand, is not based on any pre-existing proprietary interest. Instead it is based on the court's view of what is just and reasonable in the circumstances. So it is based on the broad equitable principles that are being developed under the banner of the law of restitution, those of unjust enrichment. Once we find unjust enrichment it is a short step to the imposition of the remedial constructive trust which can impose a proprietary remedy where no proprietary interest hitherto existed. In 1993 Hammond J in the NZ High Court case of *Daly v Gilbert* (1993) 3 NZLR 731 applied the reasoning from *Gillies v Keogh* and said there is room for extension in terms of relief available and the issue is not the enrichment but whether it is unjust. Hammond J cited, as have many judges in this sort of case, the judgment of Lord Goff when he was sitting as Mr Justice Goff in the case of *BP Exploration (Libya) v Hunt (No 2)* (1979) 1 WLR 783 where he said that the cause of action based in unjust enrichment has broad outlines. There must be receipt by the defendant of a benefit at the plaintiff's expense in such circumstances that it would be unjust to allow the defendant to retain the benefit.

Lord Goff, as he was in 1996, was part of the Privy Council panel which heard the case of *Goss v Chilcott* (1996) 3 NZLR 385 and it was he who delivered the judgment. It was a case concerning money paid for a consideration that had failed and he appeared to consider the question on the basis of a developing law founded on the principle of unjust enrichment. By the time *National Bank of NZ v Waitaki International Processing (NI) Ltd* (1999) 2NZLR 211 (CA), was heard three years later the Court of Appeal was expressing the issue in terms of unjust enrichment using Lord Goff's formula. Despite this, in the same year, (1999), Salmon J in the Court of Appeal case of *Rod Milner v A-G* (1999) 2 NZLR 568, stated that the principle of unjust enrichment did not yet have the status of a cause of action in itself and cited statements by Lord Browne-Wilkinson in *Woolwich Equitable Building Society v Inland Revenue Commissioners* (1993) AC 70, to support him when he said, "This is not the appropriate occasion to consider whether the time has come to give the principle such a status". He did not close the door on the idea, but simply postponed the recognition of unjust enrichment as a cause of action in its own right. So if it has not already been accepted as a cause of action it would appear that members of the court believe we are on the verge of doing so. It remains to consider what the factors would be that would tip the balance of acceptance.

6. A Liberal Approach to the Distinctions between Equity and Common Law

This brings me back to my proposition that if our judiciary is prepared to adopt a liberal approach to issues of distinction between equity and common law then it is a small step to extend that liberal approach and accept unjust enrichment as a cause of action giving rise to a constructive trust as the remedy. Whether the constructive trust imposed would be remedial or institutional would depend upon the circumstances of the case. For example it has been suggested that a fiduciary relationship is not a necessary requirement for a remedial constructive trust, in *Commonwealth Reserves I v Chodar* (2001) 2 NZLR 374 per Glazebrook J at paragraph 45. However the grant of proprietary relief without the basis of breach of fiduciary duty must be regarded with caution. The remedial constructive trust is imposed at the discretion of the court so while it is potentially available it is not inevitable that it will be awarded. There is another issue to be considered here. Situations where there has been unjust enrichment but where there is no fiduciary relationship are hard to envisage. Even in cases where the primary relationship between the parties is contractual the courts have had no difficulty in finding a fiduciary relationship did exist as a precursor to the imposition of a constructive trust. In that case an institutional constructive trust would arise automatically whenever a breach of fiduciary duty occurred, obviating the necessity of considering a remedial constructive trust.

6.1 The Remedial Constructive Trust

In *Fortex Group Ltd v MacIntosh* (1998) 3 NZLR 171 CA the plaintiff employees sought a declaration of trust over the assets of the company on the basis that Fortex was under an obligation to place money retained from their wages into a superannuation fund. Not only had the company unilaterally elected to pay the money into the fund annually instead of monthly, it had ceased paying the employees' contributions into the fund altogether. The issue in the case was, in part, whether there was any identifiable property over which the trust could be imposed. The obstacle to identifying

money that should have been allocated to the fund was the fact that the company's bank account was at all material times overdrawn. By retaining the employees' money Fortex had sought not to increase the amount by which it was overdrawn. There were assets of the company available to satisfy some of the claims of the secured debenture holders and it was decided in the Court of Appeal (overturning the judge at first instance) that it would be unjust to allow the employees to succeed in their claim as the money would be taken from the debenture holders who had not received it without juridical reason. Blanchard J went so far as to say that, although the company was the sole trustee of the superannuation fund this did not mean it had the duties of a trustee nor did it owe any fiduciary duty in relation to its contractual obligation to pay the employees' pension contributions from its general bank account to a separate account for that purpose. Tipping J was determined to avoid the creation of backdated proprietary interests.

The Court regarded the dispute as between the employees and the debenture holders, saying it would be unconscionable for the employees to gain at the expense of the debenture holders as the latter were secured creditors, whereas the employees were merely unsecured creditors. However there seem to be some issues that were not addressed by the Court of Appeal. The employees were vulnerable in their position with the employers. They trusted the employers to pay the retained money into the proper account promptly, as per the superannuation trust agreement. They were unable to compel the employers or to check that they had performed their duties. This is evidence of the vulnerable position of the employees. At the time of the initial failure by Fortex to pay promptly the retained money into the proper account it could be argued that a constructive trust arose based on the relative positions of the parties and the trust and confidence that one party placed in the other, in the manner of the parties in *Sullivan v Management Agency* (1985) 1 QB 428. This would have imposed fiduciary duties on Fortex to use the employees' money in accordance with the agreement or else cease to deduct the contributions. The fiduciary duty would have been breached at an earlier time than the one examined by the Court. The imposition of a remedial constructive trust at the earlier time would have obviated the necessity to find an identifiable pool of money since this type of trust looks only for an unjust enrichment. Fortex were unjustly enriched at the expense of the employees when it continued to deduct money from employees' salaries with no intention of paying those deductions into the fund. That enrichment could have been redressed by the imposition of a remedial constructive trust over the assets of the company and, once that earlier claim had been settled, the claims of the debenture holders could have been addressed. It is unfortunate when two groups of innocent people, investors and employees, have to suffer loss but in this case the interests of the employees were sacrificed to the interests of investors.

6.2 Lack of Fiduciary Relationship no bar to Remedial Constructive Trust

Glazebrook J, in *Commonwealth Reserves I v Chodar* (2001) 2 NZLR 374 found that she had jurisdiction to award a remedial constructive trust and that there appeared to be a clear case of unjust enrichment. She said that the remedial constructive trust should only be imposed where other available remedies are inadequate and that she considered lack of a fiduciary relationship not to be an impediment to the imposition of such a trust. In choosing to exercise her discretion and impose the constructive trust Glazebrook J looked carefully at the conduct of the defendant and at the interests of third parties. As the plaintiffs had not retained equitable title in the money paid to the defendant, and as there was no fiduciary relationship between the parties, the only available remedy was the remedial constructive trust, which was duly imposed.

As Cooke P said in *Gillies v Keogh*, "Normally it makes no practical difference in the result whether one talks of constructive trust, unjust enrichment, imputed common intention or estoppel." It is certainly true that in reading the cases in this area there is a sense that the 'basket of remedies' approach advocated in *Aquaculture* is truly in use and constructive trusts and unjust enrichment are used in many different ways. In *Smith v Hugh Watt Society* (2004) 1 NZLR 537 the court decided that the transferee of real property had knowingly received property in breach of trust. In that case, the recipient of the property acquired notice of the existence of the trust after the transfer of the property through its solicitor and agent. The constructive trust was imposed based on unjust enrichment. Thomas J said, in *Powell v Thompson* (1991) 1 NZLR 597, at 609, "the property which is acquired is 'encumbered' by an equitable interest." In *Smith v Hugh Watt* the society was found to have been unjustly enriched at the expense of those people who raised the original funds for the purchase of the property in question. A constructive trust was imposed over the property to protect the plaintiff's equitable interest.

7. Quantum Meruit gives way to Unjust Enrichment

However, prior to that case *Buyers v Dean* (2002) NZFLR 1 was heard where there was no application made for a proprietary remedy since the plaintiff had not made a contribution to the defendant's property and she did not have an expectation of a share in his property. Her claim was advanced by way of quantum meruit and unjust enrichment for money restitution for housekeeping and childcare over a nine year period which terminated prior to the commencement of the Property (Relationships) Act 1976. There was no identifiable property to which the plaintiff could lay claim. Hers was a simple claim that either the defendant had been unjustly enriched by her because she had not worked during their relationship but for seven years and nine weeks she had looked after their two children full time, or that she should

get fair compensation for the benefit she provided. Despite the fact that there was no contractual relationship upon which to establish quantum meruit, the court followed the Australian precedent of *Pavey v Mathews Pty v Paul* (1986) 162 CLR 221 in allowing the claim to succeed. However to establish the quantum meruit claim in the absence of an implied contract it is necessary to establish that an incontrovertible benefit has been received by the defendant, the test for which is to show that “no reasonable man would say that the defendant was not enriched.” (Peter Birks 1989). This kind of reasoning works well in cases such as the one cited, where a householder called the fire brigade believing the service was free but was wrong, because the cost of the service is readily established: *Upton-on Severn Rural District Council v Powell* (1942) 1 All ER 220.

In the present case of *Buyers v Dean* the plaintiff tried to establish the true value of her services by calling witnesses who deal in household and child care provision and the total came to \$201,420. However the judge did not award that amount but instead considered it “entirely appropriate for the plaintiff to stay at home and care for the two infant children” but that “some compensation is justified for domestic housekeeping”. Furthermore he considered that “the child care services were as much for the benefit of the plaintiff, as mother of the children”. So the judgment moves from a claim in straightforward quantum meruit, compensation for a benefit received by the male partner, to a calculation based in part on the appropriateness of the plaintiff being responsible for child care. The compensation was further reduced to \$58,000 to take into account weekends and times when the father was at home to share in the responsibility. Whether or not this was adequate for services provided over a nine-year relationship I am not sure, but it would seem that the judge is leaning towards an unjust enrichment basis for his decision rather than quantum meruit. In unjust enrichment it is entirely acceptable for the calculation to be based on matters beyond the mathematics of a claim when looking for the factor that makes it unjust for a defendant to retain the benefit without compensating the plaintiff. I believe in this case it was the judge’s reluctance to apply unjust enrichment principles to the issue for fear of opening the door to a proprietary claim where he believed none was justified.

7.1 Indirect Contributions as Basis for Unjust Enrichment Claim

In the same year, 2002, the Court of Appeal took a different approach in *King v Church* (2002) NZFLR 555 where Tipping J’s judgment in *Lankow v Rose* (1995) 1 NZLR 277 was applied allowing indirect contributions were allowed to qualify as contribution to the property. Tipping J said, “There may be greater difficulties of proof and assessment when the contributions are indirect, but, once established, they are as real as direct contributions.” He went on to say that he would accept a service by the claimant as a contribution if its provisions helped the other party to acquire, improve or maintain the property or its value. Contributions under this test do not have to be financial, so contributions in the home may qualify on this basis as contributions to the home. Even where there is no proprietary interest in property available to the claimant there is no reason why the claim may not be satisfied by a monetary award. The basis of this analysis is the enrichment of the defendant at the expense of the claimant where it would be unjust for the defendant to retain the benefit without some award to the claimant. If we applied that reasoning to the previous case of *Buyers v Dean* the claim would have been based on the claimant’s contribution by child care and housework which enabled the defendant to increase the value of his assets unencumbered by the expense of providing care for his children and housekeeping. This was the approach adopted in *Shears v Waters* (2002) NZFLR 673 where the court used its equitable jurisdiction to interfere with the assertion of strict legal rights on the basis that for the defendant to retain the full benefit would be unconscionable. In other words it would be an unjust enrichment that the defendant was not entitled to retain. In 2004 *Ewing v Donaldson*, (CA231/03), was decided in the Court of Appeal of New Zealand on the basis that indirect contributions to the household including caring for the children in the absence of the male partner while he was on assignment with the RNZAF gave rise to an interest in property which was held by Mr Ewing alone. In this case Ms Donaldson was also awarded a share in assets that had been acquired using pension funds that had accrued to Mr Ewing during his time in the Air Force. A constructive trust was imposed to give effect to her claim. It was said that to pay her equivalent wages for the services she performed over the 20 year relationship was not enough. If this judgment were based on an institutional constructive trust then the evidence of a promise by Mr Ewing that he “would do good by” Ms Donaldson and that she should not “worry about anything, he would see it all through” would need to be relied on to support a legitimate expectation of a proprietary interest in the assets. It would seem to be more likely that the circumstances gave rise to a remedial constructive trust base on unjust enrichment where it would be inequitable for Mr Ewing to refute the contribution made by Ms Donaldson in the acquisition of the assets.

8. Conclusion

Flexibility has always been prized by Equity but the note of caution is often sounded that too much flexibility leads to uncertainty and too much discretion is judicial anarchy. However, if a wrong is identified where no remedy as yet would give relief it seems that it is the very essence of equity that all available sources should be used to find a remedy. In New Zealand the blurring of the differences between common law relationships and fiduciary duties has been the subject of much debate in which the blending of the two is usually referred to as fusion. Commentators who argue against the possibility of fusion between common law and equity refer to ‘the fusion fallacy’ saying that there was

nothing in the Judicature Act to show it was intended to codify law and equity into one subject matter. While the roots of the conceptual distinction between law and equity remain intact, in many courts the practical ramifications of that distinction are being eroded, particularly in commercial cases. It is sometimes felt necessary to impart some sense of morality into cases involving businessmen or sometimes the reason is pragmatic, simply to find the most suitable remedy for the situation.

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The Darfur Situation and The ICC: An Appraisal

Omer Y. Elagab

City Law School, City University London

Northampton Square, London EC1V 0HB, UK

Tel: 44-20-7040-8310 E-mail: o.y.elagab@city.ac.uk

Abstract

On 31 March 2005, the Security Council adopted Resolution 1593 referring the situation in Darfur, Sudan, to the Prosecutor of the International Criminal Court (ICC). In accordance with the Rome Statute, the Prosecutor commenced his investigation and presented evidence to Pre Trial Chamber I (PTC I), implicating two Sudanese men in the commission of crimes against humanity and war crimes in Darfur. Consequently, the Chamber has issued Warrants for their arrest. This chain of events has given rise to a number of jurisprudential issues which will be discussed here, namely, the legal significance of the referral by the Security Council to the ICC; the various grounds of jurisdiction of the ICC and personal responsibility for atrocities committed; the questions of admissibility complementarity, and double jeopardy.

Keywords: Darfur, ICC, Security Council, Crimes Against Humanity, Genocide, War Crimes, Complimentarity

1. The Purpose

This paper attempts to discuss some of the issues raised by the UN Security Council referral of the situation in Darfur to the ICC. The paper begins by offering analysis of the jurisdiction of the ICC in the context of subject-matter of international crimes (genocide, crimes against humanity, war crimes and aggression). This will be followed by an evaluation of international criminal responsibility of the two accused Sudanese nationals. The conclusions reached by the ICC in this respect will also be alluded to. Some questions of principle will be discussed. Admissibility will be referred to, as will the important regimes of complementarity and double jeopardy. Thereafter the relationship between the Security Council and the ICC will be assessed.

2. Background

The conflict in the Darfur Region of Sudan began in February of 2003. At least 400,000 people have been reportedly killed; more than 2.5 million civilians are displaced. They now live in displaced-persons camp in Sudan or in refugee camps in neighbouring Chad; and more than 3.5 million men, women, and children are completely reliant on international aid for survival.

When shown a picture of a US State Department map depicting burnt villages in Darfur during an NBC News interviews in Khartoum, President Bashir of Sudan called it a 'fabrication'. Adding that, 'Yes, there have been villages burnt but not to the extent you are talking about. People have been killed because there is war. It is not the Sudanese culture or people of Darfur to rape. It does not exist. We do not have it' (See Note 1). Bashir linked the photograph to pictures shown by former US Secretary of State Colin Powell at the UN Security Council before the start of the Iraq war as proof of the presence of weapons of mass destruction in Iraq. No such weapons have been found since the war started 5 years ago.

The Sudanese armed forces and Sudanese government-backed militia known as "Janjaweed" have been fighting two rebel groups in Darfur, the Sudanese Liberation Army/Movement (SLA/SLM) and the Justice and Equality Movement (JEM) (See Note 2). The stated political aim of the rebels has been to compel the government of Sudan to address under-development and the political marginalization of the region. In response, the Sudanese government's regular armed forces and the Janjaweed - largely composed of fighters of Arabic nomadic background- have targeted civilian populations and ethnic groups from which the rebels primarily drew their support – the Fur, Masalit and Zaghawa (See Note 3).

On March 2005, the Security Council adopted Resolution 1593 referring the situation in Darfur to the Prosecutor. In accordance with the Rome Statute, the Prosecutor opened an investigation in relation to that on 1 June 2005. After a lengthy investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor had on 27 February 2007 applied to PTC I to issue summonses to appear against Ahmad Harun and Ali Muhammad Ali Abd-Al-Rahman

(also known as Ali Kushayb). Not confident that the two men would voluntarily surrender themselves, the Chamber issued Warrants of Arrest against them. The interaction between the government of Sudan and the ICC evolved into outright hostility after the ICC judges issued Arrest Warrants in April 2007 for the two men. Sudan has categorically rejected the jurisdiction of the ICC over the cases and called the Prosecutor “junior employee doing cheap work” (See Note 4). It is most unlikely that these warrants would be enforced, as the government of Sudan is adamant not to surrender the two men.

3. Jurisdiction

The ICC differs a great deal from all previous international tribunals as far as territorial and personal jurisdiction are concerned. The Nuremberg Tribunal exercised personal jurisdiction over persons who had committed one of the crimes within the Tribunal’s subject-matter jurisdiction (See Note 5). The jurisdiction of the International Criminal Tribunal for former Yugoslavia (ICTY) is territorial in nature as it is confined to crimes committed on the territory of that country, after 1991 (See Note 6). By contrast, the jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) is both territorial and personal as it spans over crimes committed in 1994 and over crimes committed by nationals of that country in neighbouring states during the same era (See Note 7).

As against these precedents, the ICC is created by the Assembly of States who have voluntarily agreed to be themselves subjected to its jurisdiction. Moreover, the jurisdiction of the ICC is somewhat less expansive than the jurisdiction exercised by individual States over the same crimes. A further limitation imposed by the Rome Statute on the jurisdiction of the ICC is that, national courts are given priority to exercise jurisdiction over offences and only when they become “unwilling” or “unable” to prosecute can the ICC intervene. This is referred to in the Statute as *admissibility*. At this juncture it should be noted that although the Rome Statute recognises the interrelation between these two concepts (jurisdiction and admissibility) yet it draws clear distinction between them.

As concerns jurisdiction, it relates to the scope of the ICC operation in terms of (a) subject-matter (*jurisdiction ratione materiae*); (b) temporal (*jurisdiction ratione temporis*); (c) space (*jurisdiction ratione loci*); and (d) jurisdiction over individuals (*ratione personae*). The issue of admissibility comes up at a later stage, and its purpose is to establish whether alleged offences over which the Court has jurisdiction should be litigated before it. A further distinction between the two concepts is that rules of *jurisdiction* are rather rigid as compared with *admissibility* which admits a degree of flexibility. Having said that, it has to be admitted that the demarcation line between the two categories is not always easy to identify. This may be illustrated by Article 17 (1) (d) of the Statute which deals with *admissibility*. That provision inhibits the *jurisdiction* of the ICC to proceed with a case which is not of sufficient gravity. Conversely, Article 8 (1) of the Statute empowers the ICC to exercise jurisdiction with respect to war crimes, in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

3.1 Subject matter jurisdiction (*ratione materiae*)

The ICC has jurisdiction over four categories of international crimes, namely genocide, crimes against humanity, war crimes and crimes of aggression (Article 5(1) (a) to (d)). The gravity of these crimes is described in both the preamble to the Rome Statute and its Article 9 as “the most serious crimes of concern to the international community as a whole.” (See Note 8)

3.1.1 Genocide

Article 6 of the Rome Statute adopts the same definition of genocide as the 1948 Genocide Convention (See Note 9). In view of this, reference may first be made to the Genocide Convention and how it has been interpreted by competent international tribunals. The text of Article 2 of the that Convention defines genocide as meaning any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

This provision can be without a doubt regarded as a part of customary law corpus and as such has been also accepted by two *ad hoc* international criminal tribunals. Both statutes of the ICTY and the ICTR share the same definition of genocide as the 1948 Genocide Convention.

The systematic rape, humiliation and mutilation that occurred in Rwanda in 1994 resulted in very serious physical and psychological traumatic experience, not only to the Tutsi women, but also to members of their families and community at large. The ICTR handed down for the first time ever a conviction for genocide in the *Akayesu case* (See Note 10).

The ICTR ruled in that case that, acts of sexual violence may “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.” (See Note 11)

Moreover, in the *Kayishema and Rutaganda Cases*, (See Note 12) the ICTR found that sexual violence satisfies the definitional requirements of “causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part and imposing measures intended to prevent births within the group.” (See Note 13)

In a similar vein, the ICTY stated in the *Jelisić Case*, (See Note 14) that “genocide is characterized by two legal ingredients according to the terms of Article 4 of the Statute: (1) the material element of the offence, constituted by one or several acts enumerated in paragraph 2 of Article 4; and (2) the *mens rea* of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” (See Note 15)

Consequently, it results from the accepted legal definition that the murder of a large number of victims does not necessarily equate to genocide. On the other hand, the murder of a single person could constitute an attempt at genocide “if the aggressor's intent was to kill that person as part of larger plan to destroy a group.” (See Note 16) In fact, genocide could occur in the absence of killings.

In the light of the definition presented above, it is abundantly clear that the Government of Sudan has not committed the crime of genocide in the region of Darfur as the legal elements of that offence cannot be established. In short, although there are serious allegations of mass murder and massacres against the Government of Sudan, no credible charges of genocide could be brought against its officials.

For its part, the US Government seems to take an opposing view. Thus, in a testimony before the Senate Foreign Relations Committee on 9 September 2004, the then US Secretary of State, Colin Powell, declared that the fighting in Darfur was “genocide”. Although, this was an extremely alarming allegation, none of the remaining Permanent Members of the Security Council supported it. Moreover, a report submitted by an International Commission of Inquiry on Darfur, set up under UN Security Council Resolution 1564 (2004) expressly absolved the Sudanese Government of pursuing “a policy of genocide” (See Note 17). Having said that, the Commission warned that,

“The conclusion that no genocide policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should be taken in any way as detracting from the gravity of the crimes perpetrated in that region. International offences such as the crimes against humanity and war crimes that have been committed in Darfur may be no less serious and heinous than genocide” (See Note 18).

Although, the occurrence of genocide in Darfur is contentious, it should always be remembered that these claims are exclusively based on reports of NGO's and the media. Moreover, consistent with the above findings, the ICC Prosecutor stated in his Fourth Report to the Security Council that he collected sufficient evidence to back up charges of crimes against humanity and war crimes, but not genocide (See Note 19).

3.1.2 Crimes Against Humanity

As has been mentioned hitherto, crimes against humanity are within the jurisdiction of the ICC. The elements of this type of crime will be analysed with a view to ascertaining what the Prosecutor will have to prove in order to establish that the alleged conduct amounts to crimes against humanity.

The Rome Statute defines crimes against humanity in Article 7(1) as unlawful acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The same Article goes on to list murder, extermination, enslavement, deportation, arbitrary detention, torture, rape, persecution on political, racial and religious grounds, and other inhuman acts that can qualify as crimes against humanity. It should be emphasised that the attack against a civilian population should either be on a widespread basis or in a systematic manner, but not necessarily both (See Note 20). Furthermore, culpability of crimes against humanity requires that the perpetrator has the relevant knowledge of the attack against the civilian population. Article 7 of the Rome Statute appears to accept the rule stated by the ICTY Trial Chamber in *Blaskić case* (See Note 21) that, while there is no necessity for identifying the perpetrator with a policy or plan underlying crimes against humanity, it is sufficient that he or she has knowledge of the attack.

As concerns the Darfur situation, the Commission of Inquiry reported that the term “Janjaweed” was employed to describe members of Popular Defence Force, other government agencies as well as Arab militia. In any event, the Commission saw no merit in distinguishing between the three groups, as they were all guilty of “violation of international human rights law and humanitarian law” (See Note 22) and that there were direct links between these three groups and the Government of Sudan.

As hereto mentioned, on 27 February 2007, pursuant to Article 58(7) of the Statute, the Prosecutor applied to PTC I, requesting it to issue summonses to appear against the two suspected Sudanese men. The allegation centred around the

following points (See Note 23):

- The crimes were perpetrated in the context of a non-international armed conflict in the Darfur region between the Government of the Sudan and rebel forces.
- The Sudanese Armed Forces and Militia/Janjaweed attacked the villages based on the rationale that the tens of thousands of civilian residents living in the villages supported the rebel forces.
- Mass murder, summary execution, mass rape, forced displacement of entire communities and other grave crimes were committed against civilians who were non-combatants.

Turning to the determination made by the PTC I, in accordance with Article 19(1) of the Statute, the PTC I had to satisfy itself that it had jurisdiction in the case brought before it by the Prosecutor. On the basis of the evidence and information supplied to it, the judges of the PTC I ruled that “without prejudice to any challenge to the admissibility of the case under article 19(2) (a) and (b) of the Statute and without prejudice to any subsequent determination”, (See Note 24) they found that the case against Ahmad Harun and Ali Kushayub fell within the jurisdiction of the ICC and appeared to be admissible.

As concerns the question of whether there were reasonable grounds to believe that the contextual elements of at least one crime against humanity within the jurisdiction of the Court had been met, the PTC I stated thus:

“Having considered and analysed the Prosecution Application and its supporting material,..., the Chamber is of the view that the information contained in the documents leads it to conclude that there are reasonable grounds to believe that during the period relevant to the Prosecution Application, the specific elements of crimes against humanity within the jurisdiction of the Court were met under article 7(1) (a), 7(1) (d), 7(1) (e), 7(1) (f), 7(1) (g), 7(1) (h) and 7(1) (k) of the Statute.” (See Note 25)

These findings leave the two accused or the Government of Sudan with the option of challenging the jurisdiction of the ICC or the admissibility of the case under Article 19(2) (a) and 19(2) (b) respectively. However, as the PTC I noted, the Sudanese Ministry of Foreign Affairs had stated in a public document that, Sudan would not cooperate with the ICC as it had no right to extend its power over Sudanese territory or Sudanese citizens (See Note 26).

3.1.3 War Crimes

Article 8 of the Statute of Rome deals in extensive details with war crimes. In fact it is the longest provision in the Statute, and indeed also the lengthiest when compared with its antecedents (the Nuremberg Charter and the four Geneva Conventions). This Article can be seen as a progressive development of the rules applicable to war crimes, seeing that it expressly brings non-international conflicts under its ambit. Not only that, but it also defines war crimes in considerable details. Moreover, the Article divides these crimes into four categories, two for international armed conflicts, and two for non-international armed conflict.

In the context of the conflict in Darfur, it is proposed to deal with the part of the provisions applicable to armed conflict not of an international character. Thus, Article 8(c) embraces all serious violations of Article 3 common to all four Geneva Conventions. However, these crimes are only prosecutable before the ICC if they were committed against ‘protected persons’. This term includes persons (civilians) who are taking no active part in the hostilities and members of the armed forces who became *hors de combat* for whatever reason. The crimes listed consist of murder, mutilation, cruel treatment and torture, outrages upon personal dignity, taking of hostages and summary executions.

The other category of offences relating to armed conflict not of an international character is contained in paragraph (e) of Article 8. They include attacks that are intentionally directed against civilians, cultural buildings, hospitals, humanitarian workers (including those from Red Cross and Red Crescent organisation) and peacekeeping missions. The Article also punishes all forms of sexual abuse, such as rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.

Article 8 does not provide jurisdictional threshold for war crimes, unlike the case with crimes against humanity where widespread or systematic abuse must be established as prevalent. It is also unlike genocide where very high level of specific intent must be established. In a curious way, Article 8(1) endeavours to remedy that situation by introducing what came to be known as “non-threshold threshold” (See Note 27). This stipulates that the ICC has jurisdiction in respect of war crimes in particular when committed as part of a plan or policy as part of a large scale commission of such crimes.

However, the treatise known in the Rome Statute as the Elements of Crimes makes the task of the Prosecutor less onerous, as he is not obliged to establish the aforesaid threshold element of war crimes. According to this, he is not required to prove that the alleged perpetrator knew of the existence of the armed conflict or its designation.

In considering whether there were reasonable grounds to believe that the contextual element of at least one war crime within the jurisdiction of the Court was present, the PTC I determined as follows:

“Having considered and analysed the Prosecution Application and its supporting material, in particular the report of the International Commission of Inquiry on Darfur and witness statements, the Chamber is of the view that the information contained in the documents leads it to conclude that there are reasonable grounds to believe that, between August 2003 and March 2004, the specific elements of war crimes within the jurisdiction of the Court were met under article 8(2)(c)(i), 8(2)(c)(ii), 8(2)(e)(i), 8(2)(e)(v), 8(2)(e)(vi), 8(2)(e)(xii) of the Statute.” (See Note 28)

A word of caution has to be said at this juncture, namely, that the nature and the weight of the evidence may be questionable. This is because although the Prosecutor took considerable period to investigate the situation in Darfur, in the end he relied exclusively on secondary data such as testimonies taken from witnesses scattered in 17 countries and also the report of the International Commission. One would have thought that the office of the Prosecutor with its good resources should have come up with primary evidence. Furthermore, although these are early stages of the prosecution, concern is raised as to the ease with which the Court has readily accepted the supporting material submitted to it along with the Prosecution Application.

3.2 Temporal Jurisdiction (*Jurisdiction Ratione Temporis*)

According to Article 11 of the Rome Statute, the ICC has no jurisdiction retrospectively: it can only prosecute crimes committed on or after 1 July 2002, the date on which the Rome State entered into force. Where a State becomes party to the Rome Statute after that date, the Court can exercise jurisdiction automatically with respect to crimes committed after the Statute enters into force for that State. The Rome Statute seems to repeat the principle of non-retroactivity contained in Article 11 into Article 24 as follows:

No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

In fact the two Articles (11 and 24) could easily have been merged at the time of drafting them (See Note 29).

It has to be admitted, however, that there is a notable exception to the principle of non-retroactivity of the Rome Statute in the form of making an *ad hoc* declaration recognising the jurisdiction of the Court over specific crime, even if the State is not a party to the Statute. This provision is stipulated for in Article 12 (3), obviously does not encompass crimes committed prior to 1 July 2002, nor for that matter referrals by the Security Council for crimes preceding that date.

This limitation on the jurisdiction of the Court is logical, otherwise the Court would have been able to dig into events of the distant past. At the same time, one can see the drawback of this argument, namely, the provision of immunity from prosecution for those who committed atrocities prior to the date on which the Rome Statute came into force.

Applying this legal narrative to the situation prevailing in Darfur, it would be recalled that the referral by the Security Council to the Prosecutor was expressly stated in relation to events only since 1 July 2002 (See Note 30). Clearly, therefore, both the Security Council and the office of the Prosecutor have acted within the terms of the Rome Statute, as far as events predating its coming into force.

3.3 Territorial jurisdiction (*Ratione loci jurisdiction*)

The general principle regarding the jurisdiction of the ICC over crimes committed on the territory of the State parties, regardless of the nationality of the offender is set out in Article 12 (2) (a) of the Statute. As concerns referral of cases by the Security Council under Chapter VII, Article 13 (b) of the Statute entitles the ICC to exercise jurisdiction over all the crimes listed in Article 5, if such crimes appear to have been committed within the territory of the State in question.

As concerns the Darfur situation, clearly the ICC has no jurisdiction under Article 12 (2) (a) because the Sudan is neither a party to the Statute, nor has it accepted the jurisdiction of the Court with respect to any given crime. If either limb of jurisdiction was applicable then the Sudan would have been obliged under Article 12 (3) of the Statute to co-operate with the Court without delay or exception.

Having said that, it is arguable that the ICC could have territorial jurisdiction over the situation in Darfur, this may be possible under Article 13(b) of the Statute as the crimes identified by the prosecutor were allegedly committed within Sudanese territory. The judges of the ICC seem to have accepted that there were reasonable grounds to believe that the two Sudanese men in question had committed war crimes in the region of Darfur in Sudan.

Notwithstanding that, Sudanese authorities have refused to hand over the suspects. The Minister of Justice is on record to have stated:

“We do not recognise the International Criminal Court ... and we will not hand over any Sudanese even from the rebel groups who take up weapons against the government.” (See Note 31)

To conclude this point, the issue of territorial jurisdiction is not contentious with regard to the situation in Darfur. This is because none of the fighting factions dispute the fact that the human suffering and alleged crimes took place within the boundaries of Sudan. The fact that civilians fled to Chad does not compromise the territoriality of the crimes committed.

4. Individual Criminal Responsibility

Article 25 of the Rome Statute addresses the issue of individual responsibility as two categories. The first comes under paragraph 3(b) and covers primary offenders who order, solicit or induce the crimes in question. The second category comes in paragraph 3(c) and covers secondary parties (known as accomplices) who aid, abet or otherwise assist primary offenders in committing the crimes in question.

Article 25(3) (d) deals with complicity in a criminal enterprise where a person contributes to the commission or attempted commission of such a crime by a group or persons acting with a common purpose. The same Article deals further with notion of attempt in paragraph (3) (f). It requires that, before responsibility can be attached, the individual concerned must have taken substantial steps towards the commission of the offence, but due to circumstances beyond his control the offence is not committed. On the other hand, criminal responsibility will not attach where the individual in question voluntarily and intentionally abandons his efforts to commit the crime, or prevents its consummation by others.

Leaving substantive aspects of the crimes aside, Article 27 stipulates that criminal responsibility under the Rome Statute applies to all persons irrespective of official capacity, including *inter alia* members of Governments and government officials. Moreover, Article 29 stipulates that the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations. All other germane matters are to be dealt with under Article 28. According to its provisions, the Commanders or other superiors may be culpable for failing to prevent crimes committed by their subordinates. The responsibility is not confined to military Commanders, as it also attaches to civilians who are effectively acting as military Commanders.

The view held by Human Rights Watch is that:

“In Darfur, individuals such as militia leaders, soldiers, and pilots involved in bombing campaigns, military commanders, and government officials who directly participated in, planned, ordered, or were otherwise complicit in the commission of war crimes and crimes against humanity can be found criminally liable for these activities in international courts, regardless of the presence of Sudanese amnesty or immunity laws. Some of these individuals including those named in this report—both civilian and military—may also be liable for war crimes or crimes against humanity under the theory of command responsibility.”(See Note 32)

The Prosecutor offered a summary of a one hundred pages document containing his evidence on which he based his allegations of complicity on the part of the two named Sudanese persons.

The Application of the Prosecutor raised the following matters:

After the attack on Al Fashir, Ahmad Harun was appointed as Sudanese Minister of State for the Interior by the regime in April 2003, to head the “Darfur Security desk”.

He further asserted that Ahmad Harun recruited Militia/Janjaweed with full knowledge that they, often in the course of joint attacks with forces of the Sudanese Army, would commit crimes against humanity and war crimes against the civilian population of Darfur.

Moreover, the Prosecutor alleged that statements and speeches made by Harun while in Darfur demonstrate that he had full knowledge that the Militia/Janjaweed were routinely attacking civilian populations and committing crimes against them.

As concerns Ali Kushayb, the Prosecutor accused him of commanding thousands of Militia/Janjaweed by mid-2003, and that he personally led Militia/Janjaweed at the attacks upon Kodoom, Bindisi, Mukjar, and Arawala.

A further allegation made against Ali Kushayb was that, in December 2003, he personally inspected a group of naked women in Arawala before they were raped by men under his command. The victims were tied to trees with their legs apart and continually raped.

The significant allegation by the Prosecutor was that Ahmad Harun and Ali Kushayb joined each other, and others, in pursuing the shared and illegal objective of persecuting and attacking civilian populations in Darfur.

In conclusion, the Application alleges that Ahmad Harun and Ali Kushayb bore criminal responsibility in relation to 51 counts of war crimes and crimes against humanity including: rape; murder; persecution; torture; forcible transfer; destruction of property; pillaging; inhumane acts; outrage upon personal dignity; attacks against the civilian population; and unlawful imprisonment or severe deprivation of liberty.

Acting under article 58(7) of the Rome Statute, PTC I decided on 27 April 2007 to issue Warrants of Arrest for Ahmad Harun and Ali Kushayb for their alleged responsibility for crimes against humanity and war crimes. The decision set out that the case against Harun and Kushayb fell within the jurisdiction of the Court and was admissible. It further stated that there were reasonable grounds to believe that the crimes described in the Application have been committed and that there were also reasonable grounds to believe that Harun and Kushayb were criminally responsible for the crimes.

Based on the information provided by the Prosecution, PTC I was not satisfied that summons to appear were sufficient to ensure Harun's and Kushayb's appearance before the Court and therefore issued arrest warrants instead. PTC I also decided that the Registry shall prepare two requests for cooperation seeking the arrests and surrender of Harun and Kushayb (See Note 33).

Sudanese authorities have made it abundantly clear that they had no wish to comply with the provisions of Article 59 of the Statute. This non-compliance may be inconsistent with the terms of the UN Security Council Resolution 1593. It will be recalled that, the Security Council referred the situation in Darfur to the ICC under that resolution. Moreover, it required under that Resolution the cooperation of the Government of Sudan with the Court even though it is not a State party to the Rome Statute. As the legality of that Resolution is a contentious matter, it is arguable that Sudanese authorities could insist that it becomes the subject matter of an Advisory Opinion before the International Court of Justice (ICJ). If this line of argument is persuasive, the Security Council could then suspend proceedings before the ICC until the legality of the Resolution is established.

4.1 Some questions of principle on individual criminal responsibility and crimes against humanity

As we stated, the ICC issued its first Warrants of Arrest for suspects accused of war crimes and crimes against humanity in Sudan's Darfur region in early May 2007. As already indicated the warrants were issued for the arrest of Ahmed Harun, a cabinet minister, and Ali Kushayb who is a militia commander. The INTERPOL has circulated a notice for the arrest of both men soon thereafter.

The Prosecutor has announced on 13 March 2008, that he is currently finalising two more investigations into the atrocities in Darfur to be presented by the Court by the end of this year. The Prosecutor has indicated that one of the investigations relates to involvement of Sudanese officials in attacks against civilians while the other looks at rebel attacks against peacekeepers and aid workers. It is significant that the Prosecutor stated that, "[his] office will proceed to investigate who is bearing the great responsibility for ongoing attacks against civilians; who is maintaining Harun in a position to commit crimes; who is instructing him" (See Note 34). The Prosecutor seems here to invoke Article 28 of the Rome Statute which imposes command responsibility. This concept applies not only to military personnel, but also to civilian superiors. Successful invocation of that provision will depend on the prosecution's ability to establish the three elements required for that, namely, (a) existence of superior-subordinate relationship; (b) the superior must have known or had reason to know that the subordinate was about to commit a crime or had committed a crime; and (c) the superior must have failed to take necessary and reasonable measures to prevent the crime or punish the perpetrator.

Leaving aside these disclosures by the Prosecutor, it has now been one year since the Arrest Warrants have been issued and the Sudanese government made no attempt to hand over the two suspects. What is more, the UN Security Council which asked the ICC to investigate Darfur crimes under a Chapter VII mandate in resolution 1593 some three years ago, appears to be reluctant to subdue Sudan into surrendering the said two suspects. Even more than that in September 2007 three members of the Security Council (China, Russia and Qatar) blocked the Presidential Statement supporting the arrest and extradition of the two individuals in question.

This state of affairs raises several questions of principle. First, was it prudent of the Prosecutor to proceed with two names only on his original application to the PTC I? This limitation was done with total oblivion to the cry by the preponderant majority of credible human rights organisations to go for more names. Secondly, the question is begged as to the extent to which the ICC Prosecutor relied on the Report of the International Commission on Darfur as a basis for his application of February 2007. This point should be understood in the context of the sealed envelope handed over from the Security Council to the Prosecutor when the situation in Darfur was referred to him in March 2005. It is now common knowledge that that envelope contained a list of fifty-one individuals named as suspects of committing serious crimes under international law. The Prosecutor sealed off the envelope again as quickly as he opened it, saying that the list was a mere advice to him and that it carried no mandatory status whatsoever. The Prosecutor was at pains to point out that, his Office and the International Commission on Darfur have two entirely different mandates. He then went on to state specifically that the list of names identified by that Commission would not bind his selection of suspects. Thirdly, it would seem that the Prosecutor has unfettered discretion whether to prosecute or not. This is in accordance with Article 53 of the Rome Statute which impels the Prosecutor to prosecute only upon being in possession of sufficient evidence which gives rise to reasonable grounds for believing that the suspect in question must have committed crimes within the jurisdiction of the Court. Thus, the Prosecutor is obliged to carefully review the evidence in terms of scale, nature, manner of commission and impact of crime. Whatever the case may be now, time will tell whether the attitude adopted by the Prosecutor in relation to Darfur lays a solid foundation for the future of international criminal litigation or not.

Trial *in absentia* is another matter that is raised by the refusal to hand over the two accused to the ICC (See Note 35). The simple and straightforward answer is that, the Rome Statute does not allow for trial *in absentia*. It does, however, allow for confirmation of charges in the absence of the accused, but this does not seem to be an option currently pursued. Even, where that is the case, it is doubtful whether that would fulfil any of the aims of international criminal litigation.

The same can also be said about staging a fully fledged trial *in absentia* with all the huge financial costs involved.

5. Admissibility Under the Rome Statute

The starting point is that, admissibility and jurisdiction are two related concepts. As stated before, Jurisdiction refers to competence of the ICC under the Statute, and it embraces subject matters, time and individuals. On the other hand, the applicability of the domestic jurisdiction over perpetrators of crimes, or the submission of such persons to the jurisdiction of the ICC is what the Statute refers to as admissibility. A case will be deemed admissible before the ICC, if the criteria listed in Article 17 of the Statute are fulfilled. The most important of these criteria, in the context of Darfur is the one which enforces the inadmissibility of a case before the ICC, on the ground that it has been properly investigated, with prosecution being carried out by or otherwise opposed by the organ of the State which possesses competent jurisdiction over that case (See Note 36).

To avoid abuse of the system, the aforesaid criteria are made subject to a number of exceptions to safeguard against impunity, as the general idea of the Statute is to put an end to impunity. The rules in the Statute are precisely designed to remove any possibility of powerful individuals escaping justice. It is precisely for this reason that the ICC is empowered to prosecute a case when a State with competent jurisdiction is unwilling or unable to utilise its domestic system to carry out investigation or prosecution of an individual who allegedly committed international crimes, or when the decision not to take an action against such individual is the result of the unwillingness or inability of the competent State to genuinely prosecute.

As mentioned previously, on 31 March 2005, the UN Security Council took an unprecedented step by referring the situation in Darfur to the ICC. That referral was within framework of Security Council Resolution 1593 (2005) and was in marked contrast to the three earlier referrals of the situation in Uganda (2003), the Democratic Republic of Congo (2004) and Central African Republic (2005). The three States mentioned here have pledged their unqualified support to the ICC, while the Sudanese government is opposing the admissibility of the case before the ICC from the outset most and foremost on grounds of jurisdiction and complementarity. This will be the next item to be discussed.

6. The Complementarity Regime

According to paragraph 10 of the Preamble and Article 1 of the Rome Statute, the ICC ‘shall be complementary to national criminal jurisdictions’.

This must, however, be read in conjunction with the primary objective of the legal regime created by the Rome Statute. This provides that, criminal jurisdiction over persons who commit the most serious crimes of international concern should in principle be exercised by the national courts, rather than by the ICC. To make this possible, the Statute has come up with the principle of complementarity, encompassing a number of procedures for testing admissibility of the cases before the ICC which must be satisfied before any such case can be heard before the ICC. When these procedures are not fulfilled, then the jurisdiction of the ICC is ousted.

The aforementioned procedures have for now been successfully invoked by the Prosecutor before the PTC I as the latter determined that he had competence to launch investigation of the type of crimes listed in Article 5 of the Statute and that it fulfilled the test pertaining to admissibility. By the same token, the PTC I stated that these procedures would entitle those against whom Arrest Warrants have been issued to mount a challenge against the jurisdiction of the Court over them. In short, no case can reach the Trial Chamber stage before all procedural hurdles have successfully been surmounted.

A perplexing issue is whether the principle of complementarity applies to a case that has been referred by the Security Council to the ICC. Although the Statute appears not to address this question the PTC I seems to accept that to be the case without questioning it. The present writer believes that there are two possible alternative interpretations: first, a referral by the Security Council carries with it the authority of Chapter VII, and this could obviate the need for invoking the principle of complementarity to the case at hand. The second interpretation is that, the principle under review applies to any and all cases, irrespective of the route which they chart to the ICC. This interpretation is consistent with Article 53 of the ICC Statute. The end of the second paragraph of that provision imposes a duty on the Prosecutor to inform the Security Council in case of a referral under Article 13 (b), of his decision whether to proceed or not. Apart from the two approaches to interpretation, it has to be appreciated that the question of admissibility refers to “cases”, while referral by the Security Council relates to a “situation” suggesting that in the latter category a much broader concept is intended.

The applicability or otherwise of the principle of complementarity in a concrete case emanating from a Chapter VII referral is brought to the forefront in relation to the Darfur proceedings. This is a thorny issue and must be fully addressed by the PTC I before a proper hearing is convened before the ICC (See Note 37).

As concerns accountability and justice in Sudan, although it has been argued that the national court system is functional and has jurisdiction over human rights crimes perpetrated in Darfur, at a practical level these courts were said to have

been unable to achieve much. It is argued in some quarters that the justice system as a whole appears to be unable or unwilling to prevent attacks. This was alleged to have been compounded by a general lack of independence and resources and ill-equipped police force and legislation that protect state officials from criminal litigation. Such allegations require thorough investigation.

As against that background, the Sudanese government took several initiatives to address impunity in Darfur. Thus, in the period between 2004 and 2006, it created five judicial and quasi-judicial organs with a mandate to ensure accountability for human rights crimes in Darfur. The available evidence suggests that these organs did not achieve the desired result. This may be illustrated by the limited success of the National Commission of Inquiry established in May 2004 to investigate crimes committed by armed groups. It appears that the Commission did not go beyond recommending "further investigations" into a number of specified incidents.

In addition to the foregoing, a number of *ad hoc* Investigatory Committees have been established in Darfur in response to incidents of attacks against civilians. Along with that, a number of Committees against rape were established to look into the issue of rape and sexual violence in Darfur. Several commentators have criticised these committees for being ineffective. Another body known as the Unit for Combating Violence against Women and Children was established but has failed so far to investigate specific cases.

The most elaborate attempt by the Government of the Sudan to create an accountability mechanism with conventional judicial elements was the establishment of the Special Criminal Court on the Events in Darfur (SCCED). Created by a decree of the Chief Justice, the SCCED was initially constituted as a panel of three judges, based in El Fasher, but with ability to circuit to any location deemed appropriate. It was granted wide jurisdiction covering all crimes in the Sudanese Penal Code and any charges concerning investigations into the violations cited in the report of the Commission of Inquiry and any charges pursuant to any other law, as determined by the Chief Justice. On 26 November 2005, the Chief Justice established two additional Special Criminal Courts for Nyala and El Geneina with the same jurisdiction as the initial SCCED, but with the addition of international humanitarian law (IHL). The SCCED statutes also contained explicit provisions on the right of observers from the AU or other entities to attend the court hearings (See Note 38).

The effectiveness of the SCCED has been limited at best. According to observers, of the nine known cases that came before it, verdicts were delivered in eight of them. A ninth case was initially heard but later dismissed. Only one of these cases dealt with the types of major violations of human rights and the laws of war that have characterized the conflict in Darfur. For example, in relation to an attack on Tama in South Darfur in October 2005. No one was found guilty of taking part or held responsible for orchestrating it (See Note 39). The men charged in connection with the attack were found guilty only of stealing property at the site of the attack after it took place. Moreover, it seems to be the case that the SCCED has yet to address the issue of criminal responsibility of senior government officials, with the exception of trying one such official who was subsequently acquitted.

The government of Sudan has been consistent in its rejection of the legitimacy of the ICC as Darfur war criminals would be tried effectively under its national judicial system. A Sudanese Minister of State declared that the legal system of his country is one of the best in Africa and should be trusted to deliver justice to the suspected perpetrators of the Darfur war crimes. More significantly, he stated that: "The International Criminal Court efforts to try the Darfur war crime suspects should be complementary and should take place in cases where the government has shown clear unwillingness to provide justice." (See Note 40)

He added: "If there is fresh evidence, I can assure you everyone in government will be investigated and brought to justice". (See Note 41)

7. Double Jeopardy

The principle of double jeopardy is comparable in scope to the Latin maxim of *ne bis in idem*. It is enshrined in all the important human rights treaties such as the 1966 International Covenant on Civil and Political Rights (See Note 42). The core idea of this principle requires that nobody should be tried or punished twice for an offence for which he has already been convicted or acquitted. This principle is also enshrined in Article 20 of the Rome Statute (See Note 43). Paragraph 1 of that article stipulates that the ICC shall have no jurisdiction over a person that has either been convicted or acquitted by that Court. By contrast, paragraph 2 of the same article removes the competence of all other courts to deal with the crimes listed in Article 5 where the person involved has already been convicted or acquitted by the ICC. It should be emphasised that the restriction is only in relation to offences enumerated in Article 5 of the Statute. By necessary implication, therefore, prosecution by national courts for ordinary crimes resulting from the same behaviour is not barred. As can be readily seen, the prohibition is not absolute and perhaps this is in recognition of State sovereignty in relation to prosecution of ordinary crimes committed within its territory. In theory, the doctrine of double jeopardy seems to work without much difficulty, but in practice its application fails when criminal proceedings before domestic courts turn out to be sham in nature. In anticipation of such difficulties paragraph 3 of Article 20 made an

exception which restores the jurisdiction of the ICC or other possible national courts where the previous proceedings in the domestic court had the purpose of shielding the accused from criminal liability for crimes within the jurisdiction of the ICC; or, where otherwise conducted without adhering to due process as recognized in international law. In practice, the application of the two limbs of the rule in paragraph 3 is not an easy matter. The judges will have to review the national proceedings in order to determine whether they were conducted for the purpose of shielding the offender from appearing before the ICC or were lacking in due process. Politically speaking, the judges will have to deal with a very sensitive issue, namely putting the legal system of the State in question on trial. It is almost certain that the State whose legal system is put under scrutiny will protest and may view the whole exercise as an unacceptable interference with its sovereignty. There is, however, a *lacunae* in the Rome Statute insofar as it does not address the situation in which an individual is properly prosecuted, but subsequently pardoned by the State. It would be recalled that Captain Kelly received a life sentence for the Mei Lei massacre in the Vietnam war, (See Note 44) but was pardoned within a brief spell. It would be of great interest to find out how the ICC would deal with a case the facts of which are comparable to that of Kelly's.

On 5th December 2007 the Prosecutor of the ICC delivered a report to the Security Council detailing the failure of the Sudanese Government to arrest and surrender to the ICC the two men suspected of committing crimes against humanity and war crimes in Darfur. The Prosecutor indicated that the failure is so profound that the ICC has been effectively prevented from any further dealings with the case. Both men were free to move within Sudan, noting in particular that one of them was released from custody allegedly for lack of evidence and the other was subjected to a brief investigation and contemporaneous with that he received a ministerial appointment (See Note 45).

In conclusion, the Prosecutor indicated that their possible involvement in the atrocities committed in Darfur would never be investigated domestically.

8. The Relationship Between the Security Council and the ICC

One of the important questions raised as a result of the crisis in Darfur concerns the relationship between the Security Council and the ICC. The Security Council has been seized of the matter right from the time when the crisis erupted. It will be recalled that, the Security Council adopted Resolution 1564 on 18th September 2004, creating an International Commission of Inquiry on Darfur to investigate violations of international humanitarian and human rights law. That Report was fully completed and submitted to the Security Council in January 2005. The findings of the Commission were so alarming in the sense that they accused the Government of Sudan and the Janjaweed of complicity in serious violations of international human rights and humanitarian law amounting to crimes under international law, and as these crimes were so widespread and systematic they might have constituted crimes against humanity. The Commission also accused rebel force from the JEM and SLA of complicity in serious violations of human rights and humanitarian law which might amount to war crimes.

Further Resolutions were also passed by the Security Council, dealing with the crisis in Sudan (See Note 46). Of special significance to the present enquiry is Resolution 1593 of 31 March 2005 which referred to the situation in Darfur to the ICC (See Note 47). The purpose of that Resolution was to allow the ICC to investigate and prosecute the alleged perpetrators of crimes in Darfur, including those identified by the International Commission of Enquiry.

We shall begin by analysing the Article in the Charter which deal with powers of the Security Council. Thus, Article 24(1) of the UN Charter confers upon the Security Council 'the primary responsibility for the maintenance of international peace and security'. And, paragraph (2) of the same Article makes express reference to the specific powers granted to the Security Council for the discharge of its duties in Chapters VI, VII, VIII and XII of the Charter. The framers of the Charter used the term 'primary responsibility' in Article 24 (1) as a way of characterizing the substantive and qualitative aspects of powers conferred upon the Security Council in the field of maintenance of peace as a whole (See Note 48). Examples of when such powers are exercised include, decisions binding upon Member States under Article 25, and ordering of sanctions against a delinquent State found guilty of an act of aggression or of a threat to the peace. As concerns the special powers listed in Chapters VI, VII, VIII and XII which are granted to the Security Council, they should not be viewed as conclusive (See Note 49). To suggest otherwise, would be inconsistent with the purposes of the UN Charter. Accordingly, Article 24(1) must therefore be seen as the basis of the comprehensive powers for the Security Council which exceeds those enumerated in the second paragraph of Article 24. This serves to fill in any potential gap within the powers of the Security Council (See Note 50). Pertinent to this, the question as to the meaning of the reference in Article 24(2) to the special powers of the Security Council under Chapters VI, VII, VIII and XII, has recently been considered within the framework of establishing the ICTY and the ICTR. Consideration was therefore given to the decisions based on Article 24, exclusively or jointly with Article 29 or directly on Article 29 alone. No conclusive decision had been reached in this respect, as the Security Council opted to act under Chapter VII as the issues fell within the ambit of Article 39 (See Note 51). The discussion may now conveniently proceed to Article 39 of the UN Charter. Under the terms of that provision, the Security Council is empowered to make a determination as to the existence of "any threat to the peace, breach of the peace or act of aggression". It may be noted at the outset that, the

Security Council has unfettered discretion in this respect. In other words, the Council is under no obligation to come up with a determination in each and every instance.

Narrowing down the focus to internal armed conflicts, does the Security Council have the power to deal with them, or is it powerless as such conflicts do not in themselves constitute breaches of international peace? On the basis of contemporary practice of the Security Council, the preferred position is the former. This is the case now, notwithstanding that the original concept of threat to the peace contained in Article 39 related only to inter-state conflicts. Within a short space of time from the inception of the Charter, the Security Council practice confirmed that development. For an illustration, as early as 1948 the Security Council regarded the Palestinian conflict as a threat to the peace and security; and likewise the situation in the Congo in 1961 was also seen as one threatening the peace although external involvement was negligible.

As might be expected the Security Council had, in the post Cold War period continued with its liberal policy of characterizing internal conflicts as threat to the peace (See Note 52). Thus, without any reluctance the Security Council declared the heavy tribal fighting in Somalia caused a threat to the peace (See Note 53). Likewise, it came to the same conclusion with regard to the heavy fighting within the various Federal Republics in the former Yugoslavia (See Note 54). In subsequent practice, the Security Council was consistent in its attitude, but on occasions alluded to the need for the of fighting to be on a considerable scale, spilling over to neighboring countries, or affecting the stability of the region, as such. The internal conflicts concerned were in Angola, Liberia, Burundi, Rwanda, Sierra Leone, Central African Republic, East Timor and Albania (See Note 55). What may be gleaned from this review is that any internal strife of sufficient magnitude can be designated by the Security Council as a threat to international peace and security.

The same conclusions can also be said with respect to violations of human rights and humanitarian law. Thus, as early as 1965, when Rhodesia unilaterally declared its independence (UDI) from the UK, the Security Council condemned the racist regime and determined that the continuation of the UDI constituted a threat to the peace, not least because of its massive violation of human rights (See Note 56). A more recent example in 1991, when the Security Council characterised the repression of the population of Northern Iraq Kurdistan as a breach of the peace (See Note 57). It is noteworthy that the SC did not in its endorsement practice allude to cross border involvement. With regard to Somalia, the determination of threat to international peace and security was based on "the magnitude of the human tragedy", (See Note 58) while the underlying reason for the determination with regard to Rwanda and Eastern Zaire was said to be, "the magnitude of the humanitarian crisis" (See Note 59).

A final example that may be cited is Security Council Resolution 687 (1991). In the aftermath of the Gulf war, when the Security Council determined that the situation amounted to a "threat to the peace" and ordered certain measures, including the demarcation of boundaries between Iraq and Kuwait. Although, that Resolution was full of anomalies, not least because it omitted any reference to the principles of international law regulating disputed boundary, its legality was not contested.

The jurisprudential question is whether this line of practice amounts to customary international law. In order for that to happen the practice in question must be accepted as law. The International Court of Justice seems to apply one of two alternative options; the first involves a presumption in favour of the existence of an *opinio juris* on the basis of evidence of general practice. The second is more rigorous as it requires positive evidence of acceptance. As to which option the Court would follow, that would depend largely on the discretion of the Court bearing in mind the nature of the issue involved. Thus, in the *Lotus Case*, (See Note 60) the Permanent Court of International Justice (PCIJ) adopted the second criterion as evidenced by the following: "States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of a duty to abstain would it be possible to speak of international custom." (See Note 61)

What emerges from the above is that, the PCIJ interpreted silence of States as lack of interest in the matter, rather than tacitly accepting the existence of the customary law rule in question. It is with justification that Professor Brownlie questioned the above statement, adding that the PCIJ had "misjudged the consequences of absence of protest and also the significance of fairly general abstention from prosecution by States other than the flag State" (See Note 62).

A question suggests itself here: are there any Charter provisions which fetter the discretion of the Security Council once Chapter VII is invoked? It seems to be the case that, the Security Council cannot act with total oblivion to two Charter provisions, namely, Articles 1(1) and 2(7). This is because the former imposes a general obligation on the Security Council to defer to 'principles of justice and of international law'; and the latter requires the Security Council not to intervene in matters which are essentially within the domestic jurisdiction of any Member States. It is submitted that, at the very least, the Security Council should always bare in mind these two provisions when determining what action to take, after a determination under Article 39. By the same token, the action taken must also be consistent with the principles of general international law. This requirement may be adhered to tacitly as happened in the case Resolution 731, when the Security Council simply attached the demands by the UK and USA in relation to the Lockerbie incident, without any reference to general international law. Failing that, the Resolution under which the Security Council

purports to take action could be condemned as being *ultra vires* the Charter.

It must be appreciated that the Security Council would not be able to function, if decisions adopted by it under Chapter VII were not legally binding upon all Members of the United Nations. In order to avoid any potential difficulties, Article 25 requires the Members' agreement to accept and carry out the decisions of the Security Council in accordance with the United Nations Charter. It has to be noted, however, that Article 25 comes with its own complications as it is capable of differing interpretations. For example, one school of thought maintains that, the phrase 'in accordance with the present Charter' relates to the manner in which the Security Council reaches its decisions (See Note 63). It follows therefore, where a particular decision is not based on a Charter provision, it should have no binding effect. The second school of thought, on the other hand, maintains that the phrase in question relates to the obligation undertaken by the Members to obey the decisions of the Security Council (See Note 64). It is submitted that the former interpretation is to be performed. This position gains more grounds, particularly when Article 25 is read in conjunction with Article 103 which stipulates that in the event of a conflict between obligations arising under Chapter VII and those arising from other treaties, the former prevails. A closer examination of Article 103 reveals that it presupposes the *intra vires* nature of decisions taken under Chapter VII and has nothing to do with the criteria for establishing its legality. In short, Article 103 is merely concerned with the prevalence of obligations arising under Chapter VII over all other obligations entered into by the Member States, particularly those arising from treaty regimes.

In relation to the situation in Darfur, it needs to be emphasised here that, the UN Security Council has been continuously seized of it since it first erupted. For example, the Council adopted Resolution 1564, (See Note 65) giving mandate to the International Commission of Inquiry on Darfur to investigate violations of international humanitarian and human rights law. The specific mandate given to the Commission was: (1) to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties; (2) to determine whether acts of genocide have been committed or not; and (3) to identify the perpetrators of such violations with a view to making accountable those responsible. The Commission submitted its Report to the Security Council in January 2005. Its findings may be summarised as follows:

- (1) The Sudanese Government and the Janjaweed were responsible for serious violations for international human rights and humanitarian law amounting to war crimes under international law.
- (2) Condemnation of the Sudanese Government and the Janjaweed for being responsible for indiscriminating attacks, killing of civilian population, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout the region of Darfur. The Commission concluded that these violations were carried out at such a large scale and systematic basis, that they could constitute crimes against humanity.
- (3) As concerns rebel forces (JEM and SLA) the Commission also found credible evidence establishing responsibility for the commission of serious violations of human rights and humanitarian law, amounting to war crimes. The Commission, however, noted that the evidence relating to these groups did not disclose widespread and systematic violations.

Significantly, the International Commission recommended that the Security Council should formally refer the situation in Darfur to the ICC rather than to an *ad hoc* tribunal. Several reasons were provided for that preference: Firstly, as the ICC is situated at the Hague, it would be far away from the perpetrators sphere of influence and it would therefore ensure the administration of justice to the maximum; secondly, as the perpetrators are men of influence, perhaps their removal to The Hague could only be achieved by the joint efforts of the Security Council and the ICC; thirdly, it is anticipated that the ICC will be more efficacious than any other tribunal owing to the fact that its procedures are already set; fourthly, the cosmopolitan nature of the judges at the ICC, makes it a more appropriate body for conducting a fair and equitable trial; and fifthly, as compared with the other *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda it is expected that the ICC will be more cost effective.

The efforts of the Security Council did not stop at Resolution 1593 (See Note 66) under which the situation in Darfur was referred to the ICC to deal with alleged perpetrators of crimes in Darfur, including those identified by the International Commission of Inquiry. The Security Council thereafter passed Resolution 1706 (See Note 67) explicitly reaffirming the elements of responsibility to protect as contained in the World Summit Outcome Document (2005). In that Resolution the Security Council determined again that the situation in Darfur constituted a threat to international peace and security. Moreover, it took a unanimous decision to deploy more than 20,000 peace-keeping forces to Darfur with a Chapter VII mandate, allowing for the use of force for civilians protection.

Resolution 1706 caused a storm of controversy among Sudanese leadership, as they accused the UN of helping Western endeavour to re-colonize Sudan. The Sudan Government asserted further that the presence of an international force in Darfur would attract terrorist in the region (See Note 68). Moreover, the Sudanese President Omar al-Bashir has invariably been insisting that the scale of the Darfur conflict has been exaggerated (See Note 69).

It is against this background that it is proposed to discuss some of the main issues relating to the relationship between

the Security Council and the ICC. It stands reason that, as a matter of legal necessity, the latter must at the very least work in such a way that must not be wide off the mark from the primary responsibility of the Security Council for the maintenance of international peace and security.

With this in mind, three fields of operation need to be examined. The first is when the Security Council refers a situation to the ICC under Article 13(b) of the Rome Statute. This referral has in fact taken place for the first time ever in relation to the situation in Darfur. Thus, on 31 March 2005, the Security Council adopted unanimously Resolution 1593 (2005) after determining that the situation in Sudan continues to constitute a threat to international peace and security. It is significant that in adopting its Resolution, the Security Council relied heavily on the report of the International Commission of Inquiry on Darfur. Pertinent to this, the determination made by the Security Council was exclusively based on that report, in spite of the fact there were other extensive reports readily available by other credible institutions such as Human Rights Watch (See Note 70).

The reason for this preference perhaps lies in the fact that the Report of the International Commission of Inquiry on Darfur was ordered by the Security Council under Chapter VII of the Charter (See Note 71). It was odd that although, Resolution 1593 referred the situation in Darfur, to the Prosecutor of the ICC to backdate his investigation to 21 July 2002, yet the Commission focused only on incidents which took place in the period from February 2003 to January 2005. This suggests that a period of seven months (July 2002 to February 2003) had not particularly been subjected to rigorous scrutiny by the Commission. Be that as it may, the Resolution demanded that all the disputing parties in Darfur, including the Sudanese Government, "shall co-operate fully with, and provide any necessary assistance to the Court and the Prosecutor pursuant to the Resolution". Thus, what is required from all concerned was full co-operation with the Prosecutor, and the provision of all necessary assistance to him. Seeing that the Resolution frankly acknowledges that non-members of the Rome Statute are under no obligation to co-operate, it is a bit odd to impose that obligation on Sudan as it is not a party to the Rome Statute.

The second area concerning the relationship between the ICC and the UN Security Council is covered by Article 16 of the Statute. Under that provision, the Security Council could ask the Prosecutor of the ICC to defer any particular investigation for a period of twelve months, through a Resolution adopted under Chapter VII of the UN Charter. An important aspect of this form of deferral is that it is renewable. This means that, if the Security Council is taking action under Chapter VII, the Prosecutor of the ICC must defer investigating crimes, even though they happen to be within the jurisdiction of the ICC, for as long as measures under Chapter VII are being pursued.

In this respect, the Security Council stated in the preamble of Resolution 1593 as follows: "Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect..."

What is suggested here is two fold: Firstly, the Security Council could at any stage exercise its powers by asking the ICC for a deferral of the Darfur case for at least one calendar year. Secondly, albeit implicitly the Security Council was not contemplating to invoke its aforesaid powers of deferral.

The third area in which the relationship between the Security Council and the ICC needs to be looked at, concerns the crime of aggression. Although, Article 5 of the Statute of Rome stipulates that the ICC has jurisdiction over the crime of aggression, it cannot exercise that jurisdiction until the offence in question is defined. And, apparently this definition must be consistent with the relevant provisions of the UN Charter. The need for the Security Council and the ICC to work harmoniously together arises from the fact that it is the Security Council which determines, under Article 39 of the Charter, whether an act of aggression has taken place. Thus, in future if the Prosecutor of the ICC is investigating whether a given act amounts to aggression, he must ensure that what he is doing is not inconsistent with what the Security Council is doing in that respect. In short, the relationship between the Security Council's exercise of its powers under Chapter VII and the ICC exercise of jurisdiction over the crime of aggression is most crucial. The key point now is that, the debate is still ongoing in an attempt to find a definition of aggression and the possibility of an appropriate amendment of the Rome Statute. The crime of aggression in the context of the Darfur investigation is of academic interest only, not least because the ICC has as yet to acquire jurisdiction over it.

9. Conclusion

Some see the adoption of Resolution 1593 by the Security Council as a stand against impunity and an expression of confidence in the ICC to handle complex cases. On the face of it, the Security Council can be seen as sending a message that there is no one who can get away without retribution for grave crimes. Moreover, the referral of the situation in Darfur to the ICC can be viewed as a means for enhancing the Council's conflict prevention and resolution capabilities. This is all very well, but Sudan, the target State, is not a party to the Rome Statute, and without its cooperation the implementation of the Resolution becomes fraught with procedural impediments and practical difficulties. This is independently of whether the Sudan is under legal obligation or otherwise to comply with the referral Resolution taken under Chapter VII of the Charter. As against that, the Sudanese government and its supporters see the adoption of the

Resolution as an exploitation of the Crisis in Darfur as part of domination of weak countries by the big powers.

The jurisdiction of the ICC centres around the contentious issues of *unwillingness* and *inability* of the State to deal with, to investigate and prosecute an individual for crimes listed in the Statute. *Unwillingness* in a particular case may be established when the ICC concludes that the national proceedings were or are being conducted for the purpose of shielding the perpetrator, or whether the proceedings were a sham. *Inability* may be illustrated by the total or partial collapse of the State, or its legal system.

As concerns the crimes in Darfur, there is a general belief among human rights organisations that attempts of the Sudanese government to present those guilty of committing atrocities in Darfur are bogus. The Sudanese government is strongly opposed to that.

What may be gleaned from the debate on the concepts of '*unwillingness* and *unable*' is that, complementarity is not so simple when it comes to implementation. One has to consider difficulties which may arise when considering the subjective versus the objective criterion to be applied by the ICC when no proceedings are commenced by the national court. Moreover, it is not even certain whether complementarity with all its attending exceptions and circumstances apply to cases of referral from the Security Council.

The case of Darfur raises serious issues of a possible conflict between the principle of sovereignty of the State and the policy behind the administration of criminal justice at an international level.

The issue of establishing the jurisdiction of the ICC (or admissibility of a case before the ICC as known in the Rome Statute) in relation to Darfur is not safe from contradictions. First of all, the Prosecutor has gathered his evidence from witnesses and organisations based in 17 countries outside Sudan. The justification for that is understandable but it is question begging whether a conviction based on that sort of evidence can be safe. Moreover, the issue of identifying only two individuals for prosecution at the ICC (now three) makes the selection procedure questionable, and also raises issues with regard to the randomness of the choice and the objective to be achieved.

Leaving that aside, the Prosecutor of the ICC should continue to retain complete objectivity about bringing the two Sudanese suspects for trial at The Hague. In so doing, he is expected to be conscious about the existence of parallel non-judicial means of settling the dispute and ending the fighting. After all, the Rome Statute empowers him to discontinue a case at any stage in the proceedings. He is empowered to do that, because a trial at The Hague might not be in the interest of the peace of the country concerned at large.

Furthermore, perhaps the time may have come for him to consider prosecuting the accused inside Sudan by a specially constituted criminal court which should be subject to international supervision. The presence of the international element will ensure impartiality as evidenced by *the Lockerbie* trial.

Finally, it must be conceded that the international community has different views and no common position with regard to the matter.

In this respect, neither the Arab League nor the African Union seem to offer any support for the prospect of holding the trial at the ICC. As to the Security Council, the support for such trials comes from the United States, the United Kingdom and France. The question is bagged whether justice will be seen to be done in such circumstances.

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Note 66. UN Security Council Resolution 1593 (13.03.2005) UN DOC. S/RES/ 1593.

Note 67. UN Security Council Resolution 1706 (31.08.2006) UN DOC. S/RES/1706.

Note 68. <http://www.vuanews.com/english2007-03-05>.

Note 69. <http://www.vonews.com/english/2007-03-05>.

Note 70. Human Rights Watch *supra* note 32.

Note 71. UN Security Council Resolution 1564 (18.09.2004) UN DOC. S/RES/1564.



Coordination and Perfection between Independent Director and Supervisor's Council

Yonghui You

College of Humanities and Law, Tianjin Polytechnic University

Tianjin 300384, China

Tel: 86-135-0119-6460 E-mail: yoyonghui79@126.com

Abstract

Inside supervision exists in the name only and is severe lack in Chinese Listed Company. The authority of supervisors' council is strengthened in the new Company Law and definitely regulate that the Listed Company should introduce independent director system. The two are different corporation inside supervision modes in unitary and binary Corporate Governance Structure. If introduce the two of them in one country's corporate law, supervisors' council will inevitably conflict with independent director in legal status and function design and etc. The two systems have different characters in exercising supervisory power, they are also complementary. This article tries to explain the realistic predicament of supervisors' council system and independent director system and to coordinate their relationship, which will benefit further to perfect inside supervision system of our Chinese corporation.

Keywords: Independent director, Supervisors' council, Inside supervise, Coordinate, Perfect

The new Company Law which is implemented on January 1, 2006 definitely provide that listed company should establish independent director, which will benefit to perfect our Corporate Governance Structure, protect and maximize investors and corporations' interest. But there is much discordance between the independent director system which originate from unitary Corporate Governance Structure and current Corporate Governance Structure in China. The discordance of the two systems must be changed. But the new Company Law simply provided that independent directors should be established in listed companies and specific should be procedures specified by the State Council. So when designing the new system we must think how to realize seamless access of the independent director's supervision function into current Corporate Governance Structure in China, coordinate the relationship between independent director and supervisor's council, strengthen their supervision function and avoid the embarrassment of their function conflict or no one to be responsible for the supervision. Otherwise, listed companies adopt both supervisory board system and independent director system which forms a parallel system of internal supervision mechanism and only increase supervision cost and reduce supervision efficiency.

1. The conflict between independent director system and supervisors' council system

1.1 There is great difference in the legal status of independent director and of supervisors' council.

The independent director system originated from America. The corporate governance structure of America is unitary and its corporate organizational includes only shareholder meeting and board of directors who exercises supervision function, and no board of supervisors which exercises specially supervision function. Because of insider control increasingly fierce, board of directors' supervision function has been weakened. And just because of the fact of insider control, America set up independent director system. Insider control refers to, on the modern corporation whose ownership is separated from management right, senior managers master the corporate control in fact or legally, and their interests will be reflected abundantly in corporate strategic decision. Public company's equity is very dispersed in America, and no one shareholder can control a company effectively, which leads to insider control at last. And independent director system is set up for avoiding this by board of directors (internal organization of the corporation) proper externalizing, and external independent director introduced will supervise and restrict to insiders. In the unitary corporate governance structure, independent director who hasn't higher authorities than board of directors, is equal director and attend board of directors and say no for supervising insider director.

Supervisors' council system originated from Germany. The German corporate governance structure is binary and vertical structure, which is composed of general meeting of shareholders, supervisors' council and board of director. Shareholders and workers representatives elect to generate supervisors, and Supervisors' council appoints members of board of director and supervises it to perform business. The most important character of German supervisors' council system is that supervisors' council and board of director aren't parallel organs, but board of director is supervisors' council's inferior organs, which is an excellent creation of company system. Commercial Law of Japan accepted

Germany mode from enacted in 1899, and corporate governance of Japan took binary structure as Germany's. According to Company Law of Japan, the ownership is separated from management right, shareholder meeting is the highest authority, board of director and supervisor are parallel organs and all belonging to shareholder meeting, which is different from German vertical structure in which supervisors' council leads board of director, and different from England and America unitary structure in which board of director has function of execution and supervision.

In a word, the Legal Policy target which the two systems pursue is the same and homogeneity, but their Law Technology structure is different. In corporate governance structure of England and America, general meeting of shareholders elects board of director, board of director elects and dismisses managers. In order to supervise and restrict managers, the measure is to insure directors' (especially independent directors') externality and independent identity to set up a higher strategy organ than manager. And doing specific labor division in the organ, electing persons who are wisdom, giving them rich salary and definite liability, and supervising managers by nomination mechanism beforehand, compensation mechanism and audit mechanism. The corporate governance character in the civil law, however, is binary structure. Supervisor's council and board of director are equal and their function is respectively business supervision and service execution, both of them obey general meeting of shareholders (at least in the form). Endowing supervisor's council with a strong position ensures it to perform its supervision function to business and finance without pinning from board of director and manager tier. Germany is a typical.

1.2 The area of authority of independent director and that of supervisor's council exist cross and overlap.

Independent director in common law and supervisor's council in civil law are two different modes of company interior surveillance. The former is interior supervising of the board of director, the latter is supervision of special supervisory organs exterior the board of director. The objective of all the two modes is to reduce cost of corporate governance and solve the problem of corporate governance to ensure to realize and maximize interest of investors and corporate. The pursuing goal's consistency determines the similar and overlap in their area of authority is inevitable.

2. Agree with independent director system and supervisor's council system

Independent director system and supervisor's council system are two interior supervising systems in different corporate governance structure and each of them has merits and demerits in practice. So it is incorrect to undue emphasis any of the systems. In fact, with the enhancement of the international tendency of capital market, countries are drawing lesson of success from other supervising modes, which show the two supervision systems have joint supervising goal and are complementary, and can draw merits from each other to reform self- system.

2.1 The two systems have joint goal.

Though independent director system and supervisor's council system are different modes of listed company interior supervising, their goals are all to supervise managers' behavior, and to ensure investors' interest not being impaired because of managers abusing power, and to reduce corporate governance cost, and also to give consideration to stakeholders' interest. The independent director is a necessary complement to our current company interior supervising system, and can change present situation that supervisor's council exists in the name only.

2.2 Two of them have very strong complementary.

Board of director is the highest power authorities of decision making, however, independent director is an important part of decision level, and they participate in the whole process of making important policy including plan in advance important decision, determination and issue at last and etc. So the independent director's supervision function has the character of close combination with supervising in advance, inside supervising and supervising of the decision making. In contrast, supervisor's council as the special supervisory organ interior company, learns the specific conditions about company daily operating and can obtain company's the most direct and authentic information and can understand timely manager tier's execution to the decision of general meeting of shareholders and board of director. Independent director participate in the whole process of decision, but its daily working time is not able to full guarantee, and its supervising to execution of decision and effect evaluation also can not be in time and accurate. After company important decision made, supervisor's council can began daily tracking supervision. So the character of supervisor's council supervising is supervision afterwards, outside supervision and supervision without participation in decision making, which can remedy the defect of independent director system. The supervision afterwards of supervisor's council includes all kinds of functions such as inspection, implementation, evaluation, feedback, and etc, which is an important complement to the supervision function of independent director, and is also an important basis for general meeting of shareholders to evaluate the decision level and management.

2.3 The combination of independent director system and supervisor's council system is beneficial to perfect Internal Supervision System of Companies.

On the one hand, our members of supervisor's council used to come from union chairmen and worker representatives, which leads to the truth of inequality between independent director and supervisor's council, and brings difficulty to the

two organs' communication. The combination of independent director system and supervisor's council system makes communication between independent director (as members of board of director) and supervisor's council and has changed their communication way. On the other hand, supervisor's council has the right to supervise work of independent directors as members of board of director. In point of the independent director's investigation to supervisor's council daily work and its professional ability, independent director also can supervise supervisor's council, so as to push supervisor's council to work fairly and effectively.

3. The coordination and improvement perfection between independent director system and supervisor's council system

3.1 The coordination between independent director and supervisor's council

3.1.1 The function orientation between them

Defining purview between independent director and supervisor's council can not deviate from their role orientation. First, the nature of independent director's supervision right is different from that of board of supervisor. In binary corporate governance structure, independent director is also director (belongs to company's service execution organ in nature), and its function can not transcend board of director's authority. Their existence, on the one hand, makes company decision making more democratic and scientific; on the other hand, apart from independent director's supervision function can strengthen board of director's supervision to managers and mutual restriction internal board of director. The role of supervisor's council in nature is to supervise work of executive organ of corporate business. Second, defining function of independent director and supervisor's council, the authority of independent director is mainly to supervise whether all the important decision what board of director has done is impartial and scientific, however, the authority of supervisor's council is mainly to supervise the legitimacy of corporate finance and business action of directors and managers.

3.1.2 The coordination of two systems

As mentioned above, the character of independent director's supervision is close combination with supervision in advance, internal supervision and supervision of decision making, however, the character of supervisor's council supervision is supervision afterwards, outside supervision and supervision without participating in decision making. The character of the two supervision modes is opposite, which constructs for us a tridimensional supervision system in corporate governance structure. If constructing a coordination system between them, we can change their function overlap into multi-line defense of supervision and improve supervision effect. The one, we should construct sharing system of information and resources between independent director and supervisor's council, and hold regularly conferences which can be participated in only independent directors and supervisors to exchange information, circulate situation with each other. Independent director may review and use financial auditing report of supervisor's council, and supervisor's council will hear Independent director's suggestion, when it exercises its supervision function. The two, negotiation system between independent director and supervisor's council should be constructed. They can negotiate with each other about some special problems, and suggest the other party to take relevant supervision measures to strengthen supervision effect. The three, independent director and supervisor's council can joint to investigate special problems and form composition forces of supervision.

In a word, we must coordinate the two systems, define their function according to their different characters on supervision function, and make them having definitely function division and positive interaction to create a Chinese-featured company supervision mode in which independent director system can do harmonious coexistence with supervisor's council system.

3.2 The perfection of independent director and supervisor's council

3.2.1 The perfection of supervisor's council

A. Change supervisory board members' structure and quality and removal mechanism to improve its supervision efficiency and strength. One of the important reasons that our current supervisory board can not exert its function effectively is supervisory board members' structure and quality and removal mechanism exist serious problems. According to the questionnaire investigation about Listed Company Governance which Shanghai Stock Exchange has done in 1999, there are there obvious characters about member structure of Listed Company supervisor's council: the one, most of members of supervisor's council are employee supervisors. 73.4 percent effective sample companies' chairmen of supervisor's council are promoted from internal companies and the appointment of most of vice chairmen of supervisor's council and other supervisors is so, too. The two, supervisors are mostly come from political cadres and model workers, and their salary and position is basically decided by management which leads to supervisors to be not able to keep their independence. The three, supervisors' educational background and professional knowledge are lower obviously than directors'. More than half of chairmen, vice chairmen and supervisors hold junior college, however, most of directors hold undergraduate which leads to supervisor's council being in disadvantage position and can not supervise board of director effectively. While other researchers think that our supervisor's council has defects below:

supervisors are non-independent and scarce capacity; the legal provisions about this have defectiveness. Obviously, we can not ask supervisor's council like that to perform its duty effectively. In order to change this present condition, we must reform supervisor's council member structure. The one, introducing outside supervisors which can be appointed directly by Listed Company and can also be delegated by Accounting Firm or Auditing Firm who has no business connection or finance connection with The Listed Company. The two, electing persons with high professional quality as members of supervisor's council, such as experts, scholars, advanced professional persons of accounting and finance with professional certificates and professional dedication. The concrete methods to elect supervisors can study ways to elect independent directors. The three, outside supervisors must also have independence, and the criterion to judge the independence can refer to that of independent director.

B. Giving supervisor's council all kinds of specific procedural rights, such as inquiry right, veto power and etc, to ensure certainty of supervision. Another important reason that our current supervisor's council can not exert its function effectively is that we have not an effective procedure to ensure certainty of supervision. For example, there are regulations about supervisory board's right to supervise company finance and directors' deed in our Company Law, but there are no specific measures to ensure the right, which leads to supervisor's council no effective measures to correct illegal behaviors when they find that. So we should give supervisor's council all kinds of procedural rights by legislation in order to assure supervisory board's substantive rights realized and restrict effectively internal rights in Corporate Governance Structure.

C. Giving supervisors definite responsibility and improving supervisors' salary to assure their diligence. The responsibility is restricting measure, however, the salary is incentive measure, and ideal mode to assure supervisors' diligence is to simultaneous use the two measures. The incentive and restricting system should be established in which risk and income are symmetric. Because independent supervisors' income comes from allowance, so there are two problems for attaching incentive effect: one is how much allowance should be given. Supervisors undertake a great deal of responsibility of supervising and decision making, and so the responsibility and the salary will be asymmetric if the allowance is too small, which will effect their enthusiasm to take part in company business; if the allowance is too much, independent supervisor will too care their allowance to keep their independence. And so, proper allowance is a problem worth studying. According to current reform thinking, we should think whether introducing stock option system and increasing an article about independent supervisor in Company Law, so as to independent supervisor can transfer freely their stock when they resign from their post. Two is who decide the standard of reward. We think independent director or shareholders who are not appointed as directors can evaluate independent supervisors' work and decide their reward. Independent supervisors should responsible for their negligence such as breaking articles of corporation, administrative regulations and law by public opinion supervision, administrative punishment and legal penalty. The author thinks this is also suitable for general directors.

3.2.2 The perfect of independent director

We achieved some achievement on practicing independent director system in the past few years. But there is much deficiency in our legislation and specific operation for many reasons, which all need further perfect. The author will discuss mainly some points as follow.

A. Strengthen legislation about independent director. Because independent director's responsibility isn't definite in our current law, which makes company lack supervision, and so three aspects as follow should be thought in the future legislation: the one, proportion of independent director in board of directors and right, obligation, responsibility and function of independent director should be nailed down in correlation laws; the two, making further explicit stipulation of independent director's qualifications, producing procedure, their allowance and etc in correlation laws and making principle specification of independent director's fault liability; the three, making independent director's responsibility more definite in legislation.

B. Establishing professional Human Resources Market of independent director. Now independent director is hired or fired by Listed Company in China, their allowance is given also by Listed Company. And so the practice of independent director's supervision function will be restricted by ownership structure and outside supervision system. In order to assure independent director to work independently, we require establishing the self-regulative professional organization such as Independent Director Association and Independent Director Firm and etc. On the one hand, independent directors can only come from the organization to guarantee the appointment of independent director; on the other hand, evaluation and assessment independent director regularly. The independent director who is unqualified or illegal will be denounced publicly and probably be canceled the qualification. If independent director's work mistake leads to shareholders' loss, he will be hold joint liability in law.

C. Restrict independent director to do part-time job to insure the practice of their function. Chinese Listed Company puts their fame and prestige and social influence in primary position when appointing independent director, and subordinate whether they play their role in company management and operation and neglect independent director's rational structure and their working time. In order to assure independent director to serve diligently, they are not suitable

to part-time excessively, and 2 to 3 companies suitable in general.

D. Establish liability system of independent director, in which their liability, power and benefits are unified. On the one hand, independent director should undertake corresponding liability for their positive action and negative action within their function and power. Compared to foreign codes, complete Responsibility Confirmation Rule for independent director has not been formed in China, the responsibility consciousness of most of independent directors is not strong. Aiming at this fact, we can draw advanced experiences from other countries and impose strict restriction upon legal liability of independent director to perfect corporation governance and protect minority shareholder's rights. On the other hand, we can establish Liability Insurance for Independent Directors. Independent director faces more risk than other directors and managers because of its special position. When independent director performs its duty, its personal experience, judgment and ability deficiencies, what it knows about company is inadequacy, and there is asymmetric at acquisition company information aspects, which all can cause fault. Establishing Liability Insurance for Independent Directors can reduce furthest risk of the position, descend career issues of independent director and make their decision more effective.

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Primetime Patriotism: News Media and the Securitization of Iraq

Ciaran O'Reilly

School of Politics and International Relations, University College Dublin

Room G310, Newman Building, UCD, Belfield, Dublin 4, Ireland

Tel: 35-38-7276-1567 E-mail: ciaranoreally@gmail.com

Abstract

Predicated on a revision of the particular criteria for success, this article contends that the Iraq War was an example of successful securitization. It examines the role of the US news media in supporting the government's push for war in the context of heightened national feeling and patriotism after the events of 9/11.

Keywords: Securitization, Iraq, Critical Mass, News Media, Hyper-patriotism

1. Introduction

This paper aims to re-examine Buzan, Wæver and De Wilde's (1998) theory of securitization in light of the US war in Iraq. The processes which led to Iraq's status as a security threat are complex, and ones which Buzan et al's concept of securitization struggles to comprehensively explain. The 9/11 attacks produced an inordinate level of national pride, sensitivity and public outrage within the United States which culminated in an atmosphere of *hyper-patriotism*. The fact that the media was both victim and contributor to this hyper-patriotism is integral to understanding its subsequent widespread support of the Bush administration's push for military action in Iraq. Therefore I hope to elaborate on Buzan et al's theory of securitization by looking at the role of the media as a functional actor. Further, I will strengthen the role of the audience beyond the implicit passivity of Buzan et al and consider the various interactions between public opinion, media and political elites which this raises. Incorporating much of Balzacq's (2005) ideas regarding securitization is key here, particularly with regard to his discussion of the congruent factors of audience and context. Balzacq recognizes much of the same shortcomings of Buzan et al, reflecting my central ideas in part but differing in others. My central argument is that while Buzan et al's theory of securitization remains core and fundamental, the exceptional circumstances leading to the war in Iraq have revealed new aspects of the process which require further study. In particular: the part of patriotism in allowing easier securitization of national security issues, the role of the media in contributing to this situation by becoming a temporary government mouthpiece in a time of perceived existential threat and the criteria of successful securitization. In regard to the latter, as opposed to popular opinion, this paper contends that the Iraq war was successfully securitized by convincing enough of the right people of its imminence as a threat, a concept I term *critical mass* and one on which I will elaborate first.

2. Buzan to Baghdad

Much has been said of the war in Iraq since it began in March 2003. While most seem to now accept that the reasons for the war were at best uninformed, there remain those of the US administration who remain adamant the cause was just and the reasons sound. These seem to be the kind of old guard that only retires in the grave. The actual securitization of Iraq has been put forward by most as a failure. A major part of this argument was the eventual US unilateral action, with the support of the UK and a few other nations, having failed to convince the majority of the international community and bypassing UN support and consent. The majority of the world's governments and their citizens remained highly skeptical of both the motives and claims of the Bush administration for the military action, with many claiming the real reasons ranged from so-called 'unfinished business' (much of George Bush Snr's staff redeemed their roles within his son's administration), to a grab for resources in the oil-rich country. Of course when it came to light that Iraq contained no Weapons of Mass Destruction (WMD) and thus did not represent an imminent or existential threat, the most fundamental aspect of any security threat and the subsequent reason for war was not produced. The Bush administration has since gone on to blame bad intelligence, and indicated the brutality of Saddam Hussein's regime as being as an equally just cause for war. This of course was not the stated motive before the conflict, and thus can be seen as a fallback position. This position itself is fairly untenable on any moral grounds, given the US support of numerous undemocratic regimes around the world. For example in the year before the Iraq war began, US political and economic support remained strong for Algeria – a regime documented by a leading human rights organization as unresponsive to and potentially directly responsible for numerous violations of basic human rights. Amnesty International noted that in Algeria in 2002 'the overwhelming problem of impunity for human rights violations continued to block the search for truth and justice in relation to the thousands of reports of torture, "disappearances" and killings committed by the

security forces, state-armed militias and armed groups since 1992' (Amnesty International 2003). With hindsight, many who initially supported the war have since expressed regret and shame. What must not be forgotten however is that the war did go ahead, without military confrontation or political dissent strong enough to derail it. This paper will contend that the securitization of Iraq was in fact a successful one, based on a re-evaluation of the criteria of successfully securitization. Broadening out the examination to the entire process leading to the war, I hope to illustrate the pivotal role of news media, itself an area left ignored and underestimated by the securitization literature.

According to Buzan et al (1998), a security threat must be existential in nature in order to legitimize the use of special powers and military action, 'traditionally, by saying "security," a state representative declares an emergency condition, thus claiming the right to use whatever means are necessary to block a threatening development' (Wæver cited in Buzan et al, 1998: 21). What is the threat and what is its target have usually been states and their respective nations, considered to be part of the 'middle scale of limited collectivities' (Buzan et al, 1998). States exist largely within identity politics, strengthening their sense of self-perception and international role through contrasts with others, particularly perceived enemies. The campaign for supporting the war in Iraq was peppered with references to 'good' and 'evil' and most memorably, George Bush's 'crusade' speech (Der Derian 2002). Such framing of the issue helps to narrow the gap between citizen and state, identifying the security interests of the political elite with that of the country's citizens. This approach was particularly salient in the aftermath of 9/11 as will be discussed throughout. It was a concerted 'hijacking' of national feeling and fostering of hyper-patriotism, driven through the mainstream media, which played upon the 9/11 attacks and created an audience far more susceptible to securitization rhetoric. It is essential therefore to examine the process of securitization itself and the relevant actors.

2.1 Critical Mass

Securitization is a speech-act, a process which performs while being said, i.e. an issue can become a security threat by virtue of having been described as such. Obviously, who makes such a claim and to whom is fundamental to this process. Buzan et al (1998) look not at whether genuine security risks exist but the process whereby something or someone is represented as such. The criteria which determine a securitizing move as being successful are fairly untreated by Buzan et al, other than a conclusion which speaks vaguely about the recognition of broken rules. I wish to elaborate further on this aspect to securitization with reference to Iraq, because it is vital to properly consider such a process without setting out how and why it achieves success. To facilitate this I have termed a concept of *critical mass*, which is the concept that securitization has been successful, i.e. critical mass has been achieved, when the securitizing actor has convinced *enough of the right people* that someone or something constitutes a legitimate security threat. There are two pillars to this process, namely *volume* and *caliber*. The first is simply the idea that a particular amount of people, usually the majority of the target group, must be convinced of the threat. This seems clear, given that convincing only a handful of US Senators or a small minority of the US public would almost certainly not have resulted in a war. The latter pertains to the appropriateness and relevance of the particular audience. It was essential above all else to convince the US Senate and American public of the threat Iraq posed rather than, for example, the people of Ireland. This is particularly so with regard to small or developing countries with little to offer in terms of military or political leverage. Each pillar is dependent on the specifics of any situation, but should be easily recognizable. The domestic/international dynamic of this concept is particularly relevant to the Iraq War. Winning the moral support of the American public and the formal support of a Senate vote went hand-in-hand, and arguably influenced each other in supporting the war. Support for the conflict outside the US was largely non-existent, though as we shall see later the US media's role in misrepresenting the international community's opinion was pivotal. I believe that Iraq was successfully securitized if one takes these criteria into consideration and accepts that while the majority of the international community was not convinced, this may not have been necessarily essential.

2.2 Formalization

The impetus to push support for the war through formal channels both in the US and at the UN may have seemed laborious and time-consuming given the malleable nature of public feeling. However this *formalization* is another key aspect of the critical mass concept, and one which gave the Bush administration four key advantages. First, they were seen as further differentiating themselves from the enemy, most notably Al-Qaeda, for respecting due process and the basics of democracy. Second, the inclusion of both parties via the Senate vote while technically necessary in order to wage war created an impression of political consensus and agreement on the issue for the wide public and media. Third, they were seen as having respect for the opinion and authority of the international community. Although soon after enough foreign states were in support of the US to circumvent UN procedure which was seen by many as an arrogant and hasty move. Last and most importantly, such formalization significantly resists challenges or charges of illegal action and/or war crimes in the future, should the military action become unpopular. This could come about either domestically or internationally based on new evidence, a perception of instability and ineptitude or a failure to achieve stated goals. Each of these four can be thought of in a broader context as elements of the securitization process which should be incorporated and considered when examining future empirical evidence.

3. Representation and Perception

The Bush administration did enough of a job securitizing Iraq as to gain support from a significant majority of the US public, the US Senate and several other states including most importantly the United Kingdom. The entire process was also made easier by the environment or 'context' as Balzacq would describe it (Balzacq 2005). Specifically, I believe there is a direct correlation between levels of nationalism and patriotism and the ease by which a securitizing actor can successfully legitimize something or someone as a threat to national security. With this mind, I will turn to how the government achieved this, given the level of international opposition, with specific reference to the role played by both the intelligence community and mainstream US media, in the context of a national identity heavily influenced by the events of 9/11.

3.1 Audience and context

Buzan et al's (1998) concept of security is somewhat narrow in its conception of the role of the referent object, i.e. the potential victim of the suggested threat. It fails to acknowledge that the referent object and the audience are often one and the same. The American public did not passively accept the words of the government simply because of the social status of the speakers or the passion of their delivery. The role of 'facilitating conditions' and 'functional actors' (Buzan et al, 1998) is understated and deserves far more consideration. Balzacq (2005) moves far more in this direction as he discusses the congruent forces of 'political agency, audience and context.' He takes Buzan et al as a platform from which he explores an area similar to my own; acknowledging the fundamental importance of Buzan et al's work while elaborating on its short-comings in order to ultimately strengthen the theory. Buzan et al's concept of intersubjectivity goes some way in approaching this process of multi-polar influence, but doesn't go far enough. Instead Balzacq's idea of the congruent forces of political agency, audience and context seem more appropriate in their realistic appraisal of the forces at work in securitization. Balzacq goes beyond a simple direct casual link between the securitizing efforts of the actor and the acceptance of the audience, which is often the referent object. Importantly however, as with Buzan et al, the specific role of the media is also understated. While it is appropriate to speak in theoretical terms of actors and context, if one is to understand real securitizing moves one must recognize the role of major actors such as the media. Given the part media plays in presenting government policy, its image as an unbiased representative of truth and its subsequent effect on public opinion, it is essential to examine its role in the process. There were many contributing factors beyond the media itself, most notably the national feeling of hyper-patriotism post-9/11, of which it was both victim and contributor. The increasingly competitive pressure to entertain and sustain high ratings within modern news media is also very pertinent. In particular the notion of trying to 'outfox Fox' (Cohen 2003) in being seen to be most patriotic is a salient phenomenon in this context.

In Buzan et al's terms I would describe the media as a major 'functional actor' whose role in Iraq demonstrates the kind of influence news media can have in the process of securitization. Equally, a 'facilitating condition' would be the hyper-patriotism prevalent throughout the country, which greatly increased the ease with which a military action, particularly one linked with 9/11, could be accepted and supported. Thus the 'context' as Balzacq (2005) describes it is an essential aspect to both the success of a securitizing move and the ways in which such a move is framed in order to take advantage of the zeitgeist. A subsidiary aspect remains security intelligence, and while its role was paramount with regard to Iraq war, I contend that it remains a smaller aspect of the authority and expert status of the main securitizing actors. By which I mean that security services provide the intelligence information on which policy is based. If achieved correctly this remains a relatively secretive and muted operation, with limited direct influence on the media or public opinion. Thus while I will discuss their role with reference to Iraq, the security services will be left aside as an understated but not essentially sui generis aspect of the securitization process itself, but something that perhaps requires further examination elsewhere.

3.2 Interpretation and reaction

While I accept Balzacq's notion of an external context with which a use must be aligned, I am reluctant to frame such a thought in concrete notions of a 'real' security threat, "In its attempts to follow a more radical approach to security problems wherein threats are institutional, that is, mere products of communicative relations between agents, the CS [Copenhagen School] has neglected the importance of 'external or brute threats', that is, threats that do not depend on language mediation to be what they are – hazards for human life," (Balzacq 2005: 181).

While some dangers exist in reality regardless of whether or not their existence is recognized, I would maintain that a speech-act remains in force in the sense of how such a threat is presented to an audience. Unless one stands by the shore waiting for rockets to come flying by, one gleans the existence of a threat real or perceived through the media. Depending on how a threat is framed, even if its results or effects remain unaffected, the response by the audience is still based on the speech-act of journalistic presentation. For example, if an American airplane was shot down by Russian forces and one network were to report the incident as an accident while another claimed it as a terrorist attack, the subsequent response by the viewers of each network would be vastly different. The real nature or motive of the attack has not been affected and of course cannot be, but the subsequent perception, response and reaction of the

audience are based on such journalistic presentation. Indeed the study done in 2003 on misperceptions and the Iraq war by the Program on International Policy Attitudes (PIPA) and Knowledge Networks would seem to support my thesis. External context remains paramount because threats will always exist regardless of acknowledgment or acceptance, but the response and reaction to the threat by the referent object is nonetheless shaped by a speech-act, i.e. the framing of the threat by news media, the source from which the referent object learns of the threat's existence. In the PIPA/Knowledge Networks study an element of the methodology reveals a worldwide majority was opposed to the Iraq war (PIPA & Knowledge Networks 2003). Could it be based on the variance in how Iraq was presented as a threat within US media compared to international news media sources? Can intelligence be to blame when all major international security services were under the same illusion as to the presence of WMD in Iraq?

"Of course, by virtue of 'good reasons' (i.e. the claim that they know more than they can say or the argument of secrecy) public officials would find it easier, compared to any other securitizing actor, to securitize an issue, primarily, because they hold influential positions in the security field based on their political capital, and *have privileged access to mass media*" (Balzacq 2005: 190, my emphasis).

Could it be perhaps because the world's media, without a US government influence or the context of 9/11, presented Iraq more realistically and truthfully? The singularity of hyper-patriotism within the US at that time must be taken into account to explore this further. The US government's use of media in convincing the American public was significantly based on this concept of perception and framing and an understanding of the power of the media to affect public opinion. It remains for individual networks and print media to reflect on their roles in misrepresenting the cause for war, and their motives for doing so.

Taking it further, the government who are in theory privy to all relevant information, are in a position to make what Buzan et al describe as a 'political choice' (Buzan et al 1998) to securitize something with a far more balanced opportunity than the general public. They have in theory been allowed to view all the intelligence data and been spared the inherent selectivity and framing of mainstream media, particularly any news media channels recognized as either right or left-leaning. This is premised on the notion of competent intelligence gathering of course, which in the case of Iraq was arguably non-existent. Depending on your source, one can conclude that the failure of the security services was anything from a vested interest in instigating war, pure ineptitude and human error or the result of heavy and consistent influence and pressure from policy-makers and members of the Bush administration. The impetus from the US government to produce evidence to support their war on Iraq seems to have incessant and unforgiving (Pillar 2006). Rather than creating policy based on intelligence produced in relative isolation, there is much to suggest that intelligence services were continuously guided in a particular direction, where it became apparent that only intelligence supporting Iraq as a threat would be accepted (Taylor 2007). The fundamental failure therefore of the security services was not the issue of WMD (although they were clearly mistaken on this issue) but rather for not taking a stronger stance and resisting the policy-makers. By putting their name to such intelligence they knowingly contributed to justifying government policy, misinforming media sources and thus indirectly shaping public opinion.

4. Legacy of 9/11

Balzacq's (2005) concept of an externalist approach bears particular appropriateness in relation to the Iraq war when one incorporates the events of 9/11. The attacks of Al Qaeda on September 11th 2001 were extraordinarily daring and horrific. They shattered the notion of America's safety and distance from terrorism and redefined America's role within the international community. The immediate effect was to engender feelings of sadness, shock and outrage throughout the country and create a desire for vengeance. The subsequent military action in Afghanistan produced success in this new 'War on Terror,' a campaign and phrase born from Ground Zero. This national feeling had cemented into resentment; questions of confusion and vulnerability seemed on the minds of every American. Until that point the media may not have accurately portrayed the impact of US foreign policy across the world, particularly in the Middle East. An immediate effect of 9/11 was to create a stark diatribe which identified Al-Qaeda, groups like them, all Islamic militants, etc outwards in ever-widening circles, as 'evil' and 'hating freedom'. Any attempt at understanding their motives or examining the historical or political context, particularly with regard to the legacy and effects US foreign policy was usually dismissed as at best irrelevant and at worst, unpatriotic and treasonous.

"Questions about the root causes or political intentions of the terrorist acts have been either silenced by charges of 'moral equivalency' or rendered moot by claims that the exceptional nature of the act placed it outside political discourse: explanation is identified as exoneration" (Der Derian 2002: 102)

Much of this feeling permeated the media, which of course consists of journalists not immune to the effects of such national feeling. Within the media many sources saw fit to promote the patriotic anthem and government policy, or simply passively allow government intervention. Der Derian provides several examples of media manipulation by the administration following the attacks, particularly when the Afghanistan conflict was involved. These included varied campaigns of propaganda by the Orwellian 'Office of Strategic Influence' and the Defense Department (Der Derian 2002). Hyper-patriotism could perhaps be best defined as such a situation in which political dissent is seen by society as

unpatriotic and/or treasonous. This hyper-patriotism was an environment in which securitization of Iraq was made immeasurably easier for the political and military elites. It is hard to imagine how the war could have been justified in an America in which the attacks had not taken place. Indeed, it is vital to note that during the campaign to securitize Iraq by the Bush administration, key figures made statements on several occasions suggesting a direct link between Saddam Hussein's regime and Al-Qaeda. To take one of many examples,

"One of the greatest dangers we face is that weapons of mass destruction might be passed to terrorists who would not hesitate to use those weapons. Saddam Hussein has longstanding, direct and continuing ties to terrorist networks. Senior members of Iraq intelligence and al Qaeda have met at least eight times since the early 1990s. Iraq has sent bomb-making and document forgery experts to work with al Qaeda. Iraq has also provided al Qaeda with chemical and biological weapons training. And an al Qaeda operative was sent to Iraq several times in the late 1990s for help in acquiring poisons and gases. We also know that Iraq is harboring a terrorist network headed by a senior al Qaeda terrorist planner." (George Bush 2003).

This is an essential component to the entire process because unlike Afghanistan, two years had passed since 9/11 and it was insufficient to simply state to need to invade Iraq and expect support. Indeed the success in Afghanistan was undoubtedly a contributing factor to the general faith and trust of the American people in the judgment and capability of both the administration and the armed forces. Hence there was a need to base the securitizing move on intelligence which suggested that Iraq held WMD and had maintained a link with Al Qaeda. Again my reasons for not overly focusing on the security services are because of the vast differences in the substance and nature of these two fundamental claims. The WMD were widely thought to exist by security services worldwide (the Blair's government's infamous 45 minutes scenario being a prime example), which was then discovered to be false. Importantly however the security services did not believe such weapons would be used against the United States, a fact that government officials and high-ranking administration personnel, including the President, chose to ignore. The link between Iraq and Al Qaeda remains the key issue and one which unfortunately seems to have been lost to collective journalistic amnesia, overshadowed by the ability to shift blame on the issue of WMD to the intelligence services. Importantly, many sources have revealed that from just days after 9/11, security services made it clear to the president that no such link existed between Iraq and the attacks. Regardless, what followed was a concise effort by government officials and high-ranking government members to misrepresent the relationship between Iraq and 9/11, to the point where a significant proportion of the American public believed such a link existed (Woodward 2004).

5. Networking Patriotism

While many of these inferences and claims were made in speeches from the President and Vice-President to the nation and hence unfiltered by media sources, the subsequent hours of discussion, debate and news coverage played a pivotal role. A PIPA (2003) study which correlates media source with misperceptions is staggering in its discoveries, and its conclusions are illuminating. *Misperceptions, The Media and the Iraq War* is an important piece of this puzzle which defines clearly the level and nature of the relationship between US mainstream media and the misperceptions regarding Iraq, on which much of the support for the war was based. Published in October 2003 after the war had officially ended, the report correlates three key perceptions about the Iraq war with the preferred news sources of the respondents. These three claims were that evidence of links between Iraq and al-Qaeda has been found; weapons of mass destruction have been found in Iraq; world public opinion favored the US going to war with Iraq. It concluded among other things that while perhaps expectedly Fox News viewers were the most uninformed, other mainstream 'liberal' media networks ranked close to and sometimes above Fox with regard to many misperceptions, having controlled for demographic differences within the viewing audiences. It also found a positive link between levels of misperception and support for the war (PIPA 2003). This is the key element of the study in that it establishes that news media can influence and in this case misinform public audiences with regard to an issue of national security. The subsequent viewing public has an opinion and attitude shaped by such media which directly affects the securitizing efforts of the actor, in this case the government.

What could be at work is the concept of 'manufacturing consent' and in particular the elite version, i.e. that 'news media coverage conforms with the interests of political elites, where elites are defined broadly as members of the executive, legislative or any other politically powerful group', (Robinson 1999). If we were to look at the UN response to the crisis in Darfur, it remained one of indifference until media and public outrage grew to what Robinson calls a 'crescendo' wherein the five permanent Security Council members were forced to act. The whole experience itself can be seen as an example of the influence of media in another area of international relations - principal-agent theory. Darfur serves to contrast starkly with the war in Iraq, a situation in which a government was pushing a policy and looking for public support, which was fostered and encouraged through the mainstream's presentation of government claims, the airing of key speeches and selective coverage. The latter was quite similar to the process of 'cherry-picking' known within intelligence services' circles (Taylor 2007).

5.1 *The voice of the people*

To complete the circle it seems appropriate to look at the link between public opinion and policy, keeping in mind the more general notion of an audience's reaction to the securitizing actor and its effect on subsequent political policy. The war in Iraq required the moral support of the American people and to be seen to have that support. It is doubtful that the actual campaign specifics or tactics were in any way influenced by public opinion, but it remains worthwhile to examine the relationship as a whole. Shapiro and Page examined public opinion and policy data for the United States from 1935 to 1979. With reasonable certainty they concluded that US policy including foreign policy has responded positively to public opinion, often within a lag of one year (Shapiro & Page 1983). With that in mind, it is easy to understand the importance of winning the moral support of the American people in achieving a successful securitization of Iraq, and thus a major component of the critical mass. Americans who believed the US did the right thing by taking military action in Iraq has dropped from 64% in December 2003 to 35% in May 2007 (New York Times 2007).

5.2 *American exceptionalism*

The events of 9/11 and the ways in which they shaped national identity in the following years were influenced by American exceptionalism, and the religious ideology underlying Al Qaeda's agenda. Securitizing actors combine 'collective memories' and 'general feeling' to redefine the nature of a threat to suit their aim, and to identify their own interests and security as being inseparable and integral to that of the referent object (Balzacq 2005). George Bush spoke often of 9/11 in the run-up to the war, and referred many times to the country's exceptional greatness and singularity within the international community. Media sources, and in particular the major television news networks, strived to show how patriotic they were, how proud they were to be American and most importantly how just was the cause for war.

"The mainstream media in the US reinforced this moralistic imagery by cheerleading the moves toward war and excluding any expression of dissenting or skeptical voices. This unconditional celebration of American life, values and institutions, without a scintilla of willingness to listen to anti-American grievances so prevalent in the Arab world and zero receptivity to self-criticism, had produced a patriotic fever with dangerous implications for Americans as well as others" (Falk 2002: 326).

Thus, through either professional laziness, naivety or conscious action the media can be said to have been somewhat of a mouthpiece for the Bush administration and had a direct link to the public's support for the Iraq war. The subsequent regret and remorse expressed by many media publications in recent months and years is proof of their self-awareness and reflective attitude (Washington Post 2004). The process of formalization is as mentioned earlier integral to the securitization process and in the case of Iraq was pursued both domestically and internationally. Former Secretary of State Colin Powell spent much time at the United Nations to compel those states of the Security Council to take stronger measures against Iraq in the hopes of preventing war (Woodward 2004). The majority of the administration however continued to push for war, as we have seen with regard to the intelligence community and the presentation and framing of Iraq by both the administration and mainstream media. Domestic support was formalized by a Senate vote in October 2002 which agreed to the use of US military action in Iraq (US Senate Legislation and Records 2002). This bipartisan agreement on the issue could have been interpreted as a move to put aside political disagreements for the greater good of the nation, something which undoubtedly must have impacted on a great many Americans. We saw a similar bipartisan effect within the mainstream media, as not just the traditionally conservative but the so-called 'liberal' sources joined the campaign to rally the nation towards this controversial war.

6. Conclusion

The shortcoming of Buzan et al (1998) is as Balzacq (2005) explains the lack of consideration of the influence of wider forces and context in the process of securitization. Balzacq's concept of the congruency of agency, audience and context goes a considerable way in elaborating on this and explains much of which Buzan et al fail to address. However, like Buzan et al, Balzacq does not go far enough in considering the nature of these actors within the process. The theory is an excellent template, one in which Buzan et al's ideas remain core, but the intertwining role of the media, the public and the state requires the focus for which I have strived. The state remains the most basic and common securitizing actor within security issues and the public remains its most common audience and referent object. As we have seen with the Iraq War, within this relationship the role of the media as provider of information, facilitator of communication between the two and bastion of truth and investigation is fundamental. It deserves far greater study that can be achieved here. Beyond the Iraq war, I hope to have put forward some noteworthy definitions, terms and examinations of securitization, such as the concept of critical mass and all its components. The criteria by which an issue is successfully securitized have hopefully been given more clarification, in addition to those steps taken by securitizing actors throughout the process. News media exists in a specific and trusted position within our society, in order that accountability and truth may be presented against the sometimes self-serving political motives of government and military powers. However in times of exceptional national threat, when a nation may regress to more defensive perceptions of themselves and their enemies, journalists too feel the effects. The personal feelings of vulnerability and distress combined with the expectations and competitive atmosphere of the profession can create a media more willing

to shirk its responsibility to unbiased reporting. To thoroughly examine the role of news media as a functional actor and patriotism as a facilitating condition would add to the whole theoretical framework and allow for a greater understanding of empirical evidence in the future.

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Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights

John Helis

Department of Law, Carleton University

1125 Colonel By Drive, Ottawa, Ontario, K1S 5B5, Canada

E-mail: jhelis@connect.carleton.ca

Abstract

This article considers how Hannah Arendt's understanding of human dignity comes to terms with two of the most significant controversies in contemporary human rights discourse, while also providing a sound basis for the application of the term. By focusing on the right to membership in a political community, Arendt's understanding of human dignity realizes the importance of maintaining the tension in the dichotomy present in two controversies: universalism and cultural specificity; natural law and positive law. The practicality of Arendt's approach will be demonstrated through a review of a number of domestic and international human rights instruments with specific focus on the *Canadian Charter of Rights and Freedoms*, which thus far have failed to provide a universally accepted definition of the term.

Keywords: Human dignity, Hannah Arendt, Canadian Charter of Rights and Freedoms, Natural law, Positive law, Universalism, Cultural specificity, Controversies in human rights discourse

1. Introduction

The problems associated with the human rights project can be summed up in the simple phrase that it is trying to achieve too much for some in theory while at the same time achieving too little for others in practice. Critics of human rights point to the inadequacy of the concept of natural or inalienable rights both because of its historical failures and its theoretical insufficiencies. The most vocal critics consider human rights to be a new form of Western imperialism, and an affront to national sovereignty and culture (Note 1). In contrast, the proponents of human rights are facing the dual challenge of addressing concrete violations while at the same time responding to this theoretical assault (Note 2). This has led to an impasse on human rights.

This paper seeks to address some of the theoretical and practical problems associated with the foundations of human rights in light of the work of Hannah Arendt, whose corpus has only recently been tapped for its application to human rights (Isaac, 1996: p. 106). Arendt's work provides an appealing foundation for human rights because it moves away from the problematic idea of natural or inalienable rights and focuses on the right to membership in a political community with a basis in the concept of human dignity. This will be shown to provide a foundation for human rights while also coming to terms with the dichotomy in the following two controversies in contemporary rights discourse: universalism and cultural specificity; natural law and positive law. While human dignity is commonly referred to in human rights instruments, there is no universally accepted definition of the term, and even the Supreme Court of Canada has been inconsistent with its use of the concept. Arendt's understanding of human dignity will be shown to have practical application through a review of a number of human rights instruments throughout the world, with specific focus on the *Canadian Charter of Rights and Freedoms*.

2. Hannah Arendt's Understanding of Human Dignity as a Foundation for Human Rights

Hannah Arendt's work on human rights stems from her experiences during the Second World War and its aftermath: namely the Holocaust, the refugee crisis and mass statelessness. She asks why the concept of natural or inalienable rights failed humanity at the very time when they were needed most, despite having been pronounced for over a century and a half (1951: p. 287). She answers this question to the detriment of individualism by suggesting that individuals, without belonging to a political community, are not as sacred in themselves as the concept of individual human rights would suggest. The political empowered simply cannot relate to the disempowered as equal members of humanity. In the words of Arendt, "the world found nothing sacred in the abstract nakedness of being human" (1951: p. 295). As such, it has said that Arendt did not develop a comprehensive theory of human rights, but rather was more concerned with the problems associated with "the failures of the rights of man to secure human dignity" (Isaac, 1996: p. 64).

2.1 Freedom in practice and in theory

Arendt's concern with the practical realities of the effects of human rights violations should not divert attention from her

theoretical approach. Indeed, she believed that the modern practical realities were in many respects an inevitable consequence of the Western tradition of political philosophy, one facet of which was a dichotomy between the practice and theory of freedom. As Peg Birmingham has noted, “it is clear that Arendt places the responsibility for the death camps squarely at the feet of a philosophically invalid and politically impotent notion of human rights” (2006: p. 5). Arendt traces the problem back to classical antiquity, where “freedom was an exclusively political concept, indeed the quintessence of the city-state and of citizenship” (1961: p. 157). In contrast to the practical political concept of freedom which developed in antiquity, political thought was developed by Greek philosophers in a way which was “explicitly in opposition to this polis and its citizenship. The way of life chosen by the philosopher was understood in opposition to the βίος πολιτικός, the political way of life” (Arendt, 1961: p. 157). The concept of freedom did not enter the vocabulary of philosophy until relatively late in antiquity, and when it did it was used by thinkers such as Epictetus and St. Augustine to formulate a condition in which an individual could still remain free within one’s own self, despite being deprived of it in the physical world (Arendt, 1961: pp. 146-147). This tradition carried forward into the thought of the modern philosophers, and Hobbes, Spinoza, and even Kant understood freedom outside of politics, and in fact believed that freedom increased when there was a decrease in politics (Hansen, 1993: p. 55). While perhaps providing some form of escape for the powerless individual, the theoretical slippery slope which this approach leads humanity down is the justification for “the notion that men can lawfully and politically live together only when some are entitled to command and the others forced to obey” (Arendt, 1958: p. 222). For Arendt the modern experience of totalitarianism, mass stateless and genocide are the end results of the slippery slope of political disempowerment, for which the concept of natural or inalienable rights failed to compensate.

Philosophy could no longer ignore the importance of political empowerment for the full realization of human potential. Political empowerment requires a genuine form of citizenship, and some of Arendt’s most powerful writings account for the “disintegration of genuine citizenship, and the emergence of varieties of ‘anti’-citizenship, false forms of what Arendt calls ‘organized living together’” (Hansen, 1993: p. 7). The problem with the concept of natural or inalienable rights is that history has demonstrated that the rights of the disempowered will not be upheld by the politically empowered, and that displays the centrality of the right to belong in a political community which alone can guarantee what Arendt calls the “the right to have rights” (1951: pp. 294-295). The two uses of the word ‘right’ form distinct terms – the first of which is “a moral claim to membership and a certain form of treatment compatible with the claim to membership,” while the second refers to the rights which belong to members of “an organized political and legal community” (Benhabib, 2004: pp. 56-57). Arendt is most concerned with the first of these two terms, and it is within this context that she introduces the concept of human dignity, which serves to distinguish between a citizen losing specific rights, and the loss of a “community willing and able to guarantee any rights whatsoever” (Benhabib, 2004: pp. 56-57). Arendt says that that one “can lose all so-called Rights of Man without losing his essential quality as man, his human dignity” (Benhabib, 2004: pp. 56-57).

The term human dignity is used by Arendt “in the Kantian sense and [she] believes that an activity or a form of life has dignity when it is intrinsically valuable and worthy of being undertaken ‘for its own sake’” (Parenkh, 1981: p. 2). Human dignity is connected to politics first through the use of Aristotle, who is the only political philosopher who finds intrinsic value in politics by differentiating between humans and other animals on the basis that they define their life course through the social process of politics (Parenkh, 1981: pp. 2-3). Aristotle’s conception of political community is linked to human rights through Edmund Burke, who favoured the rights that come from “within the nation” over the “abstractions” of natural or inalienable rights (Arendt, 1951: p. 295).

The unique combination of Kant, Aristotle and Burke resulted in a rejection of the idea of natural or inalienable rights based on birth alone, and although in one respect this results in human rights becoming relative or culturally specific, a universal aspect is maintained in the concept of human dignity. Human rights are culturally specific because they are to be debated and brought to life in a political community. For Arendt, history has evidently shown the “pragmatic soundness” of Burke’s conception of rights arising within a political community, which “seems beyond doubt in light of our manifold experiences” (Arendt, 1951: p. 295). However, at the same time a universal element is maintained in the insistence that human dignity must be maintained and that this can only be done through the guarantee of participation in a political community. This is best expressed by Peg Birmingham:

Arendt is able to reject the fiction of human nature and still think the inalienable right of the actor who in order to act must be able to appear in a public place of freedom. Though stripped of state and home, the actor must not be stripped of this fundamental right to be able to appear, because the first act, the act of beginning itself – the event of natality – contains both the beginning and the its principle within itself (2006: p. 57).

The natality of Arendt referred to above is not simply the biological birth of a human. A merely biological understanding of natality is, of course, the basis for the natural or inalienable conception of rights which was outright rejected by Arendt. In order to understand Arendt’s notion of natality one has to refer to her categorization of the three basic human activities: labour, work, and action. Action is considered the most important of the three for Arendt because

while labour “is forced upon us by necessity,” and while work is “prompted by utility,” only action is entirely ‘free’ and ‘gratuitous’” (Parenkh, 1981: p. 2). Arendt relies on Aristotle in asserting that labour and work cannot be termed “a way of life” because they are not “autonomous and authentically human” activities” (Tlaba, 1987: p. 1). Natality is connected to action because it is action alone which allows a person to use his or birth for a higher purpose and provides the “the capacity of beginning something anew” (Kharkhordin, 2001: p. 467). Being alive as a human being rather than merely a body requires one to act, speak and engage with others (Benhabib, 1996: p. 110). Humans thus require a public space in which they can develop their full potential through politics, “the activity of conducting the affairs of a community by means of speech” (Parenkh, 1981: pp. 131 & 139). As Arendt describes it: In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world, while their physical identities appear without any activity of their own in the unique shape of the body and sound of the voice (1958: p. 179).

2.2 Human dignity and controversies in human rights discourse

It is here that Arendt’s understanding of human dignity comes to terms with two of the contemporary controversies surrounding human rights discourse. This conception of human dignity has important relevance to the debate on whether human rights are universally valid or rather based on the particular historical developments in the West. Cultural specificity in its purest form of course means that there is no objective human rights project which can be pursued. Although being less obvious than cultural specificity, universalism also results in a theoretical problem for human rights. In his review of what he terms ‘Arendt’s cosmopolitanism’, Natan Sznaider demonstrates that the inherent weaknesses of universalism is that it “obliges us to respect others as equals as a matter of principle, but yet for that very reason it does not involve any requirement that would arouse curiosity or respect for what makes others different” (2007: pp. 112-113). Arendt is said to have pronounced a form of cosmopolitanism “beyond universalism,” which is accomplished by maintaining “a tension between the universal and the particular” (Sznaider, 2007: p. 119). This tension means that human rights are debated and decided upon in particular political communities and are not in themselves inherent in nature. However, this requires a universal safeguard of human dignity; humankind’s right to belong to a genuine political community in order to resolve issues of rights. This right to belong to a political community is thus the only universally valid right according to Arendt, from which the remaining rights arise through discussion and debate in particular political communities. In the same vein, this tension also allows us to come to terms with the controversy surrounding the dichotomy between natural law and positive law. Substantive rights arise from the positive laws of political communities. However, these rights can only come about through “the right to have rights,” the first requirement of which is genuine belonging to a political community.

3. Human Dignity in Human Rights Instruments

The term human dignity has served a practical function in contemporary human rights regimes worldwide, and has been incorporated into the constitutions of a number of states as the basis for human rights protection. The first time that human dignity was incorporated into a legal text was in Germany after the Second World War. The German constitution, which is referred to as the Basic Law for the Federal Republic of Germany, states in Article 1 that “Human dignity shall be inviolable.” This reference to human dignity in the German Basic Law has been interpreted by a majority of legal scholars as representing the objective basis for all the rights protected in the German constitution rather than serving as an independent civil right in itself (Erdman, Essert, & Yachnin, 2003: para. 13).

Human dignity is also explicitly referenced in the constitutions of a number of other states. Section 1A of the Israel’s Basic Law reads “The purpose of this Basic Law is to protect human dignity and liberty.” In the constitution of South Africa, the term dignity is found in both the preamble of section 7 and as the subject of a specific right in section 10. Section 10 reads: “Everyone has inherent dignity and the right to have their dignity respected and protected.” It is not surprising that human dignity, especially in the Arendtian tradition, would be so profoundly appreciated in Germany, Israel and South Africa, as all three of these states have been founded on the aftermaths of the greatest deprivations of human dignity in modern history: the Holocaust and Apartheid.

3.1 Human dignity in the international context

It is also not surprising that human dignity is also explicitly referred to in a number of international human rights instruments, since the international human rights project was largely restored after the Second World War following the gross violations of human dignity. The first sentence of the preamble of the *Universal Declaration of Human Rights* reads as follows:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

The preamble of the Universal Declaration makes a link between human dignity and the right to belong to a genuine political community by reference to the right to oppose tyranny: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by

the rule of law,

A number of other international human rights instruments also refer to human dignity, such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

3.2 Human dignity in the Canadian context

Although human dignity is not explicitly found in any of Canada's constitutional texts, the Supreme Court of Canada refers to the term on a regular basis when interpreting the rights enumerated in the Charter, and it is found in the preamble of the quasi-constitutional *Canadian Bill of Rights*, which states in the first paragraph:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions.

While the preamble of the Charter does not refer to human dignity, it does refer to the supremacy of God – as does the preamble of the *Canadian Bill of Rights*. The preamble of the Charter reads as follows:

“Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

Interestingly, it has been argued that this reference to the Supremacy of God in the Charter represents human dignity, which is the theory “upon which the Charter is based” (Penny & Danay, 2006: para. 4). It has also been suggested that if human dignity was linked to the supremacy of God there would be “a more coherent and robust elaboration of the Charter's moral architecture” (Sossin, 2003: p. 228).

More importantly, the Supreme Court of Canada has referred to human dignity as the basis for the substantive rights and as lying “at the heart of the Charter” (*R. v. O'Connor*, 1995: para. 63). In *R. v. Morgentaler* Justice Wilson held that “the idea of human dignity is expressed in every Charter provision and stands as the basic theory underlying the Charter” (1986: p. 166). Thus, human dignity is not a single substantive right itself, but rather a theoretical basis upon which the substantive rights are anchored.

The Supreme Court's analysis of section 1 of the Charter brings the analysis close to Arendt's view of linking human dignity with participation in a political community. Section 1 gives life to the substantive rights enumerated in the provisions that follow, and also provides the justifiable limitations to those rights. Section 1 reads as follows:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *R. v. Oakes*, the leading decision from the Supreme Court on section 1, Chief Justice Dickson made a crucial link between the idea of human dignity and participation in political community by stating that:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society (1986: p. 136).

This view was subsequently approved unanimously by the Supreme Court in the *Quebec Succession Reference* case when analysing the unwritten constitutional principle of democracy (1998: para. 64).

This is not to suggest that the international human rights instruments, the constitutions of various states, and the Supreme Court of Canada have fully adopted Arendt's understanding of human dignity. The examples presented display how aspects of Arendt's approach have been successfully used. It needs to be stressed that the term human dignity has also been applied in a number of ways which are inconsistent with Arendt's view. The Supreme Court of Canada has in fact been criticised for “failing to develop a coherent approach to” its use of the term human dignity (Fyfe, 2007: para. 3).

In many cases, the term human dignity has been used as a justification for a specific right. For example, the Supreme Court of Canada has often relied on the term human dignity when analysing the right to life, liberty and the security of the person in section 7 of the Charter. The provision reads as follows:

Everyone has the right to life, liberty, and security of the person, and the right not be deprived thereof except in accordance with the principles of fundamental justice.

In addition to endorsing the idea that human dignity underlies the entire Charter, Justice Wilson in the *Morgentaler* case also relied on the term when interpreting section 7, and held that it provides “a degree of personal autonomy over important decisions intimately affecting their private lives” (1986: p. 171). This is completely contrary to Arendt's view of human dignity, and in fact is reflective of the aspect of liberalism which she highly critical of, which equates freedom with the individual's right to carry out essentially private activities. This liberal conception of freedom, which Arendt finds to be concisely characterized in the credo, “the less politics the more freedom,” is contrary to her notion of linking freedom to action in the political realm (Arendt, 1961: p. 149). However, it may still be possible to reconcile this

position with Arendt's understanding of human dignity. As Jürgen Habermas has indicated, once humans have achieved a degree of material equality in their private lives, they will then want to "live in a world ordered by Hannah Arendt's notion of equal participation, defending the liberty of all against the threat of domination by any group or individual" (May, 1986: p. 88).

While Arendt's understanding of human dignity is most compatible with the view that it underlies the Charter as a whole, it can also form part of the analysis of a specific right, provided that it is consistent with the purpose of enhancing the ability of an individual or a group to engage in political action. For example, in the case of *F.C.W., Local 1518 v. K-Mart Canada Ltd.*, the court linked the notion of human dignity to the freedom of expression guaranteed in section 2(b) of the Charter (1999). While this case concerns the freedom of expression within the context of a labour dispute, which at face value is outside the ambit of Arendt's understanding of human dignity, the case on the whole does serve to underscore the importance of "free expression as a means to social and political empowerment" (Fyfe, 2007: para. 15). Indeed, it difficult to envision how Arendt's understanding of human dignity can be actualized without the freedom expression.

Arendt's view of human dignity is well suited for cases involving the freedom of expression, but it can also have practical application in cases involving the equality right as guaranteed by section 15 of the Charter. Arendt believed that equality was only possible when "unequal people have equal rights," which requires the "concrete difference themselves are organized into the political realm" (Hansen, 1993: p. 138). Section 15(1) of the Charter reads as follows:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This section of the Charter is particularly well suited to be interpreted in light of Arendt's understanding of human dignity as it organizes the concrete difference that have traditionally denied people full participation in the political and legal systems. In *Law v. Canada*, the foundational case for the interpretation of section 15, Justice Iacobucci had the following to say about human dignity:

Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society (1999: para. 53).

This definition appears to have some of the characteristics of Arendt's understanding of human dignity. However, the court also acknowledges that "there can be different conceptions of what human dignity means," and unfortunately does not establish which is the most appropriate (1999: para. 53).

4. Conclusion

Hannah Arendt's understanding of human dignity comes to terms with some of the most significant controversies in human rights theory, while at the same time providing a practical basis for the application of human rights law. Rather than attempting to solve the tension between universalism and cultural specificity, and between natural law and positive law, Arendt comes to terms with it and focuses on the need for constant dialogue to maintain the optimum balance. The lack of a universally accepted definition of human dignity has lead one commentator to describe the Supreme Court of Canada's approach as "muddled and inconsistent," and recommend that the term "be excised from Charter discourse altogether" (Fyfe, 2007: para. 54). Arendt's view of human dignity is a suitable alternative to this proposition. This approach reminds us that rights are not automatically protected simply because the political community in the distant past enshrined them in a written constitution. A constitution for Arendt requires continuous action by the body politic as a whole and constant commitment to live by it (McGowan, 1998: p. 88).

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Notes

Note 1. See for example - Ding, Y. (1989). Opposing Interference in Other Countries' Internal Affairs Through Human Rights. *Beijing Review*, 32, 14-16.

Note 2. See for example - Tharoor, S. (1999/2000). Are Human Rights Universal? *World Policy Journal*, 16(4), 1-6.



Observing the World from the Perspective of Multi-culture in Canada

Yue Yang

Guangzhou 510425, China

Tel: 86-135-4348-4054 E-mail: yylqq2007@163.com

Abstract

In the world, the relations of various cultures and civilizations are becoming fundamental in the human society of the era of globalization. The different relations within Canada are actually a microfilm of the worldwide cultural relations. The research on Canadian multicultural policy and reality can help us deeply understand the relations of various cultures in the world. Thus it is of global significance. This text, revolved around the multicultural issues, from Canadian and global angles, tries to give a brief description and exploration of such confusing phenomena and conceptions as the cultural unit, cultural conflict, cultural biological chain, cultural magic, cultural fog, cultural barriers, cultural trenches, Cultural Cold War, cultural background and cultural accumulation.

Keywords: Canada, Multi-culture, World culture, Global culture

Broadly speaking, cultural issues are the integrative problems dealing with political, economic, diplomatic, national, religious, educational and legal elements, community groups, civil customs, literature and art, press and public opinions, scientific research etc. "The cultural studies have become the most dynamic and creative academic trend of thought in the international academic community. And it is one of the most exciting fields in the contemporary intellectual life full of changes." (Cao and Zhang, 2005). "One of the most important features is the cultural diversity, which is determined by the different natural and social environments that human beings are in and the ways of thinking." (Laguna-carat, 2006, p.1). In the world, the relationships of various cultures and civilizations are becoming fundamental in the human society of the era of globalization.

"Canada is one of the countries with the most complex ethnic compositions. It is a leading country that advocates the cultural diversity. And its mosaic model is unique in the national cultures." (Dai, 2007, p.9). Various cultural relations in Canada are a microfilm of the worldwide cultural relations. The research on Canadian multicultural policy and reality can help us deeply understand the relationships of global cultures, as is of global significance. To a certain extent, to solve the Canadian cultural problems can provide a useful inspiration to settle the world cultural or global cultural issues.

1. Values and interests: cultural unit

"The long world history tells us that the origin of human culture is diverse. In the world there has never existed a single global cultural pattern. The cultural diversity of human cultural sources still can be seen clearly so far. It can be said that the history of human civilization, in a sense, is the history of the development of cultural diversity of every nation." (Yu, 2007, pp. 206-207). The multi-culture contains a number of cultural subjects and every cultural subject is known as a cultural unit. There exist actual differences of various aspects in cultural subjects, that is, the cultural units. The differences are mainly in value orientation, interest ascription, the customs and styles. The value, interests and customs are the basic symbols to distinguish cultures. Each cultural unit has a particular value, specific interests and specific practices. Accordingly, every cultural unit is a community of people with common interests, common practices and common customs. The interests are especially attractive.

In human society, culture does not absolutely exist in isolation. Especially the ideological culture, which reflects the economy and politics, has generated and developed with their growth. Therefore, the fundamental reason leading to cultural conflict is the economic and political interests, including territory, wealth, resources, power, status, personal and group interests." (Zhao, 2004, p.123). A cultural unit is actually a value community, a community of interests and a custom community. The cultural identity of an individual is mainly the value of identity, interests and practices recognition. Only when an individual gets a cultural identity from a cultural unit, can he belong to that cultural unit. Although there are differences and contradictions of the members within a cultural unit, still the cultural unit displays the distinctive commonness of all members externally. If the ken of the commonness of the cultural unit can be expanded to the world, it would be a blessing to all the human beings.

2. The Status quo and the situations: cultural conflict

From the viewpoint of the process of social development, Canadian multi-culture has reflected more or less the

historical progress. The most obvious is that violence is replaced by peace, duel by compromise, and conquest by coexistence. There is no doubt that the Canadian multi-culture has shown the goodwill of humanity, conscience and rational growth, as is commendable. However, the problem goes far beyond that. "There are complicated contradictions and differences between one theoretical policy and the reality. Since 1970s, multi-cultural policies and legislation of human rights have improved ethnic relations. But it does not mean that Canadian society has overcome and eliminated all the subjective and objective conditions resulting in the ethnic differences". (Gao, 1999, p.125). As far as the present is concerned, Canadian multi-culture has not harmonized fundamentally social contradictions, and basically eradicated social evils. From the situations of the international community, the same conclusion can be drawn. Mr. Huntington did not provoke deliberately but revealed truly the clash of civilizations. So far, it is still hard for people to strictly distinguish cultures from civilizations. If the concepts of the civilization and culture can be mixed up, the clash of civilizations also means cultural conflict. Furthermore, cultural conflict is undoubtedly the multi-cultural conflict. "In the contemporary world with increasingly obvious trend of globalization, culture has become an important factor to control the world pattern. The conflicts of cultural factors or caused by cultural factors do not only exist far and wide but also get severer and severer." (Zhao, 2004, p.120). The conflicts stem from the potential and complex advantages and disadvantages and hidden, complicated relations of multi-culture, which is testing the human beings dealing with complicated things rationally. If Multi-culture is a symbol of the era, then it is an era of glacies. The next step may be regressive, or stagnated, or progressive.

3. Power and potential difference: cultural biological chain

Every cultural unit in the pluralistic cultures is in different course of development and has weak or strong overall strength. Thus it has weak or strong power in the community. The difference of social power among all cultural units is equivalent to the difference in social status, as can be called potential difference. The dominant cultural units will certainly use this potential difference to give priority to their fellow members in the community while exclude the members of the other cultural units. The strongest cultural units will try its best to tyrannize over the stronger one and those in vulnerable situations, and keep the situation. The stronger cultural units, on the one hand, show their protest against being oppressed. On the other hand, they can get compensated by tyrannizing over the disadvantaged and exerts their efforts to keep obtaining the interests. The vulnerable cultural units are struggling to scrape their living in the cracks oppressed by the strong cultural units. The cultural units have formed a relationship of favoring the strong and excluding the weak. The sequent link among them is called the cultural biological chain. After long time of biological evolution, the human society which has stepped into the senior civilization drops to the low-level biological chain. It may be a mockery of embarrassment, a bitter irony, a big question mark for the civilization and culture the human beings are proud of.

4. The ideal and the reality: cultural magic

"The Canadian government has adopted the multi-cultural policy in order to ease the contradictions among the migrant nationalities, to support the migrants to develop their traditional national cultures and to protect their equal status in cultural and social life." (Dai and Wang, 2001, p.67). Canadian multi-cultural policy has depicted an ideal blueprint that all cultural units can co-exist harmoniously, treat and respect each other equally and friendly. However, due to the existence of the cultural biological chain and the cultural barriers, Canadian social reality is inconsistent with or deviates from the ideal blueprint of its multicultural policy. Whether to look up to the ideal blueprint in the situation of poor reality or to examine the poor reality from the ideal position, people will have to bear tremendous psychological and spiritual contrast. For such a phenomenon of contrast, an appropriate description is needed. It is certain that the multi-cultural policy is not a cultural shell game deliberately played by Canadian government. But to say the least, the multi-cultural policy can be compared to a cultural magic. As far as the multi-cultural policy at this stage is concerned, this scene of cultural magic seems to be tempting, attractive, worth appreciating and full of joviality. However, it is essentially not true. Political magic is prevalent in today's world. Every government is good at and keen on the performances of making wonderful commitments and slogans. The political magic, which is of duplicity and pleasing to both the eyes and the mind is very commonplace. Canada's cultural magic in nature belongs to a political magic. To meet the country's political demands, and serve the state politics, the Canadian cultural magic has played a role of whitewashing the peace, easing the tension and appeasing the people in the national governance. Any magic creates and utilizes the people's hallucinations. Cultural policy should be linked to reason, honesty and truth. It should be converted to scientific decision-making and social projects.

5. Objectives and means: cultural fog

Examining the Canadian multicultural policy and polishing it in legal documents, I think it tries to aim at putting forward an expected and ideal goal of development. Unluckily, it does not tell us clearly how to achieve the target. This phenomenon is like a mist or fog of culture that the people can not feel clearly within the sight. From the perspective of social progress, the right development goals are no doubt important. But it is also vital to make clear the way to achieve the goals. From the viewpoint of the problem of system engineering, it is more commendable to find the proper ways

than to establish the correct target. The indistinct means of social development goals is like a mirage wonder. Better as it is, it is just a Utopia, which is of little significance to the progress of the human society in the modern world. A good desire and goal has always been cherished in the history. In today's world, what is needed most for human society is the actual action taken towards the right destination. Stressing the objectives, while ignoring the approaches, is not conducive to the Canadian multicultural policy to gain the good social benefits. It is necessary for the scholars studying the public policies and the officials formulating the public policies to spend more energy in finding the right approaches to realize the objectives of multicultural society and to remove the dense fog of culture before the people's eyes. Any nation, any country, or even the whole mankind is thirsty for a clear and bright cultural sky.

6. Protection and exchanges: cultural barriers

Based on the sacred dignity and the respect for nobleness, the protection of culture has become beliefs and tenets of unalterable principle. Therefore, the cultural protection weighs much in a multicultural policy. However, the cultural exchange has not got much attention. The orientation of the policy is one-sided. Thus, the social public has paid a one-sided attention to protecting the value and benefits of every cultural unit, in particular, to the self-protection. One-sided emphasis on the identity of the cultural values and interests within every cultural unit will virtually exclude the values and interests of other cultural units and the dissidents of the other cultures. Furthermore, cultural exchanges will be seriously impeded. The cultural policies and practices of one-sided protection, the exclusion of the dissidents, and impeding cultural exchanges are the cultural barriers. People are ready to undertake the roles of the defenders and fighters of cultural barriers. Both the social elite and the common people have surface knowledge of cultural exchanges. They can not give a clear definition and distinction of the concepts of cultural exchanges, cultural expansion, and cultural invasion in theory or in practice. Cultural exchanges suffer a lot while cultural expansion or cultural invasion is confidently opposed. The smooth cultural exchanges can not be easily and naturally achieved. There are a lot of difficulties to face and many risks to take. And expertise is also needed. Cross-cultural phenomenon has just aroused the attention of scholars. "When we use the term of cross-culture, we mean the communications happen among people of different cultural backgrounds. They may come from different countries, or just from the same country." (Sana and Deborah, 2004, p.7). Crossing cultural barriers is a challenge for cultural exchanges. (Bradford, 2003). However, whether in Canada or in the international community, people have not yet reached deep level and all-round realm of cultural exchanges. They are living in a world of cultural barriers full of mutual hostility, suspicion and precautions. Compared with the familiar trade barriers, the subtler cultural barriers are a hundred times more harmful to the advancement of human society.

7. Division and integration: cultural trenches

Cultural division is an important prerequisite of the cultural diversity. Culture, from different angles, can be divided into national or ethnic cultures, or various state cultures, or North American culture and South American culture, or European culture and Asian culture, or the Western culture and oriental culture, etc. Where there is a division, there is a boundary. Although the boundaries of culture are not clear in theory, in fact, they have become the cultural trenches. "All the peoples and states are used to living their lives and communicating each other within the border. They dare not and are unwilling to cross the border. They isolate themselves from the impact of the outside world." (Ostrom, 2003, p.40). Migrants can overstep the boundary of a country, but few can stride over the cultural trenches. There is no exception to the scholars, who are always standing on one side. Cultural exchange only stresses the apparent etiquette instead of the internal substantive. Confined by man's rational knowledge, decision-making, and behaviors in the current era, we can not see the situations of the current cultural integration, its trend and hope. And we have no way or dare not to predict its future. If cultural assimilation is impossible, separation will not be evitable. Not only in Canada, but also in other countries around the world, cultural trenches are replacing the boundaries of provinces, states and countries and have become the primary border of a large scale to polymerize the people. Since there is division, there exist inevitable distance. Between those people who are not in the same side of the cultural trench, and belong to different cultural communities, there exists a remote distance in emotion, understanding and communication. The scholars of comparative studies of culture have focused their interests on the uniqueness and differences of various cultural units. They have provided academic arguments for deepening the trenches and enlarging the gaps. In fact, the human culture has commonness. For example, truthfulness, benevolence, and beauty are the distillate advocated and pursued by a variety of cultures. The cultural commonness of human beings exists in all common cultures, as is the most original truth and valuable spiritual wealth. Comparative studies of culture should focus on finding the bilateral commonness of Sino-American culture, Britain-French culture, North and South American culture, Eurasian culture, and the Eastern-Western culture. As far as its importance is concerned, seeking common points speaks louder than reserving difference. The basic means of survival in the natural world and human society is to seek common points while reserving difference. Only by seeking common points, can differences be reserved.

8. Identification and rejection: Cultural Cold War

In the era of globalization, it is not oceans and borders but the multiple separatism and all kinds of cultural barriers and

cultural trenches that seclude the people. Facing the multi-cultural barriers and trenches, people feel difficult to step over and they are always in embarrassment when conducting cross-cultural activities. First of all, they should pass the toll-gate of cultural identity. Cultural identity is the disguised form of cultural censoring. If you can not get your cultural identification, you are doomed to be refused culturally. The upgrading of the contradiction leads to the cultural exclusion and cultural discrimination. Cultural issues begin to have a political tendency. People are worrying about that. In a country or in the international community, culture has been reduced into a slave, bowing and scraping to the politics. Followed by the ideological Cold War from 1950s to the 1990s with features of class labels and ism camps, the human society has come into the swamp—a Cultural Cold War after getting rid of muddy quagmire. This is a round of new ideological cold war featured with cultural labels and cultural camps. From Szczecin by the Baltic Sea to Trieste beside the Adriatic Sea, the old Iron Curtain, used to traverse the European continent, has collapsed. In the global scope, lots of new iron curtains in the pluralistic separatist pattern have quietly come. To observe both sides of the new Iron Curtain, there are cultural fronts, cultural line of defense, cultural weapons in addition to cultural barriers and cultural trenches. There are cultural security, cultural attack and cultural threats besides cultural invasion. Witnessing such a state, any people who have sound reason except those who remain ignorant and apathetic would feel bitterly disappointed and disgusted. The next target of human society should be set to end the Cultural Cold War and to build a good and kind global village on the basis of reason and science. All will begin with just and modest cultural dialogues. Modesty and justice are the qualities that God adopts to inspire his people while pride and prejudice are the trap that Satan sets to confuse the people.

9. Macrostructure and microstructure of society: cultural background

The cultural unit is located at the macrostructure of society, while individuals are at the microstructure. Pluralistic cultures do not only reflect the relations among the cultural units at macrostructure but give impact on the personal life and destiny at microstructure. During the period of ideological Cold War, the society of the ideological extremism—the paramouncy of class and ism identification—stressed a person’s class background and adopted the class stand and ism beliefs as a basic criteria to judge his identity. In such a society, people lived a depressive, restrained and terrible life. Unfortunately, the new ideological cold war, that is, the Cultural Cold War has followed it. Class and ism identification give their way to cultural identity. The supremacy of cultural identity becomes the mainstream of social ideology. A person’s cultural background is valued, and cultural stand and the sense of cultural belonging are adopted to judge his identity as a basic criterion. In social life, class mark is replaced by the cultural mark. The cultural conflicts are in the place of class struggles. Immediately after the class label applied to every backbone was just torn off, the cultural label is affixed to the wounds. What the cold mainstream society recognizes is tags instead of identity. It is hard for those individuals who have no cultural identity to be accepted by the mainstream society. It seems what left for them is to be excluded or even abandoned by the mainstream society. Canadian skilled migrants of minority have been deeply troubled by their ethnic origin issues. A good case in point is that they have lived a bitter life, suffering from serious hidden discrimination and employment difficulties in this multi-cultural country. In any country, even in such a developed Western country as Canada of today’s world, it seems there is a big gap between the real social conditions and the real human rights, freedom, equality and justice.

10. Tradition and Innovation: cultural accumulation

Multi-culture apparently has focused on each cultural unit of inheriting the cultural traditions respectively in case that it be lost and die out. As for innovation, it is not marked strikingly on the banner of cultural diversity. Therefore, from Canada to the other countries in the contemporary world, the human landscape is featured with cultural accumulation rather than cultural progress. This is a time when culture is wandering. This is a time when it is hard to tell good culture from bad one. Everyone knows that cultural traditions lasting for thousands of years have both essence and dross. But no one knows how to distinguish what on earth is the essence or what is the dross. On the one hand, a cultural tradition has very strong vitality. It can always regain its pneuma and get prosperous after a devastating revolutionary turmoil. On the other hand, the cultural innovation will meet many constraints and obstacles from the tradition. Facing with the profound cultural accumulation, what the scholars can do is to sing high praise of the good tradition or just avoid telling the correct and false of the tradition ambiguously. And what they do to the ancestors who cultivated the tradition is to awe and worship. Whether the tradition from the forefathers is good or bad seems to be a taboo question. By now no book of history and culture has been published on how to reserve the excellent practices or differentiate the corrupt customs with reason. The worse is that it has not become the generally accepted consensus. Such things occur to the culture of every nation, every country. It is the same to the world culture and global culture. When human beings can refine the culture rationally, when the disadvantages and advantages of cultural traditions are getting entirely distinct, a new era will begin.

11. Conclusions

Culture is one of the most popular concepts in the academia at home and abroad. (Wang. and Zhang, 2007, p.1) Cultural diversity is then getting known in the context of globalization. Pluralistic culture can be a policy tendency, or a doctrine,

or a social ecology. However, it is not perfect or intact. The contemporary human living conditions in the cultural visual field can be summarized to be chaotic, unfair and peaceless.

Canada and the other parts of the world do need the harmonious multi-culture of seeking common points while reserving differences instead of the disintegrated one full of conflicts. However, the multi-culture that should have sought common points while reserving differences is to seek the common points while excluding, rejecting, even attacking the differences. The future progress of human society needs to seek common points among diverse cultures. The prospect and the ways to realize the multi-culture's seeking common points while reserving differences need further exploring. Shyness and regrets are needless for the human beings are objectively still in the state of the half-civilized and half-savage era. At this turning point of history, the age of enlightenment has not yet come to the end. Rationalism has not yet won its final success. The enlightenment needs to go on and the rational spirits still need to be carried forward. If we have much opener mind and wider visual span, we will see that the human civilization and human culture are the same sun rising from the horizon.

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“Political Volcano” in 12th Malaysian General Election: *Makkal Sakhti* (People Power) Against Communal Politics, “3Cs” and Marginalization of Malaysian Indian

Kim-Hui Lim

Institute of Occidental Studies (IKON)
Universiti Kebangsaan Malaysia (UKM)
43600 UKM Bangi, Selangor, Malaysia
E-mail: limkimhui@yahoo.com

Wai-Mun Har

Faculty of Accountancy and Management
Universiti Tunku Abdul Rahman
Bandar Sungai Long, 43000 Selangor, Malaysia
E-mail: harwm@mail.utar.edu.my

Abstract

Malaysian politics has been overwhelmingly dominated by the ruling Barisan Nasional coalition since 1969. In the 12th Malaysian General Election, the ruling coalition suffered a shocking moral defeat. This paper argues that the 12th Malaysian General Election is metaphorically a political volcano eruption, witnessing the rise of People Power against suppression of dissatisfactions over communal politics, deteriorating social-economic conditions (dubbed the “3Cs” factors) and continues marginalization of Indian community in Malaysia. Aspects of communal politics include (1) the issues of NEP, Ketuanan Melayu, racism and “second-class citizen” treatment to the Malaysian non-bumiputera, and (2) the issues of UMNO-putra politicizing the NEP and Malay poverty. The “3Cs” refers to dissatisfaction over increasing (1) cost of living, (2) crime and (3) corruption, taking the first letter of each to form the acronym. Meanwhile, the revolution by the Hindu Rights Action Force (Hindraf) highlighted the marginalization of Indian. Indeed, the Hindraf revolution popularized the *Makkal Sakhti* that means “People Power” in Tamil.

Keywords: Political volcano, People Power, *Makkal Sakhti*, Malaysian General Election, Malaysian politics, Communal politics, Marginalization, Malaysia

1. Introduction

In the 12th Malaysian General Election on 8th March 2008, the ruling coalition of Barisan Nasional (National Front) suffered moral defeat. Since independent in 1957, the only other general election the ruling coalition, then called *Perikatan* (Alliance, which later changed its name to Barisan Nasional) failed to win handsomely is in the 1969 election that resulted in racial riot. Consequently, economic inequality between ethnic groups is blamed as the root cause of the riot and thus, the New Economic Policy (NEP), which gives various economic priorities to the *Bumiputera* (literally means “son of the soil”) group, was introduced in 1971 as the remedy. The NEP is supposed to have a 20 years lifespan that end in 1990 but its legacies, the “30% quota system” and priorities to the *Bumiputera* group are continued in the subsequent policies of National Development Policy (NDP) (1991–2000) and National Vision Policy (NVP) (2001 – 2010). In practical, one may argue that the NEP has not expired yet, hence Malaysian laymen know of only NEP but not the other two policies. The NEP managed to strengthen the ruling coalition by winning the support and votes of Malays while the antagonism from non-Malay groups are either softened by their respective ethnic-based political parties within the ruling coalition or suppressed by various laws, particularly the Internal Security Act (ISA). Consolidation of the Barisan Nasional’s (BN) power over Malaysian politics since 1969 is obviously at its peak in the 11th General Election in March 2004 where the BN won 90.87% of Parliament seats and 89.70% of State seats, enabling them to form the ruling government at national level and for all states except Kelantan state where *Parti Islam Se-Malaysia* (Malaysia Islamic Party, PAS) won marginally. Communal politics is played to the best effect by BN using the issue of PAS

intention to set up Islamic State that cause fear to the Chinese while reminding the Malay to defend their *Ketuanan Melayu* (Malay Supremacy or Malay Dominance) [Note 1] and hence, the NEP and United Malay National Organization (UMNO) that championed their supremacy. UMNO is a Malay ethnic based political party and also the leader component party in the BN coalition. All the while, Indian ethnic seems to be a voiceless and “obedience” group, unbelievably content while marginalization of this group seems obvious. With support from the *Bumiputera* (mostly are Malays but also included natives in Peninsular Malaysia, the Sabah state and the Sarawak state), Indian and the “opportunist” within Chinese group, BN has little resistant to retain two-third majorities in Parliament. Government’s control over media make it a mammoth task for any opposition alliance to break the BN’s political dominance until in the 12th General Election where the opposition coalition of *Parti Keadilan Rakyat* (People Justice Party, PKR), Democratic Action Party (DAP) and PAS won a total of 82 (36.94%) Parliament seats and 196 (38.81%) State seats. The PKR-DAP-PAS coalition also gained majority State seats to form State government in five states, namely Kedah, Penang, Perak, Selangor and Kelantan.

The 12th General Election result is the most shocking and best ever result for opposition coalition in Malaysian history, thus prompting media, politician, academician and even laymen tagged this phenomenon as “political tsunami”. However, the factors contributing to moral defeat to the BN are continuous suppression of dissatisfactions under communal politics and the marginalization of Indian ethnic. Hence, the “shocking” loss of BN in the 12th General Election is the results of eruption of a volcano of accumulated dissatisfactions from various ethnic groups. Therefore, the phenomenon of the mentioned election result should be better reflected as a “political volcano” rather than “political tsunami”. According to Wikipedia (2008e), “political tsunami” is a term used to describe an overwhelming victory by one political party over another. The origin of this term is unknown but among the first use of “political tsunami” was by some political analysts in describing the most probable outcome of the general midterm election of November 7, 2006, when the Democratic Party swept the Republican Party out of power in both the United States House of Representatives and the United States Senate. In the 12th Malaysian General Election, the opposition did not manage to sweep Barisan Nasional out of power in federal level and eight other states, therefore the term “political tsunami” seems not appropriate. In contrast, “political volcano” generally reflects people power against political repression of continuous suppression of dissatisfactions. When these dissatisfactions no longer under-controlled, lavas of anger and disappointment erupted, usually precede by demonstrations as signal of dissatisfaction like ash smoke as signal of coming volcanic eruption. As examples, reviewed literatures found that the struggle against Felipe Calderon’s repressive program, religious obscurantism and torture in Mexico that peak in September 2006 is termed as “political volcano” (RCP Publication 2006). Schweimler (2007) portrayed “Ecuador’s political volcano” as continuous 10 years of struggle against the political turmoil, corruption and economic hardship. Subhash Kapila (2004) warned that Bangladesh is sitting on a political volcano that could explode anytime. He believed that the masses in Bangladesh could not be expected to be in state of “frozen paralysis” due to the terrorization by Islamic fundamentalists, thus not ruling out sharp reactions from the “silent majority” in terms of counter-violence. Nevertheless, the People Power Revolution of 1986 against Ferdinand Marcos in Philippine seems most suitable being tagged as “people powered political volcano”, a reflective of Malaysian people-powered 12th General Election. In the Philippine scenario, its citizens raised against years of authoritarian regime of Marcos that suppressed their dissatisfactions through repressive laws and political assassinations. The assassination of opposition leader Ninoy Aquino on 21 August 1983 sparked off the eruption of Philippine political volcano. In Malaysia, the dissatisfactions are squashed through restriction of freedom of speech that in turn camouflaged as “noble sacrifice for economic growth and social stability”. Freedom of speech in Malaysia is often mocked as “having freedom to speak, but no freedom after speech”. Three major public rallies are signs of eruption, metaphorically to smokes coming out of an active volcano. For 50 years, the Barisan Nasional thought Malaysian political volcano is inactive as the repression actions have overwhelmingly success. Suppression of speech, which included detention without trial under Internal Security Act (ISA) and biasness of mainstream media as government’s propaganda vehicles seem very effective. Nevertheless, in the 12th Malaysian General Election, the volcano finally erupted, witnessing the rise of People Power against suppression of dissatisfactions over communal politics, deteriorating social-economic conditions (dubbed the “3Cs” factors) and continues marginalization of Indian community in Malaysia. There are two aspects of communal politics, namely (1) the issues of NEP, *Ketuanan Melayu*, racism and “second-class citizen” treatment to the Malaysian non-*bumiputera*, and (2) the issues of UMNO-putra politicizing the NEP and Malay poverty. The “3Cs” refers to dissatisfaction over increasing (1) cost of living, (2) crime and (3) corruption, taking the first letter of each to form the acronym. Meanwhile, the revolution by the Hindu Rights Action Force (Hindraf) highlighted the marginalization of Indian. Indeed, the rally by Hindraf popularized the *Makkal Sakhti* (literally in Tamil means “People Power”).

2. People Power Revolution against Communal Politics

History of communal politics in Malaysia can be traced back even before the country’s independent. British colonial used the “separate-and-rule” policy that resulted in identification of ethnic groups. Generally, the Malays are identified as public administrators that hold most of the government positions allocated by the British to the locals. Chinese

generally are identified as tin-miners and entrepreneur while the Indians are mainly perceived as estate and railway workers. When the British introduced Malayan Union after World War II in 1946 to merge all Malay states, Melaka state and Penang state that were under British colony at that time into centralized governance under a British Governor, the Malays forcefully objected, fearing their status as *bumiputera* being threatened. The Malays objected two aspects of the Malayan Union. The first is the abolishment of the supremacy of the King (known as *Sultan* in Islam-Malay world) to just empowered in matter relating to Islam and Malay's customs. The second is the award of equal citizenship to the non-Malay based on *jus soli* principle. As a result, the British replaced the Malayan Union with Federation of Malaya on 1 February 1948. The Malay has managed to reinstate the power of *Sultan*, tightened the requirements for citizenship and the Malay is to be given special rights as *bumiputera*.

Antagonism against Malayan Union and efforts to protect Malay's privileges resulted in the establishment of United Malays National Organization (UMNO) by Onn Jaafar in 11 May 1946, which has the motto of "Hidup Melayu" (literally means "Long Live the Malays"). From its background, UMNO is a Malay ethnic based political party. UMNO and Malayan Chinese Association (MCA) [Note 2] formed the *Perikatan* (Alliance) for the Kuala Lumpur Municipal Council's election in 1952 and won convincingly (Barisan Nasional, 2004). Malayan Indian Congress (MIC) [Note 2] joined the Alliance in 1954 (Malaysian Indian Congress, 2004). The Alliance won 51 out of 52 seats in the first General Election in July 1955 and further strengthened when more political parties joined the coalition. This coalition of various parties was later institutionalized as Barisan Nasional (BN). Nevertheless, Mauzy (1983: 78) questioned that the formation of BN could be an *ad hoc* happening following the racial May 13 riot rather than a planned effort to form a truly multiracial coalition. MCA was formed on 27th February 1949 out of the need to save the Chinese in Malaya from being repatriated to China (MCA 2007). Meanwhile, MIC was established in August 1946 to fight along for Indian independence from British colonial, and then turned to struggle for Malaysian independence after India obtained its independence (Wikipedia 2008a). All three main parties of then, the Alliance and now BN are ethnic based political parties. UMNO is confined to ethnic Malays, MCA to ethnic Chinese and MIC to ethnic Indians. Furthermore, the fact that these three core political parties of the BN coalition, namely UMNO, MCA and MIC still remained as individual ethnically based party further proves racial politics exist in Malaysia. Some other BN component parties are state-based. For example, the Sarawak United Peoples' Party (SUPP) is mainly a Sarawak state-based political party that is mostly dominated by Chinese in that state while Parti Bersatu Sabah (PBS) (Sabah United Party) is mainly a Kadazan-Dusun ethnic cum Sabah state-based political party. Besides the ruling coalition of *Barisan Nasional*, the opposition coalition of *Barisan Alternatif* (Alternative Front) also partly ethnic-religious based, especially in the prior general elections in 1999 and 2004. The clearest example is PAS. Many (but not all) in the PAS maintained a literalist-fundamentalist notion of Islam, rejected democracy as a Western legacy and as an extension of secularism, furthering Islamic laws and ultimately establishing an Islamic state (Loh 2003: 95). Taking advantage of PAS's Islamic ideology and against events such as aggression on ethnic Chinese in Indonesia, the Malaysia 13th May 1969 racial riots (dubbed as "May 13") and the looming terrorist activities that were linked to Islamic fanatic groups, issues of setting up Islamic state were played up to the benefit of the *Barisan Nasional* by striking fear into the Chinese group. In the previous 11th Malaysian General Election in 2004, issues that are either directly or indirectly linked to the concept of Islamic state were presented to the Malaysian Chinese voters through various categories of fear instilling rhetoric also known as *ad baculum* (Lim & Har 2008: 29). Nevertheless, those PAS leaders who believe Islam is not incompatible with democracy championed Anwar Ibrahim's plight for *reformasi* (reformation) and the formation of Alternative Front (Loh 2003: 95). Anwar Ibrahim is the ousted former Deputy Prime Minister of Malaysia cum Minister of Finance and current *de facto* leader of PKR and opposition coalition.

In fact, before Independent until contemporary, there were efforts to transform communal politics to multi racial politics in Malaysia. The first effort was the unsuccessfully attempted by Onn Jaafar, the founder and first President of UMNO. In his speech in the UMNO's half-year General Meeting on March 1951, Onn Jaafar proposed to open membership of UMNO to the non-Malay and renaming UMNO to "United Malaya National Organization" [Note 3]. He reminded the Malays about some plans like establishment of Labour Party or Progressive Party that did not limited their membership to one ethnic but open their doors to anyone that are willing to abide by the party's rules. Hence, he urged UMNO members to "open its door before its door is being closed by other peoples" (Mohamed Abid 2003: 180 – 181). However, his proposal went unheeded resulting Onn Jaafar left the party on August 1951 to form the multiracial party, Independence of Malaya Party (IMP). IMP failed subsequently, implying that communal politic triumph over multiracial. Onn Jaafar was succeeded by Tunku Abdul Rahman as President. In his last speech in UMNO General Meeting on 26 August 1951, Onn Jaafar claimed that UMNO is a national association of the Malays, thus questioning UMNO as a truly national organization of the people in Malaya. He further reminded the Malays that democratic rule should not protect the rights of only one group of its citizens (Mohamed Abid 2003: 191). The second effort was the success of Tunku Abdul Rahman uniting UMNO, MCA and MIC under the Alliance. That might be the best possible effort to start off multiracial politic in early days of Malaya but as those racial-based parties have been cooperating and in coalition for so long (since more than 50 years ago), should they not merge themselves into one single multiracial

party with its own political ideology rather than a group of individual racially identified parties in a coalition? Hence, a successful start by Tunku Abdul Rahman seems failed to further complete the transformation of Malaysian politics towards multiracial based. The third effort towards multiracial politics is trumpeted by the DAP's concept of "Malaysian Malaysia". This concept is made as one of their objectives and supported by their policies to abolish the division of "bumiputra" and "non-bumiputra" as paramount principle towards nation-building (DAP 2005). However, despite its strong social democrat approach, DAP is perceived by the society as a "Chinese party with few other professional Indians" due to its leadership and members structure which is dominated by ethnic Chinese. Similarly, in spite of its multi-racial political philosophy, *Parti Gerakan Rakyat Malaysia* or PGRM (another main component party in the *Barisan Nasional*) is also perceived as a "Chinese party" even though there were previously and currently few outstanding non-Chinese members in the party while People's Progressive party (PPP) has lost its strength and prominence. PGRM was formed on 24th March 1968 and when the party was approved by the Registrar of Societies on 25th May 1968, the first Central Committee comprised six Malays, including two ladies, six Chinese and three Indians. Among its non-Chinese founder included the renowned Professor Syed Hussain Alatas and V. Veerapan (PGRM 2008). PPP was formed in 1953 in the Perak state (at then, by the name "Perak Progressive Party" before changing it to the current name in 1956) by the Seenivasagam brothers mainly as an opposition party to the Alliance. In 1969, PPP was nearly able to form the Perak state Government, but fell short of just two seats in the state assembly. PPP is one of the founding members of *Barisan Nasional* in 1973 but joining the coalition would prove its undoing as it lost nearly all its seats when it contested under the *Barisan Nasional* ticket in the 1974 Malaysian General Elections (Wikipedia 2008B). Lastly and most contemporary effort towards multiracial politics, Anwar Ibrahim seems has successfully initiated another starting step towards multiracial politics by uniting PKR, DAP and PAS in the alliance of *Barisan Rakyat* (People Front) in the 12th Malaysian General Election, which was renamed as *Pakatan Rakyat* (People Coalition) after the election. Previously in the 10th and 11th Malaysian General Election in 1999 and 2004 respectively, the opposition coalition is known as *Barisan Alternatif* (Alternative Front).

Besides racially identified political parties, NEP seems to be the most controversial representation of communal politics in Malaysia as it is linked with the issue of *Ketuanan Melayu* and the event of "May 13" racial riots. Some researchers, like Dr. Kua Kia Soong, director of the human rights organization SUARAM believed that the riot is not racial in nature, but politicized using communal platform. In his book entitled *May 13: Declassified documents on the Malaysian riots of 1969*, he wrote that "official history" infers that such racial riots will occur "spontaneously" if, or when the status quo (refers to Malay Supremacy) is shaken. However, in his view, the riots were by no means a spontaneous outburst of violence between Malays and Chinese but rather a planned coup d'état by the ascendant state capitalist class against the Tunku (Abdul Rahman)-led aristocracy while Farish A. Noor (2008c) claimed that the elevation of May 13th, 1969 as a turning point in Malaysia's history was and remains a deliberate act.

2.1 NEP, *Ketuanan Melayu*, racism and "second-class citizen"

The New Economic Policy (NEP), implemented throughout the *Second Malaysia Plan 1971 – 1975* to *Fifth Malaysia Plan 1986 – 1990* has two objectives of eradicating poverty and restructuring Malaysian society to correct economic imbalance between races, both based on the belief that Malays are generally much poorer than the non-Malays, particularly the Chinese. This imbalance is also partly blamed as the cause for the "May 13" riots. According to the *Second Malaysia Plan 1971 – 1975* (as cited in Milne 1976: 240), "the government has set a target that within twenty years (1971 to 1990), Malays and other indigenous people will manage and own at least 30% of the total commercial and industrial activities in all categories and scales of operation". Kua (2007: 118) criticized that the main premise of the NEP that couched in terms of restoring the "racial imbalance" can be seen as an expression of the ruling class's communalist strategy. Kua Kia Soong also claimed that at Independence in 1957, Article 153 (of the Malaysian Federal Constitution) on the "special position of the Malays" was mainly concerned with their access to land, admission to public services, issuing of permits or licenses for operation in certain businesses, scholarships, bursaries or other forms of aid for education purposes. On the other hand, the status quo since the imposition of the National Operations Council in 1969 (as a result of the "May 13" riots) has been one of *Ketuanan Melayu*, a racist concept that is alien to the spirit of the Federal Constitution and that tries to justify all kinds of racial discrimination (Kua 2007: 1). Therefore, one of the (not surprising) Chinese complaints about the NEP is that the objective of restructuring the economy to help the Malays is being given too much attention compared with its another objective of eradication of poverty regardless of race (Milne 1976: 251). They also question why the principle of proportionate or near proportionate representation of ethnic groups not applied across the board? This was particularly referred to under-representation of Chinese in the civil service, land settlement, the armed forces, university admissions, police, nurses training, taxi and lorry licenses, and the composition of the National Youth Council. As for the Indian, they called attention to their relatively high rate of unemployment and the principle of proportionate allocations for the Indians in spheres such as land settlement schemes and admissions to university (Milne 1976: 252 – 253). Those issues are still relevant contemporary, most notably are the relative poor economic welfare of the Malaysian Indian community and under-representation of Chinese and Indian in the government Cabinet, be it in quantity of Ministers or "importance" of the ministerial portfolio. Since the resignation

of Tan Siew Sin as Finance Minister in 1974, what is the most important ministerial portfolio ever held by a Chinese or Indian? In the implementation of the policy, “the government will ensure that no particular group will experience any loss or feel any sense of deprivation” (*Second Malaysia Plan 1971 – 1975*, cited in Milne 1976: 240). The captivating point is when the targets are measured in term of percentage (30%), how can improvement of percentage share of one group not causing any loss or deprivation to other groups, and hence causing grievance?

R. S. Milne, then editor of *Pacific Affairs* and one of the active academic critics of Malaysia’s NEP has identified two main types of possible tensions resulting from the NEP, regardless of its success or failure. Those are tensions between different racial groups and those within a racial group, particularly the Malays. The second aspect shall be discussed in the later part of this article. He noted that non-Malay might be antagonized by the fact that NEP is doing more for Malays than for them, particularly in areas where there may be inter-ethnic competition for scarce resources like small manufacturing business and entry into university (Milne 1976: 257). Fundamentally, the NEP identified Malaysian into two main groups, which are the *bumiputera* and the non-*bumiputera*. The former group enjoys “special privilege” in many aspects include economic rights, university enrolment and public sector employment, hence giving impression that the non-*bumiputera* group is treated as “second-class citizen” or worst, as “foreigner”. It is a norm that application forms in Malaysia need applicants to identify themselves as either *bumiputera* or not or even more specifically stating their respective ethnic origin and religion. Ethnic and religion are also clearly stated in the National Identity card. To some extent that involved the issue of marginalization of Indian community in Malaysia, the *DNA* newspaper of India carried a front-page article claiming Malaysia practicing apartheid against Hindus (*The Star* 2007: N12). In Malaysia, as Malays are the main ethnic component in the *bumiputera* group and Malays are also Muslim, religion seems to be another channel to segregate Malaysian into two classes of “Islam” and “non-Islam”. In a BBC write-up, their Islamic affairs analyst, Roger Hardy (2005) questioned the fairness of the twin guiding principles (goals) of Malaysia’s modernization. The first is giving Islam a new pre-eminence in public life, which meant stressing Muslim values and identity, building up Islamic institutions and forging new links with the wider Muslim world. Secondly, Malaysia continuing the “affirmative action” policies, begun in the 1970s, which gave the ethnic Malays – who form some 60% of the population – a privileged position in government, education and bureaucracy. Hence, Hardy added, “Where do these twin goals leave the Chinese, Indians and others who form the non-Muslim minority? Can a society based on these two principles also be genuinely democratic?” Even in the 1970s, Milne (1976: 244) has written that the degree of administrative discretion exercised by the Ministry of Trade and Industry has caused concern among non-Malays as various Ministry approvals are dependent on their satisfying various requirements about the proportion of Malays employed and the achievement of the Malay ownership target of 30%. When administrative controls are put in the hands of the government officials, uncertainty is created and the criteria on which decision are made are obscured (Milne 1976: 251).

On the issue of fair opportunity in education and brain drain, prominent opposition leader, Lim Kit Siang has been condemning the inequality as a result of NEP since the 1970s, but remained unheeded by the ruling government. In his speech on the Royal Address on 22nd March 1978, he warned that the complete abolition of the English-medium MCE examination and switch over to the Malay-medium SPM examination after 180 might cause difficulties for Malaysian students to join Commonwealth universities and colleges simply because their command of the English language would not be sufficient to entitle them to automatic admission. Thus, when the NEP expended higher education opportunities for the Malay students at the expense of non-Malay students, the door of higher education seems close to the non-Malay students both from inside (because of deliberate government policy) and abroad (because of inadequate command of English language) (Lim 1978: 10). In the same speech, Lim Kit Siang condemned the government ignorance towards the proposal of establishment up Merdeka University that use merit system as enrolment criteria. He claimed that if the Barisan Nasional government continues to be blind to the injustice and inequalities created by the NEP as the root causes of popular frustration, discontent and alienation, students aboard might refuse to return or professionals emigrate en masse (Lim 1978: 12 – 14). Azmi Sharom (2008) claimed that 30% of the staff in the National University of Singapore Law school are Malaysians, hence questioning “How come these clever fellows (Malaysian) who are good enough to teach in a university that is among the top 20 in the world are not here in the land of their birth?” and “Is it because that talent is all non-Malay and they feel they have better opportunities there than here?” Albright the reasons, statistics from the Home Ministry of Malaysia show that Malaysian Chinese renouncing citizenship from year 2000 to 2006 is 87% of the total follows by Malays (6.6%), Indians (5.0%) and others (1.4%) (Yoges Palaniappan 2007b). Yet, the brain drain is hard to quantify, claimed Montlake (2008) in referring to many white-collar Malaysian migrate to Singapore and elsewhere without giving up their (Malaysian) passport.

The NEP and racist mindset of the ruling Barisan Nasional leaders, to some extent implied that non-Bumiputera is “foreigner”, prompting racial discrimination. This issue gained an unexpected revelation in an exclusive post 12th Malaysian General Election interview by *Malaysiakini* with Samy Vellu, a long-serving Minister cum MIC party President on 15th April 2008. While stressing that the government is not discriminatory, he claimed that those in the civil service are. “Anything for other races, they don’t like to see it ... some of them don’t consider us (non-Malays) as

Malaysian. They are the ones who brought the Barisan (Nasional) down in this election”, he was quoted saying (Anand 2008a). He also admitted they (the MIC) were not treated as equals in the coalition. Below are some extracts of Samy Vellu’s answers in report of the interview (Anand 2008b).

(1) The present total employment in government, Indians have (is) not more than four percent... And the (job) promotions are completely very bad. We (referring to the Malaysian Indian) don’t get promotions, however you work, however smart you are, you will never get promotion. If you get a promotion, you won’t last long. These are the things that made people get fed up.

(2) In the local authorities, you never get jobs, you never get any contracts, nothing. There may be councilors, one or two. These councilors will not be in the important committees.

(3) Why (did) we build the Tafe college? Because we never get places in any of the government technical college. So, I said let’s build, let’s have our own.

The issue discrimination and taking non-Malays as “second class citizen” or “foreigner” has roots to the social contract for Independent where the Malays granting non-Malays citizenship for the later to agree to four Malays’ special rights that are embedded in the Federal Constitution. There are special privilege to the Malays (later manifested in the NEP and the concept of *Ketuanan Melayu*), Islam as official religion, the power of the Malay rulers and the Malay language as official language. The non-Malays are reminded not to question the social contract while being reminded that they are not indigenous settlers and the consequences of risking other racial riots of the “May 13” tragedy if the Malays are provoked. Below are several examples of racist remarks.

(1) In his *The Malay Dilemma* book, Mahathir (1970: 116) wrote “the non-Malay is always a guest to the Malay, a guest in his country”. He also claimed that the Chinese and Indian found in fact that in the land of the Malays they are privileged (ibid: 117). Mahathir persisted that Malays bestow “inalienable rights” due to that they are “the original or indigenous people of Malaya and the only people who can claim Malaya as their one and only country” (ibid: 133).

(2) Senator Dr. Mohd Puad Zarkashi of Johor state UNMO quoted stressing that the “Hidup Melayu” slogan is the UNMO struggle to enable the return of Malays’ right that were denied by history. The right is deemed “the nation debt to the Malays due to the denial of the colonial on the *Bumiputera*’s (son-of-the-soil) right in his own soil” (Utusan Online 2007).

(3) Utusan newspaper (Utusan Online 2000) wrote in its article column: “Remember, Malaysia is originally named *Tanah Melayu* (literally “Malay Land”). Still not compromise enough of the Malays to change the name to Malaysia?”.

(4) Mohamed Rahmat, former Secretary General of UMNO and Barisan Nasional claimed that as long as Malays position is not consolidate, imbalance might occur that may cause security problem. He further threaten, “Do not conjecture the Malays, they only know one word, amok!” (Utusan Online 2006).

(5) Dr. Mahathir Mohamad, former Prime Minister of Malaysia claimed that Malaysian Chinese would ‘return’ to China if the local economy is bad while the China economy is robust. “In the past, they came to Malaysia because there were no opportunities (in mainland China). If there are little or no opportunities here, some would return to China,” he said (Hong 2007).

(6) In August 2006, Khairy Jamaluddin, UMNO Youth Deputy Chief cum Prime Minister Abdullah Badawi’s son-in-law told an UMNO Youth meeting that the Chinese Malaysian community would take advantage of any UMNO infighting to make demands to advance their interests. Besides at that meeting, he also make other racial remarks including complaints that the *Bumiputera* have not reached the 30% equity ownership and the communities is still lagging behind in many economic opportunities (Beh 2006a).

(7) In an interview with Agence France-Presse (AFP 2008) (quoted by *Malaysiakini* on 21st Jan 2008), Deputy Prime Minister Najib Razak was quoted rising the spectre of the country’s worst race riots of the “May 13” to defend the government crackdown on ethnic Indian street protest. He said, “If the Malays of Kampung Baru (a Malay enclave that was one of the flashpoints of the “May 13” riots) come out then we have the spectre of a serious possibility of a racial clash in this country.” “There were signs that they (the Malays) were preparing to come out so we had to tell them (the Indian protesters), ‘look, don’t make the situation any worst’,” Najib further added.

(8) Umno Youth chief cum Education Minister Hishammuddin Hussein has been repeatedly waving and kissing the *keris* (a Malay dagger) in various UMNO meetings for years. In 2005, he had brandished the *keris* during the Umno general assembly in rallying members behind his call for *Ketuanan Melayu* (Yoges Palaniappan 2007a). Hishammuddin waved and kissed a *keris* again at the Umno Youth annual meeting in 2006, when calling for the revival of the New Economic Policy (ibid) while warning religious freedom groups not to raise issues related to Article 11 and Article 121 (1A) in the Federal Constitution (Beh 2006b). Despite some flippant protests from MCA and PGRM, no other concrete action taken even by Abdullah Badawi.

(9) An exact quote from Wikipedia (2008c) is as follow: In 1987, as UMNO Youth Chief, Najib defended special Malay privileges in a speech where he vowed to bathe the *keris* (Malay dagger) with Chinese blood. Shortly afterwards, the government launched a crackdown on extremist elements, termed Operation Lalang, although Najib was not detained. At the same rally, banners were hoisted carrying phrases such as "revoke the citizenship of those who opposed the Malay rulers", "May 13 has begun" (referring to the May 13 racial riots in 1969), and "soak it (the *keris*) with Malaysian Chinese blood" (also, see Farish A. Noor 2008a).

(10) In the 57th UMNO general assembly in 2006, an UMNO Malacca state delegate, Hasnoor Sidang Hussein was quoted saying: "Why should Malays and Umno be passive and defensive? It's time to raise our voices and defend the Malays and Islam. Umno is willing to risk lives and bathe in blood in defense of race and religion. Don't play with fire. If they mess with our rights, we will mess with theirs" (Soon & Kuek Ser 2006).

2.2 UMNO-putra politicizing the NEP and Malays poverty

In 1970, Mahathir Mohamad wrote *The Malay Dilemma* book, arguing that the Malays were being held back partly by their physical environment and partly by hereditary factors. Due to that, the Malays possessed a worldview that retarded them in the contest between races in Malaysia, making them little match for the "industrious and determined immigrants" and thus lost out in the competition over business, skilled jobs and urban employment (Milner 2003: 134). Mahathir called for an "affirmative action" program in aid of the Malays (Khoo 1995: 25) and that "harsh punitive measures should be meted out to those who impede the elevation of the Malays to equality with other races" (*The Malay Dilemma*, p.60). Today's "Malays' dilemma" has taken another twist because the Malay poverty and backwardness have been an institutional problem that saps the Malay laymen's share of the country prosperity to politic business cloaking under NEP and *Ketuanan Melayu*. Therefore, shrill warning cry that Malays are "under treat" after the 12th Malaysian General Election is rebutted by Azmi Sharom (2008), claiming that it is UMNO hegemony under threat, not the Malays. During the recent (and many others past) election campaign, UMNO volubly criticisms about the poverty and lack of development in the PAS lead state of Kelantan backfired by empirical and statistical data that shows clearly that after 18 years of PAS rule, Kelantan was no longer the second poorest state in Malaysia while neighboring state of Terengganu (under the Barisan Nasional ruling, population in both Kelantan and Terengganu are mostly Malays) was suffering under much higher levels of absolute poverty with more people there living below poverty line (Farish A. Noor 2008b). According to Gomez (2002: 82), practice of political business has been facilitated by the extent of authoritarianism in Malaysia, characterized by the centralization of power in the executive arm of government, particularly in the hands of UMNO. This has lead to beliefs that Malays poverty is not because they are being denied their rights to the fruits of economics success by the non-Malays. In contrast, they are poor because their shares of the economic prosperity are being snatched away by "UMNO-putra", a term literally means "son-of-UMNO" but used in mockery of capitalists and opportunists that are linked to UMNO either by party memberships or other networks. Gomez has provided a list of 37 major corporate figures together with their companies in which they own an interest or hold a directorship and their affiliations with UMNO or key UMNO leaders (see Gomez 2002: 87 – 90, Table 3.2). The example of corporate figures comprises of 32 Malays (include three of Mahathir's son but not inclusive of other politically connected prominent business figures like Daim Zainuddin), four Chinese and an Indian.

There are twin perils of UMNO-putra politicizing the NEP using Malays poverty as backdrop. Firstly, this scenario naturally create money politic in UMNO, where members trying to buy votes for position in the party or promoting respective crony protégé capitalists. In a wider context, Gomez (2002: 83) describes Malaysian "money politic" as among other things included favoritism, conflicts of interest and nepotism in the award of state-created rents, securing votes during federal and party elections by disbursing current and future material benefits, and the direct and indirect interference of political parties or influential politicians in the corporate sector. According to Milne (1986: 1371 – 1372), the total money spent on votes at the 1984 UMNO elections was allegedly well in excess of RM 20 million, the highest ever and was said that for the first time more "Malay money" was spent than "Chinese money". As a result, influence over UMNO elections is shifting from rural areas, where Malay school teachers were often leaders, to urban areas, the base of Malay capitalists. A decade later in UMNO's 1993 party election (highlighted by the contest for Deputy President post between Anwar Ibrahim and UMNO veteran incumbent, Ghafar Baba), estimated sum spent has increased to approximately RM3 billion. By 1995, almost 20 percent of UMNO's 165 division chairmen were millionaire businessmen-cum-politicians (Gomez 2002: 98). Mahathir dubbed the money politic in UMNO elections as "culture of greed" (Gomez 2005: 38). Nevertheless, he seems "easily forget" that he is part of many criticisms regarding money politic and cronyism although none of those criticisms could be proven legally. Daim Zainuddin is among well-known Mahathir's protégé that worth mentioned. Mahathir appointed Daim as chairman of Peremba Bhd, a state-owned property development firm in 1979 and chairman of Fleet Holding Sdn Bhd, UMNO's private investment arm in 1981. Hence, acting in his triple capacity as private businessman, government appointee and UMNO trustee, Daim involved these companies under his control in a myriad of interlocking business transactions (Gomez 2002: 91 – 92). Daim ventured into business in the late 1960s, producing table salts and plastics. Both of those ventures failed, yet in 1992, the total value of Daim's assets was reportedly RM1 billion, which included assets in Australia, Britain,

Mauritius and the United States (Gomez 2002: 93, quoting *The Star* 19/5/92). The puzzling question is that should the emergence of “new rich” Malays by like Daim indicates the government success in developing entrepreneurship Malays? The answer is “no” as money politic and politic patronage cause polarization within the Malays. The poverty to the “laymen” Malays group is constantly being used as excuses to support continuous “constructive protection” (a term used by Mahathir in his *The Malay Dilemma* book) that protect the “new rich” Malays. In 1974, there already have some protests of dissatisfaction from the Malays like the unrest in Baling (Kedah state) in November and student demonstrations throughout the second half of that year (Milne 1976: 260). Professor Syed Hussein Alatas branded the transfer of thriving business from government agencies to Malay capitalists as “the height of absurdity which has never entered the imagination of even the most fanatical capitalists in the entire history of mankind”. His question speaks out the peril and dissatisfaction of NEP-politicking clearly: “Why should a small handful of greedy and un-enterprising Malays get the benefit of the transfer as opposed to the Malay community represented by the workers of the enterprise and the Government’s interest in it?” (Milne 1976: 249). However, the most comical criticism was in 2005 towards Minister of International Trade & Industry, Rafidah Aziz over the dispensing of Approved Permits (APs) to import vehicles without tax to selected few companies. The UMNO members lamented not the practice of targeting individuals as beneficiaries of the APs, but that they were not the people who were targeted (Gomez 2005: 39).

Secondly, this NEP-politicking leads to “dependency syndrome”, also known as “subsidy mentality” to both UMNO-putra and the Malay laymen, which has weaken the Malays in term of physical environment and mentality. Isn’t that similar with Mahathir’s version of “Malays dilemma”? Malays are preferred in the awarding of public work contracts (Bakri Musa 1999: 178) but the benefits of those contracts are shared by not all Malays. Logical deduction tells that all contracts especially the mega projects need a measurable amount of capital layout, which is not affordable to poor Malays. Hence, this gives rise to so-called “Ali Babaism” where the Malays get the contract or license, then “sells” or “outsource” it to the non-Malay, particularly the Chinese for instant monetary gain. This on one hand angered the Chinese, as they have to subscribe to rent seeking to survive or to get the fruits of the nation economic growth. On the other hand, the poor Malays that typically without political connection or big capital layout gain nothing, no contract awarded, no rent received, remained in poverty and worst still, their poverty condition being used (or rather “misused”) as reasons to justified the continuous practice of awarding of public work contracts and licenses to UMNO-putra Malays. Same argument applied to privatization of large corporations where corporate Malay businessmen owned equities but doubting that the same privilege is enjoyed by the laymen Malays as well. As a result, an intra-class cleavage is created within the Malays. Even in 1976, Milne (1976: 259) has cautious that the benefit of NEP might have been restricted to a small “special class”, “coterie” or “elite” and if it is so, the political consequences is hard to guess. Then till contemporary context, critics of the NEP or the Bumiputera privileges are usually aggressively dealt with. As examples, in 2006, Lim Teck Ghee was force to resign as the director of the Center for Public Policy Studies after it release a report that claimed the NEP has already achieved its goal of 30% Bumiputera corporate ownership while then European Commission ambassador, Thierry Rommel was heavily vilified for labeling the government’s racial quota policy as protectionism in 2007. Therefore, no surprise that a national youth survey (conducted before the Hindraf rally) revealed that 37% of ethnic Malay as contrast to 59% of Chinese and 58% of Indian disagreed that Malaysia’s government treated everyone equally. The survey also revealed that 67% Malay agreed that “Malaysian free to speak what they think without fear”, but only 44% of Chinese and 56% of Indian concurred (Montlake 2008).

3. People Power Revolution against “3Cs”

As mentioned, the “3C” are cost of living, crime and corruption. An opinion pool commissioned by *The Star* newspaper in December 2007 reported that the three most concerned issues to Malaysian are cost of living (as claimed by 96% of the respondents), followed crime rate (88%) and illegal immigrants (40%) (Zulkifli Abd Rahman & Florence A. Samy 2008). Firstly, Malaysian did not content with inflation that continuously raises the cost of living. Dissatisfaction may have mounted year by year as the government keeps on insisting that the Consumer Price Index is low, which is not reflective on the actual prices the consumers need to pay in their everyday living. Continuously increase in crude oil price has put pressure on the government to reduce petrol subsidies, increase toll rate and electricity rate, which could accelerate inflation in the country. The anger of the voters is further played up by the opposition in various campaigns like mocking “BN” acronym as “Barang Naik” (literally means “price of goods increase”) while Anwar promised to reduce petrol price if the people power backs the opposition to win the election and form the ruling government.

On crime, Malaysians generally have not satisfied with the crime rate or the police forces for a long time. The police force failed to portray a good image of integrity and efficient to the public. Statistics from the Royal Malaysia Police are summarized in Table 1. As per Table 1, total crimes, rape and property crime accelerate in year 2006 and 2007. If year 2004, the year of the prior 11th general election is used as yardstick, total crimes have increased 33.94%. Increase in rape cases is even more alarming at 84.92%. Perhaps, a laymen voters might not understand or have exact access of these statistics, but their fear of crime and their family members (especially the daughter) safety have been part and parcel of their life, hence further boiling their dissatisfaction towards the government.

Nevertheless, the eruption of dissatisfaction on crime concerns in Malaysia could be due to few high profile crime cases involving brutality against women and children. Example of those cases include the murder of Mongolian Altantuya Shaariibu (body was allegedly blown up by military-grade explosives, case still pending hearing), Canny Ong (raped, stabbed and then dumped into a manhole to be burned to dead on 14 Jun 2003), Nurin Jazlin Jazimin (8-year old, reported missing since 20 August 2007), Nurul Huda Abdul Ghani (10-year old, brutally raped and murdered, Jan 2004 case) and Sharlinie Mohd Nashar (five-year-old, reported missing on 9 Jan 2008). Besides, gang-rape cases also widely reported in Johor Baru, the capital city of Johor state. A series of rape cases in June 2007 particularly terrified the residents of Johor Baru. On 12 June 2007, three men raped a 19-year-old girl and forced her 22-year-old boyfriend to watch helplessly, after he had been slashed twice. The following day, a group of armed men took a couple on a terror ride before raping the 35-year-old woman in the presence of her friend, who was slashed. On 20 June 2007, a schoolgirl was raped by four men and another by a bogus policeman in two separate incidents within a six-hour period (The Star Online 2007 & Farik Zolkepli 2007).

Issues of corruption encompass mismanagement of public funds and juridical problems. Based on Transparency International (TI) Corruption Index (score of “10” being the least corrupt while score of zero being most corrupt), Malaysia’s yearly score from 1995 to 2007 range between 4.8 (achieved in year 2000) to 5.32 (achieved in year 1996). These index scores seem “not good enough” after Abdullah Badawi greatly being portrayed as the Chinese legendary graft-buster Justice Pao and his continuous promise of “no-nonsense” anti-corruption stand since the last general election in 2004. Worsen the corruption dissatisfaction was the Auditor General’s Report 2006, detailing mismanagement of public funds. Glaring examples include excessive expenditures by the Youth and Sport Ministry that reported to have paid RM8.4 million more than market price for 13 items. Two examples are technical books were bought at RM10 700 per set while corresponding market price is RM417 per set (25.66 times higher) and two-tonne car jack purchased price at RM5 471 per unit is 109.42 times higher than its corresponding market price of RM50 per unit. The ministry’s secretary-general was also reported to have signed 11 contracts worth RM8 million to RM74 million pertaining to the National Youth Skills (Training) Institute on behalf of the government. The defense minister (who is also the Deputy Prime Minister) was also asked to explained the RM6.75 billion scandal of six navy patrol boats that are either not been delivered or not operational (Malaysiakini 2007a). Another questionable case is the award of the RM1 billion-bridge replacement project in 2000 to Titanium Management Sdn Bhd, a company owned by a son of Chief Minister Abdul Taib Mahmud (Thein 2007). The mentioned company only registered in 1998 with a paid-up capital of RM2.4 million, thus the RM1 billion project is about 417 times its paid-up capital. Besides the 2006 report, the Auditor General’s Report 2005 highlighted the misuse of the national disaster relief fund for tsunami victims and uncollected taxes (Beh & Yap 2006) while then Deputy Finance Minister Tengku Putera Tengku Awang was quoted saying the Finance Ministry has categorized seven states as “almost bankrupt” since they were in financial deficit and needed aid from the federal government (Beh 2004).

Corruption issues were no longer be able to suppressed but exploded through the “Lingam video-clip” case, all at once brought back the memories of the historical *Operasi Lalang* (literally “Weed Operation”) and the “1998 constitutional crisis”, both started in 1987 and peaked in 1998. *Operasi Lalang* refers to events from October 1987 to April 1989 that resulted in 106 person detained under the ISA, which 38 were formally served with 2-year detention orders at the end of December 1987. Of the thirty eight detainees, seven were DAP’s Member of Parliament, ten from PAS, two from PSRM, ten Christians associated with church work, two Chinese educationists while the rest are academicians, environmentalists and individuals (Lee 1989: 14). Lee Lam Thye (ibid: 9 & 14) claimed that never in the history of Malaysia has such a wide spectrum of people ever been arrested under ISA and believed that the *Operasi Lalang* was an orchestrated intimidation of the people to repress the growing demands for government accountability and democracy. In addition, the country judiciary system was also in turmoil in 1987 when Salleh Abas, then Lord President was suspended two months after he convened a meeting of all 20 federal judges in Kuala Lumpur that decided to send a letter to the King stating that they were disappointed with comments made by the Prime Minister about the judiciary. The issue is complicated as it inter-related with the internal battle within UMNO, UMNO deregistration and later re-registered as “New UMNO” (see Harding 1998 for further reference). Salleh was then brought before a tribunal for “misconduct” but five judges of the Supreme Court convened and granted Salleh an interlocutory (interim) order against the tribunal. Nevertheless, the order was later set aside in August 1988, which Salleh was sacked (thus, making this happening known as “1998 constitutional crisis”). Meanwhile, the five judges that grant the interlocutory order were suspended, in which two of them eventually being sacked in October 1988 but the remaining three were reinstated (Ng 2008: N12). On 19 April 1989, all political detainees under the *Operasi Lalang* were released. Nevertheless, “the damage done to the Malaysian body politic, democracy and human rights have yet to be undone” (quoting Lee 1989: 6) while Malaysia’s TI Corruption Index plunged from 6.29 for the period of 1980 – 1985 to 5.10 for the period of 1988 – 1992. After about two decade, in September 2007, Malaysian judiciary system integrity is in jeopardy again after Anwar Ibrahim made public a video clip showing lawyer V.K. Lingam on the phone brokering judicial appointments with a senior judge. It is believed that the video-clip was recorded in Lingam’s house in December 2001. A Royal Commission

was established to investigate the case. In mid May 2008, the commission found that “the video clip is authentic, the person speaking on the phone is V.K. Lingam, the person whom V.K. Lingam was speaking to was Ahmad Fairuz Sheikh Abdul Halim (former Chief Justice) and there is sufficient evidence of misbehavior on the part of certain individuals or personalities identified or mentioned in the video clip”. Among other top personalities implicated in the case include former Prime Minister, Mahathir Mohamad, tycoon Vincent Tan, UMNO secretary-general Tengku Adnan Tengku Mansor and former Chief Justices Eusoff Chin (Shaila Koshy & Sujata 2008: N4). Despite the final findings came after the election, the effects of this case to the election need not wait with the opposition capitalizing on it to rallies for people power against corruption.

Another “high impact” case is the “Zakaria’s scandals” issue that emotionally spices up the corruption and misused of power issues. Zakaria Md Deros was an influential UMNO politician in Klang, state of Selangor, holding position as UMNO division chief, Klang Municipal Council councilor, state assemblyperson and land committee chief in the Selangor Economic Development Corporation (PKNS). Among related controversial issues are building his infamous palatial mansion (dubbed “Zakaria’s Palace”) in a low-cost housing area without local authority approval, having his son and daughter-in-law in the Klang Municipal Council, operating a *satay* shop on state land without license, facing various charges under the Companies’ Act for several offences as a director of Titi Steel Sdn Bhd., granting seven acres of land to the Selangor Badminton Association (an organisation he himself heads) at RM20 million below the market value and approving 11 acres of state government land to be developed by a company owned by two of his sons (*Malaysiakini* 2006a, 2006b, 2006c & 2007b). The DAP successfully further fanned up this issue by nicknaming Zakaria as “Chiak ka liau”, which literally in a Chinese Hokkien dialect is “eat (taking) up everything”.

4. Makkal Sakhti against Marginalization of Indian Community

As Malay is also Muslim in Malaysia, the issue of “Supremacy” is extended to *Ketuanan Melayu-Islam*. On one hand, Malays view pluralism as “*muhibah*” (literally means goodwill or friendly feeling), which promotes unity and harmony. On the other hand, agenda of *Ketuanan Melayu-Islam* (Malay-Islam Supremacy) did not allow pluralism parity or to some extent even the existence of it but solitary cultural power. Whenever the later dominated the former, battle for cultural superiority emerged, so do some controversial issues of marginalization like the “copyright Allah”, body snatching, restricts religion conversion and Hindu temples demolition. To some extent, marginalization covers not only Indian, but also other non-Malay (non-Muslim) communities. Collectively, these issues deposit dissatisfaction-lavas into Malaysian political volcano. On the “copyright Allah” issue, the government banned the usage of certain Arabic words like “Allah”, “Baitullah” (House of God), “Solat” (prayer) and “Kaabah” (Sacred House) in the literature, gospel and speeches of non-Muslims faiths in December 2007 (Baradan Kuppasamy 2008). *Herald*, a Christian weekly newspaper was told to drop the use of the word “Allah” in their publication or risk their near-expiring permit not renewed. This exclusive use of the word “Allah” for Muslims only has since been termed as “copyright Allah” issue and helped won the votes of Christian communities during election. *Herald* claimed that in Malay language, the term “Allah” is a correct translation of the Bible for “God” as well as “Tuhan” for “Lord”. Regarding this matter, the Titular Roman Catholic Archbishop of Kuala Lumpur filed suit against the government, arguing that for fifteen centuries, Christians and Muslims in Arabic-speaking countries have been using the word “Allah” in reference to the One God while complaining of constant harassment and numerous threats by the minister and government has infringed legal right to freedom of speech and has caused him much apprehension, anxiety and uneasiness (MySinchew 2008). Meanwhile, the Sikhs communities also claimed that for centuries, they have used the word “Allah” to refer to God as well as Arabic terms “iman” and “ibadat” for faith and worship (Fauwaz Abdul Aziz 2008). According to Farish A. Noor (2007), ‘Allah’ is an Arabic word and that the use of the word ‘Allah’ predated the coming of Islam. “Copyright Allah” issue is also criticized as Malays’ *Ketuanan Melayu* mentality problem of “I-am-right-therefore-you-are-wrong” syndrome (Sulaiman 2008), bizarre, lapse of wisdom and sense of justice, and immaturity in tackling a world of differences (Oh 2008), and a nonsensical debate that is more to do with communal and divisive politics of Malaysia (Farish A. Noor 2007). Anthony (2008) sarcastically claimed that if using the word “Allah” by Christians can confuse the Muslims, the repeated use of the word “Allah” in state anthems such as those of Perak, Pahang and Kedah might confuse non-Muslims.

The Hindu American Foundation’s (HAF) press release on its “Hindus in South Asia and the diaspora: A survey of human rights 2006 Executive summary” claimed that minorities in Malaysia struggle to maintain and practice their religions. The right to religious freedom has been eroding. Ethnic Malays are required to be Muslims, as they are born into Islam and do not have the freedom to convert. The Hindu population faces increased discrimination and intimidation, including the destruction of their temples and places of worship. The government continues to treat pre-independence era Hindu temples differently than mosques from the same era, and gives preference to mosques in the allocation of public funds and lands. These findings have lead to the HAF (2006) recommended that the United States, United Nations, the international community, and human rights groups should pressure the Malaysian government to protect Hindu temples from desecration and destruction. HAF further urged that Hindu places of worship that existed prior to independence should be designated as temple property and title to the land should be handed to the

respective temple trustees/committees as has been done for pre-independence era mosques. Farish A. Noor (2006) highlighted the case of attempt to level the Sri Mariamman Muniswaran temple, located near Seremban town (in the state of Negeri Sembilan) for road expansion development reasons. Historical records indicate that the temple was between 110 to 130 years old. The Human Rights Commission (Suhakam) commissioner claimed that in between 2003 and 2006, Suhakam received 11 complaints pertaining to the demolition of places of worship – Hindu temples (6), Mosques (3), Church (1) and a Buddhist temple (Malaysiakini 2007c). Hindraf chairperson P. Waytha Moorthy in a media statement however challenged the figures that only six Hindu temples and three mosques have been demolished by the authorities. According to him, it should be eighty-six temples as of January 2006 and not only six as mentioned. With the mosques, he said, they “have been demolished but even so those mosques were relocated to suitable land with government funds” (Palaniappan 2007).

Regarding body snatching and restricts religion conversion, Dhume (2007) cited three “high profile” cases that were capitalized by the opposition to erupt the suppressed inner dissatisfaction of non-Muslim Malaysian voters. The first case involves Revathi Masoosai, a 29-year-old ethnic Indian woman born to Muslim parents but raised by a Hindu grandmother. In April 2007, Malaysian religious authorities forcibly separated Revathi from her Hindu husband and handed their 15-month-old daughter to Revathi’s mother. The second case happened in 2005 where Islamic authorities claimed that M. Moorthy, a celebrated Hindu mountaineer had converted to Islam and snatched his body from his family to be given a Muslim burial. The third case is about Lina Joy/Azlina Jailani, a computer saleswoman in her 40s, who has spent nearly 10 years unsuccessfully seeking official recognition of her conversion from Islam to Christianity. In 2007 alone, the “Lina Joy” case has gathered numerous concerns and bombardments such as from Lim Kit Siang (June 2), Christian Federation of Malaysia (May 30), the Council of Churches of Malaysia (May 31), Hindu Sangam (May 30), AWAM, SIS, WAO & WDC (May 31) [Note 4], Aliran paper (May 30), Center for Public Policy Studies (May 31), Kim Quek (June 13), Haris Ibrahim (June 2) and Elizabeth Wong (May 31) [Refer the collection of materials from Malaysiakini and various blogsphere as cited in the book entitle *Religion Under Siege?*, edited by Nathaniel Tan & John Lee (2008)]. Besides, cases of body snatching, especially related to Indian communities are also heavily condemned by HAF (2006), the *DNA* newspaper (*The Star* 2007: N12) and various international press. On 25 January 2008, the Associated Press (2008) reported an ethnic Chinese man was buried as a Muslim following ruling of the Islamic Shariah High Court in the Negeri Sembilan state, triggering angry protests from his family. This has prompted comment that in interfaith disputes involving Muslims, the Shariah court usually gets the last word, making a favorable decision for professed non-Muslims less likely and causing non-Muslims to feel their religious rights are under threat. Lim Teck Ghee in his paper for the Regional Outlook Forum 2008, organized by Institute of Southeast Asian Studies (ISEAS) on 8 January 2008 claimed that the handling of both Moorthy and Lina Joy cases by the authorities served to aggravate already mistrustful relations between Muslim and non-Muslim, marked a decisive encroachment by Muslim zealots on the secular character of the country’s constitution and signaled the increasing willingness of UMNO to use the religious card to ensure continuing political support from the Malay/Muslim population (Lim 2008). Hence, the reason non-Malays are willing to vote an Islamic based party like PAS rather than secular coalition of BN in the 12th General Election could be that in recent years, UMNO, the leading party in BN is more Islamic than PAS, a view shared by Amir Taheri (2008), who claimed that playing Islamic card would not help in winning election.

According to Uthayakumar, Hindraf legal advisor, marginalization of Indian communities in Malaysia might have started to get international attention at the Commonwealth Heads of Government Meeting in Kampala, Uganda in November 2007 after it caught the attention of the British Prime Minister and the press in Kampala. In an interview with *Malaysiakini* on 3 December 2007, Uthayakumar told that he has wrote to British Prime Minister Gordon Brown with a reference to Kampung Medan incident [Note 5] in May 2001 where (he claimed) six people were killed, more than a hundred were injured. He claimed that over 1,000 letters have been written for the past 10 years to the Prime Minister of Malaysia, chief ministers, mayors, Attorney-General, Inspector General of Police about the atrocities done to Indians. Uthayakumar also testified that during the Padang Jawa temple demolition, Samy Vellu went to the ground and told the enforcement chief, ‘please don’t break the temple’ but the enforcement chief told him ‘go away, I’m breaking the temple’. As Samy Vellu was then the most senior minister in the cabinet, that incident seems undermining his power and ability to speak up for the Indian communities. Uthayakumar argued that only the Umno-lead government breaks temples as the PAS-led government in Kelantan has not broken a single Hindu or Buddhist temple. In addition, the largest sleeping Buddha in Southeast Asia is in Kelantan in Kampung Neting, Tumpat. He further explained that “ethnic cleansing” a la Malaysia is not killing people like in Bosnia, but could be worst as it involve “living and suffering on a day to day basis” (Soon 2007). Given robust economic growth, there is not much trickling down effect to the Indian communities. The results of a survey conducted by the Socio-Economic and Environment Research Institute (Seri) between November 1997 and February 1999, pooling 3,100 Indian households in Penang state might prove that. The reported findings are listed in Appendix 1. These imply that instead of enjoying economic prosperity, the Indian communities are made victims through overall national development. For example, Lim (2008) claimed that over 300,000 Indian poor had been displaced after the plantations that traditionally provided them modest livelihoods were acquired for property and township development in the last two decades. He also mentioned that

FELDA, the country most successful poverty alleviation program failed to take in large numbers of rural Indians displaced from plantations, consequently the Indians lost their jobs, housing, crèches, basic amenities, socio-cultural facilities and community support. Facing difficulties and hardship in negotiation transition from the plantations to urban living, suicide rates are highest amongst Indian while many Indian youth turned to anti-social activities like gangsterism but the government provides little concrete assistance in the same way that the Malay poor has been targeted. Therefore, Lim believed that the combination of socio-economic exclusion and deprivation together with repeated disrespect of Hindu religious rights by state authorities in demolishing Hindu temples and shrines has become a powerful rallying point for Indian activists, particularly the Hindraf.

5. The Roles of Anwar Ibrahim

A comment from Firas Ahmad in the *Far Eastern Economic Review* is all it takes to summarize Anwar Ibrahim's importance in the 12th Malaysian General Election. Ahmad (2008) claimed that despite BN still holding simple majority, the tectonic shift in Malaysian politics in many ways is engineered by Anwar. However, this article systematized the roles of Anwar into two categories, namely as mediator and reflector of BN's arrogant. In previous elections, the DAP and PAS are either non-cooperative or their cooperation backfire, both are due to the issues of Islamic states. DAP's political philosophy is social democrat thus opposing strongly PAS intention to set up Islamic states. Nevertheless, both parties cooperated in the previous 10th and 11th general elections. In the former election, the opposition's marginal success was not because of the cooperation, but because of the emotion from the sacking of Anwar, more popularly known as the "wave of *reformasi*". In the 11th general elections, their cooperation had become ammunition to the BN to successfully scare off Chinese voters. Another direct cooperation between DAP and PAS in the 12th general election could spell disaster to both parties while confrontation between the two might split votes to BN's favor. Through PKR, Anwar engineered an "indirect" partnership of DAP-PKR-PAS for a one-to-one challenge against BN in the 12th general election (except for contest in Sabah and Sarawak). The opposition coalition called "Barisan Rakyat" (literally, "People Front") was mediated through two partnerships of DAP-PKR and PKR-PAS. Initially, the negotiations of election seats allocation have threatened to burst away any possible cooperation, but Anwar was rushed in to broker compromise. The same compromise never happened in Sabah and Sarawak, in which it is believed that bad blood between DAP and PKR there could not be solved without Anwar's presence. Perhaps, Anwar's experience in the highest level of politics (as Deputy Prime Minister) makes the difference. Ahmad believed that Anwar paved a path for peaceful transition by bringing his credibility as a Malay politician to the table while simultaneously assuring Chinese and Indians that their rights would be respected. Besides, Anwar is believed to be the mastermind that "fine-tuned" PAS's strong Islamic stand to a moderate "welfare state" political philosophy and softened DAP (especially its leader, Lim Kit Siang)'s aggressiveness against Islamic state, both efforts greatly help in fostering the opposition coalition and dispersing fear of the Chinese to support them. Furthermore, for the first time, PAS fielded a non-Muslim candidate (Kumutha Raman from their PAS Supporters' Club), but technically contesting for a state seat under the PKR. Besides Anwar, Lim Guan Eng (DAP Secretary General) and Husam Musa (PAS Deputy President) are believed to have played important mediating roles too in their respective parties. Lim Guan Eng has been well received by the Malays and known for helping to fight and speak up for the Malays, especially in the case against then Melaka Chief Minister that resulted in him being sentenced to two concurrent 18-month jail terms from 25 August 1998. Meanwhile, Husam Musa has been known for his moderate stand and humble attitude that would not worry the Chinese.

Besides being a mediator, Anwar gained many pity-votes as a result of continuous stinging attacks from the BN and government-linked media. These "Anwar bashing" not only backfired but also reflected BN's arrogance that helped agitate the voters (particularly the Malays) in favor of the opposition. Welsh (2008) believed that personal attacks on Anwar are seen as unfair to Anwar and a serious miscalculation by the BN. Welsh also claimed that the attack re-ignited the 1999 *reformasi* spirit and served to alienate many Malays. Among the themes of personal attacks by UMNO are branding Anwar as unpatriotic, traitor to the country, hypocrite, chameleon and opportunist. Abdullah Badawi claimed that Anwar joined the opposition after he failed to rejoin UMNO. Attackers also alleged Anwar of making empty or unrealistic promises. The MCA and PGRM keep on reminding the Chinese of Anwar's previous record in the government, which is hostile to the Chinese. Two most controversial bashing incidents involved Khairy Jamaluddin (UMNO Youth deputy president and Abdullah Badawi's son-in-law) and Chandra Muzaffar (former PKR deputy president) that resulted in Anwar initiating defamation proceedings against them (Kabilan 2008). In his speeches, Abdullah Badawi claimed "Anwar is irrelevant, therefore need not be mentioned" but continued dedicating lengthy time to criticize Anwar. This gives a contradicting impression that makes Anwar bashing backfire. In contrast, political observers believed the government was rattled by Anwar, who has drawn crowds of thousands with his fiery speeches and charisma (Malaysiakini 2008). By having the 12th General Election before April 2008 so that Anwar is not eligible to contest also reflects the important role of Anwar as a credible threat to the BN.

6. Three People Power Rallies and Election Volcano Eruption

After years of suppressed dissatisfactions, the warning of eruption was in the 10th General Election in 1999 powered by the spirit of *reformasi* that also resulted in the formation of PKR (then called "Parti Keadilan" or "Justice Party").

Therefore, the first post-Independent “People Power” in Malaysian politic could accredited to the *Reformasi* rally in Kuala Lumpur that protested the sacking of Anwar Ibrahim from his Deputy Prime Minister position in 1998. The sacking is seen as a political assassination of the most likely challenger to the then Prime Minister of Malaysia, Mahathir Mohammad. Anwar was also charged in court with corruption and sodomy. “Reformasi” in Malay language literally means “reformation”, infamous as Anwar’s supporters’ demand to the ruling government to reform to curb corruption and injustice to Anwar Ibrahim. The protesters held belief that Anwar is innocent, being framed for political gain of his accusers. The *Reformasi* rally played important influence in helping the oppositions, especially the PKR. Nevertheless, the BN still achieved more than two-third majority due to low participation of Chinese and Indian. *Reformasi* was seen as “Anwar’s personal issue” that related to his Malay supporters. Thus, this first People Power failed to ignite a national eruption of dissatisfactions.

The second event of Malaysian “People Power” is the *Bersih* rally also at Kuala Lumpur on 10th November 2007, believed to be masterminded by Anwar. It is one of the biggest anti-government rallies in Malaysia in nearly a decade. The word “Bersih” in Malay language means “clean”, a name given to reflect the aim of the rally to demand electoral reform. The election process in Malaysia is deem corrupted and control by the ruling government, hence the rally demand a clean up to enable free and fair election in the future. Opposition political parties and civil society groups are among the demonstrators whom aimed to march to the national palace to submit a memorandum detailing their concern on unjust election process to the King. The organizer of the rally claimed that at least 40,000 people [Note 6] have turn up for the rally despite prior stern warning by the Prime Minister, Abdullah Badawi and his vow to suppress the demonstration, heavy police presence and roadblocks on the day of the demonstration (Malaysiakini 2007c). While marching to the national palace in heavy rain, banners and chanting of “election reform”, “justice”, “Allahu akbar” (God is greatest), “reformasi”, “Save Malaysia” and “Election Commission, stop your tricks” are reported (Malaysiakini 2007c and Jalil Hamid 2007). The third event of Malaysian “People Power” is the “Hindraf rally”, the name taken to reflect its organizer, the Hindu Rights Action Force (Hindraf). On 25th November 2007, about 30,000 protesters (believed to be mostly Malaysian Indian) are reported demonstrating at various locations in Kuala Lumpur city after their effort to gather outside the British High Commission to submit a petition was thwarted by riot police. The protest rally is also to support a US\$4 trillion lawsuit by Hindraf against the British (Malaysia’s former colonial) for bringing Indians to Malaysia as indentured labours and exploiting them for 150 years, plus to sought a declaration that the Reid Commission Report 1957 failed to incorporate the rights of the Indian community when independent was granted, resulting in discrimination and marginalisation of the Indian community (Malaysiakini 2007d). Despite the lawsuit and giving reason of wishing to petition Queen Elizabeth II to appoint a Queen’s Counsel to argue the case on their behalf, the Hindraf rally seems as a manifest of last resort to highlight the continuous discrimination and marginalisation against the Indians, which included the rampant state-sanctioned demolition of Hindu temples. In this Hindraf case, the Tamil word for “People Power”, *Makkal Sakhti* emerged and subsequently becoming an influencing slogan in the opposition alliance’s election campaign. Anwar Ibrahim seems taking a step further to blend some Malay-Islamic features into this Tamil-Hindu slogan by mix-using the phrase *Makkal Sakhti* with his slogan of “*kuasa rakyat, kuasa keramat*” (people power, blessed power). These two rallies together with DAP consistent criticism of inequality of NEP to the Chinese perfectly set up condition for a full-scale political volcano eruption. In this case, Anwar played the role of catalyst and conductor that led this eruption orchestral in 8th March 2008 of the 12th Malaysian General Election.

7. Conclusion

When the Barisan Nasional (BN) seems to be invincible in Malaysian politic, the opposition inflicted a moral defeat to them in the 12th Malaysian General Election, an event many claimed unpredictable and shocking. However, the BN moral defeat is alike to the eruption of a political volcano of accumulated dissatisfactions from various ethnic groups that the BN could no longer keep under control. The Malaysian voters were orchestrated under the People Power revolution against communal politic, the “3Cs” of cost of living, crime and corruption, and marginalization of Malaysian Indian. In this election, Anwar Ibrahim, former deputy prime minister and current PKR de facto leader has successfully unite various opposition parties to form a multiracial coalition against the communal coalition of the BN. Nevertheless, question still remains whether the People Power could continue striving Malaysian politic towards greater democracy and multiracial. Could the new People Power coalition gradually turn into another BN-like communal-based political coalition in future?

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Notes

Note 1. Quoting Wikipedia (2007d) in length, *Ketuanan Melayu* is the racist belief that the Malay people are the "Tuan" (masters) of Malaysia. The Malaysian Chinese and Malaysians Indian, who form a significant minority in Malaysia, are considered beholden to the Malays for granting them citizenship in return for special privileges as set out in Article 153 of the Constitution of Malaysia. This *quid pro quo* arrangement is usually referred to as the Malaysian social contract.

Note 2. Currently, Malayan Chinese Association (MCA) and Malayan Indian Congress (MIC) are respectively known as Malaysian Chinese Association and Malaysian Indian Congress.

Note 3. UMNO official website stated that Onn Jaafar proposed to open up UMNO and renamed it to "United Malayan National Organization". In his speech as cited in Mohamed Abid (2003: 180 – 181), Onn Jaafar repeatedly stress that he intended to renamed UMNO to "United Malaya National Organization" and asked the audiences not to mistaken it as "United Malayan National Organization".

Note 4. Those acronyms respectively are All Women's Action Society (AWAM), Sisters in Islam (SIS), Women's Aid Organization (WAO) and Women's Development Collective (WDC).

Note 5. The incident happened in a suburban squatter in March 2001 where bloody racial violence between Malays and Indians broke out. The cause is believed to be a misunderstanding.

Note 6. Estimation from the police was 10,000 to 30,000 people but was disputed by the organizer. An Internet media, Malaysiakini (2007A) published pictures of big crowd and quoted the *Agence France Presse* (AFP) estimate of close to 30,000 protestors.

Appendix

Findings of the Socio-Economic and Environment Research Institute (Seri) survey.

- a) 60 percent were wage earners in the lower income brackets.
- b) Average monthly income was between RM500 and RM1, 000 per household.
- c) Seven percent were living in hardcore poverty.
- d) About 80 percent in the manufacturing industry, Penang's biggest revenue earning sector, were low-level workers.
- e) Involvement in the tourism sector, the state's second highest revenue earner, was virtually non-existent.
- f) About 50 percent of private companies did not have a single Indian employee.
- g) The share in paid-up capital investments in the state were a mere 0.2 percent.
- h) The majority were indulged in traditional businesses due to lack of funds, bureaucratic red tape, racial discrimination and difficulty in securing loan.
- i) Nearly 30 percent were squatters or living on temporary occupation license land.
- j) About 75 percent of pupils in 28 Tamil primary schools had failed to achieve the minimum pass-mark of 'C' in all six subjects in the Ujian Penilaian Sekolah Rendah public examination.
- k) At secondary level, 80 percent of pupils had stopped schooling after Form Five.
- l) Many Indians were involved in alcohol and drug abuse, domestic violence and child abuse.
- m) Nearly 40 percent of the state's suicide cases involved Indians.

(Source: Athi Veerangan 2007)

Table 1. Crime Rate in Malaysia (2000 to 2007)

Year	Total crimes		Rape		Property crimes	
	Cases	% change	Cases	% change	Cases	% change
2000	167 173	—	1 210	—	145 569	—
2001	156 469	(6.40)	1 354	11.90	136 079	(6.52)
2002	149 042	(4.75)	1 418	4.73	128 199	(5.79)
2003	156 315	4.88	1 471	3.74	133 525	4.15
2004	156 455	0.09	1 718	16.79	134 596	0.80
2005	157 459	0.64	1 887	9.84	135 326	0.54
2006	198 622	26.14	2 435	29.04	156 279	15.48
2007	209 559	5.51	3 177	30.47	174 440	11.62
Different*	53 104	33.94	1 459	84.92	39 844	29.60

Source: Malaysia Royal Police (2008a & 2008b)

* Different between year 2007 (latest data) and year 2004 (the previous 11th general election year)



Enforceability of Database Licensing Agreement: A Comparatives Study Between Malaysia and the United States of America

Nazura Abdul Manap

Faculty of Law, National University of Malaysia (UKM)

43600 Bangi, Selangor, Malaysia

nazura@pkrisc.cc.ukm.my

Tel: 60-12-205-8669 E-mail: nazura@pkrisc.cc.ukm.my

Abstract

Licensing agreement is one of the mechanisms to secure the interest of database producers. A breach of any contractual term in the agreement will entitle a database producer to a contractual remedy. As regards to contractual protection, there are two important issues to be addressed. First, the clauses in the licensing agreement, and secondly, the issue of enforceability of certain database agreement, such as shrink wrap or click wrap license. The second issue must be resolved before a database producer is able to implement the terms and conditions provided in the database licensing agreement. This is because it determines the validity of the contract. With a valid contract, the contractual terms may be used to protect the interest of the database producers. The unconscionability of the terms in the database licensing seems to be a major issue. This issue arises due to the fact that the contractual terms are not read by licensee upon the conclusion of agreement and the inequality of bargaining power exists. Asymmetrical or unfair terms will cause unfairness to database users who will be prevented through the principle of undue influence or the common law doctrine of unconscionability. Although no clear statutory provision has provided a solution to the problem, there are two ways of dealing with it. First, the database producer must ensure that he does not use his dominant position to exercise unconscionable dealings. Secondly, it is advisable to incorporate a term providing that the buyer or user has the opportunity to reject the contract if he disagrees with the terms. To ensure the interest of the database producers the agreement should provide notice as to the database's terms of usage. This may form the basis of a breach of contract in the event that the stipulated terms are violated. A good contractual agreement is an agreement which protects the interest of both parties; i.e., the database producers and the users. To achieve that, both parties should come to a mutual agreement on the terms in the contract. The license should incorporate necessary provisions such as restrictions on use to protect the legitimate interest of the database producer. However licensees should also be given sufficient freedom to use the database content to meet their legitimate needs and should be prohibited from using the information in ways that would diminish the value of the database producer's investment in the database.

Keywords: Database, Licensing agreement, Enforceability, Unconscionability

1. Introduction

Since adhesion contracts have frequently been used in database dealing, there have been questions as to the validity and enforceability of such contract. The answers would determine whether or not these "shrink-wrap" or "click-wrap" licensing agreements would function as a shield to protect database products from exploitation. (Note 2)

How valid are these licenses? The validity of these "shrink-wrap" or "click-wrap" licenses is uncertain. Generally, the enforceability of these "shrink-wrap" or "click-wrap" licensing contracts is not absolutely clear. The main feature of these licenses is that it is a unilateral contract, in other words, both agreements are based on "take it or leave it". There is no good-faith bargaining of terms as there usually is in the ordinary contracts. The difference between "shrink-wrap" license and "click-wrap" license is that in the click wrap contract, (Note 3) the potential licensee has every opportunity to know the click-wrap's terms and conditions whereas under shrink wrap license, the potential licensee may have accepted the contract before having the opportunity to read the whole license.

Basically, the contractual problems pertaining to adhesion contract revolve around:

- (1) Unconscionability issues. (Note 4) For example, unread terms (Note 5) and lack of mutuality of agreement. (Note 6)
- (2) Formation of contract issues, i.e., issue on acceptance and the communication of acceptance;

In Malaysia, the answer to the above issues can basically be found in the Contracts Act 1950. The position of adhesion contract in Malaysia will be discussed together with the position in the United Kingdom and other relevant commonwealth countries. (Note 7)

2. Adhesion Contract: The Malaysian and Common Law Approach

Firstly, we need to determine the position of online contracting. The Contracts Act 1950 (Note 8) does not make any provision for the online environment. (Note 9) With the introduction of Electronic Commerce Act 2006 (ECA 2006) (Note 10), online contracting is recognized as all electronic transactions and shall not be denied legal effect, validity or enforceability on the ground that it is wholly or partly in an electronic form (Note 11).

The ECA 2006 has been restricted to only “commercial” transaction (Note 12). It has been argued that this restriction has excluded other important electronic transaction such as non-commercial unilateral communication, such as statement, declaration and notice (Note 13).

2.1 Unconscionability of Agreement

Even though the term “unconscionability” does not have a fixed meaning in law, (Note 14) in the context of contractual obligations, it applies to contracts that possess two elements. First, the contract’s terms are unfair, and second, the party disadvantaged by the contract would not have entered it had he not been vulnerable in some respect. (Note 15) The equitable doctrine of unconscionability arises from the need to provide relief from unconscionable conduct. The question as to whether any conduct is unconscionable depends significantly on the particular facts of the case. (Note 16) Generally, unconscionable conduct can mean:

- (1) A deficiency in either the bargaining process or the terms of the resulting transaction which operates as a vitiating factor to set aside a transaction; (Note 17)
- (2) An organizing idea informing a specific equitable rules and doctrines which do not in terms refer to, or require an explicit finding of, unconscionable conduct, such as the rules or doctrine of estoppels, unilateral mistake, or undue influence; (Note 18)
- (3) As a discrete doctrine for example as a ground to restrain a call on performance bonds. (Note 19)

Unconscionability of shrink wrap contract arises from the concern that contractual terms are not read by user before the conclusion of contract and the existence of inequality of bargaining power as they are constructed solely by the database producer. (Note 20) Yet, the doctrine of unconscionability has not been established properly in the Malaysian contract law. (Note 21) However, this doctrine has been widely developed in some other jurisdictions. In Australia, notably in *Commercial Bank of Australia Ltd v. Amadio* (Note 22), the court has clearly described the circumstances whereby this doctrine could be invoked. Dean J. in this case stated that: “The jurisdiction [to relieve against unconscionable dealing] is long established as extending to circumstances in which (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them, and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or ‘unconscientious’ that he procure, or accept, the weaker party’s assent to the impugned transaction in the circumstances in which he procured or accepted it. Where such circumstances are shown to have existed, an onus is cast upon the stronger party to show that the transaction was fair, just and reasonable.” (Note 23)

The principle of unconscionability has been further explored by Lord Templeman in the Privy Council’s decision of *Boustany v. Pigott*. (Note 24) The decisions above seem to suggest that a transaction may be regarded as unconscionable if there is inequality in the relationship between the parties to the contract and this position leads to unfair or unconscientious transactions. These ‘unconscientious’ dealings are reflected from the behaviour of the stronger party which are impropriety, power abusive and taking unfair advantage against the weaker party in the contract.

In Malaysia, whether or not inequality of bargaining power, as normally disputed in shrink wrap contract, (Note 25) be considered as unconscionable, is uncertain. Visu Sinnadurai J. in the case of *Polygram Records Sdn Bhd v. The Search* (Note 26), made no findings as to whether or not a contract may be set aside on the grounds of inequality of bargaining power. (Note 27) Although there is a possibility of invoking section 24(e) of the Contracts Act 1950 by reason of public policy, (Note 28) to set aside a contract on the ground of inequality of bargaining power, the application of this unconscionability doctrine are rarely done by the Malaysian courts except in *Saad Marwi v. Chan Hwan Hua & Anor* (Note 29) and *American International Assurance Co. Ltd v. Koh Yen Bee*. (Note 30)

Due to the absence of any established precedent on this aspect of law in Malaysia, it was submitted that the issue of unconscionability derives from the breach of the requirement of free consent. (Note 31) This requirement is reflected in section 10 of the Contracts Act 1950 which defines a contract as: “... all agreements made with the free consent of parties competent to contract ...”

Thus, factors which vitiate such consent (Note 32) will render the agreement voidable or to be precise, unenforceable contract at the option of the innocent party to the contract. These vitiating factors are stated in section 14 of the Contracts Act 1950 which illustrates that the consent is not a free consent if there are coercion, undue influence, fraud, misrepresentation and mistake of fact (Note 33).

Section 16 of the Act which deals with the concept of undue influence can also be invoked. (Note 34) This view is

submitted on the basis that the courts in certain circumstances have established a relation between the doctrine of unconscionability and the principle of undue influence. In *Credit Lyonnais Bank Nederland NV v. Burch*, (Note 35) Millet LJ in this Court of Appeal's decision observed that the role of the doctrine of unconscionability would be established in the existence of the doctrine of undue influence coupled with the doctrine of infection. (Note 36) The learned judge opined that these two equitable concepts, i.e., unconscionable bargain and undue influence have many similarities. This is reflected from his views:

"In either case it is necessary to show that the conscience of the party who seeks to uphold the transaction was affected by notice, actual or constructive, of the impropriety by which it was obtained by the intermediary, and in either case the court may in a proper case infer the presence of impropriety from the terms of the transaction itself." (Note 37)

Concluding on the same point, Nourse LJ. observed that "... the unconscionability of the transaction remains of direct materiality to the case based on undue influence ...". (Note 38) In this particular case, it was said that the transaction was clearly and manifestly disadvantageous to the defendant. Thus, it was submitted from that decision that the doctrine of undue influence can be subsumed within a broader doctrine of unconscionability. (Note 39) However, it should be noted that this case was decided based on undue influence not merely on doctrine of unconscionability.

There are two conflicting views on whether unconscionable bargain or dealing is considered as a part of the statutory vitiating factors (under undue influence or coercion) or whether it exists independently? The first seems to suggest that the notion of unconscionability could exist independently of the general scheme of undue influence. The second view proposes that no discrete doctrine of unconscionability could arise from the statutory provision. The first view is supported by the decision in *Chait Singh v. Budin bin Abdullah* (Note 40) where since a good collateral contract had been provided, an interest charge at more than 18% on an illiterate man gave rise to the presumption of unconscionability. (Note 41) This case did not rely on the unconscionability principle derives from section 16 of the Contracts Act 1950. The court was obviously moved by the fact of the illiteracy of the Defendant. (Note 42) The second view predicates that no separate doctrine of unconscionability arise out of section 16(3) of the Contracts Act 1950. In other words, unconscionability as assumed in section 16(3) is a result arising from the occurrence of several sequences of acts, that is, a relation of dominance of one party over the other and the conclusion of agreement between them. The fact that the proof of unconscionability will then give rise to a rebuttable presumption that the agreement is induced by undue influence, will make this doctrine becomes so inseparably linked to the notion of undue influence and is incapable of independent existence. (Note 43) The Lord Justice said that a presumption of such a nature would not arise in the case of a man of better education. This opinion was supported by the judgment in *Abdul Majeed v. Khirode Chandra Pal*. (Note 44) where His Lordship stated that where ample security had been furnished, the exaction of excessive and usurious interests in itself raised the presumption of undue influence which requires little evidence to substantiate.

However, Lord Shaw in the Privy Council's of *Ragunath Prasad v. Sarju Prasad* (Note 45) decision was of the view that the principle laid down in *Abdul Majeed v. Khirode Chandra Pal* was wrongly made. Thus, in the light of the above decision, the case of *Chait Singh v. Budin bin Abdullah* (Note 46) must not be followed as it does not represent the correct view of section 16 (3)(a). Lord Shaw suggested that "There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will". This indicated that the principle of unconscionability must be supported by undue influence. (Note 47)

Section 20 of the Contracts Act 1950 makes a contractual transaction voidable where consent to it is caused by undue influence. (Note 48) Undue influence, has not been clearly or accurately defined by the courts of law, however, it has been described as:

"... some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally though not always, some personal advantage obtained by the guilty party..." (Note 49)

However, section 16(1) of the Contracts Act 1950 defines the circumstances in which a contract can be set aside on the ground of undue influence, first, where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and secondly, the party who is in a position to dominate the will of the other uses that position to obtain unfair advantage over the other.

The important question is what amounts to dominance? Section 16(2) of the Act specifies the situations where such dominance is presumed, first, where a person holds a real or apparent authority over the other, (Note 50) or secondly, where a person stands in a fiduciary relation to the other; (Note 51) or, thirdly, where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress. (Note 52)

A database producer may be situated in the first position that is "holds a real or apparent authority over the other." Thus, in a contract of adhesion, it can be said that there is undue influence if the database producer has a real or apparent authority over the user. Therefore, if the database producer which is in a position to dominate the user had exercised unfair or unconscionable conduct and obtained unfair advantage over the user of the database, he is said to use undue

influence in the contractual transaction.

The key word here is “dominance” where the turning point of the notion of undue influence relies on the existence of a relationship which endows on one party the position to dominate the will of the other. In *Ragunath Prasad v. Sarju Prasad* (Note 53) the Privy Council explained that the relationship between the parties must be such that one party was able to dominate the will of the other. Once that could be established, the next issue to be considered was whether one party by the use of that dominant position had obtained an unfair advantage over the other. (Note 54)

It seems from the relationship between database producer and the user it may be presumed that the “dominance” relationship exists as the database producer dominates the will of the user. The element of “dominance” is demonstrated in the facts that the end user is not involved in the making of the terms and conditions of the agreement. The content of the licensing agreement is determined solely by the database producer. No bargaining is involved in the making of this contract. The user is only left with a choice of whether to unwrap or not, if not, the user is not able to use or have access to the database content. However, the illustrations in section 16 of the Contract Act 1950 have given us the examples of “a position to dominate”. Illustration (d) demonstrates a transaction that is considered as in the ordinary course of business which is not “induced by undue influence”. Although in that illustration it seems that the banker has charged a high rate of interest of a loan by taking advantage of the stringency in the money market, it is not considered as in a position to dominate which may amount to undue influence. This indicates that to prove one’s relationship is induced by undue influence is not an easy task. The claimant must show that the other party is in a position that he is able to influence the claimant to enter into contract such as this can be seen in a parental influence over a child (Note 55) and medical attendant influence over a man enfeebled by disease or age. (Note 56) Thus, taking the above argument into consideration, it is submitted that a database owner is not to be regarded as exercising undue influence over database user unless a fiduciary relationship or relationship of trust and confidence between him and the other party is established.

Despite the above attempt to apply the principle of undue influence to the act of inequality of bargaining power in a database licensing cases, it is believed that the application of section 16 of the Contract Act 1950 is very loose. The other alternative available is to apply the doctrine of unconscionability to overcome situations of inequality of bargaining power as found in the English doctrine of unconscionability. This is possible by virtue of section 3(1)(a) of the Civil Law Act 1956 which states that: “(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall- (a) In West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956;”

This provision allows the application of the rules of common law and equity which suit to the local needs (Note 57).

As far as the issue of inequality of bargaining power is concerned, this provision applies as no specific written law in Malaysia deals with this issue in contracts. (Note 58) It has been submitted that section 16 of the Contracts Act 1950 deals with quite a different and much narrower doctrine. (Note 59) Adoption of English doctrine of unconscionability with a broad and liberal application as in Canada is the most just solution to the issue. (Note 60) This has made the doctrine of unconscionability in Malaysia as decided in *Saad Marwi’s* case wider than the English position in *Lloyds Bank Ltd v. Bundy* (Note 61) which was rejected by the House of Lords in *Westminster Bank Plc v. Morgan*. (Note 62)

However, the importation of doctrine of unconscionability as suggested by Gopal Sri Ram JCA in *Saad Marwi* was regarded as doubtful in *American International Assurance Co. Ltd v. Koh Yen Bee*. (Note 63) Abdul Hamid Mohamad JCA was of the view that:

“We do not wish to enter into an argument whether the doctrine of inequality of bargaining power or unconscionable contract may be imported to be part of our law. However, we must say that we have some doubts about it for the following reasons. First is the specific provision of s 14 of the Contracts Act 1950 which only recognizes coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent. Secondly, the restrictive wording of s 3(1) of the Civil Law Act 1956, in particular, the opening words of that subsection, the cut-off date and the proviso thereto. Thirdly, the fact that the court by introducing such principles is in effect ‘legislating’ on substantive law with retrospective effect. Fourthly, the uncertainty of the law that it may cause.” (Note 64)

Nevertheless, the court’s stance on the decision of *Saad Marwi* was not a total rejection of the decision. This is reflected from the court’s effort to distinguish the facts of the case from that of *Saad Marwi*. This demonstrates that the court admitted the need of doctrine of unconscionability to be applied to certain cases to ensure justice. Both of the above Court of Appeal’s decisions have no definite approach. Perhaps *Saad Marwi’s* case is more acceptable as it did not introducing new law but bringing in the common law doctrine through the process allowed in section 3(1) of the Civil Law Act 1976.

It is submitted that the application of the doctrine of unconscionability in *Saad Marwi* was not meant to legislate a statutory provision in our law. This English equitable principle should serve as a supplement to fill in the lacunae in the existing law. The issue of inequality of bargaining power in a database contractual licensing can be addressed in two

ways. The first is by invoking the principle of undue influence under section 16 of the Contracts Act 1950. However, it seems that the application of this section has no concrete ground, particularly, when there is no single decided case to support it. The second is to apply the English equitable principle of unconscionability as suggested in *Saad Marwi's* case, i.e. via a statutory doors of section 3(1)(a) of the Civil Law Act 1956.

With regards to the latter, the English equitable principle of unconscionability may be applied in two ways. The first is through the interpretation of the court and the second through legislature. It was submitted by Abdul Hamid Mohamad JCA in *American International Assurance Co. Ltd v. Koh Yen Bee* (Note 65) that in importing the doctrine of inequality of bargaining power or unconscionability into our law, the following reasons must be taken into account:

- (1) The specific provision of section 14 of the Contracts Act 1950 which only recognizes coercion, undue influence, fraud, misrepresentation and mistake as factors that affect free consent;
- (2) The restrictive wording of section 3(1) of the Civil Law Act 1956 which limits its application to the cut-off date and the proviso thereto;
- (3) Introducing such doctrines is indirectly legislating a substantive law with retrospective effect; and
- (4) The uncertainty of the law that it may cause.

The above grounds presents that the application of unconscionability doctrine should not be done without proper guidance. This common law principle may be introduced through statutory door of section 3(1) of the Civil Law Act 1956 subjects to certain conditions as follow:

- (1) The court has to determine whether there is any written law in force in Malaysia;
- (2) If there is none, then the court should determine what is common law as administered in England on 7th April 1956 (in West Malaysia);
- (3) The court should consider whether 'local circumstances' and 'local inhabitants' permit its application. If it is permissible, the court should apply it. If not the court is free to reject it totally, or adopt any part which is permissible;
- (4) If the court rejects the principle, then the court is free to formulate Malaysia's own common law by looking at other sources, local or otherwise including the common law of England after 7th April 1956 and principles of common law in other countries. (Note 66)

A part from the application of common law principle and the formulation of Malaysia's own common law, the introduction of doctrine of unconscionability may be made through the amendment of the existing legislation or introducing new law. However, it is not for the court to decide but this role is played by Parliament through legislative power. (Note 67) In other words, this doctrine may be inserted in the Contracts Act 1950 through amendments of that statute or by introducing new law on this subject matter.

2.2 Lack of Notice

The enforceability of a contract depends on the existence of core elements; offer (Note 68) and acceptance, (Note 69) consideration and intention to create legal relationship. However, the first and second elements pose difficulties with regard to adhesion contract. There is no problem with offer. By virtue of section 7(1) of the ECA 2006, (Note 70) the advertisement for online database made in the website by the database owner to the users is an offer. Thus, a potential user can accept. (Note 71) by clicking the "Agree" or "Accept" button. (Note 72) But, to what extent clicking the "Agree" button is valid and contractually binds the party to the contract?

Once a potential user of the database clicks "Agree" or "OK" or "Accept" which appears on the screen, he is said to accept the terms and conditions set out together with the acceptance button. The user is usually given opportunity to read the terms prior to pushing the accept button. It is up to the user either to first read the terms and then clicking "Agree" or choose to point his mouse to the "Agree" button which, according to message on the screen that, deems that he has read the terms and are bound by those terms. (Note 73) A question arises as to whether terms and conditions in a license bind a party? The general principle is that once a party has signed a document, he is bound by those terms even if he has not read the terms. (Note 74) This principle has been applied in Malaysia as indicated in the case of *Polygram Records Sdn Bhd v. Search & Anor* (Note 75) where the Visu Sinnadurai J. stated that:

"...The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. This rule is so strict that even if a party to a contract has not read the contents of a contract, he is held to be bound by its terms..." (Note 76)

From the above case, a conclusion can be made that there is an enforceable contract even though the user has not read the terms and conditions in the license agreement. But bear in mind that "not reading" the terms of the contract because the user opts not to do so and the fact that the user has "no opportunity to read" are two different situation. In the former, the strict rule of *Polygram's* case may be applicable.

In that situation, the question arises whether adequate notice was given of the terms of the contract. (Note 77) According to the normal rules of offer and acceptance, the terms of the contract should be communicated to the offeree. This is to make sure that the offeree is aware of the nature and extent of the contract. (Note 78)

For shrink wrap licensing, a contract is made once the seal is broken, the opportunity to read the terms of the contract comes after the contract is made as this occurs when the package containing the database is handed over to the customer. Thus, in this circumstance, it is said that the terms and condition, which can be accessed after the package is unwrapped, are not part of the contract. This would render the terms ineffective and unenforceable. This contention is supported by the decision in *Olley v. Marlborough Court Ltd*, (Note 79) where the Court of Appeal held that the notice put in the room was not part of the contract. This is because it had been completed at the reception desk when the room had been paid for and the Plaintiff could not have seen it until after the contract was made. (Note 80) Unfortunately, this issue has not been addressed by the ECA 2006. (Note 81) Therefore in order to make the said terms and conditions part of the contract (Note 82) it was suggested that an ample notice to the existence of the terms and conditions must be drawn to the attention of the prospective database user. (Note 83) The notice must be brought to the contracting party before or at the time that the contract is made. If the offeree has actual knowledge of the terms, he is bound by it even though he has not read them or is unable to comprehend the terms. (Note 84) A notice after the conclusion of contract cannot be relied on. (Note 85)

Thus, notice of the terms and conditions inside a database package must be placed where it is accessible by the prospective database user, to avoid post conclusion notice. If the notice is manifestly available and the offeree is able to read before tearing out the packaging, the terms and conditions inside the package are effective. Similar requirement applies to the click wrap license, if the database user is given notice as to the terms of the database agreement before he clicks "I Accept", the terms and conditions of the agreement are enforceable. In other words, the notice must be explicit.

In addition to that condition, the notice must be reasonably sufficient. Which means the notice must be brought to the attention of the party in a sufficiently displayed form to attract the attention of the party to the contract. This form may include a notice board and the way the terms is written in the contract itself. (Note 86) The principles were discussed in the case of *Parker v. South Eastern Railway Co.* (Note 87) where the Court of Appeal held that the question that had to be answered in this case was whether the Defendant had done what was reasonably sufficient to give the Plaintiff notice of the condition. (Note 88)

Applying the said principle to the database licensing agreement, for a shrink wrap contract to be enforceable, the terms of the license must be exposed on the outside of the package. As normally the CDROM is being wrapped in clear plastic, the license may be inspected before the package is opened. In this circumstance, the notice of the terms and conditions of the contract can be considered as reasonably sufficient. Another technique used to ensure that the notice is enforceable is that the licence is printed on a sealed packet containing the disk with a note stating that breaking the seals implies acceptance of the license. However this notice is usually accompanied with a promise that even after the seal is broken the user can return the disk in the event of the user being unwilling to accept the terms. (Note 89) As to the click wrap or browse wrap license, as long as there is a clear notice of the terms before the user clicks "Agree", such as, the user is asked to read the terms and conditions before accepting the agreement or the user is given opportunity to link to the other site which provides the terms and conditions of the license, in both these situations the notice of the contractual terms is regarded as reasonably sufficient to establish enforceable contract.

An acceptance of offer can be concluded from the words or documents that have passed between the parties to the contract or may be inferred from their conduct. (Note 90) Further analysis has to be made to a situation where a user of the database was allowed to get access to the information of database even though without having to click on the "Agree" button. (Note 91). In this case the act of acceptance would not be known to the offeror (database owner), or else no communication of acceptance has been made. (Note 92)

It is an accepted rule that silence cannot amount to acceptance. (Note 93) Therefore, without demonstrating whether or not the user agrees to the terms and conditions in the license may amount to an act of "silence". Thus, without acceptance, no contract has been formed. The same goes to the shrink wrap license as no communication of acceptance of offer occurs when the user breaks or unwraps the seal.

However, this position seems to be exempted in the following situation. According to section 7(b) (Note 94) of the Contracts Act 1950, that acceptance may be carried out in the manner in which the offeror has stipulated. In this case, by clicking the "Agree" button, the user is bound to the terms and conditions of the license. If the user deviates from the mode of acceptance specified by the offeror but straight away accesses to or downloads the data in the database, the offeror cannot merely keep silent. This would be a failure on his part to insist on the prescribed manner of acceptance, (Note 95) which would be considered as an acceptance of the modified form. (Note 96)

It is submitted that in a click wrap license, the rule that the offeror has prescribed the method of acceptance would be applicable. Thus, the user of database would be bound by the terms even if the user did not read the terms since he has

accepted the contract by the stipulated method, i.e., by clicking “I Agree”. This opinion is supported by section 8 of the Contracts Act 1950 whereby a performance of the conditions of a proposal is an acceptance of that proposal. (Note 97) The same issue has come to the attention of the Indian Court in the case of *Hindusthan Co-operative Insurance Society Ltd v. Shyam Sunder & Others*, (Note 98) where the court was of the view that, “A mere tacit formation of intention cannot constitute an acceptance of an offer. Something more is required. There must be some overt act or speech from which that intention can be manifest.” (Note 99)

This opinion confirms that there is contract even though no communication of acceptance is made to the offeree, i.e., the acceptance has not come to the knowledge of the offeror. The act of acceptance by conduct, in other words, does not require actual communication of acceptance is made; it suffices if the user of database accepts the offer by performing an act which is required in the terms of the contract, for example, by unwrapping the shrink wrap license or clicking “I Agree/Accept”. In this situation, the offeror, i.e., the database producer, is not allowed to revoke the offer once the required conduct, unwrapping or clicking “Agree” has been performed by the database user.

The ECA 2006 has recognized online transactions. However, it is felt that, the ECA has not dealt with many issues such as notice.

3. Adhesion Contract: The Position in the United States

A few decided cases on enforceability of shrink-wrap licenses in the United States demonstrate that the said contracts were invalid on contract formation ground. (Note 100) Nevertheless, in a situation where the potential licensee has an opportunity to read the terms and conditions before un-wrapping the CD ROM package or clicking the “Agree” button, the contracts were considered as valid and enforceable. (Note 101)

In *ProCD, Inc. v. Zeidenberg* (Note 102) a database application is stored on CD ROM discs packaged, complete with a “how to” manual, in an appealing box encased in cellophane. The box displays a warning that the purchase of this product is subject to a restrictive licensing agreement. In fact, the licensing agreement appears each time the software is executed, forcing user to respond by pressing “Enter”. The Defendant, an entrepreneurial computer programmer purchases a copy of the database and downloads the data in the CD ROM onto his computer. He then, uploads the data onto an Internet host computer. He develops his own software to access the downloaded database across the Internet and sells access to the Internet database for a fee. (Note 103) The Plaintiff comes to know about it and files suit alleging copyright infringement and a breach of licensing agreement.

Notwithstanding prior decisions, the Court broke new ground by enforcing the restrictive license in *ProCD*. (Note 104) The enforcement of the shrink wrap license afforded the ProCD exclusive rights in the database (Note 105) which would otherwise be unprotected under copyright law. The Court justified the decision on two grounds; first, the seller or licensor in a transaction has the power to impose conditions of acceptance on certain conduct by the buyer. Secondly, the defendant had an opportunity to review the license and was aware of the contract terms, but failed to object, thereby accepting them.

The enforceability of shrink-wrap license in Pro CD was based on contract law under the Uniform Commercial Code (UCC) by virtue of §2-204(1) UCC which states that:

“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract...”

The second reason was based on § 2-606 of the UCC. This section states that: “... [b] buyer accepts goods ... when, after an opportunity to inspect, he fails to make an effective rejection ...”

The acceptance of the offer occurred when, after the opportunity to inspect he fails to make an effective rejection. (Note 106) In this case, the defendant inspected the package, tried out the software, learned of the license, and did not reject the goods. (Note 107)

However, it was argued that although the buyer had notice of the restrictive license because the packaging displayed such a warning, the explicit terms of the license were not known to the buyer until he purchased the product. This leads to the issue of the unconscionability of the terms of the licensing agreement. This is one of the grounds of unenforceability of shrink wrap license. (Note 108)

However, in this case, the Court reasoned that the defendant had an opportunity to reject the product if he found the license terms to be unsatisfactory. The examples used included theatre tickets and airline tickets, where a purchaser is not aware of the terms of issue (placed on the reverse of the ticket), (Note 109) until after they have booked and paid for the ticket. However, the purchaser can return the ticket if they do not agree to the terms and conditions. A similar right of return existed in the present case; if the defendant did not agree to the licence terms, he could have returned the disk and receive a refund from the purchaser. Thus, the court considered that the licence would be binding on the defendant.

It is concluded that the element of surprise of the terms for such licenses, i.e., shrink wrap or click wrap, would not prevent the contract from being enforced, provided that, the buyer is given the opportunity to review the license terms

and conditions and to reject should the buyer disagree with them.

The validity of shrink wrap license contract had been affirmed by subsequent cases for example in *Hill v. Gateway*. (Note 110) However, in this case, the Court noted that the buyer knew when ordering the product by phone that some sort of contract would likely be included in the transaction. In *Micro Star v. Formgen Inc.*, (Note 111) the Court held that the defendant was bound by the restrictive terms even though no actual notice was given. The plaintiff had created a computer game that allowed and encouraged users to create new advanced levels of the game and to post them on the Internet so others could use them, the Defendant downloaded and copied these new user-made versions into CDs and resold them. The Court stated that users were prohibited by the license agreement from selling the user-made versions. Although, the restrictions were meant for the users who created the new-user made version, the defendant in this case was bound to the terms and conditions as the prohibition in the agreement evidenced the Plaintiff's intent to preserve its exclusive right to commercially distribute the work. However, the Court enforced rights against the defendant based on unknown contractual restrictions. This seems to suggest that as the users of the product they should know that there must be terms and conditions accompanied with the database in question. They have the obligations to seek out on which terms are digital products, such as database, are offered or risk being bound by default, at least to the extent of terms that are not unconscionable or otherwise illegal. (Note 112)

In click wrap licensing case *Compuserp, Inc v. Patterson*, (Note 113) the Court held that by typing "agree" on an online registration form, the Defendant had agreed to be bound by the terms of the shareware license that was displayed on the screen. Similarly in *Hotmail Corp. v. Van\$ Money Pie, Inc* (Note 114). The Court granted an injunction preventing the Defendant, a user of the Plaintiff's Internet email product from sending "spam" messages. The Defendant registered online and received several of the Plaintiff's email boxes. The terms of the online license agreement prohibited sending spam or obscene messages. It was held that there was a breach of contract as the Defendant had agreed to abide by the terms of the agreement by using the email boxes and had breached the contract by violating its terms.

Thus, both cases suggested that the act of agreement by the users or potential licensees is important to determine the issue on enforceability of adhesion contract. This is particularly relevant when the users are given the opportunity to read the terms and conditions attached to the click wrap or browse wrap license and by clicking "Agree" indicates that he or she understands the terms and conditions in the license and chooses to be bounded by them. Therefore, it is not unexceptional for the court in *Specht v. Netscape Communications Corp.*, (Note 115) to hold that without clicking "Agree" the users are not bound to the license. The court in this "browse wrap" case, decided that where the user did not click "I agree" to the license before downloading the software they could not be bound by an agreement to arbitration which was on another web page, even where they were asked "Please review and agree to the terms of the ... license agreement before downloading and using the software".

The uncertain position of adhesion contract in the United States has encouraged the National Conference of Commissioners on Uniform State Laws to draft the Uniform Computer Information Transactions Act (UCITA) which adds Article 2B to the Uniform Commercial Code (UCC) to make shrink wrap license enforceable. The UCITA covers all "information transaction" and provides that a shrink wrap license is unenforceable unless, (i) the users has reason to know that more terms would be coming, (ii) the users are given a right to return the product if they do not like the terms, (iii) the right to return is cost free and (iv) the users are reimbursed any reasonable costs of restoring the system if it was altered when they tried to read the license term. In conclusion, the UCITA permits database owners to enforce shrink wrap licenses as soon as a user unwraps a piece of CD ROM containing database, whether or not the terms have been read.

From the above picture, it indicates that the issue on enforceability of adhesion contract in the United States is assured with the enforcement of UCITA. However the same issues seemed to be unresolved in Malaysia. Unlike the Uniform Commercial Code of the United States, the ECA 2006 as well as the Contracts Act 1950 is silent on the provision of effective rejection. With this provision, even though there is an element of surprise in the terms, the user nonetheless, has the opportunity to reject the contract if he disagrees with the terms.

As this is a "take it or leave it" basis of agreement, a one-sided terms or unfair terms will be a central issue here. Nevertheless, as indicated above, the issue of unconscionability, in the principle of undue influence, can be avoided if the database producer does not use his dominant position to exercise unconscionable dealings.

In circumventing the issues of unconscionability in an adhesion contract, it is submitted that the database agreement should incorporate a clause stating that if the user does not agree with any of the terms he is free to withdraw from the contract by making affirmative rejection to the contract. This clause seems to provide protection not only to the users of the database, but also the database producer as it ensures the validity of the agreement. Although the transaction involves contractual terms which will be made available only after the contract has been entered into, the contract is valid as it will be subject to the later terms which allow the users to reject the terms and terminate the contract. In addition to that, the users should be able to obtain a full refund and to be compensated for any cost involved which includes any costs involved in returning the product and any reasonable and foreseeable cost of restoring the user's

computer should this prove to be necessary.

By constructing a fair agreement for both parties, no dispute on the enforceability of contract may arise. This will ensure protection to the interest of both the database producers and the users of the database.

4. Conclusion

It is undeniable that licensing agreements can be invoked to protect the interest of database producers. The clauses in the licensing agreement protects database producer or usually known as licensor in the agreement. In other words, if the licensee breaches the terms, the licensor will be entitled to remedy under the contract. However, the protection offered by licensing is not that strong. This view is substantiated by the facts that the licenses only bind the contracting parties, whereas other regime like copyright, it is good against the whole world. Contractual protections do not work against third parties who are not party to the licensing agreement. They may manipulate the data, which are initially restricted, as they please. This can be done particularly with the assistance of digital technologies which allow a quick, easy and cheap digital copying. The third parties would include a hacker or someone accessing the database in an unauthorized manner or for unauthorized purposes for instance, a person who enter the database through “back door” methods. The unauthorized accessor might never encounter the agreement to where he or she is supposedly bound. In this circumstance, the parties could use the database in any manner they so chose, and the database producer would have no contractual recourse. Despite the above, a database licensing agreement provides notice as to the database’s rules of use, and may form the basis of a breach of contract in the event that the stipulated terms are violated. It is important to note that, problems relating to unenforceability of adhesion contract must be resolved before a database producer is able to implement the terms and conditions provided in the database licensing agreement. Once the agreement is free from those predicaments, it may be used to protect the interest of the database producers.

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Notes

Note 1. The author (Nazura Abdul Manap) would like to thank Associate Professor Dr. Abdul Mohaimin Noordin Ayus for his critical and valuable commentaries on this article.

Note 2. These agreements operate as “contracts of adhesion” which are non-negotiable and pre-printed forms offered on a “take it or leave it” basis. The party who accepts the contract does not negotiate, but merely adheres. Most of the consumer-oriented database licensing agreements are not signed. These unsigned licensing agreements purport to bind

licensees by action not signature. These databases provide notices which warn potential licensees that accessing the database indicates acceptance by the licensee of the terms and conditions in the license agreement. Thus, the conduct of the potential licensee who clicks on the notice or unwrap the package before entering the database binds the licensee to the contract.

Note 3. 'Click-wrap' or 'web-wrap' licenses are easy to find on the Internet For example, the Internet provider has one that the user agreed to before using the service for the first time.

Note 4. In *Comb v. Paypal, Inc*, 218F. Supp. 2d 77 (N.D.Cal.2002) the court questioned that whether without a record of the assent of both parties there is an enforceable agreement and found that the arbitration clause in *PayPal's* user agreement is unconscionable. Ibid.

Note 5. The nature of adhesion contract, i.e., the shrink-wrap agreements have deprived the users' right to affirmatively search for and read the licensed terms before choosing either to object or be bound by them (unread terms), J. Davidson, Scott J. Bergs, Open, "Click or Download What have You Agreed To? The Possibilities Seem Endles", 1999 557 PLI/PAT 687 at 700.

Note 6. The essential elements of an agreement are competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation. Corey W. Roush, "Database Legislation: Changing Technologies require Revised laws", 2002 28 U. Dayton L.Rev.269, at 300. Thus, they lack of mutuality of agreement and obligation as there has not been an opportunity to negotiate the terms of the contract. Even if the terms are enforceable, they cannot materially alter the terms of the original contract. Ida Madieha Azmi, "Contract or Copyright? Software Licensing and the Control of Information Products: The Malaysian Perspective." C.T.L.R. 2001, 7(6), 136-142, at 139.

Note 7. This is done as the Malaysian contract has it basis from the English common law principles.

Note 8. The validity of an adhesion contract is assessed based on the fact that the database contract is contractual licensing not a contract of sales of goods. The difference between these two types of contracts is the former does not involve transfer of ownership to the buyer whereas the latter does.

Note 9. N.Stephen Kinsella, Andrew F. Simpson, *Online Contract Formation*, First Edition, Oceana Publications, 2004, at 161.

Note 10. Act 658. This law has come into forced at 19 October 2006 (P.U. (B) 280/2006.

Note 11. Section 6(1) of the Electronic Commerce Act 1998

Note 12. Ibid, Section 2.

Note 13. Abu Bakar Munir, Siti Hajar Mohd Yasin, "Electronic Commerce Bill 2006: An Oversight or Wanting a Different or...?" (2006) 4 MLJ i.

Note 14. Stephen A. Smith, *Contract Theory*, Clarendon Law Series, Oxford University Press, 2004, at 340.

Note 15. Ibid.

Note 16. *Halsbury's Laws of Malaysia; Conflict of Laws*, Equity, Volume 26, at 264. See also note 1 which states that in the context of performance bonds, the Singapore Court of Appeal in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa* (2001) 1 SLR 657 at 663 said: 'What kind of situation would constitute unconscionability would have to depend on the facts of each case...There is no pre-determined categorisation'.

Note 17. Ibid.

Note 18. Ibid.

Note 19. Ibid.

Note 20. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), cert. denied 540 U.S. 1160. See also *Blake v. Ecker*, 93 Cal. App. 4th at 742 at 743.

Note 21. Shaik Mohd Noor Alam bin SM Hussein, "Pre-Contractual Fairness: Sections 15 and 16 of the Malaysian Contracts Act 1950", (1993) 2 MLJ cxxxi, (1993) 2 MLJA 121. The issue of unread terms is considered as pre-contractual issue as it is done before the contract is concluded.

Note 22. (1983) 151 CLR 447, (1983) 46 ALR 402.

Note 23. (1983) 46 ALR 402 at 423.

Note 24. (1993) 63 P & CR 298 at 312. In delivering the judgment of the Board, his Lordship put down a compilation of principles relating to unconscionability, which includes:

"(1) It is not sufficient to attract the jurisdiction of equity to prove that a bargain is hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that 'one of the parties to it has imposed the objectionable terms in a

morally reprehensible manner, that is to say, in a way which affects his conscience: *Multiservice Bookbinding v Marden*.

(2) 'Unconscionable' relates not merely to the terms of the bargain but to the behaviour of the stronger party, which must be characterized by some moral culpability or impropriety: *Lobb (Alec) (Garages) Ltd v Total oil (Great Britain) Ltd*.

(3) Unequal bargaining power or objectively unreasonable terms provide no basis for equitable interference in the absence of unconscientious or extortionate abuse of power where exceptionally, and as a matter of common fairness, 'it was not right that the strong should be allowed to push the weak to the wall'; *Lobb (Alec) (Garages) Ltd v Total oil (Great Britain) Ltd*.

(4) A contract cannot be set aside in equity as 'an unconscionable bargain' against a party innocent of actual or constructive fraud. Even if the terms of the contract are "unfair" in the sense that they are more favourable to one party than the other ('contractual imbalance'), equity will not provide relief unless the beneficiary is guilty of unconscionable conduct: *Hart v. O'Connor* applied in *Nichols v. Jessup*.¹

(5) 'In situations of this kind it is necessary for the plaintiff who seeks relief to establish unconscionable conduct, namely that unconscientious advantage has been taken of his disabling condition or circumstances': per Mason J in *Commercial Bank of Australia Ltd v. Amadio*."

Note 25. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), cert. denied 540 U.S. 1160. See also *Blake v. Ecker*, 93 Cal.App.4th at 742 at 743.

Note 26. (1994) 3 MLJ 127.

Note 27. Ibid. at 160.

Note 28. As suggested in the Indian Supreme Court decision of *Central Inland Water Transport Corp Ltd v. Brojo Nath Ganguly* AIR 1986 Supreme Court 1571.

Note 29. (2001) 3 CLJ 98.

Note 30. (2002) 4 MLJ 301.

Note 31. Shaik Mohd Noor Alam bin SM Hussein, *Pre-Contractual Fairness: Sections 15 and 16 of the Malaysian Contracts Act 1950*, at cxxxi, at 121. This view is supported by the facts that unconscionable conduct can mean a deficiency in either the bargaining process or the terms of the resulting transaction which operates as a vitiating factor to set aside a transaction. *Halsbury's Laws of Malaysia; Conflict of Laws, Equity*, Volume 26, at 264.

Note 32. A contract can be unenforceable on the basis of vitiating factors. These vitiating factors are based on the improper conduct of one party, the vulnerability of the other or the combination of the two. J. Beatson, *Anson's Law of Contract*, 27th Edition, Oxford, at 270

Note 33. Salleh Buang dan Nordin Torji, *Undang-Undang Kontrak di Malaysia*, Central Law Book Company, Kuala Lumpur, 1992, 147.

Note 34. Section 16 ("Undue Influence) states that "A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other..." Contracts that are voidable under section 16 of the Contracts Act 1950 for undue influence can be separated into two categories, firstly, those where there is no special relationship between the parties; secondly, those where a special relationship exists. Section 16(2)(a) of the Contracts Act 1950.

Note 35. (1997) 4 All ER 144.

Note 36. This doctrine of infection was said to be "...under certain circumstances, knowledge of the actions of a person who has actually been guilty of the exercise of undue influence (whether actual or presumed) can be 'brought home', as it were, to the party who desires to enforce her rights under the contract. If such knowledge can in fact be 'brought home', then the party so desiring to enforce her rights will be 'infected' by the guilty person's conduct and will consequently be precluded from enforcing her rights; in other words, the effect would be as if the party so desiring to enforce the rights had actually perpetrated the undue influence herself..." Andrew Phang, *Law of Contract: First Singapore and Malaysian Student's Edition*, Butterworths Asia, Singapore, 1998, at 374.

Note 37. (1997) 4 All ER 144 at 153. Millett's LJ was of the view that the transaction was not merely manifestly disadvantageous to the defendant but was also one that 'shocks the conscience of the court'.

Note 38. (1997) 4 All ER 144 at 151.

Note 39. Andrew Phang, *Law of Contract: First Singapore and Malaysian Student's Edition*, Butterworths Asia, at 391.

Note 40. (1922) 1 FMSLR 348.

Note 41. The case concerned a money lending transaction between the Plaintiff, a Sikh moneylender and the defendant, a Malay farmer. The Plaintiff sued the defendant on a pro-note which provided for interest at the rate of 36% per annum. The Defendant had deposited his mukim register extracts with the Plaintiff as collateral security. Mr Justice Innes, the acting chief judicial commissioner held that since good collateral had been provided, an interest charge at more than 18% on an illiterate man gave rise to the presumption of unconscionability. Shaik Mohd Noor Alam bin SM Hussein, "Pre-Contractual Fairness: Sections 15 and 16 of the Malaysian Contracts Act 1950", at cxxxi, at 121.

Note 42. Ibid.

Note 43. Ibid.

Note 44. (1915) 42 Cal 690 at 699.

Note 45. AIR 1924 PC 60.

Note 46. (1922) 1 FMSLR 348.

Note 47. Section 16(3) of the Contract Enactment that had been discussed in *Chait Singh v. Budin bin Abdullah* (1922) 1 FMSLR 348 is *pari materia* with section 16(3) of the Contracts Act 1950.

Note 48. Section 20 (Power to set aside contract induced by undue influence) states that: "...When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the court may seem just..."

Note 49. Andrew Phang, *Law of Contract: First Singapore and Malaysian Students Edition*, Butterworths Asia, Singapore, 363.

Note 50. Section 16(2) (a) of the Contracts Act 1950.

Note 51. Ibid.

Note 52. Section 16(2) (b) of the Contracts Act 1950.

Note 53. AIR 1924 PC 60. This case discussed on the scope of section 16 of the Indian Contracts Act which is in *pari materia* with the Malaysian Contracts Act.

Note 54. As stated by the Privy Council in the above case:

"...even though the bargain had been unconscionable (and it has the appearance of being so) a remedy under the Indian Contracts Act does not come into view until the initial fact of a position to dominate the will has been established..." Ibid. pp. 64-65.

Note 55. Illustration (a) of section 16 of the Contracts Act 1950.

Note 56. Ibid, Illustration (b).

Note 57. See *Lee Kee Chong v. Empat Nombor Ekor (NS) Sdn Bhd & Ors* (1976) 2 MLJ 93; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor.* (1990) 1 CLJ 675.

Note 58. Gopal Sri Ram JCA in *Saad Marwi v. Chan Hwan Hua & Anor* (2001)3 CLJ 98 at 115.

Note 59. Ibid.

Note 60. Ibid. pp. 115-116.

Note 61. (1975) QB 326 at 335. Lord Denning in his judgment said that: "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

See Cheong May Fong, "A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After Saad Marwi" (2005) 4 MLJ i at v.

Note 62. (1985) 1 All ER 821. Lord Scarman in that case was of the view that: "The question which the House does have to answer is: did the court in *Lloyds Bank Ltd v Bundy* accurately state the law? Lord Denning MR believed that the doctrine of undue influence could be subsumed under a general principle that English courts will grant relief where there has been 'inequality of bargaining power' (see (1974) 3 All ER 757 at 765, (1975) QB 326 at 339). He deliberately avoided reference to the will of one party being dominated or overcome by another. The majority of the court did not follow him they based their decision on the orthodox view of the doctrine as expounded in *Allcard v Skinner* (1887) 36

Ch D 145, (1886—90) All ER Rep 90. This opinion of Lord Denning MR, therefore, was not the ground of the court's decision, which has to be found in the view of the majority, for whom Sir Eric Sachs delivered the leading judgment.”

See Cheong May Fong, “A Malaysian Doctrine of Inequality of Bargaining Power and Unconscionability After Saad Marwi” (2005) 4 MLJ i at v.

Note 63. (2002) 4 MLJ 301.

Note 64. Ibid. pp. 319.

Note 65. (2002) 4 MLJ 301 at 319.

Note 66. Judgement by *Abdul Hamid Mohamad FCJ in Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* (2006) 2 MLJ 389 at 414.

Note 67. Ibid at 415.

Note 68. Section 2 (a) of the Contracts Act 1950 defines an offer or proposal as “...when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to act or abstinence he is said to make a proposal...”

Note 69. Section 2(b) of the Contracts Act defines an acceptance as “...when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted; a proposal, when accepted, becomes a promise...”

Note 70. This section states that “...In the formation of a contract, the communication of proposals, acceptance of proposals, and revocation of proposals and acceptances or any related communication may be expressed by an electronic message...”

Note 71. To hold otherwise would imply that there would never be a contract until the database owner agrees to the offer made by each and every potential user and he is required to inform each potential user of his intention to perform the contract in order to ensure that there is an enforceable contract. Therefore, if this is the case, then to avoid unenforceability of contract the database owner should clearly stipulate that a response from the user of the site to the advertisement constitutes an offer. It actually depends on the intention of the database owner whether to treat the advertisement as an offer or mere advertisement which will only amount to invitation to treat. N.Stephan Kinsella, Andrew F.Simpson, *Online Contract Formation*, at 163.

Note 72. The communication of acceptance, according to, the Contracts Act 1950 can be either through postal rule or instantaneous communication. This is highlighted in section 4(2) of the Act, where it provides that: “...The communication of an acceptance is complete- (a) as against the proposer, when it is put in the course of transmission to him, so as to be out of the power of the acceptor; and (b) as against the acceptor, when it comes to the knowledge of the proposer. Hence, the validity and enforcement of all communications of proposals, acceptance and revocation would be determined in accordance with these rules. It is submitted that this click-through mode of acceptance resembles that of instantaneous communication. Ibid.

Note 73. Julian Ding, *E-Commerce; Law & Practice*, Sweet & Maxwell Asia, 1999, at 60.

Note 74. Subject to vitiating factors, such as when fraud, undue influence, or misrepresentation is established. *Polygram Records Sdn Bhd v. Search & Anor* [1994] 3 MLJ 127 at 147.

Note 75. (1994) 3 MLJ 127.

Note 76. Ibid. at 147. The court came to the decision by referring to the leading case of *L'Estrange v F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p 403): “...When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

Note 77. A basic rule of contract law is that it is not possible particularly in unilateral contract, to introduce new terms into a contract after it has been made. David I Bainbridge, *Introduction to Computer Law*, 4th Edition, Pearson Education, 2000, 238.

Note 78. J.Beatson, *Anson's Law of Contract*, at 162.

Note 79. (1949) 1 All ER 127. In this case a husband and wife went to a hotel paid for a room. Their room contained a notice excluding liability for articles lost or stolen unless handed to the manageress for safe custody. A fur coat belonging to the wife was stolen and the hotel sought to rely on the exclusion notice. It was held that the notice was ineffective and the hotel was liable for the loss of the coat on the ground of negligence.

Note 80. See also contrasting cases dealing with tickets; *Thompson v. LMS Railway* (1930) 1 KB 41, *Chapleton v. Barry Urban District Council* (1940) 1 All ER 356.

Note 81. The Act only focuses on general contract formation. It has been suggested that other communications

concerning the performance of contractual obligations such as relevant notices or statements may be issued in the electronic message should be addressed in that section. Abu Bakar Munir, Siti Hajar Mohd Yasin, "Electronic Commerce Bill 2006: An Oversight or Wanting a Different or...?" (2006) 4 MLJ i.

Note 82. Therefore to be absolutely sure that the terms in the license are part of the contract the database user should be asked to sign the license before the package is handed over. However, in many situations, this is impracticable particularly when the delivery of the database makes it not possible to do so for example where the database is acquired through mail order. David I Bainbridge, *Introduction to Computer Law*, 239.

Note 83. *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* (1988) 1 All ER 348.

Note 84. Provided that the offeree has not been misled by fraud or misrepresentation. J. Beatson, *Anson's Law of Contract*, at 160-161.

Note 85. In *Thornton v. Shoe Lane Parking Ltd.* Lord Denning (1971) 1 All ER 686 in His Lordship's decision stated that: "The custom customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it... He is committed beyond recall. He is committed at the very moment when he puts his money into the machine. The contract was concluded at that time... The offer is made when the proprietor of the machine holds it out as being ready to receive the money. The acceptance takes place when the customer puts his money into the slot... he is not bound by the terms of the ticket... because the ticket comes too late. The contract has already been made."

This issue was also discussed in the Malaysian case of *Goh Gok Hoon v Eusuff Bros. Sdn. Bhd* (1990) 2 MLJ 421.

Note 86. In *Spurling (J) Ltd v. Bradshaw* (1956) 2 All ER 121. Lord Denning was of the view that the more unreasonable the clause is, the greater the notice which must be given in some cases, in order to give sufficient notice, it would need to be printed in red ink and a red hand pointing to it, or something equally startling.

Note 87. (1877) 2 C.P.D, 416 at 421. In this case the plaintiff deposited a bag in the defendant's station cloakroom. He received a paper ticket which said on its face 'See back' and on the back were a number of printed conditions, including a condition limiting liability for any package to £10. The plaintiff admitted that he knew there was writing on the ticket, but stated that he had not read it, and did not know or believe that the writing contained conditions. The bag was lost, and the plaintiff claimed £24 10s for its value.

Note 88. To what extent the notice is sufficiently available is a question of fact which depends substantially on the circumstances of the case and the situation of the parties. The case of *Thompson v. L.M. & S. Railway Co.* (1931) 1 K.B. 41 represents a liberal approach to what constitutes reasonable notice.¹ In this case it was held that a clause exempting the company from liability, printed in its time table was sufficiently incorporated into the contract since the ticket referred to the timetables and excursion bills. However, the situation is different in *Richardson, Spence & Co. v. Rowntree*, (1894) A.C. 217 where a term limiting the liability of the steamship company to \$100 as stated in the ticket was held not to be incorporated. This was due to the fact that the ticket had been handed to the plaintiff folded up and the terms were eradicated by the red ink stamping on the parts of the ticket. The notice was said to be insufficient as the plaintiff could not read the conditions even though she knew the terms were there. Thus, it can be concluded that the notice is considered as sufficient if the way the terms is displayed is as such that it attracts the attention of the offeree and he is able to read it, see *Malaysian Airlines System v. Malini Nathan* (1986) 1 MLJ 330.

Note 89. David I Bainbridge, *Introduction to Computer Law*, at 238.

Note 90. Andrew Phang, *Law of Contract: First Singapore and Malaysian Student's Edition*, at 82.

Note 91. As discussed above, it was decided by the court in *Specht v. Netscape Communications Corp* 150 F.Supp.2d 585 (S.D.N.Y.2001), that to hold that without clicking "Agree" the users are not bound to the license. The court in this "browse wrap" case, decided that where the user did not click "I agree" to the license before downloading the software they could not be bound by an agreement to arbitration which was on another web page, even where they were asked "Please review and agree to the terms of the ...license agreement before downloading and using the software".

Note 92. Section 4(2) of the Contracts Act 1950 states that "...The communication of an acceptance is complete (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; and (b) as against the acceptor, when it comes to the knowledge of the proposer..."

Note 93. An offeror may not arbitrarily impose contractual liability upon an offeree merely by proclaiming that silence shall be deemed consent. In *Felthouse v. Bindley*, (1862) 11 CBNS 869, the Court of Common Pleas held that the action must fail as there had been no acceptance of the plaintiff's offer before 25 February, and the plaintiff had therefore, at that date, no title to maintain conversion. Andrew Phang, *Law of Contract: First Singapore and Malaysian Student's Edition*, at 94.

Note 94. Section 7(b) of the Contracts Act 1950 states that "...In order to convert a proposal into a promise the

acceptance must-be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in that manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance...”

Note 95. It is an accepted rule of contract law that if one party submits an acceptance of an offer which contains other terms, then that particular new terms are considered as a counter offer. A counter offer is a new offer which means the previous offer has not been accepted, thus no contract is formed.

Note 96. See section 7(b) of the Contracts Act 1950. Compare this position to English cases (common law rule) in *Tinn v Hoffman & Co*, (1873) 29 LT 271, *Manchester Diocesan Council for Education v Commercial and General Investments Ltd*, (1970) 1 WLR 241. Julian Ding, E-Commerce; Law & Practice, at 61.

Note 97. Section 8 of the Contracts Act 1950 on acceptance by performing conditions, or receiving consideration states that “...Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal...”

Note 98. AIR 1952 Calcutta 691.

Note 99. Ibid, at 692. See also the old case of *Weatherby and Another v. Banham* (1832) 5 C & P 228, 172 ER 950.

Note 100. Stephen J. Davidson, Scott J. Bergs, Open, *Click or Download What have You Agreed To? The Possibilities Seem Endless*, at 700. *Vault Corporation v Squaid Software Ltd* 655 F.Supp.750, 761 (E.D. La 1987), aff’d, 847 F.2d 255 (5th Cir. 1988), *Foresight Resources Corporations v. Pfortmiller* 719 F.Supp. 1006 (D.Kan, 1989), *Step-Saver Data Systems, Inc. v. Wyse Technology* 939 F. 2d 91 (3d Cir.1991), *Arizona Retail Systems, Inc. v. The Software Link* 831 F. Supp. 759 (D Ariz. 1993).

Note 101. E.Leonard Rubin, “Understanding the Intellectual Property License: Database and Content Licensing”, 2004 806 PLI/Pat 537, at 547-548.

Note 102. 908 F Supp 640 (W.D. Wis. 1996), reversed and remanded, 86 F3d 1447 (u 7thCir 1996). The Plaintiff, J-CAP Directories, Inc, specializing in a computer disc technology, invested \$10 million in researching and developing a comprehensive telephone database. The researchers compile 95 million listings and incorporate them into electronic database. The listings include residential and commercial names, addresses and telephone numbers. This database application enables the computer user to search using any number of fields, i.e., name, town, state, zip code, industry code and telephone area code.

Note 103. The Defendant accomplishes all this less than three months with the investment of only \$50,000.

Note 104. The District Court case decided that the licensing agreement unenforceable under contract law. However, the Seventh Circuit reversed this holding and further held that the shrink wrap license, imposing restrictions on an end-user, was enforceable. 86 F3d 1447 (7th Cir 1996), at 1449.

Note 105. The court effectively (1) extended database protection by preventing the end-user from copying the database application, (2) by-passed copyright’s first sale doctrine; (3) permitted an ambiguous acceptance of contract terms following the purchase of a product, and, (4) ignored the doctrine of fair use.

Note 106. As stated under § 2-602 (1) of the UCC.

Note 107. 86 F3d 1447 (7th Cir 1996), at 1453.

Note 108. Ida Madieha Azmi, “Contract or Copyright? Software Licensing and the Control of Information Products: The Malaysian Perspective”. C.T.L.R. 2001, 7(6), 136-142, at 136. See also Stephen J.Davidson, Scott J.Bergs, Open, *Click or Download What have You Agreed To? The Possibilities Seem Endless*, 1999 557 PLI/PAT 687, at 702.

Note 109. 86 F. 3d 1447 (7thCir 1996), at 1453.

Note 110. 105 F. 3d 1147 (7th Cir. 1997) , In this case the court held that an arbitration agreement packaged inside a computer shipping box was enforceable despite the fact that the original agreement between the parties took place over the phone and no mention of the specific license terms was made at that point of time.

Note 111. 154 F. 3d 113 (9th Cir. 1999)

Note 112. Stephen J. Davidson, Scott J. Bergs, Open, “Click or Download What have You Agreed To? The Possibilities Seem Endless”, 1999 557 PLI/PAT 687, at 702.

Note 113. 89 F.3d 1257 (6th Cir. 1996) at 1264. However, the formation of the contract was not the primary issue in the case. Instead, the court stated that a contract had been formed in the context of a discussion of whether the defendant was subject to personal jurisdiction in Ohio, where the plaintiff’s computer and operation resided.

Note 114. 1998 WL 388389 (N.D. Cal., April 16, 1998).

Note 115. 150 F. Supp.2d 585 (S.D.N.Y.2001).



The Relieve Method and Its Related Issues of Executive Aspects about Trademark Infringement in China

Xuemei An

Center for studies of IPR in Zhongnan University of Economics & Law

Wuhan 430074, China

Tel: 86-20-8560-9980 E-mail: anxuemei@gmail.com

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Abstract

Trademark is a kind of “privacy right”, the major method to protect it is to use civil law in foreign country. But in china, there are two tracks to protect trademark right, which are called the Judicial and Administrative actions with Chinese characteristics. Moreover, administrative protection has become the major method to protect intellectual properties.

Keywords: The Relive Method, Trademark, Infringement, Administration

Trademark is a kind of “privacy right”. The major method to protect it is to use civil law in foreign countries, and only take executive relieve under some special situations, like customs protection. However Chinese trademark protection is different from that of in other countries, by reasons of administrator consider that trademark is relating to product quality control and consumer’s benefit, and while infringement has happened, it is also violating the social welfares. Therefore there are two tracks to protect trademark right, which are called the Judicial and Administrative actions with Chinese characteristics. The former protects the intellectual property by judicial approach, whose intellectual right is through the People’s court to prosecute infringer, and investigate the legal responsibility for infringement. The latter is to take action by state administrative departments to manage and punish the infringement. In China, administrative protection has advantages of efficiency, period and cost than judicial protection, which became the major approach to protect intellectual properties. In recent years, this system with Chinese characteristics has helped to against counterfeiting registered trademark, stop trademark infringement and effective protection of the exclusive right to use of registered trademarks, which played a very important role by significant effectiveness. In China 80 to 90 percent of the trademark cases were investigated by industrial and commercial administrative organs at present.

According to Chinese legal provisions, when trademark’s specific right has been infringing, the registered and interested relaters can choose to complaint to trademark administrative management office. In China the departments who have right of trademark enforcing the law are: State Administration for Industry and Commerce Trademark Office, Trademark if the Vetting Committee in State Administration for Industry and Commerce Trademark Office, the provincial Industrial and Commercial Administration departments and county level of Industrial and Commercial Administration departments. The State Administration for Industry and Commerce Bureau is mainly responsible for trademark application and registration, prosecuting cases of trademark infringement if necessary, responsible for affirming the well-known trademarks and guidance lower level trademark administration authorities. The State Administration for Industry and Commerce sets up a professional committee, whose mainly responsibility is to deal with the trademark disputes, but has no right to deal trademark infringement. Generally the provincial Industry and Commerce management authority is the trademark office, being responsible for investigating and dealing with the trademark infringement cases and well-known trademarks of transfer, confirmation and protection work. The county level and above trademark Trade and Industry Authority management department (as trademark office) is mainly responsible for trademark infringement cases, handling of complaints and mediation. Naturally, local Industry and Commerce Administration department can also take the initiative to investigate and deal the violations in accordance with terms of reference of infringement to administrative penalties people. Besides there are other offices inside those departments, they are mainly responsible for monitoring the marketing trade actions, suppression of monopolies and unfair competition.

For trademark oblige, the most common relief approach means the administrative relief after oblige applied to the local administration departments.

1. Procedures of administrative relief by trademark infringement

If trademark oblige selects to relieve by administrative protection, it will be suitable to administrative protection procedure. In China, the county level Industry and Commerce administrative organs accepted mainly execute the trademark infringement cases.

1.1 The choice of case handled department

When the right of trademark has violations, oblige or agent need to select an appropriate department to handle the case, the Trademark office and Economy inspect office inside the Trade and Industry Bureau are dealing with different infringement cases. Generally, as the counterfeiting of oblige registered trademark or the application as inclusive by oblige trademark, or the malicious registration of other oblige registered trademark, complaints has to select the trademark office in Industry and Commerce department (such as Trademark office). If oblige is not using their trademark directly as the trademark, but used other way to easily caused confusions, like use the similar trademark name, packaging, decorating and etc as policy trademark, which caused confusion of other registered trademark product, affect consumers misunderstandings or unauthorized use of similar trademark as enterprise registered trademark product, may caused misunderstanding, all above can sue at the Economy inspect office inside Industry and Commerce Bureau. Sometimes, the infringement actions are involving directly trademark infringement and also the customers misunderstanding situation, agent need to base on specific situation to choose a stronger enforcement department to act admissibility agencies.

1.2 Cases accept procedures and related issues

According to the Chinese legal provisions to require the administration relief, firstly agent need to prepare complaint files which include complaint document, identity documents and evidence documents if complainant, statement of both parties basic situation in written, the complaints of goods storage location. The tort facts and reasons for request of complainant matters, (like requiring for administrative penalties of infringement), corresponding related evidence like proof of trademark right, evidence of infringement actions or identification of authority or other identification proof documents (such as the identification of trademark already been a well-known trademark) and etc.

After authorities received complaint documents, it will first to review the case than accord the provision to place a case on file for investigation and prosecution to determine the applicable procedures. Under the normal situation, administration department will execute the procedures of taken the main file, investigate and collect evidence, listen parties statements, make administrative punishment, delivery the punishment decision document and etc. If a party against the punishment by authority's decision, it may raise the reconsider to a higher-level authority within 15 days of administrative made the punishment decision date, can also raise an administrative proceeding to the court in the statutory time limitation, or skip the reconsideration and directly raise the administrative proceedings.

The executive can take the administrative measures are ordered to stop the infringement violations, confiscation, destruction infringement goods and product used to produce infringement goods, tools to counterfeit registered trademarks, in order to take punishment and etc. Industry and Commerce department can also arbitrate both parties based on requirement of parties on the amount of compensation for trademark infringement. But this kind of arbitrate do not have administration effect. The party who refused to accept mediation can prosecute at the court.

Based on above matters and compare to civil relief under trademark infringement, in the administration relief process the infringement must accept the punishment which given by nation order, may afford greater economic responsibility.

2. Related issues need to take attention

During the practical, trademark violations are often having difficulty to investigate completely, especially in the vast territory of China; some search fee of infringement actions is extremely high, that agents should handle cases flexible.

2.1 Choice of relief ways

When the violations are hidden and in a state of flow, agent better choose as combine the administrative penalties, administrative proceeding and civil compensation, it may restrain the infringement actions effectely. Such as oblige or agent often complaints to Industry and Commerce department at first, than let the administration office investigates and treat the infringement actions. If violations against, oblige can always ready to prepare to cooperate with administration office to participate in administrative proceedings, furthered identify the illegal identify infringing acts. In addition oblige can also obtain the relief first than request civil compensation. Therefore the infringement act already been confirmed before litigation procedure, related evidence also collected, so the civil compensation request can achieve easier.

2.2 Problems need to pay attention

As the proceedings are major reviewing the legality to make the administration decision, so strategy of combine the administrative and civil contains a certain legal risk. Mainly act as for Industrial and Commercial administrative organs

of law enforcement of challenges legality procedures. Because of Chinese law enforcement has large difference in quality and law enforcement procedures are not standardized, it may cause risk of administrative proceedings. And lose a lawsuit by illegal procedures will cause negative effect of oblige trademark protection works. Therefore in practice, oblige and agent need to actively cooperate with the Industrial and Commercial administrative department of law enforcement, in order to secure enforcement procedures flawless, for better foundation of administrative proceedings in future.

3. Conclusion

By the reason of "Two tracks" protection model's characteristic, it supports an advantage condition to protect trademark in China. Oblige can search for justice relief like abroad countries. On the other hand, it can also receive the administrative department's proactive care. In China, the administrative protection of trademark right play an important role, this contains timely and quick of characteristics of decision. Generally, under the clear tort facts and sufficient evidence, trademark oblige always select the efficient administrative protection. Especially in some situation that judicial protection is powerless occasions, the protection showed a unique advantage. For example according the law provision, when the trademark right's general permits who was found been use of trademark infringement, as the main qualification do not match that can not filed against infringement of trademark right, which only by oblige as a fitness of promoter proceedings, it difficult to effectively curb the infringement. At the point, if the licensee turned to executive authorities can seek to report to administrative protection, in order to stop infringing purposes.

As we well known, every coin has its reverse; the law is enacted which has no perfect legal system over the world. Chinese trademark infringement relief still has some deficiencies; it needs to improve the legislation and judicial practice in the future. From the legislative point of view, Chinese civil legal norms further improved, the well-known trademark need to complete rules, to minimize the vague definition of the scope of trademark right, to confirm trademark obligor's legitimate interest should be protected. By the secretary regulation system, the administrative protection based documents still contain some instability to protect trademark rights, and the right to information relevant stakeholders. In addition, the administration of justice backlog of cases, and investigation delay are the reason of caused many infringement cases were holding for a long period. Furthermore, administrative and judicial protection's combination system has impacts of administer problems and problem of convergence of two protection methods.

Overall, the Chinese government is doing a great improvement of complete trademark legal system, against infringement actions and safeguarding the obligor's benefits. In a short 20 years period, Chinese trademark law system has done the developed country's 100 years history already, the judge's quality and administration justice has improved continuously, basically it formed a better complete trademark protection system, also support an advantage legal environment for Chinese enterprise's foreign trade business and oversea enterprise's intellectual property protection. Also has laid a solid foundation of national economic development in the future.

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Clients' Perspectives of Risk Management Practice in Malaysian Construction Industry

Norazian Mohd Yusuwan, Hamimah Adnan & Ahmad Faris Omar

Department of Quantity Surveying

Faculty of Architecture, Planning and Surveying

University Teknologi MARA, Shah Alam, Malaysia

Tel: 60-3-5544-4935 E-mail: hamimah689@salam.uitm.edu.my

Hj. Kamaruzaman, Jusoff

Yale University, School of Forestry & Environmental Studies

205 Prospect St, New Haven, CT 06511, USA

Tel: 20-4-321-384 E-mail: jusoff.kamaruzaman@yale.edu

Abstract

This research focuses on the practice of risk management (RM) in Client's organization and aims to identify the level of awareness among construction professionals towards risk management and to examine the policy undertaken when dealing with risks in a construction project. Apart from that, it also aims to identify the problems and challenges for the implementation of risk management in Malaysia. Questionnaire survey and interviews were carried out in order to obtain a better view on the implementation of risk management in the Malaysian construction industry. It was found that Malaysian clients are slowly accepting risk management as a management tool that will help in managing a construction project effectively and successfully. Based on the findings of the questionnaires and interviews there are a number of clients who know about risk management and who have attended training and some of them have even practice risk management in their organizations. At least, it has been proven that there are organizations that have implemented risk management in their operations although this is only on a small scale. It can be concluded that risk management still has a long way to go in order to be accepted and recognized in the Malaysian construction industry.

Keywords: Risk management, Client, Construction industry, Practice, Malaysia

1. Introduction

The construction industry is one of the most dynamic, risky, challenging and rewarding fields (Mills, 2001). As any other major sectors, the construction industry is exposed to a lot of predictable and unpredictable risks. Among the risks faced by the construction industry are political risk, economic risk, technology risk and social risk. Risk is inherent in every construction project and normally assumed by the owner unless it is transferred to or assumed by another party for fair compensation. The principle guideline in determining whether a risk should be transferred is whether the receiving party has both the competence to fairly access the risk and the expertise to control or minimize it.

According to Mills (2001), risk management has become a main part in the decision making process. It can affect productivity, performance, quality and the budget of a construction project. The goal behind the risk management process is to obtain understanding by all parties and agreement around what the risks really are and how they will be managed. Apart from that, it is also intended to improve project to performance through early risk identification, mitigation and project life cycle management.

The Construction industry plays a vital role in our country's economic growth. It has contributed to the Gross Domestic Product (GDP) of the country and can be the indicator or yardstick of the country's economic performance. According to Market Watch 2005 published by the Construction Industry Development Board (CIDB) Malaysia, the Malaysian construction industry is generally divided into two areas. First, is the general construction, which comprises residential construction, non-residential construction and civil engineering construction. Meanwhile the second area deals with special trade works, which comprises activities such as metal works, electrical works, plumbing and services, carpentry, tiling, flooring works and glasswork. Although it accounts for less than 5 percent of the GDP, the industry is a strong growth push because of its extensive linkages with the other economic sectors. No doubt, the construction industry is an important contributor to Malaysia's growth. It includes activities ranging from constructing building, roads, electricity or other transmission lines or towers, pipelines, oil refinery to other specific civil engineering projects.

The slowdown in award of contracts by the Government has spurred many construction companies, in particular the larger ones, to venture abroad in search of greener pastures. India and the Middle East are the popular, accounting for about half of the overseas projects, particularly India where Malaysian companies have completed 39 projects worth RM5.7 billion and are reported to have a market share of 25% of the infrastructure jobs awarded there. Going forward, the implementation of construction projects under the Ninth Malaysia Plan (9MP) is expected to provide some impetus for growth in the construction sector. The budgeted expenditure under the 9MP, spanning from 2006 to 2010, will be around RM150. The main thrust of the 9MP is on the development of human capital and the services industry. This is good indication that there will be more construction and upgrades of education centres, hospitals and tourist destinations as well as improvement of infrastructure facilities such as roads and bridges. The 9MP will also endeavor to gradually reduce the Government's budget deficit through exercising greater fiscal discipline or prudence to ensure that maximum benefits are obtained when selecting and implementing projects under the 9MP. Due to limited resources, new projects that will be considered for the 9MP are projects that will generate multiple benefits for the nation. Among the criteria used will be human friendly projects whereby emphasis will be given to improving road safety and providing convenience for road users and projects which can save traveling cost and time. This will include construction and upgrading of roads to overcome traffic congestion in town centres as well as in new growth areas.

The aims of this research are to identify the implementation procedure and policy of risk management and to examine the barriers and challenges to the implementation of risk management in a construction project from the Client's perspective.

2. Risk management awareness in client's organization

To create sustainable value in today's dynamic environment, considerations of risk and opportunity have become imperative in business management. Risk management that emphasizes on proactive measures provides contingency planning and will enhance the achievement of the projects aims and objectives. Flanagan (1995) argued that, the individuals involved in the construction industry that undertakes various activities are heterogeneous since client, consultants and contractors have different roles and objectives. Flanagan (1995) further explained that the principals or the client could easily see the relevance of risk management when making the decision to commission a project. The decision to commence a project or invest in a project involves a lot of risks in terms of cost benefit or cash revenue, which is competitive with the best that the financial market can provide.

Other parties in the construction team such as consultants, contractors, subcontractors and supplier are also exposed the risks. This statement is supported by Sawczuk (1996), who he stressed that no matter how small or simple the project is, it still can go wrong, as soon as the two parties; the client and the contractor have signed a contract, they have taken onboard the risks. Risk awareness is of paramount importance to all participants to ensure that the possible risk occurrence is reduced. In the Malaysian construction industry, risk management is one of the new management concepts. It will take a long time to be fully accepted by the participants in this industry. Most of them are reluctant to change, they are still comfortable with their traditional culture in doing their job without realizing that this new concept will make their job easier.

Due to the rapid pace of changing technology, inflation and the new problems of energy and environment, risk management is a management tool that the construction industry cannot afford to be without. However, this awareness among the Malaysian construction industry's participants is still low. However, no one can deny that there are the companies in this industry which practice risk management in their daily operation. However, we can only see this culture in big companies which have a very good reputation, strong financial standing and which are involved in projects.

3. Method and data analysis

Following a literature review research on risk management success, data were also gathered from the questionnaire surveys on Clients who have implemented the risk management process 27 companies in the construction industry surveyed in the Klang Valley, Selangor, Malaysia. Respondents were asked to fill a questionnaire. They may or may not be fully conversant about risk management or the policy and procedure and its implementation in its entirety. This is more likely to be so in the case of respondents who represented companies that do not have risk management policy and procedure already in place.

For this research, Clients from the public and private sectors were chosen due to their heavy involvement and their important role in a decision making for any matter arising in a project. Apart from that, risk management is one of the most important management tools for a Client when making a decision to commission a construction project. The Questionnaire comprised the following sections:

Section A: Respondents Particulars

Section B: Level of Awareness and Perception on Risk Management

Section C: Implementation and Practice of Risk Management in an Organization

Section D: Barriers and Challenges for the Implementation of Risk Management

It was found that 48.1% of the respondents were trained as civil and structural engineers, 22.2 per cent are graduates of quantity surveying, 14.8 per cent were architects, and another 14.8 per cent were made up of individuals from other professional fields (Table 1).

3.1 Section A: Respondents' Particulars

3.1.1 Education Background (Table 2)

Table 2 shows that a large number (63%) of the respondents were degree holders and the rest were master or degree holders (18.5%) respectively and diploma holders (18.5%).

3.1.2 Company Profile

(1) Years in Operation and Number of Employees

The descriptive statistics on how long the companies have been in operation and their number of employees are as stated in Table 3.

The mean number of years the companies have been in operation is 13.3 years, but the standard deviation (S.D) of 8.853 (C.V = 66.6%) is large, implying that the mean does not represent the majority of the companies. The variation between individual companies in term of years of operation is very large. Therefore, this research is of the view that the median value of 11.0 years represents a more accurate indication of how long the majority of the companies have been in operation.

In terms of the number of employees, a few companies with relatively a bigger number of employees appear to dominate the sample. The mean number of workers, which is 406.5, has an extremely large S.D. of 1378.197 or a C.V. of 390 per cent. This implies that the mean does not represent the majority of the companies. Therefore, this research will refer to the median value of 55.0 whenever the issue of how many employees the companies under study have. That is, half of the companies have less than 55 employees each and half have more than 55 employees each.

Despite the less than normal distribution of the companies with respect to years in operation and number of employees as discussed before, the result of the survey would still be useful to the specific objectives of the study. However, risk management is an issue equally important in successful project implementation regardless of whether a company is new or old, big or small.

(2) Sector of Project Involvement

As shown in Table 4, more than three-quarters (77.8%) of the companies are involved in private sector projects with 18.5 per cent coming from both the private and public sectors. Only 3.7 percent of the companies are involved totally with public sector projects. (Table 4)

(3) Type of Construction Projects

It was found that (63%) per cent of the respondents were involved are in the construction of commercial office buildings. 18.5% of the companies are involved in civil engineering projects, 14.8% per cent in public infrastructure projects and 7.4 per cent each in industrial and oil & gas projects. It can be concluded that most of the companies are involved in more than one line of construction. (Table 4)

3.2 Section B: Awareness and Perception towards Risk Management

3.2.1 Level of Awareness

This study gauges the levels of awareness of respondents towards risk management.

(1) Understanding Risk Management

Table 6 shows that the largest proportion (44.4%) of the respondents heard about risk management only occasionally. That is, risk management is certainly not a term vocabulary they are familiar with, while only 29.6 per cent have heard and attended trainings on it. 14.8 percent are practicing risk management in their job and (11.1%) per cent have not heard about it at all. (Table 5)

(2) Value of Risk Management

Only 14.8 per cent of the respondents are practicing risk management on their job where (51.9%) are of the opinion that risk management can help and add value to the to daily work, especially when working on a project (Table 7). It also shows that (33%) think that risk management is useful in time of crisis, but only the organisations benefit from it. Many respondents think that risk management is useful either to themselves or to their organizations. This augurs well for the construction industry. 14.8% apply risk management in their daily work on accounts the grounds of it being in the business plan of the companies account. This equals the percentage of those who claimed to have practiced it on

their job as mentioned earlier. (Table 6)

(3) Taking Note of Risk at Work

Table 8 shows that (50.0%) of the respondents take note of risk associated with their work, but do not plan to mitigate the risk. This lends support to the earlier contention that the relatively low percentage of risk management application is, perhaps, due to the fact the companies have not made it a policy. 23 per cent know that the risk management system exists and are aware of the process of risk management. The interpretation of this point is that 14.8 percent go through the process of risk management in their job as it is a policy of the companies and 8.3 percent do it although it is not a policy. The percentage of respondents that have never taken any note of the risks involved in their projects they are working is miniscule at 3.8. (Table 7)

(4) How Risk Management is Applied

40.7% of the respondents claimed that although departments are communicating risk strategies with one another, it is hazy. 29.6% confirmed that their companies apply risk management on an ad hoc basis or only during times of crises. 18.5 per cent confirmed that as individual employees, they have used the strategy and process of risk management that is already in place where only 3.7 per cent asserted that there is communication between departments on risk management process. 7.4 % never had applied the risk management process. In a way, this points to the possibility that the majority of respondents are at various stages of readiness to apply risk management, but the companies have not been forthcoming in their overall effort to make it a policy. (Table 8)

(5) Provision of Training on Risk Management. (Table 9)

Table 10 shows that 44.4% of the respondents claimed that the companies provide very minimum training on risk management, and even if it is so, it is for relevant personnel only. 37.0 per cent said that their companies do not provide such training at all. Those who asserted that their companies provide formal training regularly, including follow-up programmes, account for 11.1 per cent, while those claiming that their employees do plan the training calendar and pursue it actively make up 7.4 per cent.

3.3 Section C: Perception towards Risk Management

The perception on each of the above elements is measured/gauged using a 5-point scale from 1 (strongly disagree) to 5 (strongly agree). Table 11 shows the descriptive statistics of the perception scores. (Table 10)

Following the interpretation of a 5-point scale, the respondents, on the average, strongly agree with a mean score of 4.52 that risk affects productivity, performance, and quality and project budget. Although not explicitly stated, the effect of risk on project implementation has to be negative in nature. The respondents also agree that risk management is suitable for projects with certain characteristics (e.g. projects which involve new technology, multiple participants, unstable political conditions, etc.) with a mean score of 4.48. The respondents agreed that risk management should be continuous from start to finish for a project which has a mean score of 4.26 and that risk management with a mean score of 3.67 is required for all projects in descending order of agreement. The respondents were not sure whether the construction industry has a very good reputation in coping with risk (mean score = 3.04). They are also not quite sure whether the implementation of risk management increases operational cost (mean score = 3.48).

3.3.1 Risk management policy and implementation procedure

The policy of the companies on the implementation of risk management is gauged from the respondents' response on several questions. The respondents' response will indicate whether the companies do have a credible risk management policy in place. The first indication that a company has a specific policy on risk management implementation is whether it has issued a formal statement about it. Table 12 shows that 18.5 per cent of the respondents confirmed that their companies have issued such a statement. 18.5 per cent of the companies have a risk management strategy and process in place. 4.8 per cent of the respondents have actually been practicing risk management on the job. Only one-fifth of the companies have a risk management policy officially in use. (Table 11)

On the other hand, 34.6 per cent of the respondents asserted that their companies have an identifiable and effective risk management framework in place. Having a risk management framework, even an effective one, does not necessarily mean having a policy per se. Indeed, only 23.1 per cent of the respondents said their companies have separate departments handling risk management. All evidence points to the fact that the seriousness with which companies place emphasis on risk management has not gone to the extent of incorporating it as a company policy. Nevertheless, 34.8 per cent of the respondents claimed that all their projects are subjected to risk management process, while another 34.8 per cent asserted that their companies only carry out risk management on infrastructure projects.

For companies with formal statement on their risk management policy, it was found that 80.0 per cent have policy goals, policy objectives, policy strategies and 80.0 per cent have performance indicators. Looking at these percentage figures, it can be concluded that each company that has risk management policy incorporates all the four elements in its policy. With 18.5 per cent of the companies having issued formal statements on their risk management policies, and out of

these, 80.0 per cent have been incorporating all the four elements in its risk management, the percentage of companies that have credible policies on their risk management works out to 14.8 per cent. This percentage figure is similar to that of respondents who have applied risk management in their work because it is in the business plan of their companies.

At which stage of a project do organizations begin their risk management undertaking? Feasibility study stage appears to be slightly preferred over other stages, followed by the conceptual/ schematic design stage with 24%, the inception/project briefing stage, detailed design stage, and construction stage with 20.8 per cent of the companies. The various percentages imply that there are a number of companies that initiate risk management activities at more than one stage. This could be project-specific.

3.3.2 Implementation Procedure

Twenty-two percent (22.2%) of the respondents confirmed that their companies have specific processes of identifying risk associated with a project. This is about the same figure as those who claimed their companies have risk management policies and procedures in place. That is, if the companies have a policy and procedure of risk management, they would certainly have a method of identifying the risk associated with a project. Thus, the response of the respondents on this issue is highly consistent. For those who asserted that their companies have specific processes of identifying risk, 80.0 per cent identify it as risk identification process, 80.0 per cent as risk analysis and 66.7 per cent as risk/response control. It is apparent that many of these companies incorporate more than one specific process of identifying risk. Through these risk identification processes, 83.3 per cent of the companies assess the probability and impact of the risk on their projects, 83.3 per cent determine what control measures to implement and 83.3 per cent review the degree of success of the control measures implemented.

18.5% of the respondents indicated that their companies have used the service of risk analysis/management consultant. Looking at this percentage figure one is inclined to suspect that the companies concerned are those that have implemented risk management, in particular those that have policy and procedure in place. The service could have been for the purpose of establishing and making the risk management procedure operational, including follow-up evaluations. (Table 12)

50.0 per cent claimed that they have adequate processes of reporting, reviewing, monitoring and recording every on-going risk management activity. 83.3 per cent said that their management reviews the performance of each risk management activity, 80.0 per cent at every completion of project; 75.0 per cent half way through each project; 80.0 per cent at any time deemed necessary. For those who said their companies have risk management standards and procedures, 80.0 per cent claimed that their senior management endorses the document. Eighty per cent said that they are easy to understand; 83.3 per cent thought that it is easy to apply; 80.0 per cent considered the document up-to-date; and 66.7 per cent said that it is available to all staff. 92.3% considered the additional cost and time expended in evaluating risk as contingencies. In this context, this is no different than what is generally adopted by construction companies that do not practice risk management.

3.4 Section D: Barriers and challenges in implementation

The barriers in implementing risk management are expected to be in the areas of expertise, cooperation among team members, guideline, and resistance from management as well as staff. Table 14 shows the percentage of respondents that perceive companies are facing problems according to problem areas. 81.5% of the respondents believe that they lack knowledge on risk management. 14.8 per cent of them apply risk management in their job and in order to apply risk management in their job they have to be conversant in it. Now, when 14.8 per cent said they do not lack knowledge on risk management, they were being consistent in their perception, and this augurs well for the overall reliability of the information obtained from the survey. (Table 13) (Table 14)

Sixty-three per cent of the respondents thought that the companies lacked expertise to lead the risk management team/department. 63.0% respondents confirmed that there is no guideline on the standard procedure of managing risk and that the management is resistant to the idea. There are other problems facing the implementation of risk management in the companies according to the respondents. 63.0% do not think that there were lack of cooperation and commitment among construction team members. 29.6% thought that there was resistant to risk management implementation from the staff.

The above statistics clearly point to the respondents' inclination of placing the "blame" for any weakness in the implementation of risk management on their companies on top management more than on themselves. Take the case of resistance to implementation: it was the management rather than the staff that who are resistant to it (63.0% against 29.6%). This tendency on the part of the respondents is also evident when 63.0 per cent said that their companies lacked expertise to lead their risk management teams/departments, while 63.0 per cent claimed there were no guidelines on the standard procedure of managing risk.

This research found that the majority of the respondents attribute the problem of risk management implementation to

the top management. They suggested that top management should provide training to develop expertise and come up with a workable guideline, or at least make an initiative to that effect. The respondents admitted that they lacked knowledge on risk management but part of the blame was still attributable to the top management if the companies do not invest enough to train their staff on risk management.

3.4.1 Ways of Promoting Risk Management in the Construction Industry

Table 15 provides an insight into what the respondents think could promote risk management strategies in the construction industry. (Table 15)

All of the respondents reiterated that companies should provide training and seminars on risk management, presumably at least to all those managing projects. They also believed that new staff being employed in a construction company should possess sufficient knowledge on risk management, if not the operational aspects of it, by suggesting that universities/colleges offer courses and programmes on risk management. 96.3 per cent of the respondents suggested the setting up of separate risk management/department in their companies that implying risk management is essential for companies involved in construction projects. Fourteen percent (14.8%) of the companies confirmed that they should have risk management policy and procedure in place, most do not have a specific unit/department for it. 88.9% of the respondents confirmed that the Government should introduce a standard of risk management process and agreed that the government must enforce a statutory requirement in order to promote risk management in the construction industry.

3.4.2 Who Should Promote Risk Management

Table 16 shows that 96% per cent of the respondents are in favor of their own management/companies taking up the effort where as 92.6 per cent confirmed that professional bodies such as Construction Industry Development Board Malaysia, Board of Architects, Board of Quantity Surveyor and 88.9 per cent confirmed that the government should do it. In conclusion, the majority of the respondents feel very strongly that the implementation of risk management should be promoted by all who have a direct interest in the construction industry, including the government. (Table 16)

4. Conclusion

A Client in the construction industry is someone who ultimately pays for all the construction cost. They are justified in demanding that their project be completed on time within stipulated budget and according to the quality and performance levels specified. However, the construction industry is among one of the many industries which is exposed to a lot of predictable and unpredictable risks that may have a greater impact towards the productivity, performance, quality and the budget of the project. Therefore, in order to ensure the successful of the project, there should be a proper and systematic risk management strategy in place in order to manage the risk in the most efficient manner.

Based on the findings of the questionnaires and interviews there are a number of clients who know about risk management and who have attended training and some of them have even practice risk management in their organizations. At least, it's been proven that there are organizations that have implemented risk management in their operations although this is only on a small scale. Although the survey indicated the low level of awareness of risk management in the Clients' organization, their perception towards risk management is very encouraging. Most of them agreed that risk can affect productivity, performance, quality and the project budget. The respondents also agreed that risk management is suitable to be implemented in a construction project with certain characteristics for example project which employ new technology. Earlier observations show that majority of the respondents were unaware about risk management, but when it come to their perception towards risk management there was a positive feedback. This new concept will eventually become more acceptable and there is a brighter future it to be implemented in this industry.

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Table 1. Distribution of Respondents by Professional Background

Professional Background	No. of Respondents	Percentage (%)
Architecture	4	14.8
Civil & Structured Engineering	13	48.1
Quantity Surveying	6	22.2
Others	4	14.8

Table 2. Distribution of Respondents by Education Background

Education Background Qualification	No. of Respondents	Percentage (%)
Diploma	5	18.5
Degree	17	63
Master	5	18.5

Table 3. Descriptive Statistics on Years in Operation and Number of Employees

Item	Mean	Median	S.D.
Years in operation	13.3	11.0	8.853
Number of employees	406.6	55.0	1378.197

Table 4. Distribution of Companies by Sector of Project Involvement

Sector Involved	No. of Respondents	Percentage (%)
Public	1	3.7
Private	21	77.8
Both	5	18.5

Table 5. Distribution of Companies by Type of Construction Project

Types	No. of Respondents	Percentage (%)
Public & Infrastructure	4	14.8
Residential	27	100
Commercial	17	63
Civil Engineering	5	18.5
Industrial	2	7.4
Oil & Gas	2	7.4

Table 6. Distribution of Respondents by Understanding of Risk Management

Understanding on Risk Management	No. of Respondents	Percentage (%)
Never heard of it	3	11.1
Heard Occasionally	12	44.4
Heard and Attend Training	8	29.6
Practice RM	4	14.8

Table 7. Distribution of Respondents on the Value of Risk Management

Value of Risk Management	No. of Respondents	Percentage (%)
Useful in time of crisis	9	33.3
Add value to daily work	14	51.9
Applied in daily work	4	14.8

Table 8. Distribution of Respondents by Category of Risk Note Taking

Risk Note Taking	No. of Respondents	Percentage (%)
Never take note	2	3.8
Take note only	13	50
Take note only when asked	6	23.1
Take note of all process	6	23.1

Table 9. Distribution of Respondents by How Risk Management Is Applied

How RM Being Applied	No. of Respondents	Percentage (%)
Ad hoc	8	29.6
Communicated between department but not clear	11	40.7
Communicated between department	1	3.7
Risk Management in place	5	18.5
None	2	7.4

Table 10. Distribution of Respondents by Companies Providing Risk Management Training

Provision of Training	No. of Respondents	Percentage (%)
None	10	37
Minimum training to relevant personnel	12	44.4
Regular formal training programme	3	11.1
Plan training calendar	2	7.4

Table 11. Descriptive Statistics on Perception on Risk and Risk Management

Statement	Mean score	Median	Standard Deviation
Risk affects productivity, performance, quality and project budget	4.52	5.00	0.802
It should be continuous from start to finish	4.26	4.00	0.712
It is required for all projects	3.67	4.00	1.074
It is suitable for projects with certain characteristic (e.g. new technology, multiple participants, unstable political conditions, etc.)	4.48	5.00	0.700
It increases operational cost	3.48	3.00	0.580
Construction industry has a very good reputation in coping with risk.	3.04	3.00	1.160
All elements	3.91	3.83	0.407

Table 12. Percentage of Respondents by Statement Related to Implementation of Risk Management Policy

Statement	Yes	No	Not Sure
The company has an identifiable and effective risk management framework in place	34.6	61.5	3.8
The company has its own risk management department	23.1	76.9	0.0
Implementation of Risk Management on projects:			
All projects	34.8	65.2	0.0
Infrastructure projects	34.8	65.2	0.0
Other projects	100.0	0.0	0.0
The company has issued a formal statement on its risk management policy	18.5	77.8	3.7
For those with formal statement of policy, it contains:			
Goals	80.0	20.0	0.0
Objectives	80.0	20.0	0.0
Strategies	80.0	20.0	0.0
Performance indicators	80.0	20.0	0.0
Stage at which organisational risk undertaking begins:			
Inception/project briefing stage	20.8	75.0	4.2
Conceptual/schematic design stage	24.0	72.0	4.0
Feasibility study stage	26.9	69.2	3.8
Detail design stage	20.8	75.0	4.2
Construction stage	20.8	75.0	4.2
Other stages	3.7	96.3	0.0

Table 13. Percentage of Respondents by Elements of Risk Management Procedure

Element	Yes	No	Not Sure
Company has specific processes of identifying risks associated with a project	22.2	77.8	0.0
The specific processes are:			
Risk identification	80.0	20.0	0.0
Risk analysis	80.0	20.0	0.0
Risk/response control	66.7	33.3	0.0
The above processes are to execute the following:			
Assess its probability and impact on a project	83.3	16.7	0.0
Determine what control measures to implement	83.3	16.7	0.0
Review the degree of success of the control measures implemented	83.3	16.7	0.0
Company has used the service of risk analysis/management consultant	18.5	81.5	0.0
Processes of reporting, reviewing, monitoring and recording every ongoing risk management activity are adequate	50.0	16.7	33.3
Management reviews the performance of each risk management activity	83.3	16.7	0.0
If so, it is at:			
The completion of project	80.0	20.0	0.0
Half way through project	75.0	25.0	0.0
Any time deemed necessary	80.0	20.0	0.0
The company's risk management standard and procedure is:			
Endorsed at the senior management level	80.0	20.0	0.0
Easy to understand	80.0	20.0	0.0
Easy to apply	83.3	16.7	0.0
Up-to-date	80.0	20.0	0.0
Available to all staff	66.7	33.3	0.0
In evaluating risk, additional cost and time is considered as contingencies	92.3	7.7	0.0

Table 14. Percentage of Respondents Opinion on Problem Areas

Problem	Yes	No	Not Sure
Lack of knowledge on risk management	81.5	14.8	3.7
Lack of expertise to lead the risk management team/department	63.0	25.9	11.1
Lack of cooperation and commitment among construction team members	37.0	63.0	0.0
There is no guideline on the standard procedure of managing risk	63.0	25.9	11.1
Resistance from management	63.0	33.3	0.0
Resistance from staff	29.6	66.7	3.7
Other problems	96.3	3.7	0.0

Table 15. Percentage of Respondents by Ways to Promote Risk Management in Construction Industry

Ways to Promote Risk Management	Yes	No	Not Sure
Provide training and seminar on risk management	100.0	0.0	0.0
The management should support the setting up a risk management unit/department	96.3	3.7	0.0
Introduce standard on risk management by government or any other agencies	88.9	7.4	3.7
Introduce courses and programmes related to set up risk management in colleges/universities	100.0	0.0	0.0
Enforce a statutory requirement	85.2	14.8	0.0

Table 16. Percentage of Respondents by Who Should Promote Risk Management

Who should promote risk management (RM)	Yes	No	Not Sure
Government	88.9	3.7	7.4
Management of company	96.3	0.0	3.7
Professional bodies such as CIDB, Board of Architects, Board of QS, etc.	92.6	3.7	3.7



Secession Right – an Anti-Federal Principle? Comparative Study of Federal States and the EU

Florentina Harbo

Norwegian Institute for Strategic Studies

Youngstorget 5, N-0181, Oslo, Norge (Norway)

Tel: 47-22-396-074 E-mail: florentina.harbo@noriss.no

Abstract

This article argues that the secession right is incompatible with federalism. The right of secession is one of the main criteria to differentiate a federal state from a confederation and a *Bund*. There are only a few federal states that recognised the secession right in their constitutions and they failed. On the other hand, there are even confederations which did not accept a secession right in their treaties. The issue of secession has always been very controversial in the European Union, which is a *Bund* (federal polity), but its Treaties never included it. The radical change is the introduction of Art. I-60 in the Treaty Establishing a Constitution for Europe ("Reform Treaty" now), which might give a new face to the EU if ever it is ratified.

Keywords: Secession, Federalism, Federal state, EU

1. Introduction

Modern politics started with an act of secession, in the form of the American Declaration of Independence. The issue of secession is very significant in the framework of federal states or unions. The secession right, the location of sovereignty, the founding pact or the legal document and citizenship are the main criteria used to differentiate a confederation from a federal state and a federal polity or *Bund*. (Note 1) In a confederation, the individual member states sign an international treaty, but keep their sovereignty. The confederation is characterised by multiple *demoi* and individual citizenships. Its member states are allowed to withdraw, just as is the case in an international organisation, but not unilaterally. In a federal state, sovereignty is divided or shared between the different levels of government as defined by the federal constitution. Individual member states are thus transformed in federal entities, the federal state creating one *demos* and one common citizenship. All off these elements exclude the secession right for the entities. Because it allows for secession, the confederation is less a stable political order, while the federal state retains the solidity of a state (Beaud 1999). The classical state theory of the 19th century divided the possible federal structures into federations, confederations, and *tertium non datur*. By contrast, the theory of the *Bund* abandons the federation-confederation dichotomy and can also be useful for the EU, as Schönberger (2004) suggests. The definition of the *Bund* includes all those federal structures that are based on voluntary associations of states and are more than confederations, but do not yet constitute federations. A *Bund* is a political territorial or functional union of political entities that have a common goal. Social and political relations exist among the entities of the *Bund*. A significant feature of the *Bund* is the principle of the federal loyalty (*Bundestreue*) as a reciprocal legal duty. In a *Bund* sovereignty is divided on the basis of its founding compact, but remains open and is unfinished (Schmitt 1928/1957). The *Bund* is composed of multiple *demoi* and the citizens have double citizenship. Crucially, the founding compact does not provide any explicit secession right.

The aim of this article is to analyse the secession right in theory and practice and to show why it is incompatible with federalism. The analysis will be based on a comparative study of federal states and the EU.

The first part of this article will define the various concepts and argue why the secession right is incompatible with federalism. The second part will analyse particular experiences of secession in federal states. The final part will focus on the secession right with regard to the EU.

2. Why is the secession right incompatible with federalism?

A variety of terms are used by scholars in the discussion of theories of secession. The terms generally differ according to the fields in which individual scholars operate: lawyers of international law, political scientists, philosophers, historians, geographers and finally scholars of federalism. All use interchangeable notions such as secession, (unilateral) withdrawal, exit clause or option, as well as self-determination. This analysis will not deal with the right of secession as a subject of international law, when a group secedes from a unitary state and seeks international recognition – the right

of self-determination. (Note 2) It will rather discuss the secession right in federal states. Thus, the term “self-determination” will not be used in this article. The notions of secession and withdrawal will be used interchangeably. The term “secession” comes from the Latin word *secedere* and means: “The fact of an area or group becoming independent from the country or larger group that it belongs to”. (Note 3) Buchanan defines secession as: “a form of refusal to acknowledge the state’s claim to political authority” (Buchanan 1991, 4). A political entity secedes from a union when it no longer agrees with its policy - only, however, only when this right is clearly introduced in the legal document of the union. For the purpose of this analysis, I define secession as an act of formal withdrawal from membership in a federal polity, whereby a group of people and its territory breaks all the ties (e.g. political, economic, cultural etc.) it had with the federal polity.

Political theorists have traditionally worked with notions such as constitution and dissolution of polities, but they have until recently neglected the issue of secession. Certain philosophers treated this issue in a partial manner: Althusius, for example, mentions secession in his analysis of the justified remedies against tyranny (1603/1965, chapter XXXVIII). Grotius emphasised that in exceptional cases a part of a state may have the right to secede. Pufendorf, on the other hand, basing his arguments on the Hobbesian theory of absolute sovereignty of the ruler, maintains that secession is not permissible (in: Beran 1984, 22). Classical social-contract theory was dealing with the creation of political communities by voluntary mutual agreements, where the consent of the people was the basis of the authority of government. The liberal theory of John Locke bases the individual right to emigration and the collective right to revolution on this principle, but is opposed to secession (Locke 1689/2002). The American revolutionaries extended the Lockean right of resistance to tyranny in order to justify the right of secession (Buchheit 1978, 55). In the framework of federal states, John C. Calhoun was the first who tried to justify the right of secession in his “States Rights” (1851) doctrine. Before his claims, the only alternative to the functioning of the institutions in a federal union had been the act of revolution. Calhoun argued that if a federal unity’s existence is threatened and constitutional principles are not respected, then this unity has the right to secede. If a revision of the constitution does not succeed, a state may secede: “That a State, as a party to the constitutional compact, has the right to secede, – acting in the same capacity in which it ratified the constitution, – cannot, with any show of reason, be denied by any one who regards the constitution as a compact” (Calhoun (1851) in: Cralle 2003: 179). In order to protect the Northern American South from political attack, Calhoun proposed the theory of state sovereignty within the federal union and derived from it the doctrines of nullification and secession. The right of secession from the union followed directly from state sovereignty. For Calhoun, the Constitution was a treaty concluded among sovereign states: thus, the interpretation of the text according to the law of the treaties belongs to each of the parts. Significantly, however, Madison had earlier mentioned that there could be no other form of secession than revolution, as secession could not take place without revolution (in: Hamilton et al. 1787-1788/1982).

Most of the scholars on federalism argue that federalism and the secession right do not go hand in hand: once the secession right is established one cannot talk any longer of a federal constitution. A federal unit does not have the right to exit from the union that it has in a confederation (though not in this case unilaterally). As Jellinek emphasises: „Sezession der Staaten aus der Union ist daher nicht der Gebrauch eines natürlichen Rechtes sondern Hochverrat“ (Jellinek 1882/1969, 255). (Note 4) A federal polity is created to last and duration excludes secession (Steiger 1966, 151). Others argue that secession may become a justified right. Harry Beran develops a liberal normative theory of secession and claims that liberalism requires that secession be permitted if it is effectively desired by a territorially concentrated group and is morally and practically possible. This is required by the value liberalism places on freedom, by a liberal theory of popular sovereignty, and by a presupposition of legitimate majority rule. The permissive principle of secession in this case is neither theoretically, nor practically unacceptable (Beran 1984, 21-31). Even though the federal units have the right of expression in liberal democracies, this is not enough as the only way they could express their particularity would be to secede. However, such notions as effectiveness, morality and practicability are difficult to measure. In addition to this, there emerges the further problem of where the limits to this should be drawn? Michael Walzer underlines: “Separation, secession, partition, liberation – all for the sake of statehood – point the way toward a kind of international settlement ... That the process is uneven, that it is violent, that it produces anomalies along the way (states without nations, nations with more than one state): none of these is a reason for backing away from it” (Walzer 1986, 230-231). He also supports the idea that secession might be a justified right. However, the price to pay is very high. John Rawls wrote in *The Law of Peoples* about the right to self-determination: “... the right to independence, and equally the right to self-determination, hold only within certain limits, yet to be specified by the Law of Peoples for the general case” (Rawls 1999, 38). However, Rawls did not develop a theory of secession since he described the law of peoples in which all peoples had their own state. (Note 5) Michel Seymour underlines that states have a general primary right to self-determination and, what is new, a primary right to internal self-determination for their constitutive nations. The latter have the right to secede only if they suffer important injustices, but the injustices should not be limited to the violation of human rights and annexation of territories. The moral importance of individuals and peoples should be taken into account. (Note 6) Seymour thus concludes that secession could be compatible with federalism. John Stuart Mill was the one who paid much attention to the moral and

philosophical justifications for secession as well (Barktus 1999, 15-16).

Now I will examine the main reasons, which explain why the secession right is not federal (Note 7):

(1) If secession is legally recognised in a federal polity, it could weaken the federal system by giving a tool of political coercion to the federal units, i.e. greater bargaining power. Thus, every time they do not agree with the policy of the federal level, they will threaten it with secession. The threat might be particularly dangerous if the federal unit can or might want to exist on its own.

(2) The secession right could have negative consequences on fundamental federal principles such as cooperation and solidarity. When a federal unit wants to secede, it no longer accepts its federal obligations. This could lead to the fact that the other federal units losing their trust in the federal polity and thus to a breakdown in “federal loyalty” (*Bundestreue*) among the entities.

(3) If the constitution provides a right to secede, each federal unit will be vulnerable to threats of secession coming from other units.

(4) A possibility of secession could be an element of uncertainty for federal economic development and unity of the system as a whole.

(5) A federal polity that admits the right of secession demonstrates that it is generally failing (e.g. former USSR and Yugoslavia).

The secession right may create problems in every form of constitution, and not only in federal constitutions. Even if secession might be justified as a matter of politics or morality (Note 8), not including it in a constitution could prevent many problems (Sunstein 1991, 635). This is for the following reasons:

- The secession right would increase the risks of ethnic and factional struggle;
- Reduce the prospects for compromise and deliberation in government;
- Raise dramatically the stakes of day-to-day political decisions and introduce irrelevant and illegitimate considerations into those decisions;
- Create dangers of blackmail, strategic behaviour and exploitation;
- Endanger the prospects for long-term self-governance.

Having seen the arguments in favour of the thesis that secession is incompatible with federalism and the reasons why secession should not be included in any constitution, not only in a federal one, the conclusion can be drawn that secession is not only constitutionally, politically, economically or geographically a problem of democracy: it is also immoral and inconsistent with the very idea of democracy.

Exiting a federal state means for a member to break the pact, but does not automatically mean revolting against a power. Not respecting a contract can sometimes be legally justified, but acting against a constitutional power can never be justified. There is no contractual clause that could justify the *ultra posse nemo obligator*. It is possible to exit a confederation, since it is based on the autonomous decision of states, but a union of public law can never be dissolved in a legal way by the member states. “Political suicide” is not a juridical category (Bismarck quoted in: Jellinek 1900/1929). In a confederation, the states do not give up all their sovereignty, but this is no longer the case in a federal state. Carl Schmitt criticises the right of secession when he talks about a *Bund*:

Entweder Dauer des Bundes, d. h. weder Sezession noch Nullifikation; oder selbständige politische Existenz der Mitgliedstaaten, d.h. - wenn auch nur im äußersten Falle - Nullifikation und Sezession. Aber der Begriff einer aus Staaten zusammengesetzten, dauernden und doch ihre vertragliche Grundlage nicht verlassenden politischen Einheit erscheint als etwas im höchsten Grade Widerspruchsvolles (Schmitt 1928/1957, 375) (Note 9).

Schmitt also bases his arguments on duration. Before a sovereign state enters a federal polity at all, it has to abandon the secession right. Pruss does not even question the fact that the secession right and the federal state exclude each other (Note 10): „The renunciation of secession precedes federalism, not vice versa“ (Pruss 1997, 24). If a federal unit leaves the federal state, it dissolves the constitution and endangers the other units. These are convincing reasons to avoid including the secession right in a federal constitution. All these arguments have shown that the secession right is theoretically incompatible with federalism.

A federal constitution may prevent secession by: a) a very clear vertical and horizontal division of powers, b) checks and balances, so that the federal units do not feel oppressed by the federal level and vice versa that the federal level does not feel threatened by the demands of the federal units and c) a system of judicial review. In order to avoid secession the federal state could propose such options as decentralisation, devolution or other forms of self-government. All these constitutional measures may contribute to the survival of federalism. Guy Laforest introduces the idea of “partnership loyalty” in this context. Patience, calmness and dialogue are required in order to build a partnership. Everything

depends on the reciprocity of concessions and on the clear-mindedness of the parties seeking a balance: “... a balance that will remain ever precarious” (Laforest 1998, 78-79). This is also a means of avoiding secession.

Wheare (1946/1963, 90-92) doubts whether the right of secession is incompatible with federalism as a matter of logic. He makes the distinction between the right of secession and the right to nullify the laws of the general government. An essential requirement of a federal government is that there should be no right of secession from the federal state on the part of the regional governments. If such an action is permitted, it means that the general government is subordinated to the regional governments or vice versa thus implying the end of the federal union. As such, what is really inconsistent is the right to nullify the laws of the general government. An example here could be the case of the Southern States of the US, which pleaded for the nullification of the laws of Congress in the event if such laws proved to be unsatisfactory. Calhoun (1851 in: Cralle 200) asserted that the general government was the agent of the states and that the states were therefore entitled to nullify any acts of their agent meeting their disagreement. Wheare (1946/1963, 92) states that this doctrine of nullification is contrary to federalism, since it places the general government, as a matter of law, in a subordinate position to the regional governments. The federal units continue to be members of the union and at the same time can decide which of the laws of the general government they want to accept. This poses a clear problem. The use of the right of secession, on the other hand, means that the states can reject the authority of the general government entirely, without making it, as the right of nullification an agent of the states does. Finally, Wheare (1946/1963, 92) comes to the conclusion that even if the right of secession may be compatible with federal government, it is not compatible with *good* federal government. An exception could be made so that the right of secession could be granted in such a way the states would never exercise it, but this generally weakens the government (Wheare 1946/1963, 92). In conclusion, neither secession nor nullification is compatible with federalism.

3. Secession right in federal states

Secession, in the final analysis, may prove to be highly dependent on prevailing historical circumstances. In some cases secessions have been the result of revolts and wars, in others they were peaceful, sometimes called “velvet divorce” or “rupture tranquille” (“peaceful rupture”). Peaceful secessions are always achieved through established legal processes: even if they bring about a constitutional change, this is achieved constitutionally. In this case there is no “legal rupture” (Young 1994, 787) as in the case of a unilateral declaration of independence. Secession may occur for a variety of reasons, such as geographical position, social problems, economic interests, political aspirations as well as psychological matters.

Only a few “federal states” have included the recognition of the secession right in their Constitutions: the former USSR (1922, Art. 17 and Art. 72 in the revised Constitution from October 7, 1977 to 1991); the former Yugoslavia (1945-1946, 1963-1991); the Constitution of the Malaysian Federation (1957-1965); St. Kitts-Nevis (until 1983) and Ethiopia (1962-1993 and 1994 - present). Before going to the analysis of some of these experiences with secession in federal states, it has to be mentioned that there have even been some confederations and international organisations which have not included any secession right. The Articles of the American Confederation (1777 (1781 ratified) -1787) excluded the secession right and referred to a “perpetual union” in the preamble. Art. XIII reads: “the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State”. The South Confederate States of America (1861-1865) did not include any secession in their “Constitution” (Note 11) either: “We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government ...”. (Note 12) There was no nullification or secession right, neither explicitly nor implicitly. The Charta of the United Nations (UN) and the Statutes of the International Health Organisation are more recent examples where the secession right is not included. These are admittedly exceptions. Most of the international treaties include the secession right. (Note 13) However, they do not, of course, do so unilaterally: e.g. *Deutscher Zollverein* (German Tax Union) (March 22, 1833, Art. 41), European Free Trade Agreement (Art. 42) etc. Other international organisations permit the withdrawal after a certain period of time, e.g. Art. XII, § 3 of the Western European Union admits it after fifty years. Withdrawals from international organisations are quite normal and frequent, e.g. Canada and the US withdrew from the Organisation for Industrial Development of the UN. (Note 14) The International Atomic Energy Agency allows its members to withdraw only when they do not want to vote upon the revision of the statutes.

The following section presents an analysis of those federal states which have admitted the right of secession in their Constitutions.

Former USSR

Art. 70 of the 1977 Constitution of former USSR reads: “The USSR is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics”. The principle of “free self-determination” was, of course, violated, since Lithuania, Estonia or Moldova were never asked whether they wanted to belong to the USSR. On the other hand, Art. 80 gave a great deal of freedom to the individual republics. They could sign international treaties and become members of

international organisations – Ukraine, for example, was a member of the Council of Europe at the same time as a member of the USSR. This is not the case of any federal unit in a federal state. Art. 72 reads: “Each Union Republic shall retain the right freely to secede from the USSR”. (Note 15) This was of course a myth (Alksnis 1991, 64). This article provided no legal mechanisms for the enforcement of the secession right. Potential unilateral secession was considered by the soviet authorities to be in violation of Art. 73 and 74 of the Constitution, which provided for the supremacy of the Soviet law and sovereignty. Secession was condemned by the Communist leaders as “fundamentally opposed to the interests of the mass of the peoples both of the center and of the border regions” (Welhengama 2000, 310). The USSR Law on Procedure for Deciding the Secession of a Union Republic of 1990 made attempts at secession impossible, stating that Republics had to get the consent of the USSR Supreme Soviet before seceding. Secession would be possible only through a 2/3 majority in a referendum and after a five-year transition period. At the beginning of the 1990s, the first unilateral move for independence, also called “secession” took place (Lithuania, March 11, 1990), later Latvia, Estonia, Ukraine, Moldova etc. followed on the basis of this procedure. On December 8, 1991, the former Russian President Boris Yeltsin signed the Bela Vezha Agreement stating that: “the Soviet Union as a geopolitical reality and a subject of international law has ceased to exist”. On December 26, 1991, the Supreme Soviet Court officially dissolved the USSR (cf. Friel 2004, 421). Estonia, Latvia and Lithuania justified their secession with the argument that they have never voluntarily adhered to the USSR, and that they were therefore simply taking back what had belonged to them previously, that is their independence (cf. Mälksoo 2003). When they were annexed to the USSR in 1941, many international states, e.g. US and Germany did not recognise that annexation. This can mean that these states were not being newly formed, but merely their long standing independence was finally being recognised. The end of the USSR can actually be considered as the dissolution of the whole federal state, rather than secession of the republics.

The former Socialist Federal Republic of Yugoslavia

Art. 1 of the 1974 Constitution of the former Yugoslavia recognised the right of every nation to self-determination, including the right to secession. However, there was no mechanism in the Constitution to implement such a right. When Yugoslavia disintegrated in 1991, Serbia accused Slovenia and Croatia of secession, and of thereby threatening the integrity of Yugoslavia. The latter claimed that they were not seceding as Yugoslavia had ceased to exist prior to their declaration of independence on June 25, 1991. The statements of the representatives of the UN were very ambiguous. Some of them recognised the right of self-determination; others said that the peoples of Yugoslavia had to decide about their future. However, a right of secession of the peoples of Yugoslavia was not explicitly acknowledged. Germany was the initiator followed by other European states, the EC and the US of the moves to recognise these independent states. (Note 16) This act of recognition was against the doctrine of international law that prohibits the recognition of secession when the central government opposes it.

Eritrea, as an autonomous unit, was federated with Ethiopia under the UN Declaration in 1952. From the moment of the creation of the federal state, Eritrea began to organise resistance against Ethiopia, leading to a secessionist war in 1970s.

The *Ethiopian* Constitution of 1994 allows that every nation, nationality, and people of Ethiopia have an unconditional right of self-determination, including the right of secession (Art. 39, 1). Not only the nine sovereign ethnic states have the right to secede; every minority tribal group in each of the nine states also has the right of secession. This is, however, a radical change in the Ethiopian constitutional tradition.

The *Malaysian* Constitution states that a region may be dissociated by a mere act of Parliament (Shafruddin 1987, 26). Singapore is the only region that was formally expelled from the Malaysian federal state before it seceded in 1965. Singapore, in its turn, introduced a provision in the Constitution which states that: “... no part of the sovereignty of the Republic of Singapore” can be surrendered or transferred in any way (including joining another sovereign territory, e.g. a reunion with Malaysia) unless approval is given by a two-thirds vote of the people of Singapore in a nationally-organised referendum (Singapore Constitution, Part III, Art. 6).

South Africa, while it looks like a federal state according to its system of government, has not yet adopted the label “federalism” in its Constitution. The Constitution of South Africa (1996) provides some encouragement to secession. Section 235 states: “The right of the South African people as a whole to self-determination, as manifested in the Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or *in any other way*, determined by national legislation” (emphasis added). (Note 17) The phrase “or in any other way” might be used by secessionists to justify their separatist claims. Some states consider that there is a link between the situation of minorities and self-determination. They could exercise certain rights in the context of internal self-determination, but they have to maintain the national sovereignty and territorial integrity of states in which they live.

This presentation has shown that when the secession right is included in the constitution, sooner or later the federal units will profit from it. In the case of the USSR, secession happened because the republics were included in the federal

state by force and some of them did never give full consent to the union: in short, there was no democracy. The soviet case thus involves a remedial right of secession since the territories were unjustly annexed. In the case of Eritrea, resistance to the federal state was expressed from the very beginning of its creation. In all the cases, the federal government failed to protect the basic rights and security of its citizens and the economic interests of the federal units. There are different constitutional provisions for secession, but none of them allows a unilateral right of secession, besides St. Kitts-Nevis. This Constitution provides that a referendum and a legislative approval for secession are limited only to the seceding unit, the island of Nevis. Every state that is governed democratically and respects the human rights of its citizens is entitled to have its territorial integrity respected.

The following federal states have never allowed the right of secession in their Constitutions, however, secession either happened or became a very controversial issue.

The secession of *Bangladesh* from Pakistan took place in 1971. In the preceding years, East Pakistan (as Bangladesh was known between 1947 and 1971) was economically exploited by West Pakistan. Between 1965 and 1970, 64 percent of the resources of the Five Year Plan were spent on West Pakistan and 36 percent on East. However, the East Pakistan was in much greater need for help, as well as being more populous. Mujibur Rahman's Awami League participated in the election of December 1970 with a platform, which demanded autonomy for East Pakistan. His party won 72.6 percent of the votes and 165 out of 167 seats in East Pakistan and also had a clear majority in the Parliament of Pakistan as a whole. However, the Pakistan military authorities did not hand over power to Rahman's Awami League. The East Pakistani citizens were systematically excluded from leading positions in the Pakistan government, bureaucracy and army, even though the region contained 56 percent of the population of Pakistan as a whole. India "invaded" West Pakistan on humanitarian grounds and, thus "liberated" Bangladesh from Pakistan. India was not supported by the UN at the beginning, and it was only when the Indians had secured militarily victory that the secession of Bangladesh was recognised (Premdas et al. 1990, 83-94).

Czechoslovakia became a federal state in 1969 and never allowed the right of secession. When the Slovaks began campaigning in earnest for their independence, the President of Czechoslovakia Vaclav Havel despite being an advocate of the unity of the federal state, declared that if they wanted independence, they could not be prevented from achieving this. The only condition demanded was that it had to be done in a civilised way. A peaceful "velvet divorce" finally took place in 1993 (Note 18).

The *Swiss* Constitution of 1975 allowed cantons to split into half cantons, but did not allow them to secede from the federal state. In 1978, four districts separated from the canton Bern and formed a new canton Jura. Specific changes were made to the right of secession in the 1999 Constitution. Art. 53, §3 reads: "Modifications of the territory of a Canton are subject to the assent of the population concerned, of the Cantons concerned, and the assent of the Federal Parliament in the form of a federal decree".

In 1919, the federal unit Vorarlberg wanted to secede from *Austria* in order to become a canton of Switzerland. Switzerland refused to accept this request and Vorarlberg is still part of Austria (in: Doering 2002, 50). It is not always only the will of one part, the other has to agree as well.

The state of Western *Australia* attempted to secede from the federal state in 1933-1934. In 1934, a petition was made to the United Kingdom Parliament to pass an act for its secession from the Commonwealth of Australia, but did not succeed. A select committee of the House of Lords and the House of Commons decided that the Parliament was not authorised to deal with such a matter that is to rule on the petition of an individual Australian state. The conclusion was that there was no right of secession for any constituent state acting unilaterally. The desire for secession in Western Australia was eventually dampened by concessions from the centre resulting in the rectification of the perceived economic injustice that have given rise to the referendum to secede (Wheare 1946/1963, 91; Zarkovic Bookman 1993, 7). Western Australia's proposal to secede appears to have been a "bargaining counter" in that the states had otherwise struggled to get better financial terms from the federal government.

The *Spanish* Constitution (Spain functions as a federal state, but it does not have the label "federalism" in its Constitution) even prohibits a referendum on secession.

Canada

There is no secession right allowed to the Provinces in the Canadian Constitution. However, Quebec had already tried on two occasions. The result of the referendum on sovereignty in Quebec in 1980 was of 40.4 percent "yes", while in 1995 it was of 50.48 percent "no" against 49.52 percent "yes" – a mere 54,288 votes of the 4,671,008 ballots casted making the difference (Bayefsky 2000; Turp 2003, 167-206). On September 26, 1996, the federal Government of Canada submitted a request for an advisory opinion to the Supreme Court of Canada. In its August 20, 1998 *Reference re Secession of Quebec*, the Court gave (Note 19) an opinion on the legality of Quebec secession and a statute, the *Clarity Act*, which codifies the Supreme Court's decision. The federal government passed the *Clarity Act* in 2000. Thus, Canada has legislative guidelines for secession, but the right of secession is not substantively or procedurally

entrenched. The Court stated that Quebec did not have any right to declare its independence unilaterally, neither according to constitutional nor to international law. The Supreme Court stated that no province has the unilateral right to secede from the rest of Canada, but secession is legal and conditional under the Canadian Constitution. The federal and provincial governments had a constitutional and mandatory duty to negotiate if Quebec should vote in favour of sovereignty (Quebec Secession Reference, §88). In doing so, they should be guided by four fundamental constitutional principles: democracy, federalism, constitutionalism and the rule of law, and protection of minority rights. The federal and provincial governments should introduce a constitutional amendment ratifying the secession of Quebec. The Court also stated that the right of secession is based on the democratic nature of Canada and could be allowed, but that there has to be a clear majority in favour of a clear question of secession, and secession could take place only if all the Provinces agree. The Court did not agree that the referendum in 1995 provided a clear question. The question asked to Quebec was not whether or not it wanted to secede. The question of whether there could be an alternative relationship between Quebec and Canada was not a clear question at all (Friel 2004, 418-419). The *Clarity Act* finally identifies who determines what a clear majority and a clear question should look like. The federal government in the form of the House of Commons should determine these questions. Quebec struggled for more social justice, for a better society. The independence movement of Quebec has changed Canada in significant ways. It campaigned for more social justice and for a better society, and has shown that Canada can and should be a modern and “normal” nation-state, but it also weakened the federal principle and the acceptance of asymmetrical characteristics of the Canadian political system. The independence movement of Quebec did not obtain the desired international recognition as an independent state, but Canada can profit from it and proclaim itself as the only federal state that precisely provides the democratic and constitutional conditions of a legitimate secession for its federal units.

United States

In the USA, the right of secession proved to be highly controversial. Initially, it was never clear what the Constitution actually provided for in this regard. The Civil War of secession (1861-1865) was the ultimate outcome of this ambiguity. The “federalists” ignored the difference between treaty and constitution and asked to have a secession right in the federal state as had existed in the confederation, while the “unionists” clearly differentiated between treaty and constitution and did not want to accept the secession right (Fischer 1957, 42). The secession war is called Civil War because the act of secession was not legitimate and led to a revolutionary movement. The term “secession war” comes from international law, while the term “civil war” derives from internal law. The American secessionist crisis was both international and constitutional. It was international because the question was whether a state could secede from the Union. It was constitutional because the essential question was who in a federal state had the power to interpret the dispositions of the federal pact. Livingston objects to the secession war being referred to as “Civil War”, since the US was not a state, but a federal state, where each unit was a state in itself (Livingston 2003, 18).

During the first years of the federal Constitution and before the Civil War, the US was confronted with many existential problems. This includes issues related to the constitutional crisis of an internal political nature, defence and foreign affairs, the question regarding protective tariffs and how the federal government spent the funds generated by tariffs and other taxes. An issue of an absolutely different nature was slavery, which became very significant in the 1820s. The leaders of the Southern States felt threatened when the Congress broke the convention that new states would be admitted to the union on the basis of one slave state for one free state. When Northern politicians ignored the warnings of Calhoun and others on this issue, they provoked the secession by Southern States, whose leaders felt that their interests and the future structure of the society was in danger. For liberals, such as Birch, this secession was justified (Birch 1984, 600-601). The Supreme Court declared in 1868 that “the Constitution in all its provisions looks to be an indestructible union, composed of indestructible states” (quoted in: Wheare 1946/1963, 91). The states could have the right to secede only in the event of a constitutional amendment to that effect. Today “no serious scholar or politician argues that a right to secede exists under American constitutional law”, since “such a right would undermine the Madisonian spirit of the original document” (Sunstein 1991, 634). Nonetheless, attempts at secession do still arise. The twenty-seven Northern counties of California have introduced in the state legislature in January 1992 a plan to secede from California and to form a new 51st state of the USA. These counties did not, however, form no single administrative, cultural etc. unit. (Note 20) More recent are the secession movements in Hawaii. (Note 21)

It would have been interesting here to examine some other cases of secession, e.g. Hungary from Austria (1867), Norway from Sweden (1905) or Iceland from Denmark (1944), but these cases did not involve federal states and this is a task larger than can be accomplished in this paper. We have seen from the above that secession is present phenomenon whether or not it is provided by the constitution. The federal level and especially the seceding unit seek stability, the former for damage control and the latter for international credibility (Young 1994, 788). Some countries like Ethiopia and St. Kitts-Nevis provide a clear constitutional right to secede, as well as concrete procedural rules on secession. Other countries, like Austria, do not provide any right of secession, but have clear procedures in respect of changes to the country’s territory which could be classified as involving implied right of secession. Switzerland has no constitutional right of secession, but provides specific means of the creation of new cantons. This also applies to Canada,

but the Supreme Court gives secession guidelines and the *Clarity Act* constitutional principles for secession. When the right of secession is legalised in constitutions it is used as a tactic to unify regions in a stronger union for the purpose of securing political, economical and social benefits. However, it is very of then the case that once this goal is achieved, the right of secession is delegitimised, either politically or legally. If the right of secession is not explicitly stated in the constitution, there is always an opportunity to discuss, interpret or invoke moral and legal rights in order to achieve it. Such matters as geographical reconsiderations, morality, liberty and, very importantly, economic grievances have always represented a great role in secession movements. Anderson (2004: 18) even expresses the view that choosing between federalism with the possibility of secessionism, and unitarianism with a guaranteed secessionism or, worse yet, civil war hardly represents a real choice.

4. Secession right in the EU

It might appear strange to talk about secession in the framework of the EU now, at a time when its enlargements are so successfully realised and the EU has such a strong magnetic effect on other countries willing to join it. However, with the introduction of Art. I-60 (Note 22) "Voluntary withdrawal from the Union" in the Treaty establishing a Constitution for Europe (Note 23), this subject has become more and more divisive and needs to be discussed. Another reason to discuss the subject of secession is the advanced level of integration in the EU, since more the integration process advances, and the closer the political and economic ties among the member states of the EU become, the more the states feel that they are transferring a large part of sovereignty to the EU, something which many fear will be impossible win back. The expansion of the areas in which the qualified majority rule applies, is also perceived as threatening to the member states. As a result of this individual member states are reluctant to engage themselves too much in the integration process, a tendency that of course has a negative impact on the effectiveness of the EU. By contrast, if a state has the right to withdraw from the Union when it wants, it will not have any problems with transferring as much sovereignty as is needed to the EU in order to contribute to the deepening of the integration. If we see the EU merely as an international organisation based on treaties, then there is no problem to include the secession right. The fact is, however, that the EU is more than a confederation and less than a federal state, it is a federal polity or a *Bund*, and the EC/EU Treaties have a constitutional character (Harbo 2005). In the EU, sovereignty is shared between different levels of government. Consequently there are elements of self-rule and shared-rule, which gain effectiveness through the subsidiarity principle. Community law has supremacy over national law. There are multiple *demoi* and double citizenship, that of the member states and that of the EU. However, the EU is not a true federal state. Member states remain the "masters of the Treaties". The second and third pillars are almost confederal. The EU has federal features as far as the rule of law is concerned, but it is much weaker regarding the representative government. The EU is essentially based on supranational law and intergovernmental politics. Even in this case, the *sui generis* character of the EU could be raised and a *sui generis* secession right allowed on this basis, but the new Treaty establishing a Constitution for Europe is a Constitutional-Treaty, a legal document of a *Bund*. Is the introduction of Art. I-60 simply the legalisation of a possibility which existed previously or is it something new? Is it compatible with the constitutional character of the EU and the federal idea?

The debate initiated by the introduction of Art. I-60 in the Constitutional-Treaty is not the first time that secession in the EU has been talked about. Apart from the best known case, the withdrawal of Greenland in 1985, there have in fact been a number of attempts at secession.

The French policy of the empty chair. France did not agree with the agricultural policy of the European Community (EC) discussed during a Council Meeting in 1965 and called its representatives in the EC back to Paris. Aside from its basic disagreement with the policy, the French also took this step because they were afraid of the prospect of the supranationalisation of the EC through qualified majority decision-making within the Council of Ministers, insisting on giving veto rights to every state. From July until December 1965, France did not take part in any meeting of the European Council and the Council of Ministers. On January 26, 1966, the "Luxemburg compromise" was brokered, according to which the six member states formally "agreed to disagree" (Weiler 1985, 289). This Accord gave the possibility for every state to use the veto right, when decisions of the Community contradicted vital national interests. Weiler calls this case "withdrawal from active participation", or with other words "inactive membership" (Weiler 1985, 288-230), which is a small step in the direction of secession.

The plans of withdrawal of Great Britain. In 1974, just shortly after Great Britain became member of the EC, the Labour government asked for economic reasons to revise the conditions of membership. With sixteen votes pro and seven contra they managed to organise a referendum and ask the people if they wished to stay in the EC. On June 5, 1975, the referendum took place. The question asked was: "Do you think that the United Kingdom should stay in the European Community (the Common Market)?" With a turnout of 65 percent, 67.2 percent voted to stay, while 32.8 percent were opposed (Irving 1975). The results show that there was no danger that Great Britain would withdraw, but it is important to consider such a case as a threat to integration. Another attempt was made in the statement by the national executive committee of the Labour Party on July 27, 1981, where it is said that if the Labour Party won the elections,

Great Britain might withdraw without organising any referendum. (Note 24) The committee presented economic reasons again, i.e. the excessive financial contribution to the EC, the weakening of the British industry and the high value of the North Sea oil. The party based its arguments for withdrawal on international law. None of the member states took a position regarding the referendum, which might be interpreted in terms of an understanding that unilateral withdrawal was not excluded. An opinion poll result of 1999 shows that 39 percent of British citizens would vote in favour of exiting the EU in a new referendum. (Note 25)

Greece announcement of secession in 1981. In autumn 1981, a few months after the accession of Greece to the EC, the socialist party (PASOK) announced that it would organise a referendum to leave the EC if it won the then forthcoming elections. They duly won the elections, but the referendum did not take place: the President Constantine Caramanlis was in favour of the membership of Greece in the EC and Greek law prohibits the organisation of a referendum against the will of the President. (Note 26) This is again a threatening case for the integration process. If a continuous will of the member states to advance is not maintained, the Union may stagnate.

Greenland's secession in 1985. This was the real case of secession from the EC. Greenland was not a direct member of the EC, but when Denmark became member on January 1, 1973, Greenland (Note 27) was included in the EC as a part of Denmark according to Art. 227 of the EC Treaty, Art. 79 of the European Coal and Steel Community (ECSC) Treaty and Art. 198 of the European Atomic Energy Community (Euratom) Treaty. However, when Denmark voted in a referendum on October 2, 1972 to join the EC, Greenland was opposed, this mainly because of suspicion regarding the EC fisheries policy (Krämer 1983, 273-289). Greenland was a colony of Denmark until a constitutional amendment in 1953, when it became official part of Denmark. The status of Greenland within Denmark was subsequently changed. In 1978, Greenland was given an autonomous status and a system of home government was established on May 1, 1979. Greenland's desire to withdraw from the EC was based on a variety of reasons: a) the anonymity of the "far-off Brussels" administration and the "capitalistic" features of the EEC; b) complaints against Denmark because it had forced the island into the EC; c) Greenland's desire to have lower food prices than in the EC and more control over the fishery (cf. Krämer 1983, 277). A consultative referendum was organised in Greenland on February 23, 1982, where 52 percent were in favour of secession. Greenland demanded secession despite the fact that it profited from the EC in a number of respects. The EC contributed greatly to the economic development of the island through the structural funds. The products of Greenland had an unconditional free entry to the Common Market. With a decision of the Parliament of Greenland (*Landstyre*) from March 26, 1982 negotiations started with the EC through Denmark to give Greenland a status of Overseas Country and Territory according to Art. 131-136 of the Treaty of Rome. The European Commission and the European Parliament (EP) gave their approval to the Council of Ministers, although there was a minority within the EP that did not agree with the leniency of the procedure for withdrawal. (Note 28) This was decided upon the Council of Ministers in an Agreement on February 20, 1984, which entered into force on February 1, 1985. (Note 29) The withdrawal procedure was complex: first, the main EC institutions were involved in the process, second, all the member states gave their agreement. It also decided the status of the withdrawal party. This withdrawal is very often considered as a precedence case for other members of the EU. However, it cannot in fact form a precedent for other regions of the EU, since: a) Greenland is an overseas, non-European territory (it belongs geographically to the North American continent); b) it is a former colony affiliated to a member state, and c) a developing area (Harhoff 1983, 31). On the other hand, the case of Greenland cannot be seen as withdrawal according to international or EC/EU law, since Greenland was not a direct member of the EC. The separation of Algeria from France in 1962 cannot be seen as withdrawal either, merely as the reduction of the territory of a member (cf. Waltemathe 2000, 25). Greenland's withdrawal did not even change the voting power of Denmark in the EC institutions. The fact remains, however, that withdrawal did take place: Greenland now even no longer is an indirect member of the EU.

The absence of a secession right in the EC/EU Treaties

Even if Greenland had seceded and other attempts at secession existed, the secession right has never been explicitly or implicitly included in the EC/EU Treaties. There were a number of proposals at the beginning of the integration process to include such a right, but none was adopted. The French proposal to include a secession right in the Treaty of Rome was rejected (Toulemon 1994/1999, 26). The Protocol of Germany from 1957 has been interpreted as unilateral secession and was not introduced in the Treaty of Rome. (Note 30) The draft European Constitution of Spinelli (1984) (Toulemon 1994/1999, 61) also included an article providing a right to leave the Union under "fair conditions". Later, a European Constitutional group in London made a "Proposal for a European Constitution" in 1993, Art. XXX of which provides a clear secession right. Before the Intergovernmental Conference (IGC) met in 1996, it was proposed that the next revision of the EC Treaty should include a secession right, or that a member state should have the possibility to leave the EC according to its own constitutional provisions. (Note 31) A resolution of the EP concerning the EC Treaty in the context of the IGC in 1996 states that a clause should be included in the next Treaty according to which a state may withdraw from the Union under special conditions. (Note 32) However, the intermediary report rejected this proposal before the IGC took place. One of the reasons for this was that the advanced integration would be questioned and difficulties would appear for the next phases of integration. The other reason why the secession right has never been

included in the Treaties could be due to what Weiler stresses: “the reluctance to talk about divorce on the wedding day” (Weiler 1985, 282). The promoters of European integration, like Jean Monnet and Robert Schuman wanted to achieve unity in Europe. They did not think too much about the worst scenario.

Nevertheless, lawyers still cannot agree whether the EC/EU Treaties allow secession. If the EU is understood to be based on international law, then according to Art. 54 b of the Vienna Convention on the Law of Treaties (VCLT) (May 23, 1969), a unilateral withdrawal is excluded, unless it is explicitly included in the Treaty (Note 33) as this would violate the principle of *pacta sunt servanda*. It could be allowed only in extreme cases, e.g. when serious violations of the Treaty are identified (Art. 60 VCLT). Art. 56 of the VCLT on the denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal states that withdrawal is possible only when: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty. The EC/EU Treaties being based on an “ever closer union” clause with an unlimited duration do not imply any intention to admit withdrawal. The EC and Euratom Treaties did not take the example of the ECSC Treaty which included a limited duration. The fact that this right was not included in the Treaties suggests strongly that none of the founding parties had the intention to leave the Union. It cannot, therefore, be assumed that Art. 56 of the VCLT provides withdrawal for EU member states. It could also be argued that: “... sovereign States would not have intended to abandon permanently and irrevocably their right to withdrawal without expressly so doing” (Friel 2004, 408). If international law under the *clausula rebus sic stantibus* (Art. 62 VCLT) allows the end of a treaty in some exceptional cases, it does not do this as far as the EU is concerned (Ipsen 1972, 100). Art. 62 reads that a state can use the fundamental change of circumstances clause for terminating or withdrawing from the treaty only when 1: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. This is not the case of the EU, since its members have declared in all the revisions of the Treaties that they want to achieve further economic and political integration.

It is true that the EC and later the EU were based on international Treaties, but according to the jurisdiction of the European Court of Justice (ECJ), there is a principle prohibition of the secession right, since the ECJ takes the EC/EU Treaties as a “constitutional Charta” (Note 34) (cf. Bruha/Nowak 2004, 1-25). The EU has its own legal order, which belongs neither to international law nor to domestic law. EU law has supremacy over national law (Note 35), direct effect (Note 36) and pre-emption. The will of a member state to secede from the EU contradicts EU law, which is superior to state law: state law, accordingly is overruled. “Legally speaking therefore secession is impossible, since the cumulative effect of the lack of an express process of secession, when coupled with the doctrine of supremacy, would negate any State act to withdraw from the EU” (Friel 2004, 412-413). The doctrine of supremacy is similar to the federal jurisdiction, which is against withdrawal. Thus, a unilateral withdrawal cannot be allowed, not only according to international law, but also according to EC/EU law.

Some lawyers, however, see in particular an implicit expression or prohibition of these norms. The first is the principle of “eternity” of the European integration. The Treaty establishing the ECSC – a confederation was signed in 1951 for a limited duration of fifty years (Art. 97 ECSC until July 23, 2002) and did not include any secession right. However, Art. 240 of the Treaty of Rome (1957) (later Art. 51 EU Treaty and Art. IV-446 Constitutional-Treaty) states that the European Economic Community is: “concluded for an unlimited period”, meaning that unilateral secession is illegal. The proposals of including a limited period of time in the Treaty or even a clause founding an “eternal *Bund*” were rejected on the basis of the view that goals of European integration were incompatible with the idea of a limited duration of the Union. The project of the European Political Community (1953), which failed, used an even stronger term. The Community had to be “indissoluble”: “Il est institué par le présent traité une Communauté européenne de caractère supranational. La Communauté est fondée sur l’union des peuples et des Etats, le respect de leur personnalité, l’égalité des droits et des obligations. Elle est indissoluble”. (Note 37) If this project had succeeded, then the secession right would not have had any place in it. Duration excludes secession, as has been shown above. However, the term “unlimited” does not necessarily imply that the Treaty should be permanent and that withdrawal is prohibited. It is not comparable to a labour contract, for example, from which withdrawal is possible. The same applies to economic contracts concluded for an unlimited period: “Même en l’absence de clause résolutoire ou de dédit, la faculté de rupture unilatérale existe toujours dans les contrats à durée indéterminée, à condition de respecter un préavis et sous réserve de la théorie controversée de l’abus de droit” (Feldman 2004, 506). (Note 38)

What could be conflicting with secession is the “ever closer union” clause. From the Treaty of Rome (1957) until the Constitutional-Treaty there is an article proposing “to lay the foundations of an ever closer union among the peoples of Europe”. If the Treaties are explicitly intended to establish this ever closer union, then it is not obvious that the states should want to retain the right to secede from the Union.

All these provisions show that neither EC/EU law nor international law provide the unilateral right of secession. Things might change in this regard, as the Constitutional-Treaty explicitly provides such a right. This article could dramatically

modify the character of the EU.

The implications of Art. I-60 of the Constitutional-Treaty

Article I-60 (Note 39) demands that supranationalists and federalists step back on the road to integration. According to them, if ever the EU becomes a federal state, it will need a constitutional revision, which will have to exclude the secession right. They were very reticent during the negotiations in the Convention to include such an article. One of the arguments is that if the EU is not approaching a break up, there is no need to establish a rule as to how it should be dismantled. The sovereignists, on the other hand, see the right of secession as a democratic right to allow a country to withdraw as a last resort if it wishes. A member state which entered the Union voluntarily should retain the corresponding right to exit the Union voluntarily. But can it retain this right? Can a state have the same freedom to enter and leave the Union (cf. Schönberger 2004, 103)?

This article was mainly pushed by sovereignists, who took into account such complaints as: "... l'appartenance à l'Union européenne serait une contrainte antidémocratique, presque diabolique, à laquelle les malheureux citoyens n'auraient aucun moyen d'échapper" (cf. Giscard d'Estaing 2003, 74). (Note 40) Those who support the inclusion of this article argue that the citizens are entitled to profit from the advantages of the EU, but if they believe that there are problems with the Union, the EU should not force them to stay and instead provide them with all the legal provisions to allow them to withdraw. Representatives from Denmark and Great Britain claimed that an exit clause would rob eurosceptics of the argument that the bloc was a prison from which there was no escape. This article should also help new candidates to adhere: "Art. I-59 [I-60] soll nicht Austrittswilligkeit fördern, sondern vor allem den neuen EU-Staaten ihren Entschluss zum Beitritt erleichtern, indem verdeutlicht wird, dass sie nicht in ein 'Völkergefängnis' eintreten" (Oppermann 2003, 1242). (Note 41)

The idea of including the withdrawal right in the Constitutional-Treaty appeared for the first time in an early draft, which the Presidency of the Convention presented on October 28, 2002. (Note 42) The Presidency justified the inclusion by stating that even if such an article had not previously existed in the Treaties, it had existed de facto. If a state wished to withdraw, under previous conditions, it would be able to use the absence of the prohibition of a secession right in order to achieve its goal. When Malta was not even member of the EU, the President of the opposition party, Vella, pointed out that after the accession Malta could withdraw if it were necessary. He justified his position with the argument that: what is not legally forbidden is allowed. (Note 43) With Art. I-60 nobody will be able to prevent a state from withdrawing on the basis of the argument that this would violate Community law, as the withdrawal clause will become law. The candidate state for withdrawal would of course be obliged to respect the conditions and terms of the article.

Initially, many of the "old" member states voted against this clause. Members who were candidate members at that time insisted that this clause was "psychologically necessary" in order to be sure that the Constitutional-Treaty would be ratified. This primarily concerned the Eastern European countries Estonia, Latvia and Lithuania, who had been in the "USSR prison". The Lithuanian deputy, Liene Lepina, explained that this article was symbolic and necessary to underline the value of freedom. (Note 44) By the end of the negotiations the majority of the members of the Convention were in favour of introducing the withdrawal clause, but they also asked to introduce strict conditions, so that it does not become a "blackmail clause". The representative of the German *Bundestag*, Jürgen Meyer summarised this concern in this statement that: "(We should not) offer this on a silver platter to eurosceptics, they will continue to cause disruption in their national parliaments and among national public opinion whenever something difficult is proposed by Brussels". (Note 45) Danuta Hübner, the European Affairs Minister of Poland continued: "It should be made evident that the political and economic cost of withdrawal could be very high ... This would not only be just, but it would be a deterrent to use the threat of withdrawal as a political weapon in negotiations within the Union". (Note 46) An attempt at withdrawal could be fended off, if the conditions are very difficult. One might draw an analogy to family law. If a divorce procedure is very complicated, then when misunderstandings arise in a marriage, the parties will be more willing try to find compromises and continue to live together (Sunstein 1991, 650). The more difficult it is to secede, will be the efforts of the parties to stay in the union.

During the eighteenth plenary session of the Convention on April 24-25 2003, the withdrawal clause was discussed and despite all the opposing arguments it was accepted. Some revisions of the article were proposed, e.g. the representatives of the European Commission and of the French, Belgian and Dutch Governments held that withdrawal should be allowed only when the Constitutional-Treaty is revised and should be negotiated with other partners because of the advanced interlocking of the EU policies. The Spanish deputy, Josep Borrell said "yes" to divorce, but "no" to the right of the departure from the domicile. (Note 47) The eurosceptics, on the other hand, were not very satisfied, they complaining of the very strict conditions for a state to withdraw. They suggested simplifying the withdrawal procedure and to allow withdrawal to take place in a shorter period of time, that is soon after the initial announcement of intention to withdraw. (Note 48)

Art. I-60 appears under Title IX "Union membership" in the first part, not there where it would be normally located

according to international law, that is to say, part IV “General and final dispositions”. This demonstrates its significance. The first paragraph reads: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements”. This paragraph is in conflict with Art. I-5, which assumes “sincere cooperation” and “mutual respect” between the member states and the EU, as well as with Art. I-43: “The Union and its Member States shall act jointly in a spirit of solidarity”. All these are federal principles. The second paragraph explains the withdrawal procedure, according to which the EU and not the member states will sign this agreement, which acquires the status of a legal personality (Art. I-7). The third paragraph stipulates: “The Constitution shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement, or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”. It results from this paragraph that withdrawal can actually also take place unilaterally. However, unilateral withdrawal is neither accepted according to EC/EU law nor to international law, as has been argued above. Furthermore, withdrawal can take place without any special legal material or formal conditions. This article is thus also in conflict with Art. IV-446, which stipulates that the EU is established for an unlimited period of time. As such, if the Constitutional-Treaty including Art. I-60 is ratified, then it might imply a material change of the EC/EU legal system.

None of these paragraphs, however, clearly show, how withdrawal will take place in practice. If there is a disagreement as to whether the national decision to leave the EU was made constitutionally, then the issue should be discussed by the ECJ. Art. I-60 states very clearly that the representatives of the withdrawing state cannot take part in the discussions of the Council of Ministers and of the European Council, but it does not say whether they can take part in the discussions of the EP and ECJ. This leaves a range of questions unanswerable: How will the interlocked political and economic relations between the withdrawing state and the EU be regulated? What relationship will exist between the withdrawing state and its citizens and the EU? What about the Euro? The weighting of votes in the European Council and the Council of Ministers, the number of representatives in the EP and the Commission will also be required to be revised. The primary and secondary law of the EU will no longer be applied in the withdrawing state. Many points are thus unclear. All of this shows the limits of the withdrawal clause, which may provoke even more problems once such a case arises.

If the European integration process is looked at closely, it becomes very obvious that the goals of the EC and later EU were always very demanding. The economic, strategic, politic and defence goals represent a very deep form of integration. The Euro, common trade, fiscal and international commercial policies, the Schengen area etc. all demonstrates the ambitious and highly interconnected character of the EU, which is so much interconnected. The more the integration advances and the tighter relationships between the member states there are, the more difficult it becomes to contemplate withdrawal. The more interdependence there is, the higher the costs of secession are. The process of integration thus seems to exclude secession.

This article brings back through, in another form, the option of a “partial membership” which has been proposed so many times in the EC/EU but has never been successfully introduced. According to this idea, an “outward differentiation” (“Differenzierung nach aussen”, Emmanouilidis/Giering 2003, 454, 465) would take place, which is very different from the “flexible integration” model based on a stronger cooperation of a minimum of eight states. For the EU, this article may be the beginning of a “reverse differentiation” instead of the “progressive differentiation” in the form of enforced cooperation known until now. A state might threaten the EU with secession, using the withdrawal clause in order to obtain a kind of “differentiated integration” according to its interests (Bruha/Nowak 2004, 25). Instead of compromise, this will lead to withdrawal. This article may imply, on the one hand, that the member states are still the “Masters of the Treaties”, that is, that they retain their sovereignty. On the other hand, one could say that Art. I-60 weakens the member states’ influence at the EU level. The fact that a member state may always withdraw could weaken its position in a negotiation process. To have another option - the withdrawal - could actually become a disadvantage for the union (Schelling 1960, 33-34).

5. Conclusion

The point of departure of this article was the liaison between federalism and secession. The main argument is that the right of secession is not compatible with the federal idea. All federal states are vulnerable to secessionist pressure. If the federal units are given a high level of autonomy, institutional authority and capacity, the contested right to secede comes strongly to the fore. In part one the various reasons in supporting this hypothesis were presented. In addition, the different examples were used to demonstrate the disadvantages of including such a right in the legal document of a federal polity. If a federal constitution provides a secession right, its days are numbered. One might expect that legalising secession would make the secessionists undertake a cost/benefit analysis of seceding versus staying in the union, but we have seen that this does not help. Other problems occur in cases when there is no constitutional provision for such a right. There is always a possibility to avoid secession, such as holding honest debates, looking for compromises or simply using the basic right of expression. The renunciation of secession should precede federalism and democracy. If every unit in a federal structure were to secede after every opposed decision, then no democratic

development would be possible. If moral rights are important, how can secession be admitted in democratic states? Secession would furthermore imply that some units would lose the economic benefits of distributive justice. Finally, the EU was analysed in terms of secession. The threats of secession have always been present there, even though the EC/EU Treaties have not provided any explicit right for secession. With a possible new legal document for the EU this right might be constitutionalised. If new federal features are introduced to the EU by the Constitutional-Treaty - i.e. the motto "unity in diversity", a huge step backwards will nonetheless be made from the federal point of view with the acceptance of the secession right – that is, if we see the EU as *Bund* and that in a *Bund*, as has been shown, there is no clear possibility of secession. Federalism has never been an easy issue for the EU. With the Maastricht Treaty the EU became a federal polity, however the "F-word" was excluded. The secession right now seems to be its main challenge for the next years in achieving the aims of the fathers of European integration.

There is little to add to the argument that secession is incompatible with federalism, either in the case of federal states or of a *Bund*. There is no reunification after secession. Secession is irrevocable. The event of secession marks the affected society profoundly, not only in respect to the institutional changes, which take place, but also in respect of the morality of the individuals. If democracy constrained by constitutional rules is the optional system for the protection of human rights, then those who want to secede from a democratic state, or in our case from a federal polity, have in fact no moral right to do so, because they already live in a just society.

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Notes

Note 1. See on this subject: Harbo 2005, where the author defends the theory of Bund.

Note 2. See on this subject: Dahlitz 2003, Brilmayer 1991/2000, Moore 1998, Horowitz 1985.

Note 3. Oxford Advanced Learner's Dictionary online: <http://www.askoxford.com> – accessed on September 17, 2004.

Note 4. "The secession of the states from the union is thus not the application of a natural right but high treason" (author's translation).

Note 5. See Seymour Secession as a Remedial Right: <http://www.philo.umontreal.ca/prof/documents/SecessionasaRemedialRight.pdf>

Note 6. Ibid. reference no. 5.

Note 7. See on this subject: Watts 1999, 107-108; Friedrich 1968, 21; Wheare 1946/1963, 92.

Note 8. The fundamental work on the morality of secession is that of Buchanan 1991.

Note 9. "Either the duration of the Bund, that is neither secession, nor nullification; or the independent political existence of the member states, that is – even if, only in the most extreme cases – nullification and secession. But the concept of a political entity composed of states, which is intended to last without abandoning its legal basis appears to be something contradictory to the highest degree" (author's translation).

Note 10. Except in the "personalist federation". Guy Héraud in his work "L'Europe des Ethnies" ("Europe of ethnos") points out that if the secession right is not accepted in a federal state, one has to create it, since it is not democratic for a state not to be able to go out from the union: "C'est pourquoi il convient de 'construire' le droit d'autodétermination" (Héraud 1993, 190-191). ("That is why it is necessary to 'construct' the self-determination right" (author's translation)).

Note 11. All the attempts to include it were rejected: e.g. the projects of William Waters Boyce from South Carolina and Hill from Georgia among the others were rejected by the Convention. Fifteen states' Constitutions formed between 1864 and 1875 prohibit the secession right, eleven out of them forbid the nullification right (in: Feldman 2004, 519).

Note 12. See the "Articles of Confederation" and the "Constitution of the Confederate States" online at the Avalon Project at Yale Law School - <http://www.yale.edu/lawweb/avalon/avalon.htm> - accessed on February 12, 2005.

Note 13. In Widdows' calculations, there are about 4/5 of them (Widdows 1982, 98).

Note 14. *Süddeutsche Zeitung*, December 5, 1995, 1.

Note 15. Constitution of the Union of Soviet Socialist Republics, Novosti Press Agency Publishing House, Moscow, 1977, p. 56.

Note 16. The Declaration on the "Guidelines on the recognition of new States in Eastern Europe and in the Soviet Union", 16 December 1991, published in The Hague and Brussels on December 17, 1991, EC Bulletin 12-1991.

Note 17. Constitution of the Republic of South Africa - <http://www.polity.org.za/html/govdocs/constitution/saconst14.html?Rebookmark=1> - accessed on April 15, 2005.

Note 18. In: *Frankfurter Allgemeine Zeitung*, July 7, 1992.

Note 19. Reference re Secession of Quebec from Canada (1998) 161 DLR (4th) 385.

Note 20. *The New York Times*, November 30, 1991.

Note 21. www.freehawaii.org.

Note 22. <http://europa.eu.int/eur-lex/lex> – Treaty establishing a Constitution for Europe, Official Journal, C 310, vol. 47, December 16, 2004. The Intergovernmental Conference (IGC), which discussed the Constitutional-Treaty and came to an agreement on the reform of the EU institutions that was reached at the European Council in Brussels on June 23, 2007, brought no change as far as Art. I-60 is concerned. The next IGC has the task of drawing up the "Reform Treaty" by the end of 2007, which, if ratified, could enter into force in June 2009.

Note 23. Henceforth: Constitutional-Treaty.

Note 24. "European Community: We'll Love You and Leave You" in: *The Economist*, July 25, 1981, 55.

Note 25. *Frankfurter Allgemeine Zeitung*, June 8, 1999, 7.

Note 26. See: "Greece and Europe. Would the Socialists Pull out?" in: *The Economist*, August 15, 1981, 48-50, and Waltemathe 2000, 24.

Note 27. The population of Greenland is of 55.000 of which less than 8.000 are Danes, the remainder being Inuit (Friel 2004, 409).

Note 28. EP Doc 1-264/83, 17 in: Friel 2004, 410.

Note 29. See on this subject: Dix-huitième Rapport général sur l'activité des Communautés européennes, 1984; Supplement 1/83 to the Bulletin of the European Communities Commission Opinion on the Status of Greenland; Waltemathe 2000, 26-28; Götting 2000, 119-121; Lefauchaux 1985, 81-90; Weiss 1985, 173-185; Ungerer 1984, 345-352; Harhoff 1983, 13-33; Krämer 1982, 273-289.

Note 30. The Protocol reads: "Die Bundesregierung geht von der Möglichkeit aus, dass im Falle der Wiedervereinigung Deutschlands eine Überprüfung der Verträge über den Gemeinsamen Markt und Euratom stattfindet" (cf. Dagtoglou 1972, 90-91). ("The Federal Government assumes the possibility to re-examine the Common Market and Euroatom Treaties if the German reunification happens" (author's translation)).

Note 31. Jacques Delors in: European Report, March 1, 1995, 2.

Note 32. Resolution, May 17, 1995, no. 17.

Note 33. "The termination of a treaty or the withdrawal of a party may take place: (b) at any time by consent of all the parties after consultation with the other contracting states".

Note 34. ECJ, 1/91, December 14, 1991, Rec. I-6079.

Note 35. Costa v ENEL Case 6/64, ECR 585.

Note 36. Van Gend en Loos Case 26/62.

Note 37. "The present Treaty creates a European Community of a supranational character. The Community is founded on basis of the union of the peoples and States, the respect of their personality, the equality of laws and obligations. It is indissoluble" (author's translation).

Note 38. "Even if a resolute or recall clause does not exist, the possibility of unilateral withdrawal always exists in the contracts of undetermined duration under the condition to respect a notice of dismissal presented in advance and according to the contradictory theory on the abuse of law" (author's translation)).

Note 39. See the full text of the Art. I-60 (five paragraphs) on: <http://europa.eu.int/eur-lex/lex> – Treaty establishing a Constitution for Europe, Official Journal, C 310, vol. 47, December 16, 2004.

Note 40. " ... the belonging to the EU would be an anti-democratic constraint, almost diabolic, from which the

unfortunate citizens would not have any means to escape” (author’s translation).

Note 41. “Art. I-59 (I-60) shall not encourage withdrawal but above all facilitate the new member states’ decision to entry and make it clear that they are not entering a ‘people’s prison’” (author’s translation).

Note 42. <http://register.consilium.eu.int>.

Note 43. *Der Spiegel*, 1999, no. 44, 198, 200.

Note 44. “La Convention sur l’avenir de l’Europe débat d’une ‘clause de sortie’” in: *Le Monde*, April 25, 2003.

Note 45. “EU Convention Backs Exit Clause with Conditions” in: *The New York Times* on the web, April 25, 2003.

Note 46. “EU Convention Backs Exit Clause with Conditions” in: *The New York Times* on the web, April 25, 2003.

Note 47. “La Convention sur l’avenir de l’Europe débat d’une ‘clause de sortie’” in: *Le Monde*, April 25, 2003.

Note 48. The representative of the German Bundestag in the Convention, Jürgen Meyer said: “Austritt aus der EU muss durch einseitige Erklärung eines Mitgliedes möglich sein” (“The withdrawal from the Union has to be possible through an unilateral declaration of a Member State” (author’s translation)) – www.elearning-politik.de/europa/2002/experte.

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